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CONFLICTING VALUES IN LAW

*CASS R. SUNSTEIN**

I thank you all for coming on a rainy day. Actually, I am a little preoccupied right now because there was in a Fordham colleague's office a chart which said how much Elvis would weigh on every planet and on the Sun. On Pluto, Elvis would weigh a mere thirteen pounds; and on the Sun, Elvis would weigh over 7,000 pounds. This is actually related to my topic.

I have two quotations with which to begin. The first is from the United States Constitution, and it goes like this: "No title of Nobility shall be granted by the United States."[1]

The second quotation is from a recent winner of the Nobel Prize in Economics, the University of Chicago's own Gary Becker. Here is how the second one goes: "An efficient marriage market"—now, this is personally relevant to some people here, I know, so please do listen:

> [A]n efficient marriage market assigns imputed income or "prices" to all participants that attract them to suitable polygamous or monogamous marriages. Imputed prices are also used to match men and women of different qualities: some participants . . . choose to be matched with "inferior" persons because they feel "superior" persons are too expensive. . . .
>
> [A]n efficient marriage market usually has positive assortative mating, where high-quality men are matched with high-quality women and low-quality men with low-quality women, although [and this makes it somewhat less depressing] negative assortative mating is sometimes important.[2]

I think there is a connection between the quotation from the Constitution and the quotation from Gary Becker, and I hope this will emerge in the course of my comments.

What I want to do is explore two claims and say something about their implications for law.

The first claim is that we value things in different ways; that is to say, we value things not only in terms of intensity, but in qualitatively distinct ways. It is not simply the case that some things are valued more; it is also the case that some things are valued differently from others. That is my first claim, about different modes of valuation.

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1. U.S. Const. art. I, § 9, cl. 8.

2. Gary S. Becker, A Treatise on the Family 108 (2d ed. 1991).

The second claim is that human goods are not commensurable. This is to say that there is no available metric along which we can align the various goods that are important to us, and that any effort to come up with a metric, like utility or dollars, while nominally designed to aid human reasoning, actually makes human reasoning worse than what it is when it is working well.

So the first claim has to do with diverse modes of valuation; the second has to do with incommensurability. I do think that these claims have important implications for law, though, unfortunately, it is not the case that these claims lead simply to particular recommendations. So I have to apologize in advance for saying that while these things bear on how legal problems are thought about, it is not true that they lead directly to particular outcomes. But by way of diminishing the level of abstraction, let me say something about the areas of law on which they do bear.

In environmental law, it often seems as if there is a debate between economists and environmentalists, with economists acting as if they value the environment somewhat less than the fanatical environmentalists who value it a lot. It might be more accurate to say that economists and environmentalists value the environment in different ways, with economists thinking that the environment is for human exploitation and use, and environmentalists sometimes challenging that assumption.

In debates over surrogacy and prostitution, I think it is very hard to make sense of very prominent current views within the law without noting the existence of an objection to surrogacy arrangements and prostitution that says that the way in which those transactions value sexuality and reproduction is unfortunate and deserving of disapproval.

Many current debates over the role of religion in society have a lot to do with modes of valuation. A big decision the Clinton Administration has to make, I think in the next two weeks, is how to handle the Reagan-Bush Executive Order[3] on federal regulation, which moves cost/benefit analysis to the fore. How cost/benefit analysis is thought about has everything to do with modes of valuation.

The talk will come in three parts: the first will have to do with modes of valuation; the second will discuss commensurability; the third, and longest, will have to do with law; here I will try to bring all of this down to earth. So if the stuff with which I am about to get going seems too abstract, I promise that the examples will come before terribly long.

I. MODES OF VALUATION

I have said that we value things in different ways, that goods are subject to diverse modes of valuation.

Let's begin with a simple distinction between goods that are intrinsically valuable and goods that are instrumentally valuable. I think

3. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988).

Scrooge is the only character I know for whom a dollar bill was intrinsically valuable. For the rest of us, a dollar bill is valuable for what it can do; it is not valuable in itself. Education is something that has both instrumental and intrinsic value; that is, it is valuable in itself and it is valuable for what it can do for you. If we knew somebody who thought that education was solely of instrumental value, it would seem quite strange.

Goods like friendships are of intrinsic value; they are valuable for themselves and not valuable because of what they are an instrument to.

So a first distinction is the distinction between instrumental and intrinsic value.

The category of goods that have intrinsic value is itself quite diverse. There are goods that are intrinsically valuable that produce respect—an acquaintance might do that. There are goods that are intrinsically valuable that produce affection—a friendship. There are things that produce wonder or awe, like a great musical work or a mountain. There are things that produce gratitude or love. And there are things that are solely for use—our category of instrumental goods.

So every day we make differences among modes of valuation. This is not simply true of good things; it is also true of bad things. Some things produce contempt; others produce anger and so forth. There is a wide range of negative and positive valuations.

Somebody who didn't make distinctions among modes of valuation might seem really strange, like a character in a science fiction story, or obtuse. If you saw someone who had just pro or con attitudes without making these distinctions, it would be an odd figure indeed, though if we thought for a bit, we could probably think of fictional characters who fit that bill.

What I want to suggest is that there isn't any super-concept—like happiness, or utility, or wealth maximization, or good—that can make sense out of our reflective evaluations in their diversity. That is to say, there isn't any big thing of which all these things are simply aspects. Any big thing that can be identified must allow room for the qualitative distinctions that modes of valuation embody.

That is basically an outline of modes of valuation. Conflicts among modes of valuation are really pervasive.

You can imagine an economist, let's say, who is working hard on a paper and who has scheduled lunch with an out-of-town friend. Let's suppose the economist would like to cancel the lunch, but feels bad about it because it is kind of disrespectful and inconvenient. Let's suppose the economist says to the friend, "I will compensate you— $20, $40, $80, $100, $160—for the cancellation." This would be an absurd response, though perhaps it has happened, and perhaps the so-called victim was, on balance, happy as a result. It would be an absurd response because the payment of cash as compensation for his cancellation of lunch is inconsistent with the way someone values a friend. It is not, I think, quite

right to say that the cash is less valuable than the lunch; in fact, if we are talking about aggregates and amounts, the cash might well be less valuable than the lunch. It is that the payment of cash is inconsistent with the way the lunch is valued, and that's what makes it seem like an insult.

I think that this somewhat absurd example helps with an extraordinary array of cases in which social norms or attitudes or law block the use of dollars as a mechanism for doing some sort of exchange work. Let me just give some examples.

If an adult neighbor asks another adult neighbor to mow his or her lawn for a fee, it would probably be perceived as an insult, as if the adult neighbor is being treated as a servant rather than as a person worthy of respect. To offer the dollars is turning the neighbor into someone for your use.

If someone says to you, "I will pay you a lot of money if you go out of town and leave your family for two months," you might do it, but it would seem awful. On the other hand, if an employer says, "As part of this job you have to leave for a month or two, that is part of what the job is"—it's called employment with a New York law firm, let's say—it might be okay. I think that the difference between the two cases is that in one case, absence from family is being sought by the employer, so-called, as a good to be promoted for its own sake; whereas in the other case, the absence is brought about as a kind of by-product of a job.

The movie "Indecent Proposal" is all about this—the use of dollars as a way of turning someone into a sexual object and what that does to a relationship. To get a little closer to law, suppose that in a case of environmental protection, we are trying to figure out how much to value a mountain. If a certain number of dollars is assigned to protection of the mountain, which is almost certainly a fine thing to do, it might well be jarring to say, in a kind of very simple way, "The mountain is really worth, say, two million dollars." That is jarring, I think, because the way the dollars are valued is different from the way the mountain is valued. The mountain is valued as something worthy of respect for some, or maybe awe and wonder for others, and dollars, though maybe deserving a kind of wonder and awe, get a different kind of wonder and awe from a mountain.

I think this issue is all over the current debate with respect to surrogacy arrangements, so-called "baby selling," and prostitution. Judge Posner has suggested a market in babies in writing that perhaps (in my view unfortunately) disqualifies him for appointment to the Supreme Court of the United States.[4] The argument is very provocative and interesting. One thing it doesn't quite pick up on is the possibility that the way babies are valued is inconsistent with trading them on markets, and that is undoubtedly part of the horror at the public reaction to the proposal.

4. *See* Richard A. Posner, Sex and Reason 409-17 (1992).

I have given many examples in which dollar trading of things is inconsistent with the mode of valuation of those intrinsic goods. But this is not simply a problem for money. If someone treated a cat in the same way that ordinary people treat a spouse, or if someone treated a diamond in the way that most people treat an animal, something odd would be going on. Quite apart from the issue of financial equivalence, people make distinctions in modes of valuation in their reactions to goods or events.

In lots of areas involving suggested political or legal changes, there is an issue with respect to modes of valuation. We cannot describe the shift from feudalism to capitalism in a sentence, but one thing that happened in that shift was a transition from one mode of valuation to another. With respect to the legal attack on segregation and slavery, a reform occurred in which people who were formerly for other people's use and control were seen as entitled to equal respect. With respect to the exclusion of religious convictions from the public realm, something that seems to have occurred in the last twenty years, sometimes at least, is that certain modes of valuation are being ruled off limits to politics.[5]

The movement for animal rights presents a lot of puzzles. This isn't at all the place to come to closure on that complicated issue. But the movement for animal rights might be best taken as suggesting that animals are entitled to either respect or consideration, and not to be treated as something for human exploitation and use. What the movement for animal rights is trying to do is to shift the mode of valuation and not only the intensity or quantity of valuation.

I have one more notation on modes of valuation and then we are on to commensurability. It often happens in a first-year class that there will be some question raised about the value of a life or a house, and some student will rebel against the effort to monetize, at which point an instructor or another student will say, "Well, that means you must think the life or the house is infinitely valuable," at which point the debate is over. It works as a laugh line and as a decisive objection. I think that victory—the infinite valuation point—is unearned. Often what the student is saying, in the resistance to monetization, is not about infinite value, but about the fact that things are valued in different ways. If the student says that, he or she has to explain a lot. The conversation is hardly concluded, but at least we can start to understand what it is that he or she is getting at.

So much for modes of valuation.

II. INCOMMENSURABILITY

By "incommensurability," I mean to suggest that some human goods cannot be aligned along a single metric without doing violence to our considered judgments about how those goods are best characterized and

5. For a discussion, see Stephen L. Carter, A Culture of Disbelief (1993).

experienced. By this I mean that if you develop a single metric, like dollars, by which to align things, you will often do violence to your own judgments about how those things are best understood.

Here is a story. At an academic conference, a friend of mine was buying a present for his daughter at a bookstore which also had presents for kids. He was somewhat embarrassed to be buying a present for his daughter at an academic conference. He said, "I'm purchasing goodwill." Now, he loved his daughter and he wasn't purchasing goodwill, but he was translating into the terms of commensurability what it was that he was doing; he was acting as if what he was doing was partaking of monetary exchange.

This is a jarring description. By telling the story, I mean to suggest is that sometimes there is no single metric available by which to order our assessments of various different goods. This is not to say that judgments among incommensurable goods are irrational or not subject to reasoned valuation. We decide all the time whether to take a job in one city or another, whether to do one thing or another during the evening, whether to take a vacation or not. Often incommensurable goods are at stake and judgments are made, and they can be reasonable or not. I am suggesting that if these various goods are aligned on a single metric, then we are doing violence to our best characterizations of what those things are.

It would not be conceptually impossible to make things commensurable—to line up, for example, vacation and work, or being with family or not, along a single metric, to use something like utility or dollars in order to get analysis going. Mill, the great utilitarian, was extremely tortured on the commensurability point. But this would be a way of doing violence, I think, to the way we really think about these things.

There is a relationship between my claim that there are diverse modes of valuation and my claim about incommensurability, but I want just to bracket that for a moment; to say a few more words about incommensurability, and then to get to some specifics.

One point about incommensurability is that in its most extreme form, it blocks certain reasons for action completely. Sometimes the existence of incommensurability rules off-limits certain bases for doing things that are on-limits in other places. Consider what might happen if a parent is asked, "For how much would you sell your child?" It is not as if the parent is insulted because the amount is too low; it is not as if one is asked, "Could I buy your suit for a dollar?" It is not as if the amount seems scandalously low. It's as if there is something extremely inappropriate about entertaining the choice at all.

This is also the case, I think, in areas of constitutional rights, where Ronald Dworkin describes rights as "trumps,"[6] and where the Supreme Court says administrative convenience is not a basis for intruding on a

6. *See* Ronald Dworkin, Taking Rights Seriously at xi-xii, 187-205 (1978).

fundamental right.[7] I think our notion of what rights are is inflected, at least, with an understanding that they cannot be compromised for certain kinds of reasons, as well as that they cannot be compromised unless the reason is very strong. You have to have a certain sort of reason as well as a reason of a certain level of intensity.

Some of the most interesting cases of incommensurability are ones in which the existence of no single metric makes certain reasons for action, like the acceptance of dollars, wholly illegitimate as a basis for action. But incommensurability is not just a barrier to action; it also makes possible certain valuable human relations. Without incommensurability, our understanding of what a friendship is, or what it means to be a parent, or what a beach is, would be compromised badly. So we ought not to think of the existence of incommensurability as simply an obstacle. It is also freedom-promoting, in the sense that it makes possible certain valuable human connections and relationships.

Some people think that claims of this sort—and I am going to stay abstract just for a moment longer—are not so important because it is equally accurate to say that certain things are valued a whole lot more than others. It is just as accurate to say things are valued more than others as it is to say that they are valued differently. The philosopher Donald Regan writes that, "when someone refuses to sell friendship for dollars, I think what such a person is most likely to mean is that friendship is more valuable than any amount of money, or, in other words, that the value of friendship is in comparably greater."[8] Says Regan, "When someone refuses to sell a child, it is closer to the truth to say that we regard the value of parenthood as incomparably greater than the value of money than to say that we regard these values as incommensurable."[9]

Regan is suggesting that these cases are best made sense of by saying that some things we value a lot, and in his view, it clouds things to say that they are valued differently. I think that Regan's challenge to incommensurability—as a description of what people mean and what they experience—is unsuccessful. It is possible to imagine someone who thinks that the value of parenthood or friendship is much higher than dollars and not that the value is different from dollars, but it would be a strange person if his assessment of why the child would not be sold was really, "I just like this child a lot more than even ten million dollars, even ten billion dollars." In other words, part of what it means to be a parent is to rule off-limits, even as a consideration, the exchange of the relationship for dollars.

I promised I was going to get more concrete, and I am about to. Now I'm going to talk about law.

Two qualifications. It is not the case that law automatically maps, or

7. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

8. Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. Cal. L. Rev. 995, 1058 (1989).

9. *Id.* at 1067-68.

translates our best valuations into, legal requirements. We might think, for example, that there is something about prostitution that is debasing to human sexuality, and so it is good to have a social norm that says that prostitution is not the preferred sexual mode. But we might think, at the same time, that the law ought not to ban prostitution. It would be perfectly reasonable to say that surrogacy arrangements are not the best way of producing children, but the law won't ban that. So one might think that the legal system ought not to do what social norms do.

My other qualification is this: I am going to go now over a wide range of areas of law and suggest how these issues might bear on current legal disputes, without attempting at all to resolve these issues. I am going to sacrifice depth for breadth.

The unifying theme has to do with what we might call the expressive function of law. By the expressive function of law, I mean not simply the social consequences of law, which are what are typically described, but also what sorts of values the law expresses. This, I think, plays a tacit role in lots of legal debates.

For example, there is a lot of work among economists and some lawyers about whether the antidiscrimination laws of the 1960s actually changed the world at all. Are the lives of black people better off because of those laws? Some people think that the evidence is not fully in. If what I am about to say is right, it still counts in favor of those laws that they express an appropriate valuation of the role of skin color in human relations—even if we cannot show and do not know whether those laws have resulted in higher welfare for the groups they are intended to benefit. That is to say that the values that the law expresses are themselves of interest independent of the direct social consequences.

We should break up this idea of the expressive function of law into two different notions. The first is that we might care about the expressive function of law because the value the law expresses will itself have consequences for social attitudes. If it is the case that prostitution is regularly admitted into society, it might be that social attitudes will shift in a way that is unfortunate.

I think a lot of debate over such things as affirmative action, capital punishment, surrogacy arrangements, prostitution, and drug legalization have to do with the social effects of the mode of valuation that law expresses. And here we are talking about consequences: Is the expression of an appropriate mode, in a way that will affect social attitudes for the better or for the worse?

But there is another notion which is not quite about effects on social attitudes. Here I have a quotation for you that grabbed me while I was writing this paper. It is a quotation from a civil rights demonstrator in the 1960s:

> If I had known that not a single lunch counter would open as a result of my action I could not have done differently than I did. If I had known violence would result, I could not have done differently than I

> did. I am thankful for the sit-ins if for no other reason than that they provided me with an opportunity for making a slogan into reality, by turning a decision into an action. It seems to me that this is what life is all about.[10]

Now, this is a very stark version of the expressive function of law—the notion that the valuation that law expresses is worth attention independent of social consequences. In this lies the stuff of fanaticism, so one wants to be cautious about the endorsement of the law's expressive function quite apart from social consequences. But I think it is hard to get a full handle on legal debates without seeing that the expressive function—even in this stark, totally nonconsequential sense—is part of what the debates are about.

Now for some specifics. In our society, the law carves up the world into different social spheres: politics, religion, family, labor unions, markets. One way to get a handle on what is done through this legal differentiation is to see it as a way a liberal society—"liberal" in the old sense—makes space for different modes of valuation. The family is typically the sphere for affection and love; religion is the sphere for devotion; the market is the sphere for use; politics is the sphere for the exchange of reasons.

Social criticism often consists of saying that one sphere does not live up to its aspiration; that the family, nominally a sphere for love, is actually a sphere for domination; or that politics, nominally a sphere for the exchange of reasons, is actually a place where money and use are very important. I do not mean to question these possibilities. All I mean to suggest is that social differentiation in this really critical sense is best understood as an effort to make space for different evaluative modes.

The Establishment Clause of the Constitution is very hard to make sense out of. What social work is it doing, in saying that the government cannot establish an official religion? As it has come to be understood, one thing that it does is to exclude from the political realm a certain mode of valuation which is perfectly acceptable in the private realm, that is, one of devotion to a deity. That mode of valuation—let's call it worship—is acceptable privately; but it has no role in the public sphere. The Establishment Clause, I think, at its inception and now is best understood as excluding a mode of valuation from political life.

The Equal Protection Clause can be seen as a big generalization of the titles of nobility clause with which I began. It has a similar aspiration. At least one of the things the equal protection clause is trying to do is to say that modes of valuation that reflect inadequate respect for blacks or women are not an acceptable part of political debate. An effort to pass a law because of a belief that one group is below another is systematically out of bounds.

The Supreme Court has placed an emphasis on the legitimacy of rea-

10. James Miller, "Democracy is in the Streets" 52 (1987).

sons for governmental action.[11] A literacy test that is disguised to produce good electors is fine; a literacy test that it supposed to exclude blacks is not fine.[12] If all we cared about is consequences, it might not be extremely easy to make sense out of that. Consequentialists are very agile; but I think we do not make full sense out of what is happening in the area of equality law without seeing that the mode of valuation is crucial to judicial determinations of whether the equality norm is violated.

In the law of environmental protection, there are a lot of puzzles. Recently, Americans were asked whether they agreed with the statement that "the environment is more important than anything and worth protecting regardless of the cost." Guess how many Americans said yes? Eighty percent.[13]

In response to surveys, when people are asked, "How much would you have to be paid in order to allow degradation of a park or the air of a certain percentage?" over half refused to answer.[14] If people are asked, "How much would you pay to allow continued existence of the park, or continued existence of an endangered species?" they will give an amount that it is not always that high. But if they are asked how much would they have to be paid, they say something like, "Get out of here, surveyor. I don't answer those questions."

If we look at our cost/benefit charts—expenditures per life saved—there are wild disparities, ranging from about zero dollars per life saved to the billions.[15] One regulation apparently cost over a trillion dollars per life saved—a pretty dumb regulation.

I think that it is not easy to make sense out of this without adverting to the fact that people are often saying things that suggest that the way they value the environment is inconsistent with exchange for cash straight up. Now again, this is not a claim for infinite valuation of the environment. It is a claim that one can get some purchase on the seemingly weird results by attending to what people actually say when they start to spell these things out—which has to do not with infinite valuation, but different kinds of valuation of what it is that the environment is for. When they say such things as, "No amount of money would be compensation for the extinction of a species," they are talking quite the way parents would if asked how much they would have to be paid to give up their daughter.

If this is right, the problem with cost/benefit analysis is not that it is distributionally wrong, or that it is inferior to the status quo; it is probably better than the status quo of crazy quilt patterns and irrational regu-

11. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

12. *See id.* at 245-46.

13. *See Poll Shows Four of Five Americans Support Environment, Even Over Economy*, 23 Env. Rep. (BNA) 1155 (Aug. 7, 1992).

14. *See* Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 202-03 (1991).

15. *See* Stephen Breyer, Breaking the Vicious Circle 24-27 (1993).

lations. The problem with cost-benefit analysis is that it is obtuse. It is obtuse because it does not disaggregate its various ingredients and allow participants in the democratic process a full picture of the differently valued goods that are at stake. If you are told that the cost/benefit analysis for an OSHA regulation has flunked, you know much too little. What is important to know is what those numbers represent. Do they mean more unemployment, more poverty, or higher food prices? A more disaggregated picture of consequences, while more unruly, would give a better account.

All this does not just relate to public law; it relates to private law, too. In the law of contracts, courts sometimes give specific performance remedies; that is, not dollar damages but a right to the thing itself. I guess Kim Bassinger was almost compelled to do a specific performance for a movie that has been released with another actress.

Here a real puzzle in Anglo-American law: When is specific performance granted? For economists, this quite a puzzle. The conventional answer is that specific performance is granted when the thing in question—let's say it is a painting or a piece of land—has value to the plaintiff that is too hard for courts to assess, so the costs of assessment are so high that the courts will order specific performance.[16]

There is undoubtedly something to that, but I do not think it is the whole picture. I think part of what is going on when the court orders, "You deliver the painting or the land," is that the court is thinking that the person is entitled not to something that is valued *as much* as the thing for which he or she contracted; the plaintiff is entitled to something that is valued *in the same way* as the thing for which he or she contracted. The insistence on specific performance remedies in various areas of contract law has to do with the difficulty of thinking of compensatory remedies, in terms of dollars, as really restoring a status quo ante.

If that is right, it has large implications for thinking about tort law and contract law, where it is usually thought that the purpose of the law is to restore the plaintiff to the position he would have occupied if not for the injury. It might be the case that this view is not quite accurate; that the restoration of the status quo ante is not feasible; and that what the law is doing if specific performance is not available is something different.

I have two more notations to make. One is about feminism and the other is about legal reasoning.

For feminism, I have two quotations for you. Richard Rorty, the philosopher, has paraphrased Catharine MacKinnon very prominently as saying that "being a woman is not yet a way of being a human being."[17]

Mike Tyson, the boxer, during his rape trial, and this was widely quoted—even more widely quoted than Richard Rorty or Catharine MacKinnon—Mike Tyson said, "I love women." I wanted to find that

16. *See* Richard A. Posner, Economic Analysis of Law § 4.11 (3d ed. 1986).
17. Richard Rorty, *Feminism and Pragmatism*, 30 Mich. Q. Rev. 231 (1989).

and cite it, speculating that something more interesting than appears might be at work. I put it in the computer and I got, for just a two-year period, 125 references to the words "I love women," many of them involving men accused of sexual harassment or sexual assault.

I think that there is a connection between the Tyson quotation and the MacKinnon quotation. I do not think Tyson was lying. I think he was reflecting a mode of valuation which is sincere. I think at work in Rorty's paraphrase of MacKinnon is a claim that women are typically valued either for use or through love and not sufficiently through respect or in ways that human beings deserve to be valued, that is, for their dignity.

I think a lot of feminism in law has to do with an insistence that the typical modes of valuation, having to do with intense affection or use, are not adequate and that respect or dignity ought to be the substitutes. This claim obviously bears on—even if it does not resolve—such matters as the distribution of work within marriage, abortion, prostitution and surrogacy, sexual harassment, and much, much more.

Many of the debates over surrogacy and prostitution have to do with the claim that women's sexual and reproductive capacities are being turned into objects for the use and control of others, in ways that are inconsistent with law's appropriate expressive function.

III. LEGAL REASONING

In many places analogical reasoning is not popular. Much more popular is top-down reasoning: here is a desirable end—let's call it efficiency, or utility, or equality, or dignity, or something else—and let's use the specified value to work problems through. Analogical reasoning is not now treated with much dignity, though it is the stock in trade of the lawyer.

A famous if perhaps apocryphal story at the University of Chicago goes like this: Edward Levi was the Dean of the University of Chicago, and his great book is actually a tribute to analogical reasoning.[18] When he was Dean, Levi also helped introduce law and economics into the legal culture. The way he did this was to have a fellow named Aaron Director, who never published much but was really very influential, come in and teach every fifth antitrust class. The way the story goes, Levi would spend four brilliant classes doing analogical reasoning. Did he have a theory? No. But he certainly could manipulate the cases. Director would come in the fifth class and show that what Levi had been doing made no sense. Director had a theory. By the end, the story goes, even Levi was converted.

This is something that has happened in many places in the legal culture, and in many different areas of law. In antitrust, Director may well have rightly converted everyone, but it is not clear that the victory has

18. *See* Edward H. Levi, An Introduction to Legal Reasoning (1949).

been earned everywhere. The analogical thinker is unequipped with and unburdened by a unitary conception of the good or the right; he is alert to particulars; and he is able to see the diverse modes of valuation at stake in many legal disputes. It may well be in some areas of the law—torts is a candidate, free speech is another candidate—a plurality of values is at stake. Precisely because the analogical thinker does not have a top-down theory, but instead is open to the possibility of plural and diverse theories of value, the analogical thinker has something to be said on his or her behalf.

It is time to conclude. I have not said much about the important issue of choice—that is, choice between modes of valuation and among incommensurable goods. I have asserted, and I want to assert it once more, that some decisions are reasonable and others not, so one ought not to identify incommensurability with reasonlessness or indeterminacy.

But I do want to say that the loss of diverse modes of valuation would be for the legal culture as for the political culture, something of a tragedy, not least because it would make the very notion of tragedy puzzling or even incomprehensible.

I have a quotation from Mill and then a final note. The quotation from Mill comes from his "Essay on Bentham." Mill thought that Bentham was like a one-eyed man. Because he had only one eye, he could see farther than anybody else, but he could not see everything that other people see. Wrote Mill:

> Nothing is more curious than the absence of recognition in any of his writings of the existence of conscience, as a thing distinct from philanthropy, from affection for God or man, and from self-interest in this world or in the next. . . .
>
> Nor is it only the moral part of man's nature . . . that he overlooks; he but faintly recognises, as a fact in human nature, the pursuit of any other ideal end for its own sake. The sense of *honour*, and personal dignity . . . the love of *beauty*, the passion of the artist; the love of *order* . . . the love *action*, the thirst for movement and activity, . . . the love of ease:—None of these powerful constituents of human nature are thought worthy of a place . . . .[19]

My largest suggestion is that an insistence on diverse modes of valuation may be one of the most important lessons that emerges from the study of public and private law.

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19. John Stuart Mill, Mill on Bentham and Coleridge 66-68 (F.R. Lewis ed., 1962) (1938).