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## **Value Pluralism and the Foundations of Normative Law and Economics: The Case of Threshold Deontology**

by Patricia Marino

In this paper, I explore issues related to value pluralism as a case study of how debates in law and economics can profitably engage with ethical theory. By "value pluralism," I mean the idea that there are various distinct values, such as benevolence, justice, and liberty, not reducible to a single overarching 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 honour 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.<sup>1</sup>

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But various matters here are complex. For one thing, the nature of value pluralism and the extent to which it is incompatible with consequentialist theories are contested. In cases where multiple values recommend conflicting obligations or considerations, values must be weighed or balanced against one another. 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, and 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.<sup>2</sup>

In what follows, I draw on research in ethical theory, including my own work on value pluralism and moral reasoning (Marino 2015), to explore how these issues play out in one particular law and economics context: debates over Eyal Zamir and Barak Medina's (2010) *Law, Economics, and Morality*. In contrast to typical approaches in law and economics, Zamir and Medina propose honouring plural values through "moderate deontology," in which there are obligations to promote the good overall, but there are also deontological constraints -- constraints which are to be overridden when thresholds are met. Echoing debates in ethical theory, critics have charged that moderate deontology rests on arbitrary judgments, and that addressing this problem of arbitrariness requires a monistic meta-theory, ultimately causing moderate deontology to collapse into a version of consequentialism.

While Zamir and Medina have aptly defended their approach, I'll suggest that drawing further on ethical theory allows for a stronger defence of moderate deontology and a deeper analysis of issues concerning plural values in the law and economics context. I begin, in section

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one, with some background, explaining what value pluralism is and how it relates to various forms of deontology. In section two, I draw on my previous work to examine how coherence and justification function in the relevant contexts. In section three, I explain Zamir and Medina's moderate deontology, some challenges to that view raised by critics, and Zamir and Medina's responses. In sections four and five, I show how drawing on ethical theory allows for illuminating and, in some cases, stronger responses to these challenges. Among my other aims, I hope to show the fruitfulness of bringing disciplinary discussions in ethical theory and in law and economics into dialogue with one another.

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

I start in this section with some preliminary discussion of value pluralism and its expression in deontological moral theories. 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" (Mason 2008). It is often noted that the way we value in ordinary life seems "pluralistic" in this sense. As Thomas Nagel (1979) 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 behaviour 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. Familiar values seem to exemplify multiplicity. 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. Values like justice and efficiency seem to represent distinct goods, resisting expression in terms

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of a unifying value. 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.

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 values. 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).<sup>3</sup>

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 (Rawls 1951; Daniels 2018). As Geoffrey Sayre-McCord (1985) 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 (see also Scanlon 2002). If we are working with principles, as in deontological approaches, the idea is that we work back and forth among our considered 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

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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.<sup>4</sup>

I'll call moral 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 inflicting harm (Ross 1930/2002). 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 (2009) argue for a multiplicity of principles grounded in four distinct values: respect for autonomy, non-maleficence, beneficence, and justice. 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 or whether the two are in equipoise.

## **2. Pluralist deontology, coherence, and justification**

When it comes to understanding pluralist deontology and its epistemological aspects, two important challenges are 1) to interpret "coherence" appropriately for contexts of value pluralism and 2) to give an account of how, in cases of moral conflict, we can determine which moral obligations or considerations override others. In recent work, I've tried to address these matters, and I give a summary of that discussion here.<sup>5</sup> With respect to coherence, I've argued that the typical understanding of that concept in moral philosophy is inappropriate in pluralist contexts. It is typical to interpret coherence as involving a norm of "systematicity" -- that the principles of a theory be as few and as simple as possible.<sup>6</sup> A norm of systematicity would entail favouring 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.

But, as I've argued, systematicity is unjustified and inapplicable in contexts of value pluralism (Marino 2015, Chapter 3). 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

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pluralistic ones. For example, David Brink says that "insofar 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 ... favours unified over nonunified or fragmented theories moral theories" (Brink 1989, p. 250). 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" (Kagan 1989, pp. 13-14). 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 lists [emphasis in original] (Kagan 1989, p. 13)." 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.<sup>7</sup>

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

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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 Super Bowl (and the Steelers won that year), then 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 Super Bowl, that correlation doesn't depend on any actual causal regularity; the generalization is accidental. To know why something is so, it's not enough to have a general principle that explains 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 that 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

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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 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 theories like hedonistic utilitarianism, there are no moral conflicts, not because

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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 to forms of coherence that involve systematicity, 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. One relevant norm is what I call "case consistency" -- 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.

For a person's moral beliefs to be case consistent is for them to judge in accordance with what they take 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. Typically the words used in a description would not seem a morally significant difference if the situation described is the same.

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 an intrinsically 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

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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, 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 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.

### **3. Moderate deontology in law and economics: explication and objections**

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The previous sections provide at best a rough and cursory overview of pluralist deontology and pluralist coherence, but let's move on to examine the intersections with law and economics. As mentioned above, Zamir and Medina's *Law, Economics, and Morality* makes use of "moderate deontology" -- an approach that combines deontological thresholds with consequentialism. In taking up this approach, the authors agree with other proponents of the law and economics movement that consequences should be considered and that measuring them is relevant, but they argue that we should also incorporate constraints: there are some acts, like killing, that should not be evaluated solely on a maximizing basis. In developing these ideas, Zamir and Medina distinguish a "foundational" from a "factoral" level of theorizing: the former has to do with what values ultimately matter, and the latter has to do with the factors that determine the morality of an act, their relative weight, and their interaction -- this has more to do with decision procedure. A theory like rule-utilitarianism might be monistic at the foundational level but associated with a procedure that is a version of moderate deontology -- if, say, following that procedure brings about the most well-being overall. Zamir and Medina develop and defend moderate deontology as a theory at the factoral, or decision-making, level.

To put consequences and constraints together, Zamir and Medina appeal to the idea of a threshold: in this approach we follow familiar deontological principles -- e. g., those against killing and harming others, lying, breaking promises, but we are justified in contravening these principles when consequences warrant.<sup>8</sup> For example, in the case where we must decide whether to shoot down a plane of citizens that has been hijacked for use as 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. Moving away from frameworks in which "efficiency" of one kind or another is the only

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aim, Zamir and Medina use the idea of the threshold to propose a more nuanced way that evaluation of consequences can play a role in the legal context. Their book then develops explications of how moderate deontology, or "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 could be usefully seen as an example or expression of the latter. 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 in analysing and addressing some criticisms of the former view.

In ethical theory debates, two common and connected criticisms of approaches like pluralist deontology are 1) that they are unacceptably arbitrary and 2) that in their proper form, they ultimately collapse into consequentialism. As we'll see, objections to Zamir and Medina's moderate deontology have paralleled these.

In contexts of ethical theory, 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 about what overrides what, and we must make judgments about what is, and is not, a morally significant difference. In section 2 above, we discussed Kagan's idea that cutting off

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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 Henry 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 (Richardson 2000; see also Richardson (1990). 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 concerns about arbitrariness as substantive problems, going on to argue that the other advantages of deontological pluralism, such as its plausibility, outweigh them as defects. For example, Beauchamp and Childress (2009) suggest that if a systematized theory could be found that would fit adequately well with our intuitions, that theory would be preferable to a "a heap of obligations and values unconnected by a first principle" (p. 396). The problem, they suggest, is simply that no systematized theory fits well with our commonly shared ways of valuing.

Critics of Zamir and Medina's threshold deontology have similar complaints about arbitrariness. In a review of Zamir and Medina's book, Avihay Dorfman (2011) says that while appealing to "intuitions" might seem a reasonable way to begin moral thinking and ensure that

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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)" (2011, p. 66). Without a "systematizing" theory in the background, the judgments of moderate deontology are arbitrary and cannot be justified.

Likewise Larry Alexander (2000, 2011), drawing on work by Anthony Ellis (1992), argues that the problem with threshold deontology is that the setting of the threshold is always arbitrary. 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" (1992, p. 860).

This first objection about arbitrariness is sometimes linked to a second, about the distinctiveness of moderate deontology. In the ethics context, it's said that what we need in cases of conflict is a principled way of judging what overrides what, and once we have that, we have effectively a systematized theory.<sup>9</sup> Moreover, the result can be expressed in the structure of consequentialism. One might endorse a range of values, call the production of this range of

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values the good, then endorse a consequentialism in which the single principle recommends maximization of the good.<sup>10</sup> For example, G. E. Moore is sometimes thought to have held such a view. More recently, Brad Hooker's (2000) rule consequentialism brings together pluralist values by arguing that they can be systematized and thus brought under a single principle. The objection, then, is that pluralist deontology, properly understood, collapses into consequentialism.

Furthermore, in ethical theory, the relationship between pluralist deontology and consequentialism is complicated by the possibility of consequentializing. In a recent series of papers, a range of philosophers have 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 following from the imperative to "maximize" good consequences overall. As Douglas Portmore (2009) 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" (p. 330).

Portmore says that 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 (Portmore 2009, p. 333). This, he says, fits with our other beliefs about rationality. Portmore cites Samuel Scheffler as attributing to these factors the "spell-binding force" consequentialism has, and its ability to "haunt us" Portmore 2009, p. 332)<sup>11</sup> In addition, Jamie Dreier (1993) says that there is a "stigma"

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associated with alternatives, on grounds that they seem to allow us to not do the most good that we can do, which is counterintuitive (for discussion see Brown, 2011). If the best version of a pluralist deontological theory is indistinguishable from a consequentialist theory that is superior, we should adopt the consequentialist theory.

Again, critics of Zamir and Medina raise related points. Dorfman says that once the problem about arbitrariness is addressed, "moderate deontology" collapses into a version of consequentialism: 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. Thus, as in debates over pluralist deontology in ethics, the charges are 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.

Zamir and Medina (2011) respond effectively to these objections, partly by pointing out that they often fail to appreciate the distinction between the factoral and foundational levels (p. 111). In what follows, however, I will explore the idea that drawing on ethical theory and engaging more with the foundational level may result in a fruitful and ultimately even stronger defence of moderate deontology.

With respect to arbitrariness, Zamir and Medina point out that as long as we're endorsing a theory that aims to incorporate multiple values, we're always going to encounter the same difficulty about how to weigh considerations against one another. Any theory honouring multiple values has the problem, but given the other advantages of such theories overall -- and especially how preferable they are with respect to fitting with commonly held moral views -- we should

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accept the arbitrariness problem in order to reap these other benefits. While there may be plausible alternatives to moderate deontology at the foundational level, Zamir and Medina explain, its main rivals at the factoral level -- namely, act-consequentialism and absolutist deontology -- are "far more problematic" (2011, p. 111). Echoing Beauchamp and Childress's thought that deontological pluralism is flawed but the best that we can do, they write that "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 (2011, pp. 125-126).<sup>12</sup>

With respect to the incoherence charge, Zamir and Medina argue 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" (2011, p. 116). In particular, consequentialism cannot accommodate agent-centred restrictions -- that is, restrictions that concern the specific relationship of the action to the person performing the action. "Moderate deontology," they point out, "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 impartial outlook, view such a prohibition as 'utterly irrational,' as it results in more intentional killings overall" (2011, p. 116). So moderate deontology is preferable to consequentialism at the factoral level because it makes sense of the idea that a person is specially responsible for what she does herself.

#### **4. The arbitrariness objection**

We've seen how challenges to Zamir and Medina's moderate deontology in law and economics debates are similar to those levelled at pluralist deontology in ethical theory debates, especially with respect to arbitrariness and incoherence. The next two sections explore the fruitfulness of developing the relevant interconnections further.

Let's look first at arbitrariness. In their response to this objection, Zamir and Medina point out -- correctly in my opinion -- that the same problem arises for any pluralistic normative theory (or, more precisely, for any pluralistic normative theory that does not "accord one factor an unqualified lexical priority over the others" (2011, p. 125). However, I think there is a stronger response available, and this response can be seen more clearly when we view threshold deontology as an instantiation of a pluralist deontology and engage with the foundational as well as factoral levels. From that perspective, we can see why it's not just that other pluralistic theories are "arbitrary" as well. Instead, we can say that pluralist theories have no more problem with arbitrariness than monistic single-principle ones.

To see this, we have to get into deeper questions about methodology and justification. In the ethical theory context, single-principle theories like consequentialism are often justified 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. Brad Hooker, for example, justifies his rule-consequentialism by arguing that his single principle does the best job unifying and systematizing the various duties entailed by Ross's list of principles: the strategy applies coherence to our considered convictions.

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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 (for a more detailed argument, see Marino (2015, pp. 99-101).

It may seem that monistic 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

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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, a monistic single-principle theory is not more accurate than a pluralistic one; rather, 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 favour 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 favour 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.

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This shows that as long as we are using coherence methods like reflective equilibrium, pluralist and moderate deontology have no more problem with arbitrariness than single-principle alternatives do. In a different direction, it is sometimes claimed that consequentialism has another form of justification that doesn't depend on considered convictions or judgments at all. Peter Singer (2005), for example, argues that consequentialism has a "rational" foundation that does not depend, as deontological theories do, on intuitions or judgments.<sup>13</sup> A full discussion of this topic is beyond the scope of this paper, but there are reasons to be skeptical of this claim. For example, in a critical analysis, Joakim Sandberg and Niklas Juth (2011) argue that Singer's own method of justification relies on intuitive judgments: for example, judgments about what does, and does not, constitute a morally significant difference are needed to explain why we should universalize over our interest satisfaction in the way Singer's consequentialism tells us to do. Furthermore, different versions of consequentialism appeal to different notions of well-being and thus of what, exactly, should be maximized; to say why one candidate for maximizing is better than another plausibly requires appeal to judgment as well. And as long as judgment comes into the picture, the same problems of justification and arbitrariness come into play.

This shows how, engaging with the foundational level helps to explain more deeply why pluralist deontology, and by extension moderate deontology, has no greater problem with arbitrariness than rival theories do.

## **5. The incoherence objection**

With respect to the possibility that moderate deontology collapses into monistic consequentialism, the heart of Zamir and Medina's response is that while this could be true at the foundational level, it is not the case at the factoral level, as shown by the fact of agent-centred

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restrictions. I'll argue here 1) that looking at ethical theory gives us a wider perspective and further resources for answering the incoherence objection and also 2) that the consequentializing possibility complicates Zamir and Medina's responses in ways that show the importance of 1).

As noted, when plural values have been prioritized, it is possible to represent them through a single-principle version of consequentialism. I claim that in addition to agent-centred restrictions, there are two other considerations in favour of pluralist deontology, related to dilemmas and to pragmatics.

Let's look first at dilemmas. In a case where honouring one value requires performing action A and honouring 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, there are reasons to adopt an ethical framework in which dilemmas play a role. One reason dilemmas are thought to be significant is that they play a certain role in our moral lives: they leave a "remainder" or "residue," reflecting that even when we have acted for the best, a duty has been breached, and something that ought to have been done was not. In ethical theory, the remainder can be understood as alerting us that things are not as they ought to be and motivating us to change our lives and institutions so that dilemmas are less likely to arise in the future (Marcus 1980; Marino (2001). In legal theory, the idea of a remainder has also been linked to the idea that in cases of conflict, where exercising a right can also mean breaking a law, there can be obligations of compensation and amends (Finkelstein 2001).

The idea that remainders play an ethically significant role, originally articulated by Ruth Marcus in the 1980s, has been called a "mutuality principle" by bioethicist Joseph DeMarco

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(2005). 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 honouring 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, treatments that, because they do not require transfusions, would allow us to honour both values at once. In legal theory, an analogous view of conflicting rights has been articulated by Claire Oakes Finkelstein (2001), who argues for the importance of remainders (she calls them residues). If I promise to give each of two people a banana, and I only have one, I have a conflict of obligations: but plausibly if I can compensate the bananaless person in some equivalent way, I ought to do so. Without the remainder, we lose the sense that in cases of conflict a duty has been breached; if no duty has been breached, then "compensation, apologies, and any other way of making amends are all unnecessary" -- this does not fit, she says, with the way we regard duties of compensation in such cases (Finkelstein 2001, p. 295).

For remainders to play these roles, dilemmas must be real in some sense, rather than being explained away -- by, for example, saying that only the most stringent obligation is our actual obligation, or by adding exception clauses to our principles.<sup>14</sup> With a multiplicity of principles, the possibility of conflict, what it represents, and the possibility of taking dilemmas to be real are all immediate. Since the roles of the remainder concern the decision-making aspect of moral thinking, their importance concerns not only the foundational level of morality but the factorial level as well.

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Even when maximizing single-principle theories reflect multiple values, 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-principle requiring us to maximize the good or follow the rules that would do so. In that case, when we maximize the good or follow the rule, we've done what we ought: there is no sense of a remainder or residue.<sup>15</sup> In the transfusion and banana cases, 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. Pluralist deontology fits with and helps explain the relevant aspects of moral conflict and the role it plays in our lives.

Moving beyond dilemmas, a second relevant consideration has to do with the process of weighing and the possibility of disagreement. As is often emphasized in the debates over moderate deontology, people may disagree over where to set the threshold. As deontological pluralism makes obvious, determining the weight of various values is a difficult problem -- and it is a problem about which we may expect to find a range of different answers and substantive disagreement from one person to another. As I've argued, some moral disagreement is plausibly explained by differences in how to balance conflicting values (Marino 2015). 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. Differences in prioritization would lead to different judgments about thresholds as well.

Because it puts the weighing process front and centre, the framework of principle pluralism facilitates our engagement with one another about these differences. For example, the

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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, an exchange demanding reasons will bring to light the reasons for their disagreement: they respect similar principles but disagree over prioritization in the given case. Again, this pragmatic point about how to facilitate moral debate has to do primarily with the factoral, or decision-making level, since it has to do with the framing of ethical theories rather than their ultimate foundation.

These points about dilemmas and pragmatics gain importance when we consider how the consequentializing possibility complicates Zamir and Medina's response about agent-relativity and the difference between weighing and maximizing. In consequentializing, weights are assigned to individual outcomes so that the moral conclusions are identical to those of the deontological theory. In this approach, any set of moral judgments, including those with agent-centred restrictions, can be produced through a consequentialist theory.

Here, the points about dilemmas and pragmatics become especially important. With respect to dilemmas, as Portmore (2009) points out, there are some subtleties, but consequentializing does not allow for the kind of dilemmas most pertinent to the issues 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 (Portmore, pp 339-340). However, consequentializing is incompatible

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with "obligation" dilemmas -- the dilemmas in which there are two conflicting obligations.<sup>16</sup>

Plausibly, this is the kind of obligation most relevant to the mutuality principle and the thoughts about compensation and amends.

With respect to the pragmatics of moral decision-making, the 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 (2017) argues, this point about explanations can make 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 consequentialist point of view, the "simpler" and default assumption is that distributive considerations should not factor in. Schroeder gives an example of how this leads one consequentialist to ignore distributive factors despite the fact that most people do "take distribution to be important in some way." This pragmatic point suggests another way that at the factorial level, a framing of deontological pluralism, and thus moderate deontology, could be better than a consequentialist framing, even when the latter is available.

## **Conclusion**

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In exploring the ways that debates in law and economics might engage with ethical theory, I have shown how similar issues and debates tend to arise, and also how bringing the two domains into dialogue with one another can allow for illuminating discussion. More specifically, focusing on the example of Zamir and Medina's moderate deontology, I've argued that framing this view as an expression of pluralist deontology and drawing on discussions of value pluralism, coherence, epistemology and justification in the ethics context allows for a fruitful engagement, especially with respect to charges of arbitrariness and incoherence. Moderate deontology has no more problem with arbitrariness or incoherence than rival theories do, and drawing on ethical theory helps us to understand why.

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<sup>1</sup> For a general discussion of plural values and the law and economics movement, see Nussbaum (1997).

<sup>2</sup> 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.

<sup>3</sup> See also Haidt and Joseph (2004) and Haidt and Joseph (2007); for discussion, see Marino (2015).

<sup>4</sup> 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.

<sup>5</sup> Patricia Marino, *Moral Reasoning in a Pluralistic World*.

<sup>6</sup> For endorsements of norms like systematicity, see, e. g., David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge University Press, 1989), p. 250, Shelly Kagan, *The Limits of Morality* (Clarendon Press, 1989) p. 13, and Brad Hooker, *Ideal Code, Real World* (Oxford University Press, 2000), p. 21. For discussion, see below, and also my *Moral Reasoning in a Pluralistic World*.

<sup>7</sup> For the phrase "unconnected heap of duties," in connection with Ross, see McNaughton (1996). For a similar approach, see Brad Hooker's (2000) defense of unification.

<sup>8</sup> For more on "moderate deontology," in ethical theory, see Brennan (2009).

<sup>9</sup> For example, Sayre-McCord (1985) argues that overcoming conflicts requires seeking out a monistic theory (pp. 171–172). For discussion, Marino (2015, pp 28-33).

<sup>10</sup> My thanks to Uri Leibowitz, who mentions this possibility in a (2017) review of Marino (2015).

<sup>11</sup> Philippa Foot (1985) also uses the "haunting" metaphor.

<sup>12</sup> The metaphor is from Larry Alexander. We saw above that Beauchamp and Childress say something similar.

<sup>13</sup> In the law and economics context, a similar strategy is used by Louis Kaplow and Steven Shavell (2002). For a philosophical discussion of this part of Kaplow and Shavell's book, see Adler (2005).

<sup>14</sup> Ross's idea of "prima facie" duties is an example of the former; Henry Richardson's "specification" approach is an example of the latter. See discussion in Marino (2015).

<sup>15</sup> Typically, if the rules of rule-consequentialism conflict, one's overall obligation is simply to perform the action that will maximize best consequences in the particular situation.

<sup>16</sup> Portmore argues that obligation dilemmas are generally 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. For an overview, see McConnell (2018).