

## RIGHTS, RATIONALITY, AND THE PREEMPTION OF REASONS

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This seems obvious: an action is rational only if it can be justified by showing that the reasons for it are better than (or at least as good as) the reasons against it. Despite the appearance of obviousness, I think this is false. What can I possibly have in mind? Surely it *is* obvious that an action qualifies as rational only if it can, in principle at least, be justified by a comparison of relevant reasons. Suppose you have two actions open to you—say, reading or watching TV. You decide to read. I ask why. Insofar as your action is rational, you can—in principle—answer by stating your reasons.<sup>1</sup> So far, so good. What I question is the following. Suppose that, as is almost always the case, some reasons weighed in favor of the action you chose to perform—reading—while others weighed against it. Is it correct to hold that a full answer to the question of why you chose to read would compare the reasons and explain why one set outweighed the other? It *seems* the answer must be “yes.” Where reasons compete, it certainly seems that rational action requires justifiability by a comparison of the reasons. Call this the “Comparative Conception.” The conception is false; or, more exactly, it is false on one critical understanding of it; on another, it is indeed true.

Why does this matter? Discovering the truth about the nature of reasons matters, of course, but there is another payoff as well. The inquiry into reasons leads to a new—and much needed—perspective on governmental decision-making. We generally take the Comparative Conception for granted in our approach to governmental decision-making, and it would appear that we do so for good reason. The apparent good reason is that, in a democracy, a governmental decision maker “accepts the responsibility, among others, to explain,

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1. The “in principle” is essential; there is no claim that you can immediately produce the answer when asked, or that you thought of it before you acted. The claim is that you could answer after sufficient unimpaired reflection.

particularly to those who are adversely affected, why different treatment of others in other circumstances is not capricious or arbitrary or discriminatory.”<sup>2</sup> The ideal of legitimacy is the ideal of a government that commands compliance, not through the threat of force, but because citizens, insofar as they are rational, see themselves as having adequate *reason* to comply.<sup>3</sup> How does a decision-maker demonstrate that citizens have adequate reason to comply? How else but by articulating the reasons for the policy, *and*—especially to address the concerns of the adversely affected—explaining why those reasons are better than (or at least as good as) the reasons for competing policies that would have allocated costs and benefits differently? My claim is that there is a “how else.”

The route to this goal begins by considering a conflict between moral rights and the Comparative Conception. Understanding and resolving the conflict reveals critical features of the nature of reasons and provides the basis for seeing how governmental decision-making can meet the demands of legitimacy despite the falsity of the Comparative Conception.

### I. THE PREEMPTIVE CONCEPTION OF RIGHTS

Moral rights conflict with the Comparative Conception. They do, that is, on one popular—and correct—conception of rights. The hallmark of this conception is that, as Thomas Nagel puts it,

the constraints on action represented by rights cannot be equivalent to an assignment of large disvalue to their violation, for that would make it permissible to violate such a right if by doing so one could prevent more numerous or more serious violations of the same right by others. This is not in general true. It is not permissible . . . to kill an innocent person even to prevent the deliberate killing of three other innocent persons. A general feature of anything worthy of being called a right is that it is not translatable into a mere assignment of disvalue to its violation.<sup>4</sup>

Assume, along with Nagel, that killing the one person violates a right, where the “disvalue” from the violation is the death of that person. Conceiving of the death as a “disvalue” inevitably raises the

2. Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359, 373–74 (Michael Brint & William Weaver eds., 1991).

3. The reasons in question are reasons other than the merely prudential reason of avoiding punishment by the state. See Richard Warner, *Legal Reasoning*, in *BLACKWELL'S GUIDE TO LAW AND LEGAL THEORY* (William Edmundson ed., forthcoming 2004).

4. Thomas Nagel, *Libertarianism Without Foundations*, 85 *YALE L.J.* 136, 144 (1975) (reviewing ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974)).

question, “Should we decide whether to kill this person by comparing this disvalue to the value realized by saving three people?” Nagel answers that this approach misconceives the nature of rights. If it is really true that it is wrong to kill an innocent person even when the value achieved is much greater than the disvalue of the death, then sacrificing the innocent person violates a constraint on action that we cannot properly violate. It is that type of constraint that we will call a “right.” A right is a constraint on action that is “not translatable into a mere assignment of disvalue to its violation.”

What kind of constraint is it? Joseph Raz offers the answer that we will adopt and develop. The conflict with the Comparative Conception emerges from this answer. Like Nagel, Raz insists that rights “are not reasons for action of a great weight.”<sup>5</sup> They “are a special kind of requirement for action . . . [which,] while not necessarily more weighty than other reasons, have a special preemptory force.”<sup>6</sup> Raz explains preemptory force by considering

the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. . . . [T]he arbitrator’s decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is not . . . just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. . . . The arbitrator’s decision is . . . meant to replace the reasons on which it depends. In agreeing to obey his decision they agreed to follow his judgment of the balance of reasons rather than their own. . . . I shall call a reason which displaces others a pre-emptive reason.<sup>7</sup>

Rights, according to Raz, provide a preemptive reason in this “displacement” sense. Torture illustrates the idea.

Grant, for the sake of argument, that torture violates the respect due persons, a respect due them no matter what the circumstances; and, grant that, consequently, a person—any person in any circumstance—has a right to not be tortured. It does not matter for our purposes if respect for persons is the true basis of the right, or even whether the right actually exists. Now, imagine a terrorist has planted a bomb in an elementary school, the location of which we do not know. We have apprehended the terrorist, and we are certain that, if we torture him, he will reveal the school’s location in time to defuse the bomb. There are strong reasons to torture. If we do not, 1000

5. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 195 (1986).

6. *Id.*

7. *Id.* at 41–42.

children will suffer horribly and many will die terrible deaths. We owe these children the same respect for persons we owe the terrorist. There are 1000 of them and only one terrorist; the children are innocent, and the terrorist is a monster who has callously decided to kill children. Suffering and death—and the violation of respect involved—is inevitable; the question is whether it should happen 1000 times or once. How can it be that the 1000 innocent do not outweigh the wicked one?

The Preemptive Conception of rights answers that the issue is not one of “outweighing.” There is no “weighing”—no comparison of reasons—to be done here. The right functions like the arbiter in Raz’s example. The right provides a reason not to torture, and we do, or at least should, defer to this reason in the way Raz’s disputants defer to the arbitrator’s decision. Consequently, we do, or should, regard ourselves as having a right-provided reason not to torture, and no reasons to do so; that is, no reasons that should play any determinative role in our decision. The right—in Raz’s terms—*preempts* those reasons.

This is the Preemptive Conception of rights. The conception offers a way of understanding how a right can be a constraint on action that is “not translatable into a mere assignment of disvalue to its violation.” In the torture case the “disvalue” from violating the right is the pain we cause the terrorist (and the dehumanizing effects of torture on us). This “disvalue” provides us with a reason not to torture while the imminent maiming and killing of the children provides us with a reason to do so. To translate the right into “a mere assignment of disvalue to its violation” is to think that we should decide whether to torture the terrorist by comparing these two reasons. On the Preemptive Conception of rights, one who embraces the right not to torture cannot decide in this way. Given that the right *not* to be tortured preempts the reason *to* torture provided by the maiming and killing of the children, it follows that there is a right-provided reason not to torture, and *no* countervailing injured-and-dead-children reason to do so, *no reason, that is, that we should compare*. To compare that reason to right-provided reason is inconsistent with accepting the reason-preempting constraint on action that is the right.

Of course, you may well ask how rights accomplish this reason-preempting feat. Indeed, even if such reason-preemption is possible, adherents of the Comparative Conception will—indeed, must—regard it as glaringly irrational. The risk of injury and death to the

1000 children provides a reason to torture the terrorist. The Comparative Conception holds that your decision about whether to torture is rational only if it is justifiable by a comparison of relevant reasons, the relevant reasons in this case being the risk to the children and the right-provided reason not to torture. The Preemptive Conception of rights holds that one who accepts the right cannot consistently base a decision on such a comparison. Therefore, we must reject either the Comparative Conception or the Preemptive Conception.

I reject the former. I offer an explanation of why the Preemptive Conception is correct and the Comparative Conception mistaken. My defense of the Preemptive Conception turns crucially on the claim that—generally, not just in the context of rights—reason-preemption is rational. The preemption that occurs in rights is just a special case of this much broader reason-preemption phenomenon.

## II. REASONS AND REASON-PREEMPTION

It is convenient to begin with an example of reason-preemption outside the realm of rights. The reason-preemption that occurs in the example is arguably irrational, but it provides a convenient background against which the rational cases of reason-preemption stand out in relief. The example: Mason is a gourmet who works as a restaurant reviewer for newspapers and magazines. His doctor tells him he has gout and must, on pain of destroying his health, stop eating the rich French food in which he delights. But Mason persists in his gourmet pursuits; he thinks of himself as a badly injured warrior who, although doomed to defeat, defiantly refuses to cease fighting for his ideal—the ideal for the gourmet Mason being the refinement of appetite as a source of pleasure. Mason takes this commitment to such an extreme that he regards his reasons to live his gourmet life as preempting the reasons to preserve his health. The latter play no role whatsoever in Mason's decisions about how to act. He takes pride in this, seeing it as a sign of the depth of his commitment. Many, if not most, will find Mason's commitment irrational. How could gourmet pleasures, however refined, be worth destroying your health?

Despite the arguable irrationality, the example demonstrates that reason-preemption can and does occur via commitments that lead us to ignore reasons that we would otherwise take into account in determining how to act. One key to differentiating rational forms of

reason-preemption from Mason's dubiously rational form lies in distinguishing two senses of "reason."

A. *Two Senses of "Reason"*

To illustrate the first sense, suppose Smith devotes considerable time to chess. When you ask him why, he explains that a well-played game displays the beauty of forces in dynamic tension; the game reveals the creativity, courage, and practical judgment of the players in an exercise of intuition and calculation akin to both mathematics and art. These considerations are his reasons for his devotion to chess. They are reasons in the sense that they play a certain justificatory-motivational role. If asked, for example, why he devotes time to chess, he would (in principle) cite the above considerations as his justification. The same considerations motivate him to play chess, study chess, go to the chess book sections of bookstores, and so on. In general, the considerations play a complex motivational-justificatory role. It is sufficient for our purposes to note the existence of this role; we need not characterize it in any detail. Call considerations that play this motivational-justificatory role *personal reasons*.

Compare the chess-playing Smith to Jones, who cannot play chess and has no interest in learning how to do so. The considerations that comprise Smith's personal reason to play chess, the considerations that play a reason's characteristic motivational-justificatory role, do not play that role for Jones. They are not personal reasons for him. Jones can still acknowledge that the considerations are a reason, in the sense that—in others—they play a reason's justificatory-motivational role. Call such considerations *non-personal reasons*. Classification of considerations as personal or non-personal reasons is agent-relative, of course. The chess considerations are a personal reason for me, but only a *non-personal* reason for Jones.

Of course, it may happen that considerations that do not in fact serve as a personal reason *should* do so, nonetheless. Many will view Mason, the gout-ridden gourmet, this way. Health considerations related to his gout do not play the motivational-justificatory role of a reason for Mason, but it may well be that they should, that Mason *should* compare the health reasons to the gourmet reasons in deciding what to do. Mason's friends try to convince him that he should do so, and many will think the friends are correct. The enjoyment of food, however refined it may be, is simply not that important. It is not as if Mason were endangering his health to create great works of art.

Typically, however, when considerations fail to serve as personal reasons, it is *not* the case that they should. Smith's chess playing considerations, for example, should not play the motivational-justificatory role of a reason for Jones. Jones has organized his life around different commitments, and has no time or energy to devote to chess, a pursuit which, in any case, would not further any of Jones' plans and projects. There is no point to these being personal reasons.

### *B. Rational Reason-Preemption: An Example*

Now, how does this distinction between senses of "reason" help reveal the rationality of reason preemption? An example is helpful. I describe the example in some detail and then turn to the question of why the preemption it illustrates is rational.

Suppose Jones and I are revolutionaries. An official in the government we oppose offers me \$1,000,000 to reveal names, hiding places, and plans of my fellow revolutionaries. I refuse. The official then makes the same offer to Jones, who also refuses. He refuses based on a comparison of personal reasons. Jones would use the money to buy a yacht that he would sail around the world, and, in light of this ambition, he regards the money as a personal reason to betray the revolution. However, he also regards his loyalty as providing a personal reason not to betray the revolution. On reflection, he finds the loyalty-provided personal reason not to betray to be better than the money-provided personal reason to betray. However, as Jones cheerfully acknowledges, had the price been higher, the result would have been different. Had the offer been \$10,000,000, he would have betrayed the revolution without hesitation.

I might be thought to be relevantly like Jones. Indeed, suppose I share Jones circumnavigational fantasy, and that I too would use the money to buy a yacht and sail around the world. So don't I have a personal reason to betray the revolution in order to get the money? And, since I refuse the bribe, doesn't this mean that I must take my loyalty-provided personal reason not to betray to be better than the money-provided reason to do so? No. I refuse precisely because I do *not* compare. My loyalty to the revolution consists in a commitment to it that preempts the offered bribe as a personal reason to betray the revolution. To say that my commitment preempts that reason as a personal reason is just to say that it ensures that I have no attitude toward the bribe that plays the motivational-justificatory role of a personal reason. My commitment ensures this because it is

constitutive of, definitive of, that commitment that I have no such personal reason, just as Mason's refusal to consider the health reasons was definitive of his commitment to his gourmet life. I refuse the bribe because I have a loyalty-provided personal reason to do so, and no competing personal reason weighing the other way.

One critical qualification: none of this is intended to deny that there are some circumstances in which I might abandon my loyalty for money. Suppose, for example, that I have a daughter and that she will die if she does not receive medical treatment costing \$1,000,000. I might betray the revolution to get the money, but, in doing so, I would still not be like Jones. Jones regards the offered bribe and the pleasures in which it will allow him to indulge as a personal reason to betray the revolution; I recognize saving the life of my daughter as a personal reason to betray. This is consistent with regarding the bribe-and-pleasure considerations as preempted, as not playing the role of a personal reason. In general, my commitment can prohibit the bribe-pleasure considerations from functioning as a personal reason while allowing me to allocate my time between caring for my family and spying on the government, and allowing me to buy a new assault rifle instead of the very safe, but very expensive, car in which to drive my daughter to school. In preempting reasons, commitments set boundaries to comparison; they block comparisons we would otherwise make. Such boundary-setting does not prohibit *all* comparison; that would make life unlivable. Reason-preemption defines a line that prohibits *some* comparisons, and the line may at times be a blurry, indeterminate, and difficult to discern boundary. But, whatever boundary gets defined, the point is that, given the reason-preempting commitment, you cannot, cannot, consistently with the commitment, compare the preempted considerations to the personal reasons you recognize as legitimate bases for action.

Is it rational to be loyal in this reason-preempting way? Many will think so. We admire reason-preempting loyalty, seek to associate with such people, and regard it as a virtue to cultivate in our children. Loyalty is hardly the only example. Reason-preempting commitments are common in our lives. Parental love is another example. As Joseph Raz remarks,

[f]or many, having children does not have a money price because exchanging them for money, whether buying or selling, is inconsistent with a proper appreciation of the value of parenthood. . . . [B]oth their rejection of the idea that having children has a price and their refusal even to contemplate such exchanges are part of

their respect for parenthood, an expression of the very high value which they place on having children.”<sup>8</sup>

Parental love, for many at least, is defined in part by the preemption of money as a personal reason to exchange their children. Suppose that, as I am out walking with my daughter, a stranger approaches and offers me \$1,000,000 if I will turn her over to him and never see her again. I have a reason to take the money: I would pay off bills and invest the rest. These considerations do not play the motivational-justificatory role of a personal reason for me. They might *motivate* me to take the money—although I hope they would not. But they would never play the *justificatory* role of a personal reason. I would never actually weigh the advantages of having the money against my personal reasons to keep my daughter, prepared to abandon her should the comparison come out in favor of taking the money. My commitment to her ensures that I will never abandon her—no matter how the comparison comes out. That comparison can play no justificatory role in determining what I do. So my decision is simple: I have a personal reason not to sell (my love for my daughter), and no personal reason to do otherwise; accordingly, I refuse the stranger’s offer. Such reason-preemption defines in part parental love; indeed, we regard parents for whom such preemption does not occur as monsters.

Parental love is by no means an isolated example. Raz makes a similar point about friendship: “[o]nly those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are *capable* of having friends.”<sup>9</sup> Is the reason-preemption involved in loyalty, parental love, friendship and the like sufficient to show that reason-preemption can be rational? It is difficult to imagine that loyalty, parental love, and friendship are somehow irrational. While the appeal to such examples might convince us *that* reason-preemption can be rational, it does not show us *why* it is. To understand why reason-preemption is rational, we need to understand why reason-preempting commitments like loyalty, parental love, and friendship lie at the center of our lives. The key here is the concept of the self.

8. RAZ, *supra* note 5, at 348.

9. *Id.* at 352 (emphasis in original).

## III. REASON-PREEMPTION AND THE SELF

William James captures the relevant sense of identity. “I am,” James writes,

often confronted by the necessity of standing by one of my empirical selves and relinquishing the rest. Not that I would not, if I could, be both handsome and fat and well dressed, and a great athlete, and make a million a year, be a wit, a *bon-vivant*, and a lady-killer, as well as a philosopher; and a philanthropist, statesman, warrior, and African explorer, as well as a “tone poet” and saint. But the thing is simply impossible. The millionaire’s work would run counter to the saint’s; the *bon-vivant* and the philanthropist would trip each other up; the philosopher and the lady-killer could not well keep house in the same tenement of clay. Such different characters may conceivably at the outset of life be alike *possible* to a man. But to make any one of them actual, the rest must be more or less be suppressed. So the seeker of his truest, strongest, deepest self must review the list carefully, and pick out the one on which to stake his salvation. All other selves thereupon become unreal, but the fortunes of this self are real. Its failures are real failures, its triumphs real triumphs, carrying shame and gladness with them.<sup>10</sup>

One makes oneself the kind of person one is by one’s commitments—what one “stands by.”

The essential point is that reason-preemption plays an important role in the commitments through which we define our personal identities. To see why, consider first that the contingent circumstances in which we happen to find ourselves play a major role in determining what self-defining commitments we make. Your parents, your education, and your place of birth, for example, could determine in large part that you are committed to being a lawyer, a hard worker, and an I-will-live-only-in-New-York New Yorker; and, the opportunities your life happens to offer may lead you to alter these commitments; to pursue your career as a lawyer, you might, for example, abandon New York for Los Angeles. Reason-preempting commitments provide some relief from the impact of the ruthless contingencies on our identities. It frees us from definition by a contingent sequence of circumstances. Reason-preemption allows us to define ourselves to ourselves and in relation to others in ways that provide some independence from the happenstance and accidents of our lives.

10. 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 309–10 (Dover Publications 1950) (1890). The artless sexism of the times (“a man,” “lady-killer”) should perhaps not go without comment. I discuss self-defining commitments in detail in RICHARD WARNER, *FREEDOM, ENJOYMENT, AND HAPPINESS* 53–118 (1987).

Marriage is an example. Suppose a married man routinely compares the women he meets to his wife, and that, if he found one of them sufficiently superior in his eyes to his wife, he would divorce her. The man's attitude is inconsistent with marriage, at least with the ideal marriage relationship. That ideal is defined by a reason-preempting commitment. The romantic commitment that is part of the ideal marriage relationship (at least one popular conception of that ideal) is defined by commitment that, across a broad range of circumstances at least, preempts, as personal reasons to leave your spouse, the considerations provided by the attributes of others. Marriage partners with mutual commitments in this regard build a relationship based on the trust the commitments make possible. Without the commitment, the mere happenstance of whom you happened to meet could dictate to you a sequence of more or less unenduring relationships. The marriage commitment frees you from this tyranny of contingent encounters. It allows the couple to choose and create a relationship that would not be possible without it; the world does not dictate who their partners shall be; they do.

Similar remarks hold for the loyalty example. Reason-preempting loyalty generates trust. Suppose that the revolutionaries are a secret cell of high-placed government officials. Each has ample opportunity to betray the others, where betrayal promises a safe and financially secure future. The revolutionaries nonetheless adhere to their agenda, which puts their lives in each other's hands. They do so because each trusts that none of them has secretly betrayed the rest. The trust exists because they know, and know that they know, that each has a commitment to their revolutionary task that preempts the considerations that argue for betrayal. Compare the marriage example. In deciding to get married, you have a choice between the freedom conferred by a reason-preempting commitment to another, or the freedom to have a series of monogamous relationships with different partners. In deciding to join the revolution, you have a choice between a reason-preempting commitment to a cause or the openness to contingent opportunities which that commitment would foreclose. In both examples, the reason-preempting commitment allows you to define yourself in a way that provides some freedom from the impact of contingent circumstances on the formation of your identity. You dictate to the world, not the world to you, the kind of person you are.

Imagine a person, call him Smith, with no reason-preempting commitments whatsoever. Smith is devoid of the commitments to others exemplified in friendship, parental love, marriage, loyalty, and the like. He would support or abandon people depending on a comparison of personal reasons—where no relevant reason is preempted. He would always consider betraying others for money, and would do so if the price were right. Whether Smith is helpful, hurtful, or indifferent to others depends on the reasons he finds for his actions in the contingent circumstances he encounters. In this way, the world dictates to Smith, not Smith to the world, the nature of his relationships to others. He is, in this way, unfree. We are not like Smith. We embrace reason-preempting commitments so that we determine our identities in at least partial freedom from the contingencies that otherwise shape us.

Is this rational? How could it not be? How could it be irrational to use our freedom to make ourselves capable of friendship, loyalty, parental love, and marriage? Some will insist that there is no mystery here. It is rational to do so insofar as our choice of reason-preempting commitments is itself justifiable by a comparison of reasons. Consider the marriage example. Suppose you are deciding whether to get married. You have a choice between two forms of freedom. The freedom involved in marriage, or the freedom to have a series of relationships with different partners. The Comparative Conception insists that, insofar as you are rational, you can in principle justify your choice by showing that the reasons (personal or non-personal) for it are better than the reasons (personal or non-personal) against it. How can this be false here? Surely it is irrational to choose either option without comparing the reasons (whether personal or non-personal) for each choice.

This insistence on comparison is untenable; it is simply not possible in all cases to justify our choices of reason-preempting commitments by a comparison of relevant reasons. There are two questions to distinguish here. Can we *sometimes* compare reasons—both personal and non-personal—for and against having a commitment? Second, can we *always* compare reasons—both personal and non-personal—for and against having a commitment? The answer to the first question is clearly “yes.” Suppose you are considering a choice between a career as a jazz pianist and a career as a lawyer. This is a choice between two commitments—a commitment to the jazz pianist life-plan, or a commitment to the lawyer life-plan. There might be

compelling reasons that one commitment is better than another. You might, for example, be unhappy as a jazz musician but not as a lawyer; or perhaps as a jazz pianist you would create brilliant musical scores in which many would take pleasure while as a lawyer you would actually do great harm by defending polluting corporations.<sup>11</sup>

Now, can we *always* compare reasons for and against having a commitment? We cannot. Consider the jazz pianist/lawyer example again. It could be that no such grounds distinguish the two careers. Imagine that you have values that pull you toward the lawyer-life. You value stability in personal and financial matters, and you value the role lawyers play in the legal system. Consequently, there are reasons for you to choose the life as a lawyer. The reasons may be personal or non-personal, depending on whether they happen to play the appropriate motivational-justificatory role. It does not matter whether they do so or not; all that matters is that the reasons exist. The point to emphasize is that there are also reasons—personal or non-personal—for you to choose the life of a jazz musician. You have values that pull you toward that life. You adhere to an ideal of creative expression in music, an art for which you have a deep love. From the perspective provided by the lawyer-values, you have better reason to choose to be lawyer rather than a jazz musician, and from the perspective provided by the jazz-musician-values, you have better reason to be a musician. To choose either career is to consign the values realized in the other career to a minor—and perhaps eventually vanishing—role. You are pulled both ways, and your problem is that your current point of view includes both sets of values and does not provide any neutral perspective from which to adjudicate between the competing reasons. There is no neutral perspective from which you can regard one set of reasons as better, worse, or equally good. You need to *arrive at—to construct*—such a perspective. Until you are able to do so, you oscillate uncomfortably between the alternatives—unable to decide, but pulled toward this one, then that one. Note that you would be unlikely to adopt an arbitrary decision procedure like flipping a coin; or, if you did, it would not be a sign of indifference, but of desperation, of an inability to decide in any other way. You seek a clarification and resolution in your values that cannot be achieved by flipping a coin.

11. See RAZ, *supra* note 5, at 341–42.

Such situations are not uncommon. Our values hardly provide complete maps that guide us through the decisions we must make; rather, they are sketches leaving large areas barely filled in, if filled in at all. Moreover, our perspectives not atypically incorporate competing, or outright inconsistent, claims and views. David Wiggins has aptly captured these aspects of practical reasoning:

No theory, if it is to recapitulate or reconstruct practical reasoning even as well as mathematical logic recapitulates or reconstructs the actual experience of conducting or exploring deductive argument, can treat the concerns which an agent brings to any situation as forming a closed, complete, consistent system. For it is of the essence of these concerns to make competing and inconsistent claims. (This is a mark not of irrationality but of *rationality* in the face of the plurality of ends and the plurality of human goods.) The weight of the claims represented by these concerns is not necessarily fixed in advance. Nor need the concerns be hierarchically ordered. Indeed, a man's reflection on a new situation that confronts him may disrupt such order and fixity as had previously existed, and bring a change in his evolving conception of the point . . . or the several or many points, of living or acting.<sup>12</sup>

Incomplete and inconsistent values mean that we cannot always compare reasons as better, worse, or equally good. As the jazz musician/lawyer example illustrates, this may, and often does, happen in choices among commitments, including reason-preempting commitments. Indeed, it is easy to conceive of the jazz musician/lawyer choice as a choice among reason-preempting commitments. Imagine that your envisioned commitment to being a jazz musician is defined in part by preempting considerations of financial security as reasons to take substantial amounts of time away from composing and playing music; and, imagine that your envisioned commitment to being a lawyer is defined in part by preempting composing and playing music as a reason to take substantial time away from the practice of law.

Given that the choice of reason-preempting commitments can nonetheless be rational, the rationality of such a choice cannot ultimately depend on justifiability through a comparison of relevant reasons. This hardly means that our choices are unsupported by reasons, or that we do not reason about them. You can choose to be a lawyer or a jazz musician *for reasons*, for the reasons discussed in the example. Your choice to be a lawyer is *backed by reasons* and is in that

12. David Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE'S ETHICS* 221, 233 (Amélie Oksenberg Rorty ed., 1980) (citation omitted).

sense rational. The point is simply that there is no *comparison of reasons* that decisively decides the issue one way or another.

Some may object that we have not yet shown that a relevant comparison of reasons is impossible. Our impossibility argument turns on the claim that our values are incomplete and inconsistent. But isn't it possible to fill in our values where they are incomplete and eliminate the inconsistencies? Grant, for the sake of argument, that it is. That would still not be enough to enable us to compare reasons; we also need all the information relevant to the comparison. In the jazz musician/lawyer case, for example, you need sufficient information about what would happen in the two lives, and it is extremely unlikely that you will have such detailed information. But grant, for the sake of argument, that it is possible to have all the information relevant to choosing among possible commitments. It would then be *possible in principle* to compare reasons for and against commitments. This possibility is, however, simply *irrelevant* to the rationality of our choice among commitments. We will, in fact, *never* make our values complete and consistent, and we will never possess all the information we need, so we will *never* know what the result of the complete, consistent, fully informed comparison is. Hence, given that *we can know* that our choices of commitments are rational, we cannot show that by appeal to such a comparison. We must do so without appeal to such a comparison. A choice among possible commitments can be rational even in the absence of a comparison of reasons that shows that the reasons for the chosen commitment are better (or at least as good as) the reasons for any of the other commitments.

This result is inconsistent with the Comparative Conception. Choice of commitments can be rational in the absence of any relevant comparison, and, once you opt for a reason-preempting commitment, you cannot, consistently with that commitment, consider the reasons it preempts. So why does the Comparative Conception seem so plausible? The answer is that there are two ways to understand the Comparative Conception, corresponding to the two senses of "reason."

According to the Comparative Conception, if an action is rational for a given person, then it can, in principle, be justified by showing that the reasons—personal or non-personal—for performing the action are better than (or at least as good as) the reasons—personal or non-personal—against performing it. Given that reason-preemption is rational, this is false. To state the Comparative Conception correctly, we must restrict "reason" to reasons that are, or should

be, personal reasons—thus: if an action is rational for a given person, then it can, in principle, be justified by showing that the personal reasons the person does or should have for performing the action are better than (or at least as good as) the personal reasons the person does or should have against performing it. Confusing these two versions of the Comparative Conception makes reason-preemption look irrational.

Now what does all this have to do with rights?

#### IV. RIGHTS

Return to the torture example. Suppose the terrorist in our example claims that he has the right not to be tortured, and suppose that he is correct. What does his claim mean? To claim the right not to be tortured is to make two claims: first, that others have a reason not to torture; second, that this reason has a special status that ensures that in all—or at least most—circumstances what we have the best reason to do is not to torture, no matter what reasons we may have to do so. These claims are true if we share a reason-preempting commitment to respect other persons, where that commitment is defined in part by the preemption of the prevention of harm to others as a reason to torture. Suppose, for the moment, that we do share such a commitment. This explains why, to use Nagel's words, a right is a constraint on action that is "not translatable into a mere assignment of disvalue to its violation." Suppose, for example, that, in the terrorist hypothetical, our right-provided reason not to torture preempts the harm-and-injury-to-the-children reason to do so; then, insofar as we are rational, we will refuse to torture. We have a reason not to torture, and no competing reason—no competing reasons that we will consider—weighing the other way.

This approach also explains why some may choose to torture the terrorist. There are two ways this may happen. First, suppose that our commitment to respect persons preempts—only in a certain range of circumstances—harm to others as a reason to torture. If the bomb in the elementary school falls outside that range, respect for persons does *not* preempt the harm-and-injury-to-the-children reason to torture; and, this reason may, at least in the eyes of some, provide a powerful reason to torture. In general, reason-preempting commitments are, as noted earlier, typically limited by an "only in certain

circumstances” qualification,<sup>13</sup> where the exact range of reason-preemption is often unclear and a matter of moral debate. It is easy to imagine such debate occurring in the terrorist example; someone is likely to say, “I am against torture in most cases, but not here.” The second path to opting for torture is more radical: we completely abandon our commitment to respecting persons. This is unlikely to happen in the case of respect for persons, but it is a possibility, and one that may be realized in the case of other commitments.

We should accept this approach to explaining rights. The approach explains why a right cannot be thought of as simply an indication of a significant disvalue to its violation, and it explains why we nonetheless can “override” rights in appropriate circumstances. The foundation of the explanations is the unavoidable, freedom-securing role of reason-preempting commitments in our lives. Rights turn out to be a special case of this broader reason-preemption phenomenon. The explanation is still incomplete, however. In offering the explanation, we simply assumed that we shared a reason-preempting commitment to respect other persons, where that commitment is defined in part by the preemption of the prevention of harm to others as a reason to torture. What explains such shared commitments? There is a contingent, cultural explanation. It is true (or has been true) in our culture that, as a result of formal education and informal socialization, most people do share such a commitment. If we are content to regard rights as simply cultural artifacts, we may be content with this sort of explanation. If we are not—as I am not—so content, we must show that there are reason-preempting commitments which govern our treatment of others in the ways rights require, and which any person must have to qualify as rational. I think it is possible to demonstrate this, but that is a project for another time. We conclude with the question of the impact of our understanding of rights—culturally relative or universal—on the making of public policy.

## V. PUBLIC POLICY

Public policy decisions typically require overriding rights. Consider decisions about funding medical research. How much should the state invest in research aimed at preventing heart disease, and how much in research for a more effective flu vaccine? Suppose (as is in fact true) that there is not enough money to give both programs all

13. *See supra* Part II.

that they should ideally have. If we favor heart disease research over flu vaccine research, thousands of flu victims (primarily elderly) will die, victims the research would have saved; on the other hand, if we favor flu research, thousands of heart disease patients will die, patients that would otherwise have been saved. Our reasons to save the heart disease victims are reasons to let the flu victims die, and vice versa. How do we decide which reasons are better?

The question is impossible to answer if we assume that our respect for persons is in part defined by preempting saving one life as a reason to let another die. I assume that most of us do share some commitment of this sort. Recall Thomas Nagel's observation that "it is not permissible . . . to kill an innocent person even to prevent the deliberate killing of three other innocent persons." Most certainly agree, and most would still agree (to some perhaps a more qualified version of the claim) when we replace "deliberate killing" with "knowingly adopt a course of action that will cause the death of innocent people." Indeed, knowingly adopting such a course of action is what the courts and the public found so horrific about Ford Motor Company's behavior in the *Ford Pinto* case.<sup>14</sup> Ford knowingly adopted a course of action that caused the death of innocent people. Knowing that a defect in the Pinto would cause innocent deaths, Ford nonetheless decided not to recall the cars and fix the defect. Assume then—for the moment—that our respect for persons is defined in part by the preemption of saving one life as a reason to let another die.

To see why this commitment makes it impossible to decide how to allocate funds between the heart victims and flu victims, suppose I proposed saving the heart disease victims. You respond, "But that means letting the flu victims die." I answer, "Yes, but we do not have enough money to save everyone, and the reasons to save the heart disease victims and let the flu victims die are better than the reasons to save the flu victims and let the heart disease victims die." You point out that I have just violated our commitment to respect persons. That commitment requires we not treat saving one group as a reason to let the other group die.

So how do we decide who lives and who dies? Limited financial resources mean that we cannot avoid the decision. There is only one way out of this dilemma. We must revise our commitment to respecting persons. We could do so by holding that our respect for persons is

14. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

in part defined by preempting—in certain circumstances only—saving one life as a reason to let another die. Where there is no alternative to letting one die to save another, we could hold that the reasons are not preempted. This is, indeed, precisely the difference between the Ford Pinto example and the heart disease/flu example. Ford had an alternative; it simply had to recall the Pinto. The reason-preempting commitments that underlie our recognition of rights are almost always qualified by an “under a certain range of circumstances” rider; the reason is the need to deal with situations like the heart disease/flu example, where we think we should compare the otherwise preempted reasons.

Determining the relevant range of circumstances raises issues about our collective identity as a society. Suppose, for example, that it would greatly promote economic development to allow industrial pollution that would deposit a small amount of lead in drinking water. Assume one consequence would be retarded mental development in one out of every 1000 infants in the relatively small residential area that would be affected. Many will surely object, “You can’t intentionally retard innocent infants for economic gain, no matter how great the gain.” Interpreted in our terms, this reaction asserts that our commitment to respect for persons preempt economic gain as a reason to mentally retard infants. Assuming we have such a commitment, proponents of economic gain must argue that we should revise it by holding that, in the circumstances, we should not preempt economic gain as a reason to retard the infants. In making such arguments, they are not—directly or primarily—comparing the reasons to benefit economically against the reasons to protect the health of infants; they are arguing about what it means to respect persons. If they convince us to revise our commitment, *then* we can begin to weigh the economic benefit against the mental retardation of the children. What is at issue is our collective identity as a society. Just as our individual reason-preempting commitments define our individual identities, our shared commitments define our collective identity. The question raised by the lead-in-the-drinking-water example is, do we wish our collective identity to be defined in part by a willingness to mentally retard infants for economic gain? Unfortunately, explicit attention to reason-preempting commitments plays virtually no role in the theory or practice of public policy choices. This Article is a plea to give such commitments a central role in both theory and practice.