



CSU
College of Law Library

Cleveland State Law Review

Volume 38

Issue 1 *Issues 1 and 2: Symposium: Natural
Law and Legal Reasoning*

Article

1990

Incommensurable Values, Rational Choice, and Moral Absolutes

David Luban
University of Maryland

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

 Part of the [Legal History Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 Clev. St. L. Rev. 65 (1990)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol38/iss1/6>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

INCOMMENSURABLE VALUES, RATIONAL CHOICE, AND MORAL ABSOLUTES

DAVID LUBAN*

My comments in this paper are directed to just one argument, or rather one cluster of arguments, deployed by John Finnis in just three pages of *Natural Law and Legal Reasoning*.¹ This may seem like too narrow a mandate; but I hope that Finnis's readers will agree with me that this argument is of vital importance, not just to Finnis's own position, or even to natural law theory alone, but to the deepest ambitions of moral philosophy.

I am referring to Finnis's argument that the goods and bads at stake in legal, moral and political choice are incommensurable, and to the conclusions he draws from this argument. Finnis believes that this incommensurability thesis implies that no nonmoral grounds exist sufficient to compel every rational agent to prefer one such good to another. Unique rational decision among incommensurable goods is impossible. (Call this the "nondecidability thesis".²) He does believe, however, that rational grounds exist for rejecting the intentional imposition of "bads," and that these grounds "must be respected unless some reason *for* that action is rationally preferable [to refraining from that act]."³ But (Finnis argues) the nondecidability thesis tells us that no reason for that action is rationally preferable to refraining from it. From this Finnis concludes that "there are moral absolutes, excluding intentional killing, intentional injury to the person, deliberate deception for the sake of securing desired results, enslavement which treats a human person as an object of a lower rank of being than the autonomous human subject."⁴ These absolutes, I take it, will yield part of the content of substantive natural law, and so Finnis's argument is of vital importance for the claim that natural law has content. Moreover, Finnis concludes by pointing out that if the incommensurability thesis is true, any approach to legal theory that relies on commensuration of goods—the economic analysis of law is a paradigm of such an approach—must be abandoned.

Obviously, then, much turns on Finnis's arguments for incommensurability, for the nondecidability thesis, and for moral absolutes. I shall be criticizing these arguments. Let me make clear, however, that though I disbelieve the arguments and some conclusions Finnis draws from them, I don't think that this affects the fundamental claim that there is a natural law, nor many claims Finnis makes about it in his great book *Natural Law and Natural Rights*⁵ (such as his defense of the maxim that unjust

* Professor of Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy. B.A., University of Chicago; M.A., M.Phil, Ph.D., Yale.

¹ Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990) [hereinafter Finnis, *Legal Reasoning*].

² I don't mean by this term to imply any connection with the notion of undecidability used in mathematical logic.

³ Finnis, *Legal Reasoning*, *supra* note 1, at 11.

⁴ *Id.*

⁵ J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1981) [hereinafter J. FINNIS, *NATURAL LAW*].

law is not law), nor his critique of the economic analysis of law in the present paper. I agree with these and many other of his views, and I write as a warm admirer of Finnis's work.

I will argue that while the incommensurability thesis is true, that is so for reasons somewhat different than those Finnis advances (section I); that in its most common form the incommensurability thesis does not in all cases imply the nondecidability thesis (section II); and that Finnis is wrong to conclude that even if rational decision were possible, it would lack moral significance (section III). In section IV, finally, I criticize Finnis's argument for moral absolutes, and draw from this criticism a substantive conclusion about natural law: that it requires redistribution of wealth to aid in social welfare just as surely as it requires enforcement of negative prohibitions against intentional injuries to the interests of others.

I. RATIONAL CHOICE AMONG INCOMMENSURABLE GOODS

A. *Incommensurability and Nondecidability*

As the word itself suggests, to call items "commensurable" is to say that they share a common measure. All distances are commensurable because they may be measured in meters; all commodities are commensurable because they may be measured in dollars. Some things, however, are incommensurable. Different colors do not admit of common measurement (although their corresponding wave-lengths are measured in angstroms, and their brightnesses in lumens)—there is nothing that blue is "more" of than green.

The notion of a "common measure" is not in itself fully specified. At the very least, it implies quantitative ordering; but quantitative ordering can be accomplished with different degrees of mathematical structure. It makes sense to say that Kant is a *more famous* philosopher than Asa Mahan;⁶ fame is a common measure, a quantitative ordering of philosophers. But it makes no sense to say that Kant is twenty-six times as famous as Mahan: though fame induces a quantitative ordering, that ordering does not possess multiplicative structure.

Formally, we may say that items are commensurable with respect to a certain property (distance, fame, etc.) when that property induces a function⁷ placing the items in one-to-one correspondence with elements in some ordered set. The ordered set is the common measure of the items. That ordered set, in turn, can possess mathematical structure at different levels of complexity.

⁶ Author of *DOCTRINE OF THE WILL* (3d ed. 1847); *MODERN MYSTERIES EXPLAINED AND EXPOSED* (1855); *SCIENCE OF MORAL PHILOSOPHY* (1848, 1884); *SPIRITUALISM* (1855); professor of philosophy and president of Oberlin College.

⁷ More precisely, an isomorphism—that is, a function preserving mathematical structure.

At the highest level of mathematical complexity, the ordered set will have the full panoply of properties possessed by the real numbers. In that case the items are commensurable in the strongest sense: they may be assigned utility-numbers, and thus the familiar techniques of economic analysis apply to them. Let us say that the items are *numerically commensurable*. If no such utility-function exists, the items are *numerically incommensurable*.

Numerical commensurability is what we usually mean by commensurability; it is certainly the form of commensurability assumed by economists and economically-minded utilitarian philosophers who give numerical price-equivalents to very disparate goods. Correspondingly, the incommensurability thesis is typically taken as the denial that disparate goods are numerically commensurable. But it is important to realize that items may be commensurable in a weaker sense, if their common measure (like fame) does not possess such rich mathematical structure. Goods may be *ordinally* rather than numerically commensurable: isomorphic to some ordered or partially-ordered set not possessing the rich mathematical structure of the real numbers.⁸ And so one does not have to insist that goods are incommensurable to resist the economist's claim that they may be assigned real-valued utilities, i.e., are numerically commensurable.

Now there is a trivial sense in which all goods are commensurable: one can arbitrarily assign numbers to them and thereby order them quantitatively. In the same way, we could rank-order different colors according to the wavelengths of their light. But such ad hoc rank-orderings lack significant rationale. What we want is not an ad hoc rank-ordering, but a rank-ordering induced by some significant or even essential property of the items. We make a judgment that "amount" is an essential property of money, but wave-length is not an essential property of phenomenological color. Judgments about commensurability and incommensurability thus presuppose an underlying metaphysical and axiological structure—a division of properties into "essential" and "inessential," "value relevant" and "value-irrelevant," etc.—just as they presuppose an underlying mathematical structure. There is nothing whatever objectionable or question-begging about this, and I will be assuming the existence of some such structure throughout the subsequent argument.

What is the connection between commensurability and rational choice that Finnis is exploring? It is this: if goods are commensurable, they possess a common measure, and we may choose among them by referring to this common measure. More is better, less is worse. So much is unproblematic. Finnis appears to be arguing the converse point: that if rational choice among goods is possible, they must be commensurable. For though he does not state this latter point in so many words, he does

⁸ A set is partially ordered if it orders some but not all pairs. To use our earlier example, fame induces a partial ordering among philosophers: we can confidently assert that Kant is more famous than Mahan, but no such assertion is possible between Kant and Hegel. Philosophers' reputations are nevertheless ordinally commensurable, since they are partially ordered by the "is more famous than" relation.

offer the logically equivalent claim that incommensurability of goods implies that rational choice among them is impossible. Indeed, this claim is the central point of his argument in *Natural Law and Legal Reasoning*.

To see what is at stake in this claim, it is helpful to notice that we typically disbelieve it. I have just noted that most typically we take "commensurability" to mean "numerical commensurability," i.e., the measurability of states of affairs by numbers; and surely we often make choices among complex states of affairs without believing either that they may be numerically ordered or that our choice is simply up for grabs. Thus, if Finnis equates commensurability with numerical commensurability, then his argument marks a genuine departure from our ordinary beliefs. For Finnis insists that if states of affairs are truly incommensurable then no rational grounds exist to criticize someone who instead chooses the road not taken.

But perhaps Finnis means that if states of affairs are not even ordinally commensurable then rational choice among them is impossible. This makes more sense. Finnis may argue as follows: if alternative O_1 is rationally preferable to O_2 (in the sense that every rational person would prefer O_1 to O_2), then O_1 must be better than O_2 in some relevant respect. But that is to say that O_1 and O_2 are in some respect commensurable—not numerically commensurable, but at least ordinally commensurable. Thus decidability implies (at least ordinal) commensurability, and this is logically equivalent to Finnis's thesis that incommensurability implies nondecidability.

This argument may seem irresistible; but, as we shall see in section C below, we ought to resist it nevertheless. Astonishingly enough, O_1 may be rationally preferable to O_2 without being superior to O_2 in any interesting evaluative sense except the trivial one: that O_1 is superior to O_2 in respect of rational preferability. Thus, there may well be no nontrivial version of Finnis's thesis that incommensurability implies nondecidability.

Even if this were not so, incommensurability would imply nondecidability only if incommensurability meant "ordinal incommensurability"—in other words, it would be true only of goods that cannot even be partially ordered. As we shall see, however, Finnis's argument for the incommensurability thesis will show only that goods are numerically incommensurable, for in many instances partial orderings among the most diverse goods exist, and indeed exist noncontroversially. To see this, let us turn to Finnis's defense of the incommensurability thesis.

B. Finnis's Argument for Incommensurability

Finnis argues that goods are incommensurable because we assess them along more than one dimension, and the dimensions (or criteria) of assessment are incommensurable with each other. This distinguishes Finnis's position from a different incommensurability thesis, one that asserts that goods cannot be compared along even a single dimension.

One might, for example, hold that some criteria for assessing goods do not admit of quantification; thus, it is plausible that statements like "Book A contains more knowledge than book B" make no sense. Or one might maintain that such quantitative statements make sense only in the case of the grossest comparisons (an encyclopedia compared with a coloring-book). Or one might maintain that some criteria permit us to rank-order goods but not to make quantitative statements about them, even of a very gross and approximate kind; if in addition one held that commensurability means numerical commensurability, ordinally ranked goods would be incommensurable.

Or, to take a different sort of example, a hedonist, who wishes to assess all human goods according to the single criterion of pleasure, might believe that, unfortunately, interpersonal comparisons of pleasure are impossible. In that case your good and mine are incommensurable even along the hedonist's single dimension, even if that dimension could be numerically measured. Or, finally, one might hold that although a good may be quantified, that quantification is of no moral or valuational significance. John Taurek, for example, has argued that saving five human lives is no more morally worthy than saving one human life; given the choice of saving one or saving five, one should flip a coin.⁹

None of these versions of the incommensurability thesis depend on the fact that we employ multiple criteria for evaluating and assessing goods. These are theses asserting that *intradimensional* comparisons cannot be made.

Finnis believes that *interdimensional* comparisons are impossible because the basic goods are incommensurable.¹⁰ In chapter 4 of *Natural Law and Natural Rights*, Finnis identified seven basic aspects of human well-being, and argued that they are all equally fundamental; these are the basic goods of life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness, and religion.¹¹ In the present pa-

⁹ Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293, 303 (1977).

¹⁰ Finnis also argues that the cognitive standpoints corresponding to the "orders of reality" are incommensurable, for we may assess propositions about goods scientifically, epistemologically, morally, or technologically. These cognitive standpoints cannot be amalgamated into a "master" point of view. The incommensurability of cognitive standpoints is especially important for legal reasoning, since an argument of law may alternatively be evaluated technically or morally. (I would add, as a friendly amendment to Finnis's remarks on this topic, that legal arguments may be evaluated logically as well, and indeed may be evaluated scientifically whenever they advance empirical assertions, as they so often do.) In what follows, I shall focus on the thesis of the incommensurability of the basic goods, largely ignoring the thesis of the incommensurability of cognitive standpoints, which I do not entirely understand.

¹¹ FINNIS, *NATURAL LAW*, *supra* note 5, at 85-95; see also J. FINNIS, *FUNDAMENTALS OF ETHICS* 50-51 (1983) [hereinafter J. FINNIS, *FUNDAMENTALS OF ETHICS*]. Finnis claims that the list is exhaustive. Though this is not the place to elaborate the argument, I believe Finnis has omitted two basic goods from the list, with large consequences. First, he has omitted the basic good of meaningful work—an odd omission in view of the fact that he carefully includes play on the list: surely anyone who recognizes that we are to a certain extent *homo ludens* must also recognize the extent to which we are *homo faber*. In the present paper,

per he recasts the list slightly, referring to knowledge of reality (including aesthetic appreciation of it), excellence in work and play, interpersonal peace, inner peace, peace of conscience, and harmony with "the wider reaches of reality."¹²

But no matter how the list is phrased, Finnis insists that there is no hierarchy or ordering of the basic goods, and so each basic good yields a criterion of assessment independent of the others. We must evaluate any particular good's contribution to each of the basic goods, and this seven-dimensional assessment cannot be mapped onto a single, unidimensional scale (e.g., money). In Finnis's words, aggregating basic goods in order to compare them is "senseless in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the weight of this book, and the quantity of the number six."¹³ (Notice that this analogy describes a situation of *intradimensional* commensurability—sizes and weights are each numerically commensurable—but *interdimensional* incommensurability—sizes are not commensurable with weights. The analogy thus supports my reading of Finnis as willing to grant intradimensional commensurability but still denying interdimensional commensurability.)

I am convinced by Finnis's claim that the basic goods are equally fundamental and incommensurable. As he argues in *Natural Law and Natural Rights*, the basic goods could be commensurated

only if (a) human beings had some single, well-defined goal or function (a 'dominant end'), or (b) the differing goals which men in fact pursue had some common factor, such as 'satisfaction of desire.' But neither of these conditions obtains. Only an inhumane fanatic thinks that man is made to flourish in only one way or for only one purpose.¹⁴

As I have suggested, Finnis also suggests that this interdimensional incommensurability suffices to prove the nondecidability thesis, even if

Finnis backhandedly rectifies the omission by redescribing the basic good as "excellence in work and play." Second, he has omitted the basic good of political participation, the uniquely human good of ruling and being ruled upon which Aristotle so rightly focused in the *POLITICS*. The *BASIC WORKS OF ARISTOTLE* 1129-30 (R. McKeon ed. 1941) 1253a 1-40. Perhaps Finnis assimilates political participation to sociability; but this is a mistake, for sociability is pre-political (animals possess a social life but no political life) and conversely political action lifts us out of our social station. (The point is argued persuasively in H. ARENDT, *THE HUMAN CONDITION* (1958)). Finnis himself refers to "the value of freedom and self-determination and authenticity" J. FINNIS *NATURAL LAW*, *supra* note 5, at 91, evidently without recognizing that in their political form these values are simply not on the list that he is expounding. Had Finnis recognized the basic good of meaningful (unalienated) work, I suspect that he would be less eager to assert that private ownership of means of production is usually a requirement of justice, *id.* at 169. And had he recognized the basic good of political participation, he would perhaps have laid more emphasis upon the natural law credentials of democratic institutions. In short, I believe that rectifying Finnis's neglect of the basic goods of meaningful work and political participation would lead natural law theory in the direction of social democracy, where it belongs. But that is a subject for another paper.

¹² Finnis, *Legal Reasoning*, *supra* note 1, at 2.

¹³ J. FINNIS, *FUNDAMENTALS OF ETHICS*, *supra* note 11, at 87.

¹⁴ J. FINNIS, *NATURAL LAW*, *supra* note 5, at 113.

the basic goods are intradimensionally commensurable, and indeed even if they are intradimensionally *numerically* commensurable. Now I suspect that Finnis is granting intradimensional commensurability only for the sake of argument; I doubt that he really believes that we can rank-order goods numerically even within a single category of value. Nevertheless, this is his claim: even granting intradimensional numerical commensurability, interdimensional commensurability is impossible.¹⁵

Here, however, Finnis is overly optimistic. In the next section I argue that at the very minimum, he must insist that the basic goods are intradimensionally numerically incommensurable, for once we allow numerical measures of the seven basic goods, rational choice is possible.

C. A Nash-Style Solution to the Problem of Choice

Suppose we agree with Finnis that the basic categories of value—the basic goods—are incommensurable. Must we conclude, as he does, that because the categories cannot be ordered in a hierarchy, interdimensional, i.e., cross-categorical, choices are impossible? Must we conclude, that is, that rational choice among goods is impossible? The paradigm choice situation is this:

I must choose between two options, O_1 and O_2 . The former is better in terms of basic good A, the latter in terms of basic good B. Which shall I choose?

In Finnis's view, the incommensurability of basic goods implies that there is no uniquely rational solution to this decision problem. Is he right?

If each of the basic goods may be measured numerically—albeit on incommensurable scales—the answer is often no. Finnis claims, based on considerations of transitivity, that game theory and decision theory are unable to solve the problem.¹⁶ But he has drastically underestimated the ingenuity of mathematical economists, for in fact the problem posed in the paradigm choice situation is readily solved in formal bargaining theory, provided that certain weak assumptions are granted.

Let us hire two bargainers, one of whom is charged with the task of negotiating in order to maximize basic good A. She is, as it were, an employee or agent or “guardian” of A. The other, similarly, is the “guardian” of B, and is instructed to negotiate in order to maximize B. O_1 and O_2 represent the possible bargains between the two sides; and bargaining theory is simply the formal decision theory for such bargaining games. Bargaining theorists impose constraints, or axioms, on the game intended to insure that it fulfills certain formal requirements of rationality and fairness. The outcome of the bargaining game is—when it is unique—the rational mix of A and B.

¹⁵ Finnis, *Legal Reasoning*, *supra* note 1, at 9.

¹⁶ *Id.* at 8.

We may generalize: every choice-problem is equivalent to a seven-person bargaining game, where each person is charged with maximizing one basic good, and where the options to be considered represent the field of possible bargains. If we can find a unique solution to this bargaining problem, that package is therefore the unique solution to the decision problem. Let us see how bargaining theory addresses the problem.

Suppose we assume the following:

1. All of the basic goods are equally important.¹⁷
2. The basic goods are incommensurable.¹⁸
3. If one option is no worse than another along all dimensions of value and better along at least one dimension, it is rationally preferable to the latter.¹⁹

Finnis would, I presume, endorse all three of these assumptions. Now add two more rationality assumptions:

4. A decision-maker should consider lotteries among O_1 and O_2 as well as O_1 and O_2 themselves.²⁰
5. Suppose that if additional options O_3, O_4, \dots, O_n are added to the problem it has a solution; suppose further that this solution is one of the original options S . Then the solution to the original problem is also S . More briefly, if a decision problem has a solution S , S is also a solution to any smaller problem containing S .²¹

Given these five assumptions, there is a unique solution to the decision problem, the well-known "Nash solution."²² Given different assumptions in place of the possibly-controversial number 5, other unique solutions are possible.²³

This bargaining-theory-based analysis shows something singularly important about the connection between the commensurability of basic

¹⁷ Formally, this is the so-called "symmetry" assumption. See A. ROTH, AXIOMATIC MODELS OF BARGAINING 6 (1979) (property 2).

¹⁸ This is the assumption of independence of equivalent utility representations. *Id.* at 6 (property 1).

¹⁹ This is the assumption of Pareto optimality: *id.* at 7 (property 4). Finnis is willing to accept rational decidability in this case—or so I gather from his remark on page 8 that "If the rank order was the same on both scales, of course, the case was never a hard one, and the legal system already had what one always *desires* of it: a uniquely correct answer." Finnis, *Legal Reasoning*, *supra* note 1, at 8.

²⁰ This is the assumption of convexity.

²¹ This is the assumption of independence of irrelevant alternatives. A. ROTH, *supra* note 18, at 6-7.

²² *Id.* at 8. More precisely, the Nash solution will exist whenever some lottery between O_1 and O_2 is better along all dimensions of value than doing nothing. This will be trivially true if doing nothing is not an available option. See Nash, *The Bargaining Problem*, 18 *ECONOMETRICA* 155 (1950). The Nash solution says this: form the product of the amount of basic good A , measured on its scale, and basic good B , measured on its scale. The lottery between O_1 and O_2 for which this product is greatest is the solution.

²³ See also, e.g., Kalai and Smorodinsky, *Other Solutions to Nash's Bargaining Problem*, 43 *ECONOMETRICA* 513 (1975), a version of which has been defended by David Gauthier. See D. GAUTHIER, *MORALS BY AGREEMENT* (1986); see also *Bargaining and Justice*, 2 *SOC. PHIL. AND POLICY* 29 (1985); Barry, *Don't Shoot the Trumpeter—He's Doing His Best!* 11 *THEORY AND DECISION* 153 (1979). See generally ROTH, *supra* n.17.

goods and the possibility of making rational choices among different mixes of them. Earlier in this paper I rehearsed the argument that if O_1 is rationally preferable to O_2 , then O_1 must be better than O_2 in some respect, and thus O_1 and O_2 must be commensurable. I said that this tempting argument is fallacious, for O_1 may be better than O_2 only in the trivial sense that O_1 is better than O_2 in respect of rational preferability. We are now in a position to see why this is so.

Bargaining theory studies the possibility of rational compromise among incompatible demands, such as the demand to maximize each of the seven basic goods. Solutions to the bargaining problem, such as Nash's, allow us to say that one compromise-package of basic goods is rationally preferable to all others. The Nash solution is better than any other simply because *it is a better compromise among the basic goods than all other possible compromises among the basic goods*. There is no other evaluative sense in which the Nash solution is better than the remaining options. In particular, the Nash solution need not be Pareto superior to the remaining options, and, when it is not, some other option will be better than the Nash solution with respect to one or more basic good.

But what is it to say that the Nash solution is the best compromise among the basic goods, though it is not better than other options in any other evaluative sense? Surely this says nothing more than that the Nash solution is rationally preferable to the other options. *In any sense other than this, the Nash solution is incommensurable with the other options*. In other words, by proving the existence of a best compromise among incommensurable basic goods, we prove that rational choice is possible even when commensurability fails. And this shows that Finnis's basic argument—that incommensurability implies nondecidability—does not hold even when we restrict the claim to ordinal incommensurability.

D. Numerical Incommensurability

This being so, it seems that Finnis must abandon either

(a) his view that the incommensurability of basic goods implies the impossibility of rational choice among goods (what I have called "non-decidability");

(b) rationality assumptions such as the fourth and fifth Nash assumptions; or

(c) the background assumption of intradimensional numerical commensurability, i.e., the assumption that each of the basic goods may be measured numerically.

Surely Finnis will agree that it is the background assumption (c) that must go, especially if I am right that he granted it only *arguendo* in the first place. One could instead abandon the Nash assumptions; but one needs *some* specification of what "rationality" means, and the Nash assumptions have a lot of initial plausibility—enough that it would be dishonest to abandon them simply in order to preserve the nondecidability thesis. As I mentioned above, moreover, even on alternative assumptions about rationality the decision problem often has a solution.

By contrast, the assumption that every basic good can be measured numerically, i.e., assigned a cardinal utility, is a fantastic one; it runs contrary to our deliberative experience, and (in my view) is unsupportable by a priori argument as well. A version of the economic analysis of law presupposing that goods may be priced by discovering consumers' willingness to pay for them may serve as an example of such a view. It is Finnis's explicit target at the end of his paper, but others as well have argued that the entire enterprise of assigning prices to the full range of goods that humans value rests on category mistakes and equivocations.²⁴ Adherents to such a theory will view problems of choice and deliberation as essentially computational. This is one of the most persistent of philosophical fantasies: as Leibniz touchingly hoped, "if someone would doubt my results, I should say to him: 'Let us calculate, Sir' and thus by taking to pen and ink, we should soon settle the question."²⁵ In my view, Finnis is quite right to debunk this vision of practical reason. And one way to undercut it is to abandon the incredible assumption that the basic goods are numerically commensurable, even intradimensionally.

This does not require us to go to the opposite extreme of denying that quantitative comparisons of "amounts" of some basic good *ever* make sense. Commensurability, remember, comes in degrees of mathematical structure. As I have suggested earlier, there are plausible intermediate views, such as the idea that very gross and rough quantitative comparisons are often possible. It makes sense to say, for example, that an individual troubled only by a hangnail has "more" of the basic good of health than an individual afflicted with lung cancer. But it makes no sense to ask "How much more? Twice as much health? Sixteen times as much?" And it also makes no sense to ask whether an individual with arthritis has "more" health than an individual with kidney stones: since *gross* quantitative judgments are impossible in such a case, *no* quantitative judgments are possible.

Suppose we assume that only such very crude quantitative assessments of basic goods are possible intradimensionally. Having thus weakened the assumption that each basic good is numerically measurable, bargaining theory no longer provides a solution to the problem posed by our paradigm choice situation between O_1 and O_2 , where O_1 provides more of basic good A and O_2 provides more of basic good B. It must be admitted that the incommensurability thesis is now less dramatic a result than Finnis's initial argument led us to believe. That initial argument, recall, was that basic goods are interdimensionally incommensurable even if each good is intradimensionally numerically commensurable. Now the argument is somewhat different: basic goods are *interdimensionally* nu-

²⁴ Category mistakes: See M. SAGOFF, *THE ECONOMY OF THE EARTH* 74-95 (1988). Equivocations: See Kelman, *Consumption Theory, Production Theory and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STANFORD L. REV. 387 (1981).

²⁵ Leibniz, *Towards a Universal Characteristic*, in LEIBNIZ: *SELECTIONS* (P. Wiener ed. 1951) 16.

merically incommensurable in part because each basic good is *intradiimensionally* numerically incommensurable.

This still leaves the principal question, however. Can we ever make non-numerical interdimensional comparisons between O_1 and O_2 , that is, comparisons across categories of value, in our paradigm choice situation?

II. CHOICE WITHOUT NUMBERS

A. Large-Small Tradeoffs

It will help if we distinguish three different views one might have of the question.

Radical decidability: cross-categorical comparisons are always possible. Rational choice between O_1 and O_2 is always possible.

Radical nondecidability: cross-categorical comparison is impossible. There is no rational solution to the problem of choosing between O_1 and O_2 . This, I take it, is Finnis's position.²⁶

Partial decidability: cross-categorical comparison is sometimes possible, sometimes not. The paradigm choice problem is sometimes solvable, sometimes not.

I shall be defending partial decidability. I agree with Finnis that many questions involving trade-offs among basic goods have no unique rational answer. For example, in the university community in which I work many people have had to decide between having children (an instantiation of the basic goods of life and friendship) and fully committed scholarly activity (an instantiation of the basic goods of knowledge and excellence at work). Only a dunderhead would think that there is one uniquely "rational" answer to this question. In this situation Finnis is clearly right: the (moral) choice itself establishes the "right" answer rather than tracking some pre-established rational order.

But sometimes a choice arises in which we may trade off very small gains in one category against very large losses in another. Call such a choice a "large-small trade-off." Thus, consider two choice situations involving large-small trade-offs between the basic goods of health, knowledge, and excellence in play and work.

Case 1. A college athlete, who has no intention of playing his sport professionally after graduation, finds that he can become very slightly more proficient by undertaking a new, very time-consuming training schedule. He is already proficient enough to play his sport at a high level. His academic counsellor warns him that the extra time spent on training will have devastating effects on his studies. Is it rational for the athlete to undertake the program?

²⁶ Actually, Finnis does not go this far: he acknowledges that if O_1 is a Pareto improvement over O_2 (i.e., better than O_2 along all seven dimensions), O_1 is rationally preferable to O_2 . But he does wish to say that in all other cases—all cases, that is, in which O_1 is better than O_2 along at least one dimension and O_2 is better than O_1 along at least one dimension—rational choice is impossible. Finnis, *Legal Reasoning*, *supra* note 1 at 9.

Case 2. A lawyer is embroiled in a major trial. While cross-examining a witness new facts emerge that urgently require her to change her approach in the next day's questioning. To do so she must stay up all night preparing. She knows that the trial will turn on the next day's questioning; but she also knows that staying up all night will make her feel tired for several days (though from past experience she knows that staying up all night will not affect her performance, since she will be "up" for the trial). Is it rational for the lawyer to neglect her preparation in order to get a good night's sleep?

If Finnis is right that basic goods are flatly noncomparable, one can simply offer no rational judgment whatever about these two choices. For in case 1 the category of knowledge cannot be commensurated with the category of excellence in play. In case 2 the category of health cannot be commensurated with the category of excellence in work. Thus the judgments that the loss of knowledge in case 1 is "great" and the gain in excellence is "slight" have no relation to each other; neither have the judgments that the loss of health in case 2 is "slight" and the gain in excellence is "great." Cross-categorical comparison, remember, is "senseless in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the weight of this book, and the quantity of the number six."²⁷ Finnis to the contrary, however, most of us probably believe that the athlete is irrational to do the extra training, and the lawyer is irrational to jeopardize her trial merely in order to get a good night's sleep.

Next consider Finnis's complaint that Dworkin's proposal to balance "fit" against "morality" in legal judgments is incoherent because any such cross-categorical balancing is impossible. Finnis to the contrary, many of us would think that between two legal judgments, one of which we found very slightly preferable on moral grounds, but the other of which we found immensely more plausible on technical legal grounds, it is rational to choose the latter. And vice-versa: if one decision is slightly more plausible than another from a technical point of view, but the other is immensely more attractive from a moral point of view, many of us would think it is rational to choose the latter. Both of these are large-small trade-offs. True, it is not *always* going to be possible to balance fit against morality; but it is not always going to be impossible to do so either.

We can see this point plainly in Finnis's own analogy that we quoted earlier about the senselessness of comparing the size and weight of a book. Suppose that a book-designer wants to make a book that doesn't weigh too much but has nice big pages. What format should she use? Finnis is obviously right that she cannot simply add the size of the pages and the weight of the book in order to generate a scale of comparison. But suppose she finds that on a certain format she is able to make the pages fifty percent larger while increasing the weight only two percent. I see no incoherence in judging the trade-off to be rational. Ounces and inches can't be compared; but percentage gains and losses can.

²⁷ Finnis, *FUNDAMENTALS OF ETHICS*, *supra* n.11, at 87.

B. How the *Spoudaios* Chooses

I have focused here on one situation in which we may confidently advance rational comparisons among basic goods, namely a situation in which a large gain in one basic good may be achieved by a small sacrifice in another. Are there other situations in which rational cross-categorical comparisons are possible?

Alfred MacKay offers an ingenious analogy.²⁸ Each of the ten events of the decathlon is scored numerically by a chart that assigns a certain number of points to any given outcome. At first blush, it appears that the chart must be utterly arbitrary: how is one to say that 10.1 seconds in the hundred-meter race deserves the same number of points as 812 centimeters in the long jump (both receive 1043 points)? But when we actually look at the construction of the chart, the mystery disappears. Start by giving each event the same number of points—in actuality, 1200. In each event, award the full 1200 points to a result somewhat better than the current world record. Award 0 points to an outcome somewhat worse than the worst outcomes ever recorded. Then divide the interval between best and worse performances by 1200 to get the average increment per point. Adjust these intervals so that performances near the world record receive more points per additional unit. Make further adjustments according to the particularities of the events. By continually modifying the chart in the light of shifting experience, an accurate chart can be constructed.

How do we know that the individual comparisons in the chart (e.g., “10.1 seconds = 812 centimeters = 1043 points”) are justified? We know it, first, because the chart *taken as a whole* is justified, and that fact suffices to justify its parts.²⁹ We know it, second, because people highly experienced in the decathlon have painstakingly constructed the chart with accuracy in mind. As Finnis rightly insists throughout *Natural Law and Natural Rights*, we have no better criterion of reasonableness in practical judgment than the considered view of the *spoudaios*, the “mature man of practical reasonableness” who is experienced in the subject.³⁰

The decathlon scoring chart is a perfect example of a successful attempt at rational cross-categorical comparison. It is also, I might add, an example that casts doubt on Finnis’s conception of rationality. For the rationality of the individual comparisons contained in the table is not based on an extrinsic criterion. It is based only on the rationality of the table taken as a whole, and that is judged in its turn by looking to the procedures used to construct it, not to its correspondence with some pre-existing common measure that commensurates the ten events.

The moral of the example is not that value judgments are like decathlons. Rather, it is that the rationality of cross-categorical comparisons

²⁸ A. MACKAY, *ARROW'S THEOREM: THE PARADOX OF SOCIAL CHOICE* 61-71 (1980) [hereinafter A. MACKAY, *ARROW'S THEOREM*]; MacKay, *Interpersonal Comparisons*, 72 J. PHIL. 535 (1975).

²⁹ A. MACKAY, *ARROW'S THEOREM*, at 66-69.

³⁰ Finnis, *NATURAL LAW*, *supra* note 5, at 15 n.37. For Finnis’s further discussion, see those passages indexed under the headings ‘*spoudaios*’ and ‘self-evidence’.

should not be demonstrated or dismissed by a priori argument. We must attend to the actual procedures that careful, reflective people employ when they attempt to justify cross-categorical comparisons. When these procedures make sense to us, as they do in the decathlon example, we may assert that cross-categorical comparison is rational; when they don't make sense to us, or when the *spoudaios* tells us that there is no procedure that works, we may assert that cross-categorical comparison is irrational.

III. THE MORAL SIGNIFICANCE OF RATIONAL CHOICES

I have been stressing that what I have called "large-small trade-offs"—decisions to trade a small sacrifice of one basic good for a large gain in another—are often rationally justifiable, and to that extent at least the basic goods are comparable. The partial decidability thesis seems best to accord with our assessment of cases 1 and 2 and similar large-small trade-offs.

Finnis argues that if this is so, it shows merely that large-small trade-offs do not represent morally significant choices. "If there were a reason (for doing X) which some rational method of comparison . . . identified as preferable, [t]here would remain *no choice* in the morally significant sense of choice, between the alternative options."³¹ To this I have two replies. First, even if Finnis were right there would still remain morally significant choices whenever two noncomparable options presented themselves. Remember, the fact that basic goods are comparable in large-small trade-offs does not mean that they are comparable in more ambiguous situations.

Second, however, it seems to me that even in a large-small trade-off the choice of the rational option is often morally significant. For one thing, the trade-off may involve *me* foregoing a small amount of a basic good in order to help *you* obtain a large amount of another basic good. In that case the rational choice is altruistic, and that suffices to make it morally

³¹ Finnis, *Legal Reasoning*, *supra* note 1, at 10. Oddly enough, Finnis's argument here parallels an argument of Unger that he earlier rejects. Finnis, *Legal Reasoning*, *supra* note 1, at 1-2. Unger claims that if there were objective human goods, our choices would lack "significance" and would not be "an expression of personality." R. Unger, *KNOWLEDGE AND POLITICS* 77 (1975). Finnis here claims that if there were rational methods of comparing goods, our choice would lack moral significance, since the choice would not be "free, no factor but the choosing itself settling which alternative is chosen." These arguments differ mostly in terminology alone, and both incorporate an "existentialist" understanding of freedom that is highly questionable. See Wolf, *Asymmetrical Freedom*, 77 J. PHIL. 151 (1980). As Wolf argues against the existentialist understanding:

In order for an agent to be morally free . . . he must be capable of being determined by the Good. Determination by the Good is, as it were, the goal we need freedom to pursue. We need the freedom to have our actions determined by the Good, and the freedom to be or to become the sorts of persons whose actions will continue to be so determined.

Id. at 162.

significant. Even when the trade-off is not altruistic, the irrational choice may nevertheless be highly tempting, so that choosing rationally requires strength of will. This, too, imparts moral significance. Moreover, the option foregone may itself be a very great good, so that the choice is fraught with moral weight whichever way one chooses. Finally, I will often be unable to recognize that one option is rationally preferable to another unless I possess great practical wisdom, so that choosing rationally exhibits at least one aspect of a morally worthy character. Put all these features together: Finnis surely cannot mean to say that an altruistic, important choice that cannot be made unless one has practical wisdom as well as strength of will is morally insignificant!

IV. FINNIS'S DERIVATION OF MORAL ABSOLUTES

So far I have argued that even if we accept Finnis's thesis that goods are often ordinally incommensurable, and always numerically incommensurable (because basic goods are incommensurable), we need not agree that rational choice among goods is always impossible. In particular, I have argued that rational choice is possible in large-small trade-off situations. In addition, I have argued against Finnis that the possibility of rational choice does not render that choice morally insignificant. Now I wish to turn to his derivation of absolute prohibitions on intentionally harming basic goods. His argument here is difficult and, I think, unsound. It will help to take it one step at a time.

A. Reasons For Versus Reasons Against

1. Finnis begins by claiming that "one *can* identify reasons *against* an option, wherever that option involves *choosing* (intending) to destroy, damage or impede a basic human good . . ."³² I believe this is true. The fact that the option destroys, damages, or impedes a basic human good is itself a reason against it. For precisely the same reason, however, the fact that an option promotes a basic good is a reason *for* it. What is false, therefore, is Finnis's implication that even though we can identify reasons against an option, we cannot identify reasons *for* an option, even though that option involves choosing to promote a basic good. Finnis will rely crucially on this implication in his subsequent argument.

2. "Such reasons against a certain option must be respected unless some reason *for* that action is rationally preferable."³³ Once again, this is true; but once again, Finnis seems to believe that matters are different when we consider reasons for an option rather than reasons against one. No such asymmetry exists, however. One could say with equal justice that "reasons *for* a certain option must be respected unless some reason *against* that action is rationally preferable," or even "reasons *for* a certain option

³² Finnis, *Legal Reasoning*, *supra* note 1, at 10.

³³ *Id.* at 11.

must be respected unless some reason *for* a different option is rationally preferable." In each case, we are merely trafficking in tautology: a reason should always be respected unless there are stronger countervailing reasons.

I suspect that Finnis means to be saying something different, and stronger, than the tautology in the passage I have just quoted. I suspect he wishes to say that in a situation where there is a reason against X, namely that X would damage a basic good, but also a reason for X (perhaps that X would promote a different basic good), and the choice between these reasons is rationally nondecidable, then we must go with the reason against X rather than the reason for X. The negative duty to forbear from injuring basic goods is the default position in uncertain decisions.

If this "forbearance principle" is what Finnis wishes to say, however, he has offered no argument for it; indeed, I will suggest below that it is false.

B. Moral Absolutes and Large-Small Trade-Offs

I state the final steps of his argument together, and criticize them in reverse order for ease of exposition.

3. "But what the argument about incommensurability shows is that *no* reason can be identified as rationally preferable to a reason not to choose to destroy or damage a basic good in a human person . . ."³⁴

4. Thus, when one is faced with the possibility of damaging a basic good in order to promote some other basic good, one must always refrain from damaging the basic good, since no countervailing reason can be "identified."

5. Thus, the negative duty to refrain from intentionally damaging basic goods is a moral absolute.

There are three distinct mistakes here. First, as I have already argued, the incommensurability of basic goods does not imply radical nondecidability of options. It implies only partial nondecidability. In cases of large-small trade-offs, options may be rationally ranked even though their value-dimensions are incommensurable. This blocks Finnis's conclusion—step 5—that intentional harm to basic goods is absolutely prohibited, even when the harm is slight and the gain in another basic good is great.

For example, suppose that by lying to a Gestapo spy (which slightly damages the basic goods of practical reasonableness, knowledge, and sociability) you are able to save hundreds of innocent lives. Finnis appears to forbid the lie. But in this large-small trade-off, I see no reason to doubt that the lie is rationally preferable to truth-telling; certainly the incommensurability of basic goods does not show otherwise. Thus step 3, and hence steps 4 and 5 of Finnis's argument, all fail. And this is just what we might expect: large-small trade-offs such as the Gestapo spy example are precisely the standard examples we press into service against moral absolutists.

³⁴ *Id.*

C. The Alleged Asymmetry Among Reasons

Finnis's second mistake arises from the errors we have already noted discussing steps 1 and 2 of the argument. Take a situation in which by intentionally damaging one basic good A, I can promote basic good B. That is, we have

Case 3 I can realize a significant gain in basic good B, but only by doing significant intentional damage to basic good A.

I believe that this should be analyzed in the same way as

Case 4 I can realize a significant gain in basic good A or basic good B, but not both.

Now in case 4 Finnis and I will agree; there is no rational way to decide between the options, for since we are stipulating that the gain in both A and B is significant the situation is not a large-small trade-off or any analogous situation where the choices are rationally comparable. But I believe that exactly the same diagnosis applies in case 3. That is what Finnis ought to conclude as well, for such reasoning lies at the heart of his incommensurability argument. Instead, however, he suggests that although there is no rational basis to decide that I ought to promote B, there *is* a rational basis to decide that I ought to refrain from damaging A in case 3. Why?

As we have seen in discussing step 1 of his argument, Finnis seems to believe that one can identify reasons against damaging basic goods, but one cannot identify reasons for promoting basic goods. That would explain the asymmetry, if only it were true. But it is not, for Finnis confuses two points here. The nondecidability thesis tells us that at times we will have a reason for O_1 and a reason for O_2 , with no rational method for deciding which is stronger. Finnis apparently concludes from this that we cannot "identify" a reason for either option. But that is not right. We cannot "identify" *which* reason is stronger, but we have certainly identified a reason for O_1 and a reason for O_2 . We cannot, that is, identify a decisive reason for choosing O_1 , but we have already identified *a reason* for it. The case is no different from being able to "identify" a reason against an option. Thus, step 3 of Finnis's argument is unsound—and this is so even if you do not accept my previous argument concerning the rational decidability of large-small tradeoffs.

Similarly, we have seen in discussing step 2 that Finnis believes that reasons against damaging basic goods must be respected unless there are stronger reasons for damaging them, but not the other way around. Forbearance from damaging basic goods is the default position. But he has offered no argument for this forbearance principle, and all his previous arguments about incommensurability and nondecidability suggest just the opposite, namely that there is no rational choice in *either* case 3 or case 4.

Absent a defense of the forbearance principle, step 4 of Finnis's argument unravels. Even with the forbearance principle, moreover, I have argued that his defense of absolute prohibitions—step 5—fails: moral absolutism to the contrary, large gains in a basic good may be obtained by small intentional injuries to a basic good.

V. THE FORBEARANCE PRINCIPLE

Let us turn now to the forbearance principle, which says that where there is a reason against X, namely that X would intentionally damage a basic good, but also a reason for X (perhaps that X would promote a different basic good), and the reasons are noncomparable, then we must go with the reason against X rather than the reason for X. Or, more briefly, forbearance from intentionally injuring basic goods is the default position in uncertain decisions. Can this principle be defended?

A. *Intentional Versus Unintentional Lapses*

One way to defend it is to emphasize Finnis's point that it prohibits *intentional* injury to a basic good. Failing to promote a basic good, unlike actively injuring one, need not be intentional.

This argument has limited force, however. Even though failing to promote a basic good need not be intentional, it may well be. To be sure, sometimes I fail to promote a basic good merely because I am busy doing something else. But other times it is because I have considered the possibility and intentionally rejected it. When I tell a panhandler to get lost I am intentionally failing to promote a basic good.

If the real meaning of the forbearance principle is that avoiding intentional lapses is the default position in uncertain decisions, then the principle should cover intentional omissions as well as intentional actions. And then among the moral absolutes we should find, for example, a prohibition on intentional bad Samaritanism. I take it that Finnis, concerned to defend the priority of negative over positive duties, is not trying to make this point; even if he is, the forbearance principle misstates it.

B. *Actions Versus Omissions*

But perhaps the action/omission distinction is enough by itself to ground the forbearance principle. The forbearance principle corresponds to our homely intuition that sins of commission are worse than sins of omission, or, as philosophers put the point, that there is a moral difference between acts and omissions. Killing you is morally worse than letting you die. One might think that this intuition is firm enough that no further defense of the forbearance principle is needed. But matters are not so simple.

The problem is that in practical affairs the action/omission distinction is typically accompanied by other distinctions that are logically separable from it; and these may well be the real source of our homely intuition.³⁵ They include:

³⁵ My argument here and subsequently is taken from Lichtenberg, *The Moral Equivalence of Action and Omission*, CANADIAN J. PHIL. 19-36 (Supp. VIII 1982).

Motive. My motive in killing you will usually be worse than my motive in letting you die. By reading this article rather than helping to export food to starving people in remote parts of the world, you are letting them die. But your motive is innocent in a way that it would not be were you presently engaged in assassinating them.

Certainty of the connection between conduct and harmful consequence. The outcome of my action is more certain than the outcome of my omission. If I shoot you, it is very likely that you will die. If I simply refrain from helping you, it is less certain.

Responsibility. I alone am responsible for actions that harm you. But many people are in a position to help you, so my omission in failing to give you money when you panhandle me is less likely to make me personally responsible for your plight.

Costs to me. Helping you may impose significant costs on me; refraining from harming you will not. Thus helping you is more likely to seem supererogatory, while forbearance from harming you is more likely to seem obligatory.

Each of these factors is morally significant, and thus any of them may be the real source of our homely intuition that sins of omission are less sinful. None of them, however, is logically connected to the action/omission distinction, and so to assess its moral relevance we would have to control for these other factors by finding a situation in which they are not relevant.

As Lichtenberg stresses, this is likely to be a very artificial situation. Thus, she asks us to compare a predicament in which one is told that if one pushes a button an innocent person will die with a predicament in which one is told that *unless* one pushes a button an innocent person will die. It will take some such thought-experiment as this to control for motive, certainty, responsibility, and costs to self. No distinction remains save the distinction between action and omission—and it is clear that in the example they are morally equivalent.³⁶ Thus, it appears that the forbearance principle mistakenly ascribes the moral significance of motive, certainty, etc., to the difference between action and omission. In and of itself, the distinction between actions and omissions carries no moral weight.

C. The Forbearance Principle and Natural Law

Now if action and omission were morally equivalent only in contrived examples such as Lichtenberg's we might well want to shrug off the objection. But there is one non-contrived situation in which action and omission are morally equivalent because the other factors are controlled for, and that situation is vitally important.

I am referring to the question of how to promote the common good institutionally via the legal order: the question, that is, that natural law

³⁶ *Id.* at 25-26.

theory addresses. It is here that the action/omission distinction most clearly breaks down. Consider a typical situation in which officials must allocate a fixed budget between two important social needs: the protection of citizens against murder, theft, and other acts that damage basic goods, and the promotion of basic goods through social welfare programs such as famine relief. The choice is between guns (for the police) and butter (for the poor). And, in terms of our present discussion, it is a choice between budgeting money to prevent bad actions (by criminals) and budgeting money to alleviate bad omissions (by well-to-do people who allow the poor to starve).

As we have seen, in the case of an individual moral agent, it is usually worse to injure a basic good than merely to fail to promote one, because the former usually involves a worse motive, more certainty of harm, greater responsibility, and less cost to self in avoiding the lapse. But none of this is true when we move from the individual to the state. The state must act affirmatively to protect against injury to basic goods by criminals just as surely as it must act affirmatively to fill its citizens' bellies: it must hire police, build prisons, establish courts, etc.³⁷ All this must be done intentionally, and the state will be solely responsible for doing it, just as it will in establishing its famine relief program. Thus, the distinction between crime-prevention and famine-relief policies in terms of motive, intention, and responsibility disappear. Nor is one policy necessarily more costly to the government than the other: in our example the government is deciding how to allocate a fixed budget. Finally, any difference in certainty is purely contingent. Allocating the money to the police will reduce the crime rate by some percentage, knowable in advance to some degree of accuracy; allocating the money to famine relief will reduce the starvation rate by some percentage, knowable in advance to some degree of accuracy.

Hence, just as surely as the action/omission distinction is morally irrelevant in Lichtenberg's button-pushing example, it is irrelevant here. Whatever the authorities' guns-versus-butter decision is based on, it cannot be the bare fact that the guns will go to *preventing* intentional damage to basic goods while the butter will go to *promoting* basic goods. Similarly, there is no more reason to enact a law prohibiting murder than to enact a law positively requiring state intervention to fight famine. Both, I believe, are part of the content of substantive natural law, for both are essential to the institutional realization of the common good. For this reason, the forbearance principle will turn out to play no part in legal reasoning based on natural law. And natural law principles will require redistribution of wealth to satisfy welfare rights just as surely as it will require expenditures of public monies to enforce the criminal law.

³⁷ See H. SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 35-40 (1980). For an interesting argument that conventional legal distinctions between state action and state inaction are arbitrary, see Sunstein, *Lochner's Legacy*, 87 COLUMBIA L. REV. 873 (1987).