Value Pluralism, Challenges to Consequentialism, and Law and Economics Movement

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This paper considers how issues concerning value pluralism and challenges to

consequentialism bear on legal reasoning, with particular attention to the "law and economics"

movement. By "value pluralism," I mean the idea that there are various distinct values -- such as

benevolence, justice, honesty, liberty, and fidelity -- and that these are not reducible to a single

overarching value or a super-value. In the "law and economics" movement, economic reasoning

is used not only descriptively, to explain and predict the effects of particular laws, but also

normatively, to recommend laws based on their consequences. As in consequentialist ethical

theories like utilitarianism, economic approaches to the law evaluate consequences by aiming at

some form of "efficiency" -- that is, we try to maximize well-being or goodness in one way or

another.

In one sense, value pluralism would seem to pose an obvious challenge to the use of

economics in legal reasoning. Often, consequentialism is seen as an essentially "monistic"

normative approach, since it involves maximizing one value rather than attempting to honor or

reconcile multiple values. Many of the longstanding objections to consequentialism rest on its

seeming inability to accommodate values beyond benevolence, such as justice and fairness. If

laws are being proposed and evaluated for their consequentialist efficiency, they would seem to

inherit the same problem, of being unable to incorporate, at a fundamental level, a range of

important values. On the face of it, we do seem to value pluralistically, so crafting laws that

simply maximize efficiency seems to require us to neglect or even violate some cherished values such as justice -- a particularly striking example in the legal context.[1]

But various matters here are complex. For one thing, the nature of value pluralism and the extent to which it is incompatible with single-principle and consequentialist theories are contested. Multiple values must be weighed against one another in cases of conflict. To avoid arbitrariness, it is suggested, one always needs a monistic "meta-theory" in the background to justify these comparisons. Also, some consequentialist theories are proposed as being, themselves, pluralistic: as long as we're weighing and comparing values anyway, why not say the thing to do is maximize the good, then give an analysis in which "the good" has multiple aspects? Recently, it's been argued that seemingly non-consequentialist moral theories can be "consequentialized": for any set of moral judgments we can find a consequentialist theory that entails those very same judgments.

For another, insofar as the pursuit of efficiency is understood to clash with value pluralism, it is sometimes argued that it is value pluralism that must give way. It is said that consequentialism and related forms of cost-benefit analysis are more rational, ethically neutral, or universally acceptable than those appealing explicitly to values like justice, fairness, and liberty. Ethical frameworks associated with value pluralism include "moderate deontology" and Ross-style pluralism, in which there are multiple principles reflecting a range of moral considerations; typically the associated methodology is a kind of "coherence" or "reflective equilibrium," in which we work back and forth between our moral intuitions and the more

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[1] For discussion of plural values and the law and economics movement, see Martha Nussbaum, "Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics," *University of Chicago Law* Review 64 (1997), 1197-1214.

general moral principles we endorse. Such approaches require appealing to moral judgments or "intuitions," the criticism goes, and these are a problem: they are infected with emotion; they are arbitrary; they are the unjustified by-products of an evolutionary system that tuned us into irrelevant distinctions.[2]

In what follows, I draw on my previous research on value pluralism and moral reasoning to develop a more nuanced discussion of the relationships among value pluralism, consequentialism, and law and economics methodologies,[3] and I consider how these matters bear on recent arguments concerning the use of efficiency in policy, focusing on those arising in the debates over Eyal Zamir and Barak Medina's (2010) *Law, Economics, and Morality* and Louis Kaplow and Steven Shavell's (2002) *Fairness Versus Welfare*.[4] I argue specifically against the claims that pluralism collapses into monism, that pluralism involves arbitrariness, and that appealing to judgment makes pluralist approaches less rational or justified than consequentialist ones. Zamir and Medina frame their alternative to consequentialism as "moderate deontology" --

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[2] Sources and texts are cited below. A related issue is that economic approaches to efficiency are sometimes more subtle than straightforward maximization: typically, consequences are evaluated for forms of cost-benefit analysis such as "Pareto efficiency," in which no one could be made better off without making someone worse off, or "Kaldor-Hicks" efficiency, in which the benefits to those who gain outweigh the costs to others. Since the law and economics texts I am discussing are focused on other issues, I won't be discussing these distinctions here.

[3] See my *Moral Reasoning in a Pluralistic World*. For article versions, see my "Moral Coherence and Principle Pluralism," *Journal of Moral Philosophy* 11/6 (2014), 727–749 and "Moral Coherence and Value Pluralism," *Canadian Journal of Philosophy* 43 (2013), 117-135.

[4] Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (OUP 2010); Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press 2002); Avihay Dorfman, "Humane Consequentialism: A Critical Note on Eyal Zamir and Barak Medina, *Law Economics and Morality*," *Jrslm. Rev. Legal Stud.* 3 (2011) (online); Larry Alexander, "Deontological Constraints in a Consequentialist World: A Comment on Law, Economics, and Morality," *Jrslm. Rev. Legal Stud.* 3 (2011) (online); Eyal Zamir and Barak Medina, "*Law Economics and Morality:* A Response to Critiques," *Jrslm. Rev. Legal Stud.* 3 (2011) (online); Larry Alexander, "Deontology at the Threshold," *San Diego L. Rev.* 37 (2000): 893-1201 (online); Matthew Adler, Review of *Fairness versus Welfare, Ethics* Vol. 115, No. 4 (July 2005), pp. 824-828; Jules Coleman, "Review: The Grounds of Welfare," *The Yale Law Journal*, Vol. 112, No. 6 (Apr., 2003), pp. 1511-1543. Where an online version is linked here, page numbers below refer to that version.

here, there are obligations to promote the good overall, but there are also deontological

constraints, and these can only be overridden when certain thresholds are met. In discussion,

Avihay Dorfman argues that their appeal to moderate deontology has problems with arbitrariness

and incoherence: it relies too much on "intuitions," and risks collapsing into monism.[5] In their

response, Zamir and Medina say, among other things, that all pluralist theories share the

difficulty and that the advantages of pluralism outweigh the defects.[6] In my opinion, a stronger

response is available: monistic consequentialist theories are no better from the point of view of

arbitrariness. In discussion of both books, it's been suggested that consequentialism is less

arbitrary in part because it is more rational and somehow avoids relying on moral judgments in

its justification. Drawing on recent debate, and considering specifically the case of Peter Singer

and his methodology, I argue here that consequentialism enjoys no such advantage over

alternatives.[7]

    I begin, in section 1, with some background, explaining what value pluralism is and how

it relates to various forms of deontology. In section two, I consider charges of arbitrariness and

incoherence, and in section three I discuss rationality and the purported problems with

"intuitions." With a few notable exceptions, recent debates over issues in moral philosophy and

over ethical issues in law have been conducted in a non-overlapping parallel; among my other

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[5] Avihay Dorfman, "Humane Consequentialism."

[6] Eyal Zamir and Barak Medina, "*Law Economics and Morality:* A Response to Critiques."

[7] See, e. g., Peter Singer, "Ethics and Intuitions," *The Journal of Ethics* 9 (2005), 337-338; see also Joakim Sandberg and Niklas Juth, "Ethics and Intuitions: a Reply to Singer," *Journal of Ethics* 15 (2011), 209-226 and Sabine Roeser, "Intuitions, Emotions and Gut Reactions in Decisions about Risks: Towards a Different Interpretation of 'Neuroethics,'" *Journal of Risk Research* 13 (2010), 175-190. This part of the paper draws on work I've done jointly with Rosalind Abdool.

aims here, I hope to show how discussions in moral theory, applied ethics, and legal theory take

on related issues, and thus and bring those disciplinary debates into dialogue with one another.

1. Value pluralism, forms of deontology, conviction ethics and coherence

To say that values are plural is to say that there are various, genuinely distinct values, not

reducible to one another or to some "super-value."[8] It is often noted that the way we value in

ordinary life seems "pluralistic" in this sense. As Thomas Nagel notes, not only do we care about

various different kinds of things, but even the form of moral concerns we encounter varies. For

example, some obligations are to specific people and arise because of specific past actions or

relationships, some form constraints on our behavior due to rights everybody has, some are

directed toward general benevolence toward all existing beings, and some arise out of particular

projects of our own.[9] Familiar values seem to exemplify multiplicity. And values like justice and

efficiency seem to represent distinct goods, resisting expression in terms of a unifying value. We

care about honesty, but also about not hurting others. We care about abstract values such as

fairness, but we also care more about our friends and family than about others. We care about

human rights, but we also care about bringing about the collective good. In contexts of value

pluralism, competing considerations can conflict: if a person must lie to keep a promise, say, then

honesty may recommend promise-breaking while fidelity recommends deception. In such cases,

deciding what to do is often a matter of prioritizing among conflicting concerns.

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[8] See Elinor Mason, "Value Pluralism," *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL=<http://plato.stanford.edu/archives/fall2008/entries/value-pluralism/>.

[9] Thomas Nagel, "The Fragmentation of Value," in his *Mortal Questions* (Cambridge University Press, 1979), pp. 128-141.

Some recent research from anthropology and sociology supports the common idea that the way we value is pluralistic, and that for people around the world there are a number of common but distinct moral cares. In his explanation of this research, Jonathan Haidt argues that there are roughly five basic items: harm/care (helping others and not hurting them); fairness/reciprocity (treating others with justice, not cheating them, honesty); in-group/loyalty (commitment to protecting one's community); authority/respect (respect for, and obedience to, those in positions of authority); and purity/sanctity (cleanliness, chastity, temperance in desires).[10]

In contexts of value pluralism, one approach to moral reasoning is to begin with a set of intuitions or considered judgments and try to bring them into coherence with one another -- as in the method of reflective equilibrium. As Geoffrey Sayre-McCord says, methods of moral reasoning that appeal to our intuitions are aptly considered "conviction ethics," because we begin our moral reasoning not with just any intuitions, but rather with a set of considered convictions that represent what we take to be our best moral judgments.[11] If we are working with principles, as in deontological approaches, the idea is that we work back and forth among our considered

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[10] See, e. g., Jonathan Haidt and Craig Joseph, "The Moral Mind: How Five Sets of Innate Intuitions Guide the Development of Many Culture-Specific Virtues, and Perhaps Even Modules," in P. Carruthers, S. Laurence, and S. Stich (Eds.) *The Innate Mind*, Vol. 3, 2007; Jonathan Haidt and Craig Joseph, "Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues," *Dædalus* Fall 2004, 55-66; Richard Shweder, Nancy Much, Manamohan Mahapatra, and Lawrence Park, "The 'Big Three' of Morality (Autonomy, Community, and Divinity), and the 'Big Three' Explanations of Suffering," in Allan Brandt and Paul Rozin eds., *Morality and Health* (Routledge, 1997), 119-169; and Richard Shweder, Lene Arnett Jensen, and William M. Goldstein, "Who Sleeps by Whom Revisited: A Method for Extracting the Moral Goods Implicit in Practice," *New Directions for Child and Adolescent Development* 67 (1995), 21-39. For discussion, see my Moral Reasoning in a Pluralistic World (McGill-Queen's University Press, 2015).

[11] Geoffrey Sayre-McCord, "Coherence and Models for Moral Theorizing," *Pacific Philosophical Quarterly* 66 (1985), 170-190. For more on the use of considered convictions in coherence reasoning, see, e. g. T. M Scanlon, "Rawls on Justification," in Samuel Freeman, *The Cambridge Companion to Rawls* (New York: Cambridge University Press, 2002), pp. 139-167.

judgments -- such as, you ought to keep this particular promise -- and the general principles we endorse -- such as, promise- keeping is generally morally required -- seeking an acceptable coherence among these.

On the face of it, applying coherence reasoning in contexts of value pluralism we should expect to end up with a moral theory with multiple moral principles -- principles such as "keep your promises," "don't lie," and "don't harm others" -- grounded in various values and leading to potentially conflicting obligations. This is because 1) if values are indeed plural, then we'll need a range of principles reflecting these plural values and 2) such multiplicity is indeed necessary, because the reasons we give for the moral judgments and the principles we endorse will not ultimately be reducible to a single kind of consideration. To say that beneficence and justice are fundamentally different is to say that they resist expression in terms of a single value, and thus the principles behind our judgments will not be reducible either. When various considerations apply in a given case, the principles we endorse will potentially conflict; if values are plural, the proper activity in such a case is weighing considerations against one another rather than seeking out a more general point of view from which our principles can be seen to follow. That is, we have to prioritize our cares, rather than unifying them.[12]

I'll call theories with multiple principles "pluralist deontological" theories. The best-known example of a moral theory that is pluralist in this sense is that of the early twentieth-century ethicist W.D. Ross, who argues for principles grounded in seven or so different kinds of obligations: there are duties of fidelity, such as promise-keeping; of reparation, as when one has done something wrong; of gratitude; of justice; of beneficence; of self-improvement; and of not

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[12] Of course, this is "on the face of it" because there can be further arguments in favor of unifying principles. I address such arguments below.

inflicting harm.[13] A more contemporary example of a pluralist deontological theory is the practical theory of principlism in bioethics. In presenting their pluralist version of "principlism," bioethicists Beauchamp and Childress argue for a multiplicity of principles grounded in four distinct values: respect for autonomy, non-maleficence, beneficence, and justice.[14] In pluralist theories, when principles recommend mutually incompatible actions -- e.g., a person ought to keep an appointment and ought to help an accident victim but cannot do both -- we must determine which obligation is most pressing.

Two important challenges in this area are 1) to understand "coherence" properly in contexts of value pluralism and 2) to give an account of how, in cases of moral conflict, we determine which moral obligations or consideration override others. In recent work, I've tried to address these matters.[15] First, I've argued that the typical understanding of coherence in moral philosophy is inappropriate in pluralist contexts. That approach interprets coherence as involving a norm of "systematicity" -- that the principles of a theory be as few and as simple as possible. A norm of systematicity would entail favoring unified, single-principle theories such as utilitarianism, in which the right action is the one that produces the most happiness or well-being overall. It might seem that even if values are plural we should systematize as much as possible. That is, we might say that 1) whenever there are multiple principles, we make trade-offs between the goal of reducing the number and that of fitting with our considered judgments and 2) that systematicity functions as a tie-breaker: in cases in which two theories fit equally well with our considered convictions, we ought to prefer the more systematic one.

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[13] W. D. Ross, *The Right and the Good*, Chapter 2: "What Makes Right Acts Right?"

[14] Beauchamp and Childress, *Principles of Biomedical Ethics*, 6th ed. (Oxford University Press, 2009).

[15] See texts cited above.

But, as I've argued, systematicity is unjustified and inapplicable in contexts of value pluralism.[16] If values are plural, then there is no reason to prefer more systematized and unified theories; single-principle theories would be less justified than pluralist ones. Let's take a moment to look briefly at the reasoning behind this claim. The preference for unified theories is usually justified epistemologically by appeal to the fact that the beliefs in more unified sets support and explain one another better than those in less unified, more pluralistic ones. For example, David Brink says that "[i]nsofar as a moral theory explains the connections among moral considerations and arranges them in a systematic fashion, as unified theories do, it makes our beliefs more coherent and better justified," and that because it "places a premium on systematic explanation," "coherentism ... favors unified over nonunified or fragmented theories moral theories."[17] In a similar vein, Shelly Kagan talks about the importance of finding moral explanations -- knowing not only that something is so but why it is so. Kagan says we need understanding, and this means having explanations to the extent possible. With respect to the adoption of principles that are themselves not justified by a more fundamental and general principle, Kagan says that "even though explanations may "have to come to an end somewhere," there is "no license to cut off explanation at a superficial level."[18] And later: "An adequate justification for a set of principles requires an explanation of those principles - an *explanation* of why exactly these goals, restrictions, and so on, should be given weight, and not others. Short of this, the principles will not be free of the taint of arbitrariness which led us to move beyond our original *ad hoc* shopping

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[16] *Moral Reasoning in a Pluralistic World*, Chapter 3; "Moral Coherence and Value Pluralism."

[17] David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge University Press, 1989), p. 250.

[18] Shelly Kagan, *The Limits of Morality* (Clarendon Press, 1989), pp. 13 and 14.

lists [emphasis in original]."[19] The common complaint is that pluralist deontology gives us an "unconnected heap of duties," and the hope is that greater systematicity will lead to better explanations and thus improved justification and deeper understanding.[20]

But I claim that this way of supporting systematicity relies on claims that are question-begging or worse in the context of value pluralism. The problem, in a nutshell, is that the relevant claims about understanding and justification are true only if we have independent reason to think that the more systematized a theory is, the more likely it is to be correct or on the right track. This makes sense only if it is justified by implicit appeal to independent reasons for thinking that more unified theories are better, and thus independent reason for thinking values are more unified than our considered judgments would suggest. But if we believe values are plural, there are no independent such reasons.

To see this more concretely, notice that an explanation isn't worth much unless it's a good explanation. To know "why" something is so, you need not just a more general explanatory principle that explains it, but also a reason to think the explanation is a good one. And even when we have a generality that seems to explain something more specific, knowing when that explanation is a good one can be complex. For example, if I were to propose to explain why this cat is black by saying that all cats are black, then I obviously have neither increased justification nor improved understanding, because the "explanation" appealed to is false. If I were to propose to explain why the economy was failing in 2009 by appealing to the general principle that the economy generally fails when the AFC wins the Superbowl (and the Steelers won that year), then

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[19] *Limits of Morality*, p. 13.

[20] For the phrase "unconnected heap of duties," in connection with Ross, see David McNaughton, "An Unconnected Heap of Duties?" *The Philosophical Quarterly* 46 (1996), 433-447. For a similar approach, see Brad Hooker's defense of unification in his *Ideal Code, Real World* (Oxford University Press, 2000).

I also have neither increased justification nor improved understanding -- even though the correlation in question is real. Though there is a correlation between the economy and the Superbowl, that correlation it doesn't depend on any actual causal regularity. The causal mechanism it proposes isn't one after all; the generalization is "accidental." To know "why" something is so, it's not enough to have a general principle that explain it; we have to have some reason to think the explanation is a good one.

This means that we have no reason to prefer the explanations in systematized moral theories unless we have independent reason to think they are good explanations. Take, for example, the obligations of truth-telling and the prevention of harm. With value pluralism in the background, we might explain these by appeal to two distinct principles, grounded in the distinct values of honesty and non-maleficence. In a more systematized theory, we might explain both in terms of a single value, such as the promotion of the overall good, showing how lying leads to harms. To say that increased systematicity yields increased understanding and justification, we would have to have reason to believe that the latter are better explanations. But on what could such a reason be based? If values are plural, there is no reason to think that the the explanations in more systematic theories are better than the ones in theories with more principles. This means we have no reason to prefer more systematic theories, either in cases of trade-offs with intuitive acceptability or when systematicity is used as a tie-breaker: in each case we have no reason to think the explanations -- and thus moral reasons -- in the more systematic theory would be better, and they may well be worse.

Other times, the problem with pluralist deontology and the need for systematicity are framed in terms of avoiding conflict. Multiple moral principles often conflict, and then we face

the problem of determining which obligation outweighs the other. In monistic versions of consequentialism, such as utilitarianism, this problem does not arise: in the rare case where the same amount of well-being is produced by two different actions, we can simply choose whichever we want. But, as has been noted, this feature of monistic consequentialism is not due to its having a single principle, since single principle theories can generate conflict all by themselves. For example, the single principle "keep your promises" can itself lead to conflicting obligations: you might, for instance, promise to give twenty dollars to A and twenty dollars to B and then find that a thief has stolen most of your money, leaving you with only enough to pay one. In the single-principle theory containing only this principle, we would still face the problem of how to judge which obligation overrides the other. What this shows is that insofar as single-principle theories avoid engendering conflicts, it is not only because they have only one principle, it is also because of the form of that principle. So, for example, in monistic consequentialist thinking, there are no moral conflicts, not because there is a single principle, but because that principle is a certain kind of maximizing principle rather than a principle specifying particular obligations.

As an alternative, and to address the problem about judgments in cases of conflict, I have argued for an approach I call "pluralist coherence"; instead of focusing on unity and systematicity, the basic idea is to aim at principled compromises among conflicting values, and being "case consistent" -- which means judging morally similar cases similarly when there are no morally significant differences between them. Case consistency is a common way of reasoning morally. For example, in the abortion debate, it is typical to hear interlocutors accuse one another

of being "inconsistent": of not treating similarly cases that are like one another in morally relevant features.

Case consistency means judging in accordance with what a person judges to be morally significant similarities and differences. This is obviously a complex matter but a paradigmatic example of case inconsistency might be found in framing effects, where people judge cases differently only because of the words used in the description of otherwise identical cases. A set of principles and judgments can be case inconsistent in at least two ways. First, the principles can be structured so that they apply in different ways to cases that have no morally significant difference between them. "Telling a lie at home is wrong" and "telling a lie outside is permissible" are case inconsistent principles, as long as one regards "being at home" versus "being outside" as a morally insignificant difference, as I take it most of us would. Second, in cases of conflict, judgments about one's overall obligation can be made in case inconsistent ways. If I judge that I ought to stop and help accident victims instead of keeping a promised appointment when I dislike the person I am meeting with, but ought to keep my appointment instead of helping accident victims when I like the person I am meeting with, then I have a set of principles and judgments that is case inconsistent from any point of view which takes the "liking" clause to introduce a morally insignificant difference.

With respect to judgment in cases of conflict, both Ross and Beauchamp and Childress say that in such cases, we must use our judgment to "balance" competing considerations. In the approach of pluralist coherence we also must use our judgment, to determine relative weights of various obligations and considerations, but the crucial difference is that these judgments are then subject to consistency demands and are not made on a case-by-case basis. When principles

conflict, our judgments about overall obligations are subject to the same demands of judging in

accordance with what we take to be morally significant similarities and differences. In this

approach, judgments about the relative stringency of various obligations, and judgments about

what is, and is not, a morally significant, are understood along the same lines as other moral

judgments: they are based on considered convictions and subject to demands for case

consistency, and are thus revisable in the back-and-forth method of reflective equilibrium.

Because people value direct and prioritize values differently in fundamental ways, and because

they endorse different judgments about what is, and is not, a morally significant difference, it

follows from this framing that there can be multiple internally coherent moral systems that do

not agree with one another.

This is at best a rough and cursory overview of pluralist deontology and pluralist

coherence, but let's move on. In their book, Zamir and Medina make use of what they call

"moderate deontology" -- an approach that combines deontological thresholds with

consequentialism. That is, they agree with other proponents of the law and economics movement

that consequences should be considered and that measuring them is relevant, but they say that we

should also incorporate constraints -- there are some acts, like killing, that should not be

evaluated solely on a maximizing bases. To put consequences and constraints together, they

appeal to the idea of "threshold deontology": in this approach we follow familiar deontological

principles -- e. g., those against killing and harming others, lying, breaking promises, but are

justified in contravening these principles when consequences warrant.[21] For example, in the case

where we must decide whether to shoot down a plane of citizens that has been hijacked for use as

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[21] For more on "moderate deontology," see Samantha Brennan, "Moderate Deontology and Moral Gaps,"
Philosophical Perspectives 23, *Ethics*, 2009.

a weapon, threshold deontology pushes us to go beyond a consideration of harm, to ask whether the good that will result from breaking the rule against killing reaches the "threshold" at which that action can be justified. Zamir and Medina's book develops an explication of how threshold deontology can be put to use in crafting policy and laws.

While "moderate" or "threshold deontology" is distinct from "pluralist deontology," I believe the former can be usefully seen as an example of the latter.[22] As long as our multiplicity of principles include one that demands promoting the overall good, the moral considerations in play will be the same and the threshold question can be understood as the question of how to judge, in cases of conflicting principles, what overrides what. This is not to say that the idea of threshold deontology should generally be subsumed into pluralist deontology -- the specific expression in terms of thresholds may be particularly apt and useful for certain contexts. But as I will argue below, from an abstract theoretical point of view, seeing threshold deontology as a kind of pluralist deontology can help address some common criticisms of the former view.

2. Incoherence and arbitrariness

Two common and connected criticisms of approaches like pluralist deontology are 1) that they are unacceptable arbitrary and 2) that in their proper form, they ultimately collapse into monist deontology. The arbitrariness objection goes like this: deontological pluralism renders our moral conclusions hopelessly arbitrary, because they rest on judgments: we must make judgments about how stringent or weighty various considerations are, we must make judgments

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[22] In their book, Zamir and Medina distinguish a "factoral" (decision-oriented) from a "foundational" (what values matter) level of theorizing and say they are theorizing at the factoral level. I set this distinction aside here since pluralist deontology brings the two together; in some cases bringing them together allows, I believe, for deeper defenses of the "moderate deontology" approach.

about what overrides what, and we must make judgments about what is, and is not, a morally significant difference. The objection is echoed in Kagan's comments above: without a deeper theory telling us how our principles are connected to one another, we have at best an "ad hoc" shopping list of morally relevant considerations. Even proponents of deontological pluralism sometimes admit this as an objection, going on to argue that the other advantages of deontological pluralism, such as its plausibility, outweigh this as a defect.[23]

This first objection is sometimes linked to the second, about monism. What we need in cases of conflict, it is said, is a principled way of judging what overrides what in such cases, and once we have that, we have effectively a monistic and systematized theory.[24] Furthermore, it is pointed out, it is possible to express value pluralism through a single-principle theory. For example, one might endorse a range of values, call the production of this range of values the good, then endorse a consequentialism in which the single principle recommends maximization of the good,[25] or we can consequentialize a pluralist theory by putting appropriate weights on each action.[26] Intuitively, it is said, this allows us to avoid the implausible sense in which pluralism seems to allow us to avoid doing as much good as possible.[27]

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[23] See, e. g., Beauchamp and Childress, *Principles of Biomedical Ethics*, 6th ed., p. 396.

[24] For example, Sayre-McCord argues that overcoming conflicts requires seeking out a monistic theory (Sayre-McCord 1985, 171–172). For discussion, see *Moral Reasoning in a Pluralistic World* pp. 28-33.

[25] My thanks to Uri Leibowitz, who mentions this possibility in a forthcoming review of *Moral Reasoning in a Pluralistic World*.

[26] For an overview, see Douglas Portmore, "Consequentializing," *Philosophy Compass* 4/2 (2009): 329–347. See also James Dreier, "Structures of Normative Theories," *Monist* 76 (1993): 22–40; Jennie Louise, "Relativity of Value and the Consequentialist Umbrella," *Philosophical Quarterly* 54 (2004): 518–36; and Douglas W. Portmore, "Consequentializing Moral Theories," *Pacific Philosophical Quarterly* 88 (2007): 39–73, Campbell Brown, "Consequentialize This," *Ethics*, Vol. 121, No. 4 (July 2011), pp. 749-771, S. Andrew Schroeder, "Consequentializing and its Consequences," *Philosophical Studies* DOI 10.1007/s11098-016-0768-2.

[27] Dreier, "Structures of Normative Theories," discussed in Brown, "Consequentialize This," p. 669-670.

In a review of Zamir and Medina's book, Avihay Dorfman raises similar concerns and applies them to "moderate deontology."[28] Dorfman says that while appealing to "intuitions" might seem a reasonable way to begin moral thinking and ensure that the morality we are using is connected to commonly held moral beliefs, morality cannot get off the ground without theory. And theory, he says, requires systematicity: within moderate deontology alone, it is "impossible to understand our intuitions in any systematic way so as to solve the conflicts that might -- indeed, will likely -- arise from the need to balance between the different components of this theory in general and in each and every particular case (say, between the deontological commitment to treat people as equal, on the one hand, and as free agents, on the other)."[29] Dorfman says further that solving this problem means leaving "moderate deontology" aside in favor of a monistic framework: to judge appropriately in cases of conflict requires comparing values along a single measure, and thus requires a monistic meta-theory; once we realize this, we are better off moving explicitly to "humane consequentialism" -- which maximizes value but is sensitive to the various sources of value.[30] The charge, then, is that moderate deontology is "arbitrary" and "incoherent": it is arbitrary to insist on using intuitions in the absence of systematized moral theory, and it is incoherent to describe the theory as moderate deontology when it really collapses into a version of consequentialism.

In their reply regarding incoherence, Zamir and Medina make several strong points, but in my view they have a more powerful response available to them.[31] Let's start by looking at

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[28] Dorfman, "Humane Consequentialism."

[29] Dorfman, "Humane Consequentialism," p. 66.

[30] Dorfman, "Humane Consequentialism," see p. 69.

[31] Zamir and Medina, "*Law, Economics, and Morality*: A Response to Critiques."

what they have to say. First, with respect to the incoherence charge, they point out that there is a

basic difference between weighing considerations against one another and maximizing a good --

even when "the good" is understood to involve various possibly conflicting values. "The

difficulty with these attempts," they say, "is that even those consequentialist theories that do pay

heed to values such as autonomy, human dignity, and basic liberties, do so in the wrong way.

They treat these values as goods that should be maximized, rather than as constraints on

maximizing the good. Being agent-relative, moderate deontology prohibits the intentional killing

of a baby, even when there is no doubt that this is the only way to prevent her father from

intentionally killing two other babies. Consequentialists, taking an impartialist outlook, view

such a prohibition as utterly irrational, as it results in more intentional killings overall."[32]

This point about the difference between constraining and maximizing leads them to a

second one. As long as we're endorsing a genuinely pluralist theory, they say, we're always going

to encounter the same difficulty about how to weigh considerations against one another. Any

pluralist theory has the problem, but given the other advantages of pluralist theories overall --

and especially how preferable they are with respect to fitting with commonly held moral views --

we should accept the arbitrariness problem in order to reap these other benefits. Pragmatically

speaking, they explain, faced with the "Scylla" of extreme consequentialism, which is willing to

sacrifice anything and anyone in order to achieve the general good, and the "Charybdis," of

absolutist deontology, with its refusal to consider aggregate good at all, the choice -- of moderate

deontology" -- is clear.[33]

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[32] Zamir and Medina, "*Law, Economics and Morality*: Reply to Critiques," p. 10.

[33] Zamir and Medina, "*Law, Economics, and Morality*: A Response to Critiques," pp. 19-20. The metaphor is from Larry Alexander. We saw above that Beauchamp and Childress say something similar.

This back and forth highlights, I think, two important matters. One is the question of the relationship between value pluralism, consequentialism, and versions of deontology. Is there a difference between weighing moral considerations against one another and expressing that through pluralist deontology versus weighing moral considerations against one another and expressing that through single-principle consequentialism? And if so, what is that difference, exactly? Why prefer one framework over the other? The second is the question of arbitrariness in pluralist contexts of and how this relates to meta-ethical matters of justification and methodology.

With respect to the first question, as we've seen, there are various ways that pluralism about value can be associated with monistic moral theories. Most basically, one might give a pluralist theory about the good and then say that the right thing to do is simply to maximize the good overall. For example, G. E. Moore is sometimes thought to have held such a view -- and indeed, when it comes to the difficulty of weighing, Ross deployed a similar "partners-in-crime" defense as Zamir and Medina deploy above. More recently, Brad Hooker's rule consequentialism brings together pluralist values by arguing that they can be systematized and thus brought under a single principle.[34]

A different strategy involves "consequentializing." In a recent series of papers, a range of philosophers has argued that for any moral theory, one can find a "consequentialist" version of that theory: by assigning to each individual outcome the proper weight, one can find a theory that ends in all the same conclusions about all the same cases, while expressing those conclusions as

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[34] Brad Hooker, *Ideal Code, Real World* (Oxford University Press, 2000).

following from the imperative to "maximize" good consequences overall.[35] As Douglas Portmore puts it in an overview of the procedure: "take whatever considerations that the nonconsequentialist theory says determines the deontic statuses of actions and insist that those considerations determine how their outcomes rank."[36] Portmore says the motivation for consequentializing is found in the intuitive appeal of the account of reasons, action, and the good that is associated with consequentialism. From the consequentialist point of view, the reasons for and against performing an act are wholly determined by the reasons there are for preferring its outcome to those of alternatives; then the right action for a person is the one she has most overall reason to prefer.[37] This, he says, fits with our other beliefs about rationality. Portmore cites Scheffler as attributing to these factors the "spell-binding force" consequentialism has, and its ability to "haunt us."[38] In addition, Jamie Drier says that there is a "stigma" associated with alternatives, on grounds that they they seem to allow us to not do the most good that we can do, which is counterintuitive.[39]

Both possibilities for moving toward consequentialism complicate Zamir and Medina's response. If autonomy, justice, liberty, etc. are genuine values that form part of the good, then they will be genuinely incorporated into the consequentialist theory. So it's less clear how weighing "just is" different from maximizing. And the strategy of "consequentializing" allows for constraints and agent-relative moral judgments -- making it less clear that the constraints they

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[35] See references cited above.

[36] Portmore, "Consequentializing," p. 330.

[37] Portmore, "Consequentializing," p. 333.

[38] Portmore, "Consequentializing," p. 332. Phillippa Foot also used the "haunting" metaphor. See her 'Utilitarianism and the Virtues'. *Mind* 94 (1985): 196–209.

[39] Drier, "Structures of Normative Theories," discussed in Brown, "Consequentialize This," p. 669-670

describe are incompatible with consequentialism. For example, we can assign the killing of the one baby a high enough weight that killing him or her will always be non-optimal, even compared to the father killing the other two babies. In this approach, the "impartiality" of consequentialism has been reconfigured to allow for constraints on our behavior that mimic the ones of threshold deontology.

Zamir and Medina are right, I think, to say that "weighing" is different from "maximizing" and that moderate deontology escapes the incoherence charge -- but the existence of these strategies suggests that more could be said. And I believe that seeing moderate deontology as a version of principle pluralism helps show the way to do this.

Consider first the "Moore"-style approach of combining value pluralism and principle monism. There are, I believe, several reasons to think that if values are plural, we should refrain from expressing them through a single-principle framework. The first of these has to do with dilemmas. In a case where honoring one value requires performing action A and honoring another requires performing action B, and A and B are mutually incompatible, a theory with multiple principles allows us to say that both acts are obligatory, so that whatever we choose, something sub-optimal has happened. While there is longstanding debate on how to interpret the formal status of moral dilemmas, many theoretical and applied ethicists take moral conflict to be significant in practice and take actual dilemmas -- cases in which the person ought to do A and ought to do B and cannot do both -- to be real. One reason is that moral dilemmas play a role in our moral lives: they leave a "remainder" or "residue," reflecting that something that ought to have done wasn't, and they thus alert us that things are not as they ought to be. This, in turn,

means that if possible we should configure our lives and institutions, as much as possible, so that

dilemmas do not arise - so that we can honor as many of our obligations as possible.

This idea of remainders and trying to avoid dilemmas, originally articulated by Ruth

Marcus, has been called a "mutuality principle" by bioethicist Joseph DeMarco.[40] For example,

DeMarco describes a dilemma in which parents want to refuse life-saving blood transfusion for

their child on religious grounds. Respect for parental autonomy means honoring their wishes; but

respecting the rights of the child means rejecting them. DeMarco says that even if we agree with

the outcome of Beauchamp and Childress's "principlism" -- that the rights of the child are

overriding in such cases -- the mutuality principle points to the importance of investigating and

eventually developing alternative treatments -- ones that, because they do not require

transfusions, would allow us to honor both values at once. For dilemmas to play this role, they

must be real in some sense, rather than being explained away -- by, for example, saying that only

the most stringent obligation is our our actual obligation, or by adding exception clauses to our

principles.[41] With a multiplicity of principles, the possibility of conflict, what it represents, and

the possibility of taking dilemmas to be real are all immediate.

Even when maximizing single-principle theories are pluralistic with respect to value, it is

difficult to see how they can capture these ideas about conflicts and dilemmas. As we've seen

above, this is not so much because they are "single-principle" theories, but rather because of their

maximizing form. Suppose autonomy, justice, liberty, etc are different values, and we weigh

them against one another into a single property of "goodness," and then we articulate a single-

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[40] Demarco, J. P. (2005). Principlism and Moral Dilemmas: a New Principle. *Principlism and Moral Dilemmas: a New Principle, 31*(2), 101–105. http://doi.org/10.1136/jme.2004.007856

[41] Ross's idea of "prima facie" duties is an example of the former; Richardson's "specification" approach is an example of the latter. See discussion in *Moral Reasoning in a Pluralistic World*.

principle requiring us to maximize the good. In that case, when we maximize the good we've done what we ought: there is no sense of a remainder or residue. In the transfusion case, as long as we've maximized the good by respecting the rights of the child, maximizing consequentialism renders obscure the sense that no matter what action is undertaken, an obligation was unmet; value has been lost, and something regrettable has occurred.

Moving beyond dilemmas, a second relevant consideration has to do with the process of weighing and the possibility of disagreement. As deontological pluralism makes obvious, determining the weight of various values is a difficult problem -- and it is a problem about which about we may expect to find a range of different answers and substantive disagreement from one person to another. As I explain in my book, some moral disagreement is plausibly explained by differences in how to balance conflicting values. Two people might each value truth-telling and promise-keeping, but disagree about what to do when keeping a promise requires telling a lie -- because they prioritize these values differently.

Because it puts the weighing process front and center, the framework of principle pluralism facilitates our engagement with one another about these differences. For example, the people who disagree about promise-keeping and lying may, at first, know only that they disagree: one says the promise must be kept, the other says the truth must be told. If they frame their thinking in terms of maximizing goodness, their disagreement will be constructed in an unilluminating way -- as one over whether one thing is most "good" or another thing is most "good." But if they frame their thinking in terms of multiple values and moral conflict, a exchange demanding reasons will bring to light the reasons for their disagreement: they respect similar principles but disagree over prioritization in the given case.

A third consideration is that even beyond the concerns about agent-relativity that Zamir and Medina point to, there may be no way to fit a this style of maximizing to our considered judgments. The pluralist coherence I described above allows us to make fine-grained distinctions, allowing us to say how in some circumstances one value overrides another but not in other circumstances. For example, we ought to pay back what we owe and we ought to care for our children. But there's a difference between paying back five cents when doing so would require travel taking me away from my kid for a long time and paying back a significant sum when doing so takes me away for ten minutes. The cases are different in morally significant ways, and from the point of view of pluralist coherence we are right to balance our obligations in ways that fit with our considered judgments about such cases. Even if our theory of the good includes both of the values in question, how would we incorporate them into our theory of the good so that maximizing the good would lead to the one conclusion in the one case and the other in the other?

Now let's look at the more technical "consequentializing" strategy, in which weights are assigned to individual outcomes so that the moral conclusions are identical to those of the deontological theory. In this strategy the third consideration above will not apply, since we can match any set of outcomes. With respect to dilemmas, as Portmore points out, there are some subtleties, but ultimately the first point stands: consequentializing does not allow for the kind of dilemmas most pertinent to the "mutuality principle" mentioned above. The subtleties arise because consequentializing can allow for "prohibition dilemmas" -- in which no matter what one does, one has acted wrongly. This is because it is formally possible to assign ranks to outcomes (in a way that is dependent on which actions are undertaken) in such a way that no matter what a

person does, there is another action whose outcome has a higher rank.[42] However, consequentializing is incompatible with "obligation" dilemmas -- the dilemmas in which there are two conflicting obligations.[43] Plausibly, this is the kind of obligation most relevant to the mutuality principle.

But most important here is the fact, noted already by others, that the consequentializing strategy makes it obscure how we are to explain why our moral judgments are what they are. If our moral judgment is that baby killing is not allowed, even if it would prevent other infant deaths, then from the point of view of pluralist or moderate deontology, we have a simple explanation of why: there is a principle against it, and either the principle isn't overridden or the relevant threshold has not been met. This is an explanation we can use and appeal to in other contexts and justifications. Once we have consequentialized, what are we to make of such explanations?

As Andrew Schroeder argues, this point about explanations makes a difference pragmatically, since it may affect the way we reason. Using the example of debate over whether measuring DALYs (disability-adjusted life years) should incorporate distributive considerations, Schroeder argues that framing the issues in terms of consequentialism distorts them. From the consequntialist point of view, the "simpler" and default assumption is that distributive considerations should not factor in. Schroder gives an example of how this leads one

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[42] Portmore, "Consequentializing," 339-340.

[43] Portmore argues that obligation dilemmas are conceptually impossible for formal reasons, but I think his argument is question-begging in its definition of "obligation." There are various ways to formulate obligation dilemmas so that contradictions do not arise.

consequentialist to ignore distributive factors despite the fact that most people do "take

distribution to be important in some way."[44]

Let's turn now, to the matter of arbitrariness. Both moderate deontology and pluralist

deontology strike many critics as hopelessly "arbitrary." We saw above Kagan's idea that cutting

off explanation at an overly superficial level may leave our judgments lacking adequate

justification. Theories that engender conflict, as well, require judgment in cases of conflicting

obligations, and it's often said that this use of judgment is arbitrary in a problematic way. In their

bioethics theory of principlism, Beauchamp and Childress appeal to the idea of "balancing"

conflicting considerations to decide what is most important to do overall. In response, critics like

Alan Richardson argue that this kind of balancing is *ad hoc*. What often happens, Richardson

says, is that since we have opinions about what the right outcome should be overall, instead of

assigning weights to various obligations, we improperly work backward -- "reading off" the

weights from our judgments about what to do. This, he says, is inappropriate because it means

the weights aren't assigned in an independent way but rather are being built back in to get the

outcome we want.[45]

Critics of Zamir and Medina's threshold deontology have a similar complaint. Dorfman

says that without a "systematizing" theory in the background, the judgments of moderate

deontology are arbitrary and cannot be justified. Larry Alexander, drawing on work by Anthony

Ellis, argues that the problem with threshold deontology is that the setting of the threshold is

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[44] Andrew Schroeder, "Consenquentializing and Consequences."

[45] Richardson, Henry, "Specifying, Balancing, and Interpreting Bioethical Principles," *Journal of Medicine and Philosophy*, 25 (2000), 285–307, pp. 296-297. See also his Richardson, Henry, "Specifying Norms as a Way to Resolve Concrete Ethical Problems," *Philosophy and Public Affairs* 19 (1990), 279-310.

always arbitrary.[46] How can we determine when consequences are sufficient to overrule a deontological constraint and when they are not? It is useless to appeal to "judgements," Ellis and Alexander say. What is needed to address the problem is an account of how judgments can be made appropriately. "It is not enough," Ellis writes, "simply to assert that we have to weigh the wrongness of the action against the badness of the consequences of refraining from it. That is not the solution, but the problem. What we need an account of is how that weighing can be carried out -- an account of what considerations judgment is supposed to be exercised upon, and how that exercise works upon them."[47]

In their response, Zamir and Medina point out -- again, correctly in my opinion -- that the same problem arises for any pluralistic normative theory.[48] Indeed, to avoid the problem of arbitrariness, it is not enough to have a maximizing theory: to avoid having to make judgments about relative prioritizations and weighings, we must embrace monism about value as well as the form of a single-principle. Again, however, I think there is a stronger response available, and this this response can be seen more clearly when we view threshold deontology as an instantiation or version of a pluralist deontology. In my opinion, it's not just that any pluralistic theory has the same problem. I would say more: that pluralist theories have no more problem with arbitrariness than monistic single-principle ones. In fact, they may be less arbitrary.

To see this, we have to get into deeper questions about methodology and justification. There are two kinds of approaches to justifying monistic single-principle theories. One way is

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[46] Larry Alexander, "Deontology at the Threshold;" Anthony Ellis, "Deontology, Incommensurability and the Arbitrary," *Philosophy and Phenomenological Research* 855 (1992).

[47] Anthony Ellis, "Deontology, Incommensurability and the Arbitrary."

[48] More precisely: for any pluralistic normative theory that does not "accord one factor an unqualified lexical priority over the others" ("*Law, Economics, and Morality*: A Response to Critiques," p. 19).

through a process like the one already described, in which we start with our considered

convictions and use something like reflective equilibrium to try to bring them into coherence.

But sometimes, it is claimed that consequentialism has another form of justification that doesn't

depend on considered convictions or judgments at all. Peter Singer, for example, argues that

consequentialism has a "rational" foundation that does not depend, as deontological theories do,

on judgments.

Looking first at the intuitions and coherence style of justification, I claim that when

monistic single-principle theories are justified by appeal to convictions and coherence, pluralist

deontology has no greater problem with arbitrariness than single-principle theories do. The

interpretation of coherence as case consistency, above, asks us to use our judgment to evaluate

the relative weights of various moral considerations, and to bring those into coherence with one

another. In the context of conviction ethics, this is the same way all of our moral beliefs are

evaluated and justified. So, contra Ellis, appealing to "judgments" in this context is appropriate:

if the method of reasoning is conviction ethics, then appealing to judgments, and trying to bring

them into coherence, is the way we bring justification to *all* of our moral judgments and

conclusions. So it is appropriate to use it in cases of assigning weights and balancing. Analogous

remarks apply to Richardson's complaint about methodology and "reading off" the various

weights. In the context of conviction ethics, reading off the relative weights of obligations from

our judgments about what should override what in the given circumstances is an instance of the

same methodology -- bringing coherence to considered convictions -- and so is unproblematic.

It may seem that value-monist single-principle theories are still better than pluralist ones

because they reduce the need for judgment: in case of a difficult dilemma or conflict or question

about the threshold, a monistic single-principle theory may allow us to calculate an answer where the pluralist must make a role for judgment about the answer. But I think that, at least in the absence of more powerful justificatory considerations, this is mistaken. It is not better to have an answer one can calculate than an answer that requires judgment unless we have some reason to believe that the calculated answer is the right one. Using numerology on the letters in a moral question involves calculation rather than judgment, and yields an objective answer based on this calculation. But any answers derived this way would be wrong, because they aren't based on the right kinds of moral considerations. Unless we have independent reason to believe the monist single-principle theory is more accurate in general, its answers are no less arbitrary, and may well -- as in the case of numerology -- be worse.

What might those independent reasons be? If we begin from the assumption that values are plural, then as we saw in section 1, the monistic single-principle theory is not more accurate than a pluralistic one, it is less accurate, yielding explanations based on false generalizations. Even if we are agnostic about value pluralism, we still don't have positive reason to trust monistic single-principle theories more. In fact, given the widespread acknowledgement that the way we value in practice is generally pluralistic, it seems we would need reason to believe that we're making a widespread mistake, in order to conclude that systematizing would lead us in a good direction.

In the absence of these independent reasons, a preference for monistic single-principle theories must rest on "judgments" similar to the ones denigrated in pluralist and threshold theories. For example, some forms of utilitarianism rest on considered convictions about the moral relevance of happiness, or preference satisfaction, or whatever. They also must appeal to

some judgments about how to generalize -- rejecting, for example, familiar Kantian intuitions about the importance of the separateness of persons in favor of stressing the importance of the similarity of preferences or utils. This means that not only do monistic single-principle theories rely on "judgment" the way pluralistic theories do, they often do so in ways that reject some of our most familiar and widely shared values in favor of others. So -- again, at least in the absence of strong independent reasons to believe in value monism -- they are no less arbitrary than pluralist theories, and perhaps more so.

So far I've talked just about the possibility of monistic single-principle theories that are justified through coherence applied to considered convictions. It is sometimes claimed that monistic consequentialism has a different foundation: one based on rationality rather than judgment. In the next section I argue that these justifications for monistic consequentialism are harder to come by than is sometimes suggested.

3. Does consequentialism have a rational justification?

As I explained in the introduction, it is sometimes said that even if value pluralism is incompatible with consequentialism and the pursuit of efficiency, it is the former that must give way, on grounds that the latter are more rational, ethically neutral, or universally acceptable than those appealing explicitly to values like justice, fairness, and liberty. The argument at the end of the previous section applied only to versions of consequentialism justified through bringing coherence to considered convictions and it is sometimes said that consequentialism has a different justification entirely -- based on rationality and impartiality. From this point of view, no ethical theory based on intuitions or considered convictions can be justified appropriately, and

because deontology appeals to these, consequentialism is more rationally justified as an ethical theory.

In their much-discussed book *Fairness Versus Welfare*, Louis Kaplow and Steven Shavell argue that fairness and overall well-being are often in conflict in such a way that pursuing fairness requires actions that decrease, or lessen an increase, in overall well-being, and that in these cases we must choose to promote welfare. As reviewers have noted, the fact that fairness and welfare can conflict, and the fact that the welfare costs of honoring fairness can be very high indeed, are well-known -- and the more innovative and original contribution of the book is in its second part, where the authors analyze in details how, exactly, these trade-offs are required in specific areas of the law, such as contract law and law enforcement.[49] In their more contentious first part, the authors argue that pursuing fairness at the expense of welfare is intolerable and should not happen. We now know the question that arises: why, when trade-offs are required, must we choose in favor of well-being rather than fairness?

Like others, Kaplow and Shavell support this conclusion in part by arguing that deontological considerations cannot be supported epistemologically. Deontological considerations, they say, reflect social norms that are not themselves value-grounding but rather merely expedient -- in the right circumstances, they lead us to constrain otherwise harmful actions and they act as "rules of them" for actions that increase overall welfare so that we do not have to stop and calculate.[50] These social norms, they suggest, have their roots partly in evolution: by natural selection, we evolved to have attitudes in favor actions that would generally

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[49] See Jules Coleman, "Review: The Grounds of Welfare" (a review of Kaplow and Shavell).

[50] Kaplow and Shavell, *Fairness Versus Welfare*, p. 68.

promote well-being in the long run, even if they did not necessarily promote well-being in the short run. For instance, a social norm of promise-keeping might, if followed, generally promote well-being in the long term by allowing us to depend on one another, so we evolved to have beliefs, attitudes, and emotions that support a social norm of general promise-keeping -- even though we know how that keeping some promises does not promote well-being. Because they are not ultimately value-grounding, a policy-maker has no reason to be faithful to these social norms: even if day-to-day life we feel we ought to keep our promises, tell the truth, and so on, careful analysis would show that those feelings should be overruled when we know that breaking the rule would increase welfare overall.

In a comprehensive review of the book, Jules Coleman argues a) that almost all of the arguments in the book in favor of rejecting fairness rest ultimately on their evolutionary argument and 2) that their evolutionary argument fails.[51] Why think that beliefs in favor of deontological considerations were evolutionarily successful because they were false? More fundamentally, if we assume that the beliefs and attitudes that were evolutionarily successful can always be seen as ones that bring about overall well-being, then this "overwhelms the argument": no matter what we choose, we're producing overall welfare when we choose it.[52]

Appealing to overall welfare has often seemed to people a more trustworthy approach than deontological views that appeal to intuitions and moral judgments, and is often thought to have some basis in rationality that transcends the "subjective" intuitions of conviction ethics and deontology. It's interesting to compare the Kaplow and Shavell vs. Coleman exchange with Peter

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[51] Jules Coleman, "The Grounds of Welfare."

[52] Jules Coleman, "The Grounds of Welfare," p. 1535.

Singer's recent arguments in favor of utilitarianism over deontology. Like Kaplow and Shavell, Singer argues that our intuitions are unreliable, but to a greater degree than Kaplow and Shavell, he offers a positive attempt at justifying appeal to welfare as an alternative -- going beyond evolution to discuss other evidence. Yet, or so I will argue, Singer's arguments also run into difficulties and do not show the superiority of consequentialism.

In a recent paper, Peter Singer lays out his case against deontological views in detail.[53] He starts with an argument that intuitions are unreliable and should not be used in moral reasoning, an argument he makes in three parts. First, Singer cites the research of psychologist Jonathan Haidt as showing that when it comes to making moral judgments, people typically make a snap intuitive judgment rather than reasoning out an answer; when they do deliberate, they seek out rationalizations of the judgment they've already formed, rather than using reason to come to a judgment.[54] Singer endorses Haidt's interpretation of his empirical work as showing that people's moral judgments when using deontological thinking are typically not based on reason, but rather on knee-jerk emotional reactions.

Second, Singer says that recent neuroscientific research supports Haidt's conclusions and shows how intuitive judgments are associated with emotion rather than reason. Joshua Greene and others conducted studies in which they asked people to make moral judgments about difficult dilemmas such as the famous trolley problems.[55] Some dilemmas had "impersonal"

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[53] Peter Singer, "Ethics and Intuitions."

[54] See, e. g., Jonathan Haidt, "The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment," *Psychological Review* 108 (2001): 814–834.

[55] See, e. g., Joshua Greene, "The Secret Joke of Kant's Soul," In Walter Sinnott-Armstrong (ed.), *Moral Psychology, vol. 3, The Neuroscience of Morality: Emotion, Disease, and Development* (Cambridge MA: MIT Press 2007).

options for saving five people at the cost of one -- options such as flipping a switch to divert a

train allowing five people to live while one dies. Others had "personal" options for saving five

people at the cost of one -- options such as pushing a large person off a footbridge, into the path

of an oncoming train, to save five other people further down the track. It has long been noted that

people are much more likely to regard it as permissible to flip a switch than to judge it

permissible to push a person off a bridge, even though the outcomes are essentially the same: one

dies; five live. Greene notes first, that those presented with a personal dilemmas saw more

activity in the emotional, rather than cognitive, part of the brain; second, that those few subjects

who did judge it best, in the personal case, to sacrifice one to save five, took longer to make their

judgments; and third, that those who did judge it permissible to push the person off a footbridge

onto the tracks showed more activity in the cognitive, rather than emotional, part of the brain.

Singer and Greene both say that these results indicate that utilitarian moral reasoning is more

cognitive and less affected by emotion while deontological reasoning is less cognitive and more

affected by emotion.

Like Kaplow and Shavell, Singer then says that when seen in the light of evolution, the

results of these studies are best explained by appeal to the idea that our moral intuitions are

generally the untrustworthy product of of that process, and that they were formed in response to

an environment in which hitting, pushing, and other "personal" interactions were common, and

there was no such thing as switch flipping. We evolved to have emotional reactions against

hitting, pushing, etc. and not against flip switching, but only because flip switching didn't exist.

It follows that any distinction between the two kinds of cases is arbitrary, since the result is

essentially the same. And thus our moral intuitions, which introduce just such a difference, cannot be trustworthy.

Singer says that unlike rival theories, consequentialism has a rational, rather than intuitive, foundation. To save five at the cost of one is "surely, the rational answer," regardless of how the one is killed. Singer says it is a fact that the death of one person is a lesser tragedy than the death of five, and that our knowledge of this fact is not an "intuition" in the ordinary sense. It is not emotional; it is not likely to be based on love or caring; and it is not likely a product of evolution. Even if we are to consider it an "intuition," it is a special kind, a "rational" intuition, that is thus more trustworthy.

Singer's argument raises many questions and has engendered a great deal of response. For example, Joakim Sandberg and Niklas Juth's "Ethics and Intuitions: A Reply to Singer" defends the use of reflective equilibrium by pointing out a) that Singer's characterization of reflective equilibrium is inadequate, since the point of using it is to inform an alter our initial judgments, not simply trust them and b) that Singer's own ethical theory must appeal to intuitions to be supported.[56] Building on some of these existing critiques, I show here some specific ways that intuitions come into play in Singer's justificatory strategy.

This strategy, I claim, actually relies on intuitions at several levels. Recall that Singer's version of consequentialism is based on the overall satisfaction of interests. The first intuition he needs, then, is that interests -- and only interests -- ought to be taken into account. Singer says

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[56] Sandberg and Juth, "Reply to Singer." Sabine Roeser's, "Intuitions, Emotions and Gut Reactions in Decisions about Risks: Towards a Different Interpretation of 'Neuroethics'" challenges Singer's use of the empirical work, on the grounds that not all intuitions are simple snap judgments; intuitions, therefore, cannot be so easily be dismissed. See also Folke Tersman, "The Reliability of Moral Intuitions: A Challenge from Neuroscience," *Australasian Journal of Philosophy* 86.3 (2008): 389-405 and Guy Kahane, "Evolutionary Debunking Arguments," *Noûs* 45 (2011), pp. 103-125, pp. 119-120.

that we can have interests in "avoiding pain, in developing [our] abilities, in satisfying basic needs for food and shelter, in enjoying warm personal relationships, and in being free to pursue [our] projects without interference." Even if Singer is right that we do take interests into account, justification of his view requires an explanation for why we ought to take certain interests into account. In the absence of moral intuitions, how can this be justified? After all, as is often pointed out, when it comes to our own interests we discriminate: we take some into account and not others; we take pains to actively foster some kinds of interests and rid ourselves of others. Some interests do not seem worth taking into account at all, such as those arising from projects of cruelty. One is not rationally or cognitively deficient for failing to take these interests into account, and for trying to eliminate them instead. To say that interests are morally significant, and to say which kinds of interests to take into account, requires justification that must depend on judgments of some kind about moral significance.[57]

Singer's consequentialism would also require an explanation for why we take only interests into account. After all, people often take considerations into account other than interests: on what grounds should these be ignored? As we've seen in section 1, recent empirical research suggests that people around the world care not only about benevolence -- that is, helping others and not hurting them, by satisfying and not frustrating their interests -- but also about more relational values such as reciprocity, fairness, loyalty, and respect. To support consequentialism, we would need an explanation for why these candidates for moral significance should be ignored. To be distinct from the views he is denigrating, and especially from pluralist

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[57] In an exchange with Harriett McBryde Johnson, Singer suggests that preferences against adopting mixed-race infants are unreasonable while preferences against adopting infants with disabilities are not; this seems like an example of taking into account some interests rather than others. See Harriett McBryde Johnson, "Unspeakable Conversations," *New York Times Magazine*, February 16, 2003.

deontology, Singer's consequentialism must give us a reason not only for taking interests into account, but also for ignoring other possibly morally relevant factors, in order to take only interests into account.

A second, and more complex, matter concerns the rational status of the generalizing move -- from taking interests into account to taking everyone's interests into account equally. This matter is complex, in that the status of these "generalizing" intuitions can only be evaluated against a theoretical backdrop involving the relationships among concepts such as universality and rationality. Central to Singer's view, of course, is that everyone's interests must be taken into account equally. With respect to why this is so, in *Practical Ethics* Singer writes that "In accepting that ethical judgments must be made from a universal point of view ... I am accepting that my own interests cannot, simply because they are my preferences, count more than the wants, needs, and desires of anyone else."[58] In their discussion, Sandberg and Juth argue that there is disagreement about these kinds of intuitions and that these are plausibly the result of evolution and cultural influence just as Singer says that "intuitive" intuitions are. For example -- and as moderate deontology itself shows -- many philosophers argue on behalf of special obligations that we bear to particular people, such as the obligations parents bear to their own children, which cannot be universalized in any Singerian way. Given the prominence of alternatives, theoretical intuitions about universalizing are contentious.

I claim that, beyond this matter, even universalization itself is not straightforward and relies on intuitions. First, notice that the contractualisms of Scanlon and Rawls are typically interpreted as "universalizing": Scanlon's view, for example, is based on a consideration of what

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[58] Singer, *Practical Ethics* 3rd edition, p. 11.

"no one could reasonably reject" and is described by Elizabeth Ashford and Tim Mulgan as being based "on a universal trait of persons -- rational moral agency," thus providing "general principles whose scope is global."[59] In fact, it is possible to see the "case consistency" described above as a form of universalizing as well: it universalizes over "morally relevantly similar" cases and requires us to take them into account equally.

Given alternative forms of universalizing, what would make the universalization of consequentialism more rationally-based than that of alternatives? Singer's utilitarianism universalizes over interests, in the sense that it treats all interests as deserving of consideration in the same way. Contractualism universalizes over persons, in the sense that it treats all persons as deserving of consideration in the same way. Case consistency universalizes over morally relevantly similar cases, in the sense that it treats all such cases in the same way. The existence of alternative forms of universalization casts doubt on the claim that Singer's particular form of it is required by rationality itself and suggests that this, too, relies on some kind of moral intuition.

There is, I believe, one sophisticated potential line of thought toward establishing that consequentialist universalizing is particularly rational. That is to say that consequentialist universalizing is the deepest, most rational form of universalizing, because it explains, at a more fundamental level, distinctions drawn by rival forms of universalizing. With respect to alternative forms of universalizing like that associated with contractualism and case consistency, this line of thought emphasizes that the form of universalizing associated with treating all interests as deserving of consideration in the same way is more fundamental than 1) that associated with

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[59] Elizabeth Ashford and Tim Mulgan, "Contractualism," *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2012/entries/contractualism/>.

treating all persons as deserving of consideration in the same way and 2) that associated with

treating all similar cases as deserving of consideration in the same way. It is more fundamental,

because interests are more conceptually basic: treating interests as deserving of consideration in

the same way allows us to explain why and when it is morally required to treat persons as

deserving of consideration in the same way, and why and when certain cases should be seen as

morally relevantly similar and when they should not be. The form of universalizing of Singer's

utilitarianism, the thinking goes, would allow us to explain what rival forms of universalizing

must support through intuitions and coherence, namely the morally relevant similarity of persons

(e. g., in contactualism) or the morally relevant similarity of cases that are similar in morally

significant ways (e. g., in pluralist deontology).

But I claim that however we evaluate these forms of universalizing overall, the form

associated with utilitarianism fails to be based on rationality in the relevant way. Notice first that

it runs into the same kind of problem described in section 1. Just because a level of explanation

seems "deeper" or more "fundamental" does not necessarily mean it is better justified or on the

right track: we need reasons to think the explanations are good ones. And as we've seen, when it

comes to depth and explanation, matters are complex. Again, it might appear that universalizing

over interests allows us to "explain" why and when equal treatment of persons and non-persons

is or isn't required, so that universalizing over interests is deeper and more fundamental. But,

again, it's not enough to have "an" explanation for something. We need evidence the explanation

is the right one. In the absence of other considerations in favor of utilitarianism, to say that

universalizing over interests yields more accurate explanations than other forms of universalizing

would be question-begging.

To illustrate this with an example, consider that to grant moral consideration equally to the individual gene sequences in a person would, in a sense, be more "fundamental" than granting equal consideration to individual interests: it would allow us to explain when, and why, we should treat interests of particular persons equally. But it would be most peculiar. This is because gene sequences are not a morally relevant category the way interests are. This shows we need moral evaluation to determine the right level of depth, as opposed to assuming that the more fundamental, the better.

I've argued that Singer's mode of justification appeals to "intuitions" in the same way that deontological theories do, and though I can't make this case here, I believe the same can be said for any attempt to justify consequentialism. In any case, I would like to conclude this part of the discussion by introducing the possibility that Singerian methodology, when coherently and consistently applied, might support not utilitarianism but rather pluralist or moderate deontology. With respect to basic intuitions, we've seen that shared and widespread moral intuitions include those appealing to a range of values, including, but not restricted to, the "interests" that utilitarianism takes into account. There is also some reason to think that the application of "case consistency" or a similar norm is a widely shared form of universalizing, perhaps more than the form of universalizing associated with utilitarianism. Maybe appealing to intuitions and universalizing supports pluralist or moderate deontology, rather than utilitarianism.

Singer himself has said that his methodology justifies "starting with a broadly utilitarian position."[60] There are many things this might mean. But one possibility is that it be interpreted to mean that 1) that while interests are, prima facie, morally significant, they are not always morally

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[60] Singer, *Practical Ethics*, p. 11.

significant, because other considerations can count against their being so and 2) that while

interests are (sometimes) morally significant, other values, such as respect for autonomy and

justice -- are important as well. The benevolence and non-maleficence associated with

utilitarianism would not be eliminated, they would just be contoured differently and potentially

overridden by other factors. The result would be a version of pluralist or moderate deontology.

Value pluralism poses a challenge to certain methodologies of the law and economics

movement. Drawing on the framework of pluralist deontology and the methodology of pluralist

coherence, I've argued 1) that the alternative methodology associated with "moderate

deontology" can be defended against charges of arbitrariness and incoherence and 2) that there's

reason to doubt that consequentialism has a special rational form of justification that avoids the

difficulties associated with relying on intuitions and judgment.

Since pluralist coherence allows for multiple internally coherent sets of beliefs, it might

be said that the hard question is what to do in the fact of persistent disagreement, and it might be

thought that here, consequentialism has leg up on pluralist deontology -- because it gives us

answers we can calculate. About the hard question being the hard question, I have no doubt. But

if what I've said here is right, we might be skeptical that an answer's being calculatable means

that the answer is a good one. In difficult cases, we might be better of using a methodology that

requires muddling through, relying on our various judgments -- even vague and differing

judgments -- than we would be systematizing, especially if those judgments reflect widely shared

and multiple values.