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Incommensurability as a Jurisprudential Puzzle

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INCOMMENSURABILITY AS A JURISPRUDENTIAL PUZZLE

RICHARD WARNER*

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The puzzle is that three apparently incompatible claims are all true. First: our reasons for choosing one alternative over another are *not* always comparable in strength. The reasons may be *incommensurable*. Second: legal cases—at least hard cases—often demand that courts choose among alternatives where the reasons for each alternative are incommensurable. Third: nonetheless, in such cases court decisions should—ideally, at least—be based on the *superiority* of one set of reasons over the others. But this is to compare the incomparable. How is this possible?

I. WHAT INCOMMENSURABILITY IS

There is an essential preliminary: explaining the sense in which reasons may be incommensurable. A literary example—the plight of one of Charles Dickens' characters, Silas Wegg—is helpful here. Wegg has a wooden leg and, much to his dismay, his amputated leg is the property of someone else—Mr. Venus, who bought it to use in his business of making and selling skeletons. Wegg complains: "I should not like . . . to be what I may call dispersed, a part of me here and a part of me there, but should

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wish to collect myself like a genteel person." To see the sense in which reasons may be incommensurable, consider the following, distinctly non-Dickensian analysis of Wegg's plight. This analysis begins with the observation that we—collectively as a society—have a reason to favor the making of skeletons; we need them (or at least we did in the 19th century) for various purposes such as anatomical illustration. Making the skeletons means buying the necessary bones (other means of acquisition exist, but for simplicity ignore them). So, it would *seem* at least that, since making the skeletons means buying the bones, our reason for making the skeletons—namely that we need them—is *also* a reason to buy bones; and, in the particular case of Venus and Wegg, the need for skeletons gives Venus a reason to buy Wegg's leg. Of course, Wegg has a reason *not* to allow Venus to buy his leg: namely, he is still attached to it, not anatomically, of course, but in his attitude toward it. He does not want to be "dispersed, . . . a part . . . here and a part . . . there." Which reason is better? The reason to allow Venus to buy the leg, or the reason not to? Arguably the former. What after all is Wegg going to do with his leg? Presumably he would dispose of it; he doesn't really want it. He just doesn't want to be "dispersed" by someone *else's* having it. So giving the leg to Wegg is waste where there could be gain.

Dickens would not have liked this result. He objected to treating Wegg's leg as a saleable piece of property. Wegg and his leg are part of Dickens' protest against the ways in which the emerging industrialized society of 19th century England allowed the buying and selling of various aspects of human beings. But haven't we just shown that this protest is irrational? Indeed, we have *if* we grant that our reason to make skeletons—our need for them—is *also* a reason to buy and sell bones. Suppose that is true. Then what would Dickens have us do? Ignore that reason? That certainly would be irrational; barring eventualities such as lack of time or the well-grounded expectation that the reason is too trivial to consider, it is irrational not to take a relevant reason into account. So—given that it exists—we should take the reason to buy bones into account, and if we do, in some cases surely our reason for buying and selling may be better than our reason for not doing so. Thus, if we are to be rational, certain aspects of human beings become saleable property—just the result Dickens did not like.

The *only* way to avoid this result is to deny that our reason for making skeletons is also a reason to buy bones. Then we cannot ask whether that reason to buy bones is better than our reason not to, for the first reason does not exist. Our reason to make skeletons and our reason not to sell bones are *incommensurable in that way*—on the assumption, of

course, that our reason for making skeletons is not also a reason to buy bones. It does not matter here whether this assumption is true. The point is merely to illustrate the following general pattern. Thus: suppose one has a reason to perform an action A (making skeletons), where doing A means doing B (selling bones); in such cases—*other things being equal*—one's reason to do A is also a reason to do B. This is why it is so natural, in the Wegg example, to assume that the reason to make skeletons is also a reason to sell bones. But of course, anyone viewing the matter in a Dickensian spirit will respond that things are not equal since we are dealing with aspects of human beings. Thus, the reason to make skeletons is not a reason to sell bones, so the reason to make skeletons and the reason not to sell are incommensurable—a result Dickens would very much have liked.

II. EXAMPLES OF INCOMMENSURABILITY

Of course, compatibility with Dickens is hardly a reason to think incommensurability really exists. Are there any genuinely convincing examples of incommensurability? That is, is the first claim—that our reasons are often incommensurable—really true?

A. *Love and Money*

The following example should suffice. Suppose, as I am out walking with my daughter, a stranger approaches and offers to buy her for a \$1,000,000. When I refuse, the stranger makes the same offer to Jones, who also refuses. Jones acknowledges that he could use the money; he would use it to pay off his bills and would invest the remainder, except for a relatively small amount to finance a vacation. In light of these considerations, he finds the prospect of \$1,000,000 to be a fairly compelling reason to sell his daughter. Nonetheless, he decides that he has better reasons not to part with her; among other things, he would miss her. However, as Jones candidly acknowledges, the result would be otherwise were the price sufficiently high—say, \$10,000,000. My refusal might be thought to rest on similar grounds, for I also have reasons for having the \$1,000,000. Like Jones, my reasons are primarily financial: I too would pay off bills and invest most of the rest. I also have a reason not to part with my daughter: I love her. So, since I refuse to exchange her for the money, surely I must think that my reason for keeping her is better than my reason—provided by the prospect of the \$1,000,000—for selling her to the stranger. But this picture of my situation rests on a false assumption: namely, that the prospect of \$1,000,000 provides me with a reason

to sell my daughter. I have the financial reasons for *having the money*, and—*other things being equal*—these reasons would also be reasons for *selling my daughter* since getting the money means selling her. But other things are not equal.

They are not because I love my daughter, and it is in part *constitutive* of my attitude toward my daughter—the attitude I designate as parental love—that I refuse to count such financial considerations as reasons to part with her. Indeed, I am shocked that Jones does so in the case of his daughter. I think he does not really love her, at least not in the way I love mine.¹ Of course, I do not mean to suggest that what parental love allows and disallows as a reason is well-defined. That is certainly not true; in general, one discovers case by case what one will and will not count as a reason.

Some will no doubt object that there are circumstances in which one might sell a child one loves. Suppose Sally has two daughters; one will die if she does not receive medical treatment costing \$1,000,000. Sally *might* sell the healthy daughter to raise the money. But she would still not be like Jones. Jones recognizes the financial reasons to have the money as reasons to sell his daughter; Sally recognizes *saving the life of one child* as a reason to sell the other. Of course, she also might *not* recognize the existence of such a reason; it might be constitutive of her love for her children that she does not count saving the life of one as a reason to sell the other.

But, someone is sure to object, one cannot make something fail to be a reason merely by refusing to acknowledge that it is. I do not recognize the financial reasons to have the money as reasons to sell my daughter. But surely I might be wrong. After all, it is quite clear that people can be wrong about such things. For example, suppose Mason is a gourmet who works as a restaurant reviewer for newspapers and magazines. When his doctor tells him he has gout and must stop eating the rich French food in which he delights, Mason persists in his gourmet pursuits. He thinks of himself as a badly injured warrior who, although doomed to defeat, defiantly refuses to cease fighting to achieve his ideal—the ideal for the gourmet Mason being the refinement of appetite as a source of pleasure. Mason takes this attitude because it is constitutive of the way in which he values being a gourmet that he refuses to recognize

1. One may object that all it shows is that my daughter is worth an *infinite* amount of money. She is on the scale, just above every finite amount of money. However this simply misses the point. The point is that it is in part *constitutive* of the attitude we designate as parental love that I will not measure my daughter's value in money. What I count as measuring and not measuring worth defines my attitude. To say that my child is worth an infinite amount of money just misses this point.

health considerations as a reason not to enjoy gourmet food. While Mason's friends do not doubt the sincerity of his commitment, they try to convince him that he is mistaken in thinking that the health considerations are not a reason to stop. The friends could certainly be right. Mason cannot make it the case that health considerations are not a reason simply by committing himself to the view that they are not. The existence or non-existence of a reason is not simply a matter of what one's commitments are. Mason *thinks* the health considerations are not a reason, but he could be wrong.

There are three ways in which Mason could be mistaken. First, Mason might be mistaken about what morality requires. Suppose, for the sake of argument, that it was *immoral*—objectively morally wrong—for Mason to continue to enjoy gourmet food at the expense of his health. Then Mason would certainly be wrong in thinking that the health considerations are not a reason to abandon his gourmet pursuits. Mason might also be wrong about morality in another way, for he might be morally required to count the health considerations as a reason even if it was *not* morally wrong to continue his gourmet pursuits. We are sometimes subject to such requirements. For example, suppose I can save five lives by diverting the runaway train but only at the cost of killing one other person. Even if it is morally correct to divert the train, the cost of killing one is still a reason not to, and one who thought otherwise would be mistaken in his or her moral assessment of the situation.

Now suppose that it is not objectively morally wrong to enjoy fine food at the expense of one's health; morality leaves that open as an option, and suppose as well that Mason is not morally required to recognize the health considerations as a reason to curtail his gourmet pleasures. It is at least arguable that these suppositions could be true; the degree to which I am morally required to take account of my health is a matter of considerable controversy. Even in such a case, Mason might still be mistaken. The mistake is not about what morality requires, the mistake is about what is better *for Mason*, about what his personal well-being consists in. Like all of us, Mason has organized his life around certain central plans and projects. Each of us adopts different sets of plans and projects, but each of us organizes his or her life around *some* such set, and our well-being depends crucially on the successful realization of the plans and projects in that set. One of Mason's projects is realizing the ideal of the refinement of appetite as a source of pleasure, where, on Mason's understanding of the ideal, the health considerations do not count as a reason to give up his gourmet goals. Mason cannot count the health considerations as a reason *and* realize the ideal so understood. But he

has other plans and projects beside his gourmet pursuits, and, in light of those projects, it could be that he would more effectively promote his well-being if he took the health considerations into account in deciding what to do rather than ignoring them. Then Mason would certainly be mistaken in not counting the health considerations as a reason. His refusal to do so might be a manifestation of denial, denial that he has a serious health problem. This is the second of the three ways in which Mason may be mistaken. The third way is simply that he may lack adequate information. Suppose he mistakenly believes that gout is a trivial ailment and so mistakenly believes that gout is not a reason to stop eating gourmet food. If he knew the truth, he would think his well-being depended on curing the gout and would therefore regard the health considerations as a reason.

But just as there are cases in which people are wrong, there are also cases in which they are right. The selling-my-daughter case is one of the latter. The existence or non-existence of a reason may not entirely be a matter of what one's commitments are, but commitment plays a role. Parental love is one of the clearest examples: in that case, *because of my attitude*, certain reasons do not exist. Of course, even in the case of parental love one could be wrong; one could mistakenly think that certain considerations are not a reason. Consider the example in which Sally confronts the dilemma of selling one child to obtain life-saving medical treatment for her other child. Suppose Sally thinks that saving the life of one is not a reason to sell the other. Here there are the same three possibilities of mistake that there are in the Mason case. It might be morally better to sell one child to save the other's life; then, Sally would be mistaken in thinking that saving the one child's life was not a reason. She would also be mistaken if she was morally required to count saving the life of one as a reason. Alternatively, Sally might be mistaken about what promotes her own well-being; suppose that, despite loving the child to be sold, it would actually promote her well-being to sell that child to save the other. Finally, Sally might have inadequate information. For example, she might—mistakenly—think that saving the one child's life was not a reason because she mistakenly thought the other—sold—child would not lead a happy life.

But we are not focusing here on selling one child to save the other. What we are asking here is whether my using the \$1,000,000 to pay off bills and to invest provides a reason to sell my daughter. I am not in this case helping any one else with the money; I am just making my own life more comfortable. *Perhaps* it is possible to be mistaken even in this case. Again, we have the same three possibilities. It might—although this is

wildly implausible—be morally wrong not to sell my daughter to gain money for investment; or—equally implausibly—I might be morally required to count the financial considerations as a reason to sell. *Somewhat* more plausibly, I might be mistaken about what promotes my well-being. Suppose it would be better for me to sell my daughter since my love for her is a destructive love that is destroying my life. Blinded by love, I refuse to acknowledge this. Finally, I would be mistaken in refusing to count the financial considerations as a reason because I am inadequately informed. At least it is arguable that this is possible. Suppose I believe my daughter is a kind and generous person when in fact she sells drugs to elementary school children. As long as I believe she is kind and generous, I do not regard the financial considerations as a reason to sell her, but suppose I would change my mind if I knew the truth. I would think that *all along* I had a reason to sell her; I just did not realize that because I was mistaken about her true character.

We do not have to decide how plausible these various possibilities of mistake really are. What we want to focus on is the case in which it is not immoral not to sell my daughter; in which I am not blinded by love, or in any relevant way mistaken about what promotes my well-being; and in which I am adequately informed on all relevant points. Could I be mistaken in thinking that the financial considerations are not a reason to sell? Certainly not. *In such a case*, if I think the financial considerations are not such a reason, then they really are not.² Any case in which I would be mistaken, would be a case in which it was immoral not to sell my daughter, or in which I was relevantly deficient in self-understanding, or in which I was lacking relevant information.

I take it to be clear then that the daughter-selling example illustrates the following possibility: one has reasons to perform an action A, where one doing A means not doing B, yet the reasons to do A are *not* reasons to not do B. Such cases give rise to incommensurabilities. Thus, in the daughter-selling example, I have reasons to have the money, and I have reasons to keep my daughter. To get the money, I have to part with my daughter. It is natural to assume that the reasons to have the money are also reasons to sell my daughter, so it is natural to ask: are reasons to sell her better or worse than the reasons to keep her? But—and *this is the incommensurability*—my financial reasons to have the money and my

2. This sort of connection between thinking something so and its really being so is not unique to this case. See Richard Warner, *Incorrigibility*, in *OBJECTIONS TO PHYSICALISM* 185 (Howard Robinson ed., forthcoming 1992); Richard Warner, *Is the Body a Physical Object*, in *NATURALISM: A CRITICAL APPRAISAL* (Steven Wagner & Richard Warner eds., forthcoming 1992); Richard Warner, *Why is Logic A Priori?*, 72 *THE MONIST* 40 (1989).

reasons to keep my daughter are *not commensurable in this way*, for, as long as I love my daughter in the way I do, the financial reasons cannot be reasons to sell her.

Parental love is, as we will see, just one example of an attitude that gives rise to incommensurability. There are many such attitudes. They all involve taking considerations to be or not be reasons, and there are cases in which, by virtue of being in the attitude, the reason exists.

B. The Importance of Incommensurability

So far incommensurability may not seem very significant, for there is nothing particularly problematic about the daughter case. After all, I have no difficulty in deciding what to do; I have a reason to keep my daughter—my love for her; keeping her means not having the money, so—other things being equal—my reason for keeping my daughter is a reason *not* to have the money. *And*: other things certainly are equal, so my love of my daughter *is* a reason not to have the money, and I take this reason not to have the money to be a better reason than the financial reasons for having the money. The decision is an easy one.

But there are cases in which incommensurability does make decision difficult. Thus: a sadistic Nazi officer apprehends a mother and her twin five-year old children.³ To satisfy his sadism, the officer says he will kill one of the children and asks the mother to choose which it shall be. If she does not choose, he will kill them both. The mother's dilemma is that it is constitutive of her love for each child that she refuses to recognize saving the life of one as a reason to kill the other. Yet her love for each child gives her a reason to save that child, and both will die if she does not sacrifice one. However, to choose one over the other requires that she cease to love one—at least that she cease to love that one in the way she presently does. This is not something she can do at will—even if she should want to. This makes rational decision impossible. There is no way she can act for reasons. It is not even possible for her to rationally decide by, for example, flipping a coin; to do so is to count saving the life of one as a reason to choose that the other should die. As long as she loves both children, she does not recognize the existence of such a reason.

This is what makes incommensurability important. It can be a barrier to rational action, action for reasons. Sometimes it is a particularly insurmountable and soul-rending barrier, but not always. Sometimes the barrier is relatively easily overcome. Seeing what is involved in these relatively easy cases is essential to understanding the role of the courts in

3. This example forms the central theme of WILLIAM STYRON, *SOPHIE'S CHOICE* (1979).

cases of incommensurability. To this end, consider the following example.

C. *Escaping Incommensurability*

Suppose Jones and I are avid sailors. We each spend about \$400 a month on sailing (yacht club dues, boat storage, and so on). For Jones the choice is between spending the \$400 on sailing and saving it for retirement. He has reasons to save for retirement, and, since that means not spending the money on sailing, his reasons to save are—other things being equal—reasons not to sail. For Jones, other things are equal, so his reasons to save *are* reason not to sail, but he takes his reasons to sail to be better than his retirement-saving reasons not to. Like Jones I have reasons to save money toward retirement, but unlike Jones I do not see these reasons as reasons not to sail—even though sailing means not saving. My attitude is similar to my attitude toward my daughter: I am committed to sailing, and it is in part constitutive of my commitment that I refuse to recognize saving for retirement as a reason not to spend money on sailing. In this sense, I could literally be said to love sailing.

But, in this case, my love is limited. To see how, suppose the cost of sailing suddenly rose to \$1000 a month. Jones would stop sailing at this point, for he would take his reasons to save \$1000 toward retirement as a reason not to sail, and he would take that reason to be stronger than his reason to sail. I would also stop sailing, but not quite for the same reasons. Confronted with the need to pay \$1000, I would abandon—or at least change the nature of—my commitment to sailing, for I would—sadly and reluctantly—acknowledge that saving \$1000 a month for retirement *was* a reason not to sail. I differ from Jones in that my decision involves a fundamental change in my attitude toward sailing, a ceasing to love, a change that does not occur in Jones. As we will see, similar changes of attitude are often involved when courts decide cases involving incommensurabilities.

So far I have focused on love and money, for they provide clear examples of incommensurability. But incommensurability extends well beyond this range. For example, suppose Katrina is a Russian engineer in the 1930s; she favors the development of the untouched Russian Steppe. She thinks that

[o]ur steppe will truly become ours only when we come with columns of tractors and break that thousand-year-old virgin soil. On a far flung front, we must wage war. We must burrow into the earth, break rocks,

dig mines, construct houses. We must take from the earth.⁴ Her vision is of humans as masters of the earth, transforming it in their image, and she emphasizes the enormous benefits to the Russian people of an industrialized steppe.

But she has never seen the steppe, and when she finally travels through it, she is overcome with awe at the untamed and untouched vastness of it. Insofar as she is in awe, she will not think that the benefits of exploitation are a reason to "break rocks" and "dig mines." It is constitutive of her awe that she does not recognize such benefits as a reason. To find in such benefits a reason to deface the steppe is not to be in awe of the steppe. At least, this is one clear sense of the word "awe;" I have no wish to deny that the word might also be used to designate differently constituted attitudes. The point to emphasize is that Katrina's awe does not mean that she does not have reasons to exploit the steppe; we may suppose that she still has the same reasons she had before her trip to the steppe. One and the same person can both be in awe of the steppe and persuaded by the case for exploitation. Of course, one cannot be in awe and *simultaneously* acknowledge that the benefits of exploitation are a reason to dig up the steppe. The attitudes have to alternate, but alternate they may. To resolve the conflict, Katrina must abandon one or the other attitude.

One could give similar examples involving, for example, beauty, nobility, honor, loyalty, and friendship.⁵ Examples are sufficient to show the existence and pervasiveness of incommensurability; however, there is a compelling theoretical explanation as well.

4. This passage is from a 1929 textbook used in the Soviet Union for the education of twelve to fourteen year olds. Albert E. Burke, *Influence of Man Upon Nature—The Russian View: A Case Study*, in *MAN'S ROLE IN CHANGING THE FACE OF THE EARTH* 1048 (William Thomas ed., University of Chicago Press 1956). The passage is quoted in CHRISTOPHER STONE, *EARTH AND OTHER ETHICS* 112 note (1987).

5. Loyalty is a particularly clear case. Suppose Jones and I are revolutionaries. An official in the government we oppose approaches me and offers me \$1,000,000 to reveal names, hiding places, and plans of my fellow revolutionaries. I refuse. He makes the same offer to Jones, who also refuses. Jones refuses because the price is too low. He would not betray the revolutionary cause for less than \$10,000,000. Jones makes a comparison. He does so because he regards the value to him of loyalty to the revolution as comparable to the value to him of various amounts of money. His is worth less than \$10,000,000; more than any lesser amount. I might be thought to be like Jones. After all, I do refuse to betray the revolution, so my loyalty must be worth more to me than \$1,000,000. But I do not refuse because I make a comparison. I refuse precisely because I refuse to measure the value of my loyalty in money. It is in part *constitutive* of what I mean by loyalty that I do not regard it as for sale, as having a value measurable in money. There is no amount of money that is the equivalent in value to my loyalty. Indeed, I am shocked at Jones. I do not think he means the same by loyalty as I do.

D. *Incommensurability and Value*

The source of incommensurability lies in the nature of value—or better, of *valuing*. In one central and important sense of the word, to value something is to regard it as a source of reasons for action, where the reason consists in the doing, experiencing, or having of the valued item *for its own sake*, not as the realization of any other end. For example, if I love—And, in that way, value—my daughter, then I have a reason to spend time with her, educate her, look after her health, and so on. Now I may do some of these things as means to ends. I may, for example, educate her as a means to giving her a secure future with reasonable career prospects. But, given that I love her, I may also provide for and participate in her education simply for the sake of doing so. I regard “because it would educate her” as—*in and of itself*—a reason for action. Of course, the forms of parental love are various, and some who love their children may not find such a reason in the prospect of their children’s education. But to love one’s child is, in part, to have reasons to do things—different things for different people—simply for the sake of doing those things for the child. In general the nature and extent of the value one places on something is, at least in part, a function of the reasons one’s evaluative attitude provides.

This is where the link comes between valuing and incommensurability: *the nature and extent of the value one places on something is in part defined by what reasons one’s evaluative attitude allows and disallows*. The examples of incommensurability strongly support this point. I do not, for example, count as loving my daughter unless I refuse to count the financial considerations as a reason to sell her. Katrina’s awe is constituted in part by her refusing to recognize the benefits of exploitation as a reason to “break rocks” and “dig mines.” Incommensurability is built into the very nature of valuing. In valuing, incommensurability is the rule, not the exception. Commensurability should be seen as an exceptional—and often very important—achievement.

III. THREE CASES OF INCOMMENSURABILITY IN THE LAW

A. *Environmental Law*

The second of the three claims with which we began is that legal cases—at least hard cases—often demand that the court make a choice among alternatives that are incommensurable. This claim may seem very puzzling, for consider the contrast between Katrina and the courts. Incommensurability, as we have explained it, is a very *personal* matter. It is a matter of what one’s evaluative attitudes are, attitudes like love

and awe. Katrina's awe leads *Katrina* to reject the benefits of exploitation as a reason to deface the steppe, but courts are not supposed to decide cases on such a personal basis. The decision is not supposed to depend on the particular values the court holds, values that the litigants and others in society may or may not share. The court is to decide on a far more *impersonal* basis. Courts are institutions designated by the state to decide a certain range of disputes. Typically the disputing parties argue for different decisions, each side offering a justification for its position, and the court's institutional responsibility is to decide *based on the superiority of one justification over the other*.⁶ But there is a presupposition of this description of the courts role—a presupposition of commensurability. This presupposition is—or at least *appears* to be—indefensible, for: first, incommensurability is pervasive in the law; second, this at least *seems* to undermine the idea that courts should decide based on the superiority of one justification over the other. I begin by supporting the first claim with examples, the claim that incommensurability is pervasive.

It is natural to think otherwise; at least, it is when confronted with the practical reality of framing social policy and deciding legal cases. For example, a recent EPA committee report endorses "risk analysis" as a way to approach environmental problems.⁷ According to the committee, such analysis "allows many environmental problems to be measured and compared in common terms, and it allows different risk reduction options to be evaluated from a common basis."⁸ The committee warns against the serious danger of not employing such a ranking: "If finite resources are expended on lower-priority problems at the expense of higher-priority risks, then society will face needlessly high risks."⁹ The assumption here is that there are no significant, or at least no ineliminable, incommensurabilities. Our reasons for and against various environmental options are to be ranked as better and worse on a common scale.

The committee recognizes, of course, that finding a common scale may be problematic, and the bulk of its report consists in identifying and analyzing several difficulties. In its discussion of more or less technical

6. Of course, the court is not limited to the justifications advanced by the parties; the court may think some other justification is better than either. Having noted this possibility, let us, for simplicity, put it to one side. The crucial point is that it is precisely the institutional role of courts to decide in ways appropriately backed by justifying considerations. I take it to be clear and uncontroversial that courts have such an institutional role.

7. SCIENCE ADVISORY BOARD, U.S. ENVTL. PROTECTION AGENCY, PUB. NO. 91-155259, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION, app. a (Sept. 1990).

8. *Id.* at 2.

9. *Id.*

difficulties with risk assessment, the report identifies the following "additional difficulty." They note that any attempt

to compare and rank environmental risks [involves] inevitable value judgments For example, are health risks posed to the aged more or less serious than health risks posed to infants? Are risks of cancer more or less serious than threats to reproductive processes? Comparing the risks posed to human populations with the risks posed to ecosystems may be even more difficult.¹⁰

The difficulty here is not just that we tend to disagree in our "inevitable" value judgments—although that, of course, is serious enough. Incommensurability is an equally serious difficulty—and equally inevitable. After all, the committee enjoins us to consider "all effects on humans and societies that may result from environmental problems."¹¹ The report criticizes an earlier study because it limited its concern "to only a few of the services produced by ecosystems, and ignored the more complex, long term interconnectedness of all living things on earth." Given the breadth of the concerns, incommensurability is unavoidable.

Examples bear this out. I begin with an anecdotal one. By international treaty the Antarctic is the most stringently environmentally protected region of comparable size. The principal draftsman of the legislation that implemented the treaty for the United States reports that the main reason the parties with whom he worked wanted to preserve the Antarctic was out of a kind of awe for the region; nothing else on earth on that scale had remained as untouched by humans.¹² Awe may well have supported the stringent restrictions. Suppose—as in our earlier Russian engineer example—it was constitutive of the awe that one would not recognize the benefits of exploitation as a reason to develop the Antarctic. As long as awe determined the decision, the choice between exploitation and preservation would be easy. Of course, the draftsman does not say whether this was the case, and this is one thing that makes the example a good one. It not only illustrates incommensurability but also shows the silent and unacknowledged role it may play. But we do not have to rely on speculation and imagination to provide examples of incommensurability in the environmental law area.

The Clean Air Act creates, or at least acknowledges, various incommensurabilities. Under § 7409 of the act, the EPA Administrator is to set natural ambient air quality standards (NAAQSs) at levels necessary to protect public health and welfare; in determining the levels, the Ad-

10. *Id.* at 8.

11. *Id.* at app. a, 28-29 (emphasis deleted). The deleted portion reads, "excluding health effects." The committee considers these of course, but under a separate heading.

12. STONE, *supra* note 4, at 95-96.

ministrator is *not* to consider the feasibility (technological and economic) of meeting the standard.¹³ The courts have accepted this aspect of the act, holding that NAAQSs will be upheld as long as the Administrator had a rational basis for thinking that the level set was necessary to protect health and welfare. This creates an incommensurability.

To see why, suppose we are designing a factory and we want to minimize pollution. When we tell our engineers the minimal level of pollution that we find acceptable, they reply that it is neither technologically nor economically feasible to design the factory in such a way. Now this lack of feasibility is certainly a reason *not* to design the factory in that way, and—other things being equal—a reason not to design a factory in a certain way is certainly also a reason *not to have a legal rule* that requires that it be so designed. In such a case, we should adopt the rule only if the reasons to have the rule are better than the reason—infeasibility—not to have the rule. But § 7409 tells us not to make this kind of comparison in setting NAAQSs. How can this be rational? It is not rational to ignore a relevant reason (exceptional circumstances aside). We made this point when discussing Dickens and Wegg's leg. Now the possibility fancifully illustrated arises in the real-world context of environmental legislation. Since it is not rational to ignore a relevant reason, we must, if § 7409 is not to condemn us to irrationality, interpret that section as saying that feasibility considerations *cannot count* as a reason against imposing an emissions standard. So interpreted, what underlies the section is the placing of a certain value on clean air, a valuing of clean air in part constituted by not recognizing feasibility as a reason not to impose certain clean air standards. Section 7409 reflects this attitude, or at least reflects the legislative judgment that, as a society, we do (or at least should) have that attitude.

Some may object that the legislature actually made a quite different judgement. The objection is that, where meeting a certain NAAQSs would not be feasible, the legislature *did* regard this as a reason not to impose the standard; however, the legislature also thought that there were good reasons to impose such NAAQSs, for doing so would provide an incentive to develop better and cheaper pollution control technology. The legislature passed § 7409 because it thought the reasons to have such NAAQSs were better than the reasons not to. The problem with this objection is that the legislature could not have been in any position to make such a judgment. Whether providing incentives is a better reason than infeasibility depends on detailed facts about the state of technology

13. 42 U.S.C. § 7409 (1990).

and the state of the economy; moreover, these facts will vary from industry to industry, and they will vary over time as technology develops and the economy changes. Even if the legislature could have determined, at the time of passing § 7409, that the incentive reasons are better than the infeasibility reasons, the legislature could not possibly reliably determine this for the future. If the legislature tried to make such a judgment, it tried to do the impossible. A much more plausible view of § 7409 is that it expresses a valuing of clean air in part constituted by not recognizing feasibility as a reason not to impose certain clean air standards.

Section 7409 is by no means the only part of the Clean Air Act that raises incommensurability issues. Section 7411, for example, does so as well—but in an importantly different way. The way incommensurability issues arise here illustrates an important aspect of incommensurability as it figures in the law, so I will develop the example at some length. Section 7411 directs the Administrator to set emissions standards for “new” stationary sources of pollution; these are sources constructed or modified after the effective date of applicable regulation. The standard is to reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (*taking into account the cost of achieving such reduction, and any nonair quality health and environmental impact and energy requirements*) the Administrator determines has been adequately demonstrated.”¹⁴ Here, clearly, lack of economic feasibility *is* a reason not to impose a standard, for the Administrator is to take cost into account. There is no inconsistency between §§ 7409 and 7411. Meeting the NAAQSs is a matter of the combined level of pollution from various sources; we may still meet the NAAQSs even if we allow feasibility considerations to play a role in setting standards for some particular sources.

The point to emphasize is that incommensurability issues arise even in the context of § 7411. To see how, note first that the section does not say what counts as taking “into consideration the cost.” That is, it does not say what kind of feasibility considerations can qualify as a reason not to impose an emission standard. The issue is a critical one, for it is entirely possible to value clean air in a way that is defined in part by acknowledging only a limited reason-providing role for feasibility considerations. *Portland Cement Association v. Ruckelshaus*¹⁵ illustrates the point. The EPA set emissions standards for new or modified cement plants. Portland Cement sought judicial review on the ground that the

14. 42 U.S.C. § 7411(a)(1) (1990) (emphasis added).

15. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

Administrator did not comply with § 7411 by taking "into consideration the cost" of meeting the standard. The Administrator had estimated the total capital and operating costs of meeting the standard and had determined that the industry as a whole could afford them.¹⁶ Portland Cement argued that the statute required a quantified cost-benefit analysis.

Portland Cement's argument is not without merit. Suppose the Administrator actually had prepared a cost-benefit analysis which showed that the costs significantly exceeded the benefits. Could the Administrator simply ignore the results of the analysis? Surely not; it would not be rational to do so—on the assumption, that is, that the analysis provides a reason not to impose the standard. To make the point again: it is not rational to ignore a relevant reason (exceptional circumstances aside). If the analysis provides a reason not to impose the standard, then the Administrator should impose the standard only if the reasons to have the standard are better than the reason—that costs exceed benefits—not to. Of course, in the actual case, the Administrator did not prepare a cost-benefit analysis. But suppose he had the time and the resources to do so, and suppose that, given the high costs of meeting the standard, one had good reason to wonder whether the costs did not exceed the benefits. Then, isn't Portland Cement right in thinking that taking "into consideration the costs" means preparing a cost-benefit analysis?

It certainly is—*on the assumption*, which we made above, that such an analysis can provide a reason not to impose a standard. I suggest that we regard § 7411 as rejecting this assumption; we should see the section as allowing only a limited reason-providing role for feasibility considerations—in particular as *disallowing* cost-benefit analyses as reasons. If we read the section in this way, the Administrator's approach makes sense. He does not prepare or consider a cost-benefit analysis because, under § 7411, such an analysis cannot provide a reason not to impose the standard. In support of this reading, compare § 7409. The § 7409 provision reflects the fact that we value clean air in a way that is in part defined by the refusal to recognize feasibility *at all* as a reason to impose NAAQSs. Why would we then do a complete about-face in § 7411 and allow *any sort* of feasibility consideration to qualify as a reason to not set an emissions standard?

The *Portland Cement* court agreed with the Administrator that a cost-benefit analysis was not required. But the court did not reach its

16. The Administrator decided that the costs could be passed on to consumers without significantly affecting the ability of cement manufacturers to compete with steel, asphalt, and aluminum manufacturers. *Id.* at 387-88.

decision on incommensurability grounds. The court noted that preparing a cost-benefit analysis would conflict with the time constraints imposed on the Administrator by the Clean Air Act; it also argued that it would be virtually impossible to quantify in dollars the benefit of the emissions standard to ambient air quality. The court's arguments are not particularly convincing—at least they did not convince Congress, for in 1977 Congress amended the Act by adding § 7617. This section requires that, prior to imposing a standard under § 7411, the Administrator shall prepare an “economic impact assessment.”¹⁷ The assessment is to analyze the costs of complying as well as various market effects (such as increased consumer costs), and the effects on energy use. The effect of the amendment is unclear, however, since it also provides that nothing in it shall be construed to “alter the basis on which a standard or regulation is promulgated”¹⁸ or to “authorize or require any judicial review of any such standard or regulation”¹⁹

So § 7617 leaves it unclear what sorts of considerations count as a feasibility reason not to impose a standard. This unclarity runs throughout environmental law; it is one of its most central and problematic themes. Where we recognize feasibility considerations as reasons, we are still unclear about exactly what sorts of considerations we count as reasons. It may well be that we are often like our hypothetical Russian engineer. In one frame of mind, we acknowledge considerations as reasons that, in another mind set, we disallow. An appreciation of our problems and perplexities here casts a revealing light on the EPA's recent endorsement of “risk analysis” as a way to allow “environmental problems to be measured and compared in common terms” and allow different risk reduction options to be evaluated from a common basis.²⁰ What this approach ignores is incommensurability, and to ignore this is to ignore a major source of our perplexities and quandaries over environmental law.

B. Property Law

Incommensurability also arises in non-environmental cases, of course. *Moore v. The Regents of the University of California*²¹ is an interesting example. In *Moore*, a UCLA medical center doctor removed John Moore's spleen in the course of treating Moore's leukemia. Abnormal

17. 42 U.S.C. § 7617 (1990).

18. 42 U.S.C. § 7617(e)(1) (1990).

19. 42 U.S.C. § 7617(e)(3) (1990).

20. See *supra* note 8 and accompanying text.

21. 793 P.2d 479 (Cal. 1990).

genetic material in the removed spleen had great commercial value, and without obtaining Moore's consent, the doctor and medical center marketed the material for a considerable profit.²² Moore sued, claiming (among other things) that he had a property right in the marketed material. The California Supreme Court denied this claim primarily on the ground that tens of thousands of researchers use human cell lines stored in tissue repositories, and that to recognize Moore's claim as valid would expose all these researchers to similar legal claims. The resulting liability explosion would greatly hinder research.

The strength of the majority's position is that avoiding a serious disruption in scientific research is certainly a reason not to make illegal the use of human cell lines without donor consent. Not making unconsented use illegal means not recognizing a property right for Moore in the genetic material, so—other things being equal—avoiding disruption in research is a reason not to recognize the property right.

Justice Mosk, in dissent, argues, essentially, that other things are not equal. He contends that

our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona '[R]esearch [of the sort involved in this case] tends to treat the human body as a commodity—a means to a profitable end. The dignity and sanctity with which we regard the human whole . . . are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product.'²³

One interpretation of these remarks is that Mosk flatly asserts without explanation that marketing the genetic material is inconsistent with the dignity with which we regard the "human whole." Another, more interesting interpretation is that Mosk asserts an incommensurability. Thus: the dignity with which we regard the "human whole" is in part constituted by a refusal to recognize the research value of a body part as a reason to sell it (or at least by the refusal to recognize such a reason without the patient's consent to such a sale). When we do recognize such a reason, the "dignity and sanctity with which we regard the human whole . . . are absent."²⁴

It is impossible to tell from Mosk's remarks which position he takes. However, many who object to "commodification" of the human body are

22. In exchange for this material, the doctor was given 75,000 shares of stock in the private company that bought the material, and became a paid consultant for the company. In addition, the doctor and UCLA together were given more than \$1,000,000 over a three year period. *Id.* at 482.

23. *Id.* at 515-16 (Mosk, J. dissenting) (quoting Mary T. Danforth, *Cells, Sales, & Royalties: The Patient's Right to a Portion of the Profit*, 6 YALE L. & POL'Y REV. 179, 190 (1990)).

24. *Id.* at 516.

clearly best interpreted as asserting such an incommensurability. Margaret Radin, for example, argues that it is wrong to think of "bodily integrity as a fungible object . . . We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object."²⁵ By a fungible object, Radin means one "replaceable with money."²⁶ To think of the body and its parts as *not* fungible is to refuse to recognize the commercial value of a body part as a reason to sell it. Of course, not everyone shares this attitude. The majority in *Moore* does not, for example.²⁷ Again, my point here is not to resolve the disagreement but to illustrate how issues of incommensurability arise in the law.

C. Contract Law

I consider a final example to show that incommensurability issues arise in more mundane contexts. Contract law is a good example. A contract is a legally enforceable promise, and, because of the nature of promising, incommensurabilities figure prominently in contract law. Part of promising is adopting a certain attitude toward future action, an attitude defined in part by the refusal to recognize certain considerations as reasons. For example, I promise to accompany you to the doctor on Tuesday; you face a possible diagnosis of cancer and want moral support. However, when Tuesday arrives, it is a beautiful day, and I think that it would be quite enjoyable to take a walk. Taking the walk means not accompanying you; so, since the prospect of enjoyment is a reason for me to take the walk, then—other things being equal—it is also thereby a reason not to go with you. But other things are not equal here, for I have *promised* to provide support in the face of a possible diagnosis of cancer. When I promised, I made a certain commitment, a commitment constituted in part by the refusal to count considerations like the prospect of an

25. Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1880-81 (1987).

26. *Id.* at 1880.

27. Consider their comment on Mosk's dissent:

I share Justice Mosk's sense of outrage, but I cannot follow its path. His eloquent paean to the human spirit illuminates the problem, not the solution. Does it uplift or degrade the "unique human persona" to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically, by delivering the majestic force of the law behind the plaintiff's claim? I do not know the answers to these troubling questions, nor am I willing—like Justice Mosk—to treat them . . . as issues . . . susceptible of *judicial* resolution.

Moore, 793 P.2d at 497-98 (Arabian, J., concurring). This simply misses the point. *If* it is constitutive of our attitude toward the "human whole" that we do not regard its value as measurable in money, then this question is easy to answer: "Does it uplift or degrade the unique human persona to treat human tissue as a fungible article of commerce?" The answer is that it degrades it. The majority clearly assumes that the relevant values are comparable and that the problem is to determine their relative value along a common scale.

enjoyable walk as a reason not to do as I promised. Of course, one can promise and still properly regard *some* considerations as reasons to break the promise. I may have sufficient reason to break my promise if, through no fault of my own, accompanying you means leaving my two year old daughter unattended in a city park. The point is that having an adequate reason to break a promise is a two-stage matter. First, the considerations in question must be the *kind* of considerations that, in the circumstances, can be such a reason—e.g., the safety of a young child, as opposed to the enjoyment of a walk. Second, the reason provided by those considerations must be better than the reasons to keep the promise.

We can see this two stage structure in a number of contract doctrines. The doctrine of impracticability is an example. The doctrine is that a promisor may be excused from performance under two conditions: first, an unexpected contingency makes performance commercially impracticable—i. e., especially difficult or impossible; and, second, it is not the case that the promisor seeking to be excused ought to bear the risk of loss from such a contingency.²⁸ The first condition identifies a type of consideration—the relevant unexpected contingency—as the kind of consideration that can be a reason not to keep a promise; it tells us that such a consideration is relevantly like the endangering of the child, not like the enjoyment of the walk. Given that one can show such a contingency, one then has to show that the reasons the contingency provides are better than the reasons one has to keep the promise. The second condition indicates that this is a matter of risk assignment; one must show that one ought not to bear the risk of loss from the contingency. But then why have the first condition at all? Why not simply say that, where keeping the promise will impose a loss on one, one may be excused from performing if one can show that one should not bear the risk of that loss? Clearly, impracticability doctrine does *not* work this way. Arguments about risk assignment are not relevant unless one can meet the threshold condition of showing an appropriate unexpected contingency.

Why should the doctrine have this structure? Because of incommensurability. To see this, suppose that I am wholesaler of hair gel, and I contract with you, a retailer, to supply you with all the hair gel you need at \$1 a tube. Then, unexpectedly, the costs of making hair gel rise sharply with the result that I am just breaking even on our contract. I have a reason to stop selling you hair gel for \$1 a tube—namely, I am not making any money by doing so. So, since not selling to you means breaking my promise to you, I have—other things being equal—a reason to

28. See E. ALLAN FARNSWORTH, *CONTRACTS* § 9.6, at 677-89 (1982).

break my promise. But are other things equal? After all, I have promised, and that is to adopt an attitude toward future action that disallows certain sorts of considerations as reasons to break the promise. So what about only breaking even? It is my reason to stop delivering hair gel to you, but stopping means breaking my promise. Is only breaking even a reason to do that? Suppose that it is not. Then I cannot argue that my reason to break my promise—that I am only breaking even—is better than my reasons for keeping the promise. There is no comparison of this sort to make since my only breaking even is not a reason to break the promise.

And this is precisely the position of the current law. Under current impracticability doctrine, although the rise in costs was unexpected, it does not make performance commercially impracticable. So I do not meet the threshold test of the first condition, and I cannot argue that I should not bear the risk of loss from the unexpected contingency. That is to argue that my reasons for breaking the promise—my only breaking even—is a better reason than my reason for keeping the promise. But my only breaking even is not a reason for not keeping my promise.

But perhaps the current law should be different. Suppose that if I stopped selling to you, I could sell the hair gel at a considerable profit—such a large profit that I could pay you whatever damages you sustained by my breach of contract and still make money. So it would be wealth maximizing for me to stop deliveries to you. So why shouldn't I? "Because you promised" is one answer. But did I *promise*—promise in the sense that bars me from considering just breaking even as a reason to break my promise? It is certainly possible for parties to enter a contractual relationship which does not have this character. We might explicitly agree that I should, in the above situation, sell for more money and share some of the additional profit with you by way of compensation for my breach. I will not try to resolve these issues since my point is just to show how issues about incommensurability arise in the law. Whatever the resolution of these issues, it is clear that impracticability raises such issues—as do various other contract doctrines: frustration, mistake, duress, undue influence, unconscionability. These doctrines all contain a component that defines what counts as a reason to break a promise. Delineating such reasons is one function—one of the main functions—of contract law.

We could continue with examples, but the three given suffice to make the point that incommensurability is a pervasive feature of the law.

IV. COMPARING THE INCOMPARABLE

Incommensurability raises a special problem for jurisprudence, for, as we noted earlier, courts are to decide *based on the superiority of one justification over the other*. To fulfill this role—to decide on the basis of the better justification—the courts must sometimes compare the incomparable. They must do so in those cases that demand that the court make a choice among alternatives where the reasons for each alternative are incommensurable. How is this possible?

It is possible only through relevant changes in evaluative attitudes. A comparison of two examples makes the point. Recall the sadistic Nazi example. The mother of the twins must choose which one is to die. But to choose one over the other requires that she cease to love one, and she cannot do that at will, so rational decision is impossible. Compare the sailing example. Confronted with the need to pay \$1000, I would abandon my commitment to sailing by acknowledging that saving \$1000 a month for retirement *is* a reason not to sail. I make the incomparable comparable by a change in my evaluative attitude.

In cases involving incommensurable reasons courts often have to determine whether to make such a change in evaluative attitudes: they have to decide what to allow and disallow as a reason for action. In *Portland Cement v. Ruckelshaus*, for example, the court has to decide what sorts of feasibility considerations to allow and disallow as potential reasons not to impose an emissions standard. To take another example, in impracticability cases in contracts, the court has to decide what counts as a reason to break a promise.

How should courts decide such questions? To answer this question, we should first ask another: how do *we*—in ordinary life—decide such questions? It is illuminating here to consider how courts decide from the perspective of how we decide in ordinary life. In general, we decide what to do in light of what we value, and, as we noted earlier, the nature of our valuing is partly defined by the incommensurabilities we acknowledge, by what we allow and disallow as a reason. This link between valuing and incommensurability can make it especially problematic to decide in the face of incommensurabilities. To see why, contrast the sailing example with the example of Katrina, the Russian engineer. In the sailing example, I find it relatively easy to decide that saving \$1000 a month for retirement is a reason not to spend the money on sailing. The reason is that other things I value—security and longevity, for example—may dictate the choice. Contrast Katrina. We imagined Katrina in awe of the steppe, where it was constitutive of her awe that she did not take the

benefits of exploitation to be a reason to "break rocks" and "dig mines." But we also imagined her as simultaneously having reasons to exploit the steppe; as an engineer concerned with improving the quality of Russian life, she sees the steppe as a resource ripe for exploitation. Of course, as we noted earlier, this means she must be of two minds: she cannot *simultaneously* find a reason to "dig mines" in the benefits of exploitation. The attitudes alternate. To resolve the conflict, Katrina must abandon one attitude, and this she may find difficult. The decision is easy—from the point of view provided by her awe; and, it is also easy—from the engineering/quality of life perspective. But how is Katrina, who has both points of view, to decide? The other things she values may not yield any, or any clear, answer. The reason is that her valuing is constituted by the incommensurabilities she acknowledges, by what she allows and disallows as a reason. The perspective of awe and the quality of life perspective involve values that allow and disallow different reasons; these—conflicting—attitudes express the values Katrina brings to bear on the situation, and she may have no other values that bear on this issue in a way that provides a clear resolution. When she reacts to the steppe with awe, she undermines any clear basis for decision.

Courts can face a similar dilemma. At first sight, this may seem wrong. For one thing, courts, unlike Katrina, often have legislation to guide them. Doesn't legislation often resolve incommensurability issues and thus provide clear guidance to the courts? Not typically—as *Portland Cement* illustrates. The Clean Air Act does not say what *kind* of feasibility considerations can qualify as a reason not to impose an emission standard. Even when Congress specifically addressed this question in the 1977 amendment prompted by the *Portland Cement* decision, it did not resolve the issue. The amendment merely requires that (prior to imposing a standard under § 7411) the Administrator shall analyze the costs of complying, as well as various market effects, and the effects on energy use. The amendment does not tell the Administrator *how* to analyze the costs of compliance; it does not say *to what extent* feasibility considerations can count for or against a standard. This is typical; legislation typically provides little guidance about how to resolve incommensurabilities. Legislation is general, applying to a broad spectrum of cases; it typically does not—and, practically speaking in terms of time, money, and energy, *cannot*—address all the incommensurabilities that the detailed fact patterns of specific cases force to our attention.

The common law may seem to provide more guidance. After all, we have seen that it recognizes incommensurability in the form of such doctrines as impracticability. But when we look in detail at the doctrines,

we do not find much guidance about how to handle incommensurabilities. Impracticability doctrine recognizes incommensurabilities created by promising in its threshold requirement that an unexpected contingency make performance commercially impracticable; but we will not find much guidance about what counts as commercially impracticable. Decisions are made on a case-by-case basis with the courts giving little explanation.

Thus, in cases involving incommensurabilities, courts often face the same dilemma as Katrina. They have to decide what to allow and disallow as a reason where neither legislation, the common law, nor values provide much guidance. The jurisprudential problem is how to explain how such decision making is consistent with the institutional demand that courts decide based on the *superiority* of one set of reasons over the others. *Prima facie*, it is difficult to see how a court can meet this requirement if it is to determine what to allow and disallow as a reason and neither legislation, the common law, nor values can guide its choice. What does the court appeal to as a way of showing that one set of reasons is superior to another, competing set? My point is not that this problem is unsolvable. My point is that there is a problem to be solved.