



EYAL ZAMIR  
BARAK MEDINA

**LAW,  
ECONOMICS,  
AND  
MORALITY**

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# Law, Economics, and Morality

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EYAL ZAMIR  BARAK MEDINA

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# Introduction

ECONOMIC ANALYSIS HAS TRANSFORMED LEGAL THEORY. Even its detractors can hardly deny the enormous contribution made by economic methodology to legal thinking in practically every field of law. Cost-benefit analysis (CBA) forces one to consider the interrelations between goals, means, incentives, and outcomes in a systematic and sophisticated way. It assists analysts and policy-makers in identifying false intuitions and cognitive biases, thus rationalizing decision-making.<sup>1</sup> The very act of economic modeling compels one to determine the crucial variables pertinent to any issue. At the same time, even avid supporters of economic analysis can hardly deny the fundamental normative flaws that exist in standard economic analysis.<sup>2</sup> In particular, the criteria of economic efficiency tend to ignore fundamental ethical norms such as the inherent immorality of deliberately harming other people. The consequentialist nature of economic analysis, namely its denial of the intrinsic value of any factor other than the goodness of outcomes, makes it normatively unacceptable for many philosophers and lawyers.

Deontological moral theories maintain that although the goodness of outcomes counts, it is not the only morally relevant factor.<sup>3</sup> The pursuit of good consequences is subject to *constraints*. Certain acts are inherently wrong and therefore impermissible, even as a means to furthering the overall good. The central constraint is against harming other people.<sup>4</sup> Additional

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1. Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000).

2. See, e.g., Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1037, 1037 (2000); Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1154 (2000).

3. See *infra* pp. 41–48.

4. This book mostly discusses deontological constraints rather than (moral or legal) *rights*, thus avoiding the questions of what are rights, and what is the exact relationship between rights and constraints. On this complex issue, see generally Alon Harel, *Theories of Rights*, in BLACKWELL'S GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 191, esp. at 197–201 (Martin P. Golding & William A. Edmundson eds., 2005); SHELLY KAGAN, *NORMATIVE*

constraints prohibit such conduct as lying and breaking promises. Currently prevailing deontological theories are *moderate* rather than *absolutist*. They admit that constraints have thresholds. A constraint may be overridden for the sake of furthering good outcomes or avoiding bad ones if enough good (or bad) is at stake.<sup>5</sup> Thus, while consequentialism at least presumably approves of the deliberate killing of one innocent person to save the lives of two, moderate deontology may justify such killing only for the sake of saving many more people, perhaps hundreds or thousands. Similarly, while consequentialism supports the breaking of a promise whenever it would produce slightly more net benefit than keeping one's word, moderate deontology would justify breaking a promise only to avoid very considerable losses (an absolutist would object to killing or breaking a promise under any circumstances).

Deontology differs from consequentialism not only in holding that there are constraints to attaining the best outcomes but also in recognizing *options*. People are sometimes allowed to refrain from maximizing the good, even if no constraint infringement is involved. At least under some circumstances, people may legitimately prefer their own welfare, or the welfare of their family, friends, or community, over the overall good.<sup>6</sup>

Moderate deontology conforms to prevailing moral intuitions ("common-sense morality").<sup>7</sup> At the same time, it arguably lacks the methodological rigor and determinacy characteristic of economic analysis.<sup>8</sup> Therefore, the argument goes, policy-makers and legal academics should better ignore nonefficiency considerations or, at most, consider them separately, outside of the economic model. For instance, along with the possibilities of considering deontological considerations separately from CBA or by a different governmental branch, Matthew Adler and Eric Posner mention the possibility of a "superprocedure" through which both deontological and welfarist

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ETHICS 170–77. For an account of moral rights that is closely related to deontological constraints, see JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

5. KAGAN, *supra* note 4, at 78–80. Following Thomson's terminology, we denote *morally impermissible* infringements of a constraint as "violations," describe *permissible* infringements as those that "override a constraint" or "meet the threshold," and use the term "infringement" to cover both. See JUDITH JARVIS THOMSON, *Some Ruminations on Rights*, in *RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY* 49, 51–52 (William Parent ed., 1986).

6. See *infra* pp. 41, 46 and 98–103.

7. See *infra* pp. 48, 78.

8. See, e.g., Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 *PHIL. ISSUES, SUPP. TO NOUS* 420, 431–34 (2001).

considerations would be considered together. Regarding this possibility, they write: “We suppose that that is a theoretical possibility—but we have absolutely no idea what the superprocedure would consist in.”<sup>9</sup>

Can the normative flaws of standard economic analysis be rectified without relinquishing its methodological advantages? Can deontological moral constraints and options be formalized so as to make their analysis more rigorous? This book examines the possibility of combining economic methodology and deontological morality through explicit and direct incorporation of moral constraints (and options) into economic CBA. It argues that such incorporation would improve economic analysis of law and economic analysis in general, not only as a normative theory but also as a descriptive and predictive tool, without considerably compromising its methodological rigor. At the same time, it maintains that deontologists and jurists who oppose consequentialism have been too hasty in disqualifying economic analysis as a fruitful analytical methodology.<sup>10</sup>

This book thus develops a detailed framework for incorporating threshold constraints (and options) into CBA. It addresses the challenges facing the formulation of *threshold functions* and illustrates the construction and use of threshold functions to analyze several prominent legal issues. Deontologically constrained CBA is more complex than standard CBA. Yet we maintain that it is superior to its alternatives. It rectifies some of the normative flaws of conventional CBA without significantly compromising its methodological rigor. It also improves deontology by making the analysis of threshold constraints more precise and its policy implications potentially more determinate.

For the deontologist, direct and explicit incorporation of deontological constraints into economic models is vital to make the analysis normatively acceptable. Less obviously, most of the consequentialist responses to the deontological critique, such as the move from act- to rule-consequentialism,

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9. MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 154–58 (2006). Clearly, when talking about scholarly analysis of law, an institutional separation between economic and deontological analysis is implausible. *See also* Posner, *supra* note 2, at 1157 (arguing that attempts to improve “the normative flavor” of CBA “by modifying or even rejecting the Kaldor-Hicks assumption gain less in normative plausibility than they lose in complication and uncertainty”); *infra* pp. 105–08.

10. *Cf.* Kraus, *supra* note 8. Kraus seeks to reconcile autonomy-based theories of contract law, which lack in determinacy and operationality, with economic analysis of law, whose normative foundations are deficient, through “vertical integration.” While Kraus’s proposal leaves the fine-grained analysis of contract doctrine to standard economic analysis, our proposal operationalizes deontology through its combination with economic methodology.



actually recognize or at least imply that sound CBA should incorporate constraints for practical or instrumental reasons. A consequentialist who embraces one of these responses may thus welcome our proposal without converting to deontology.

Furthermore, since people's behavior is commonly influenced by social norms and prevailing moral intuitions, any theory seeking to explain and predict people's behavior should take threshold constraints and options into consideration.<sup>11</sup> The same is true when explaining existing legal doctrines. Many legal norms fall in line with moderate deontology. For instance, under current constitutional law, statutes infringing upon "fundamental" rights are invalid unless the infringement is necessary to promote a compelling governmental interest.<sup>12</sup> Thus, threshold constraints are essential to understanding and explaining existing legal doctrines.

Our project is both ambitious and modest. It is ambitious in the sense that it proposes a general framework for analyzing and resolving a great variety of legal and policy issues. It also ambitiously strives to bridge the increasing gulf between economic analysis and other approaches to law and legal policy, and between economic analysis and deontological morality.<sup>13</sup> The project is modest, however, for we do not claim that by using the proposed analytical framework, one can avoid difficult normative judgments. The proposed framework can enable one to more adequately grasp the pertinent issues and their interrelations, which may in turn facilitate sounder solutions.

The book is divided into two parts. Part One, the first five chapters, lays the theoretical groundwork. It establishes the need for integrating deontological

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11. Cf. AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988); John Broome, *Deontology and Economics*, 8 *ECON. & PHIL.* 269 (1992); MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed., 2008); WALTER J. SCHULTZ, *THE MORAL CONDITIONS OF ECONOMIC EFFICIENCY* (2001) (arguing that moral normative constraints are essential to facilitating a competitive market); Michael B. Dorff & Kimberly Kessler Ferzan, *Is There a Method to the Madness? Why Creative and Counterintuitive Proposals Are Counterproductive*, in *THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS* 21 (Mark D. White ed., 2009).

12. See, e.g., *infra* pp. 76–77, 181, and 213–14.

13. On the fragmentation of current legal scholarship, see, e.g., Sanford Levinson & J.M. Balkin, *Law, Music, and other Performing Arts*, 139 *U. PA. L. REV.* 1597, 1653 (1991); Reinhard Zimmermann, *Law Reviews: A Foray through a Strange World*, 47 *EMORY L.J.* 659, 688 (1998); Jerry Mashaw, *Deconstructing Debate, Reconstructing Law*, 87 *CORNELL L. REV.* 682, 682 (2002).

constraints (and options) with CBA, explains how such integration may be accomplished, and responds to plausible critiques of such integration.

Chapter 1 presents welfare economics and its consequentialist nature. It first discusses the main features of positive and normative economic analysis and the meaning of “consequentialism.” It then analyzes the deontological critique of consequentialism and specifically consequentialism’s lack of constraints on attaining the best outcomes. It critically examines various attempts at defending consequentialism in general, and welfare economics in particular, against this critique. It concludes that all of the attempts to downplay, deny, or circumvent the deontological critique are doomed to failure. The responses that come closest to actually addressing the critique do so by endorsing deontological constraints (and options) on the factoral level. They imply that agents and policy-makers should only strive to attain the overall best outcomes subject to constraints and that agents sometimes have options not to attain the best outcomes.

Chapter 2 discusses moderate (or threshold) deontology, its critique, and possible responses. Deontological theories prioritize values such as autonomy, human dignity, and keeping one’s promises over the promotion of good outcomes. In prohibiting the infliction of harm on other people, they resort to distinctions such as that between actively *doing* harm and merely *allowing* it, and between *intending* to do harm and merely *foreseeing* it. Moderate deontology holds that constraints (and options) have thresholds. A constraint may be overridden for the sake of furthering good outcomes or avoiding bad ones if enough good (or bad) is at stake; and an option not to promote the good may be overridden for the sake of attaining enough good or avoiding enough bad. This chapter analyzes the main critiques leveled against deontology in general and moderate deontology in particular. While recognizing the challenges faced by threshold deontology, we conclude that threshold constraints (and options) are an indispensable part of any acceptable factoral moral theory. At the same time, as it is conventionally portrayed, threshold deontology suffers from a lack of methodological rigor and precision.

Chapter 3 addresses the argument that even if moderate deontology is the correct moral theory for *individuals*, consequentialism is the appropriate moral theory for legal *policy-makers* such as legislators, judges, and regulators (and for academic policy-analysts). It claims that this argument confuses, among other things, between constraints and options, and between the actor’s perspective and the perspective of an external reviewer. It ultimately rejects the alleged dichotomy between personal and public morality.

Chapter 4 discusses various substantive and methodological choices involved in formalizing deontological constraints and options. It proposes to determine the permissibility of any act or rule infringing a deontological constraint by means of a *threshold function*. It outlines the scope of this proposal by describing the role of threshold functions within a broader context that may involve conflicting constraints and require a choice between several deontologically permissible acts. It then delineates the general structure of threshold functions. To capture the essence of deontological constraints, threshold functions set the magnitude and shape of the threshold, as well as the types of costs and benefits that are taken into account in determining whether the act's (or rule's) net benefit meets the threshold. This chapter also briefly discusses the construction of threshold functions for deontological options.

Chapter 5 tackles a number of methodological and principled objections to the incorporation of deontological constraints into economic analysis. It discusses the claims that such incorporation would adversely affect the normative neutrality of economic analysis; that monetizing deontological constraints faces insurmountable obstacles; that it would lead to setting too low thresholds for constraints; and that it is incompatible with the expressivist role of the law. We conclude that most of these objections are unpersuasive, and none is conclusive.

Part Two of the book illustrates the implementation of deontologically constrained CBA in five legal contexts. Each chapter in this part critically discusses standard normative economic analysis of a socially important legal field or part of it. It then demonstrates how a constrained CBA of the pertinent issues might look, paying heed to extant legal norms and pertinent moral considerations. Like standard economic analysis of law, some of the illustrations use mathematical functions to present the pertinent variables and constants, while others suffice with verbal presentation.

Chapter 6 presents a constrained CBA of measures taken in the fight against terrorism. It begins by characterizing and criticizing existing normative economic analysis of the fight on terror as reflecting a simplified ad hoc balancing. It then presents the central deontological constraints pertaining to the fight on terror. The bulk of this chapter discusses threshold functions that should be employed to determine the permissibility of such measures as targeted killings and torture. We discuss the factors affecting the evaluation of the act's relevant net benefit and those determining the amount of net benefit required to justify an infringement. We argue that standard economic analysis fails to take into account critical distinctions. These include the

distinction between different goals of anti-terrorist measures (including retribution, deterrence, and preemption); the difference between harms the state inflicts through anti-terrorist measures and those resulting from unthwarted terrorist attacks; and the distinction between intended and unintended harm. Deontologically constrained CBA, which incorporates all of these distinctions, is shown to be methodologically workable and normatively superior.

Chapter 7 discusses freedom of speech. It briefly describes current constitutional protection of this freedom and surveys its standard economic analysis. It then introduces the deontological constraint against curtailing free speech and analyzes in some detail the normative judgments involved in conducting a constrained CBA of speech regulation. As to calculating the benefit of speech regulation—which is tantamount to calculating the speech's expected harm—it examines the desirability of excluding, or radically discounting, various types of harms, such as chronologically-remote and low-probability harms, small harms, harms brought about through rational persuasion, and mere offensiveness. Various ways of formalizing such excluders and combining them are examined. The chapter then analyzes the threshold that has to be met to justify speech regulation, including its shape, the setting of different thresholds for content-based and for content-neutral regulation, and different thresholds for different categories of speech.

Chapter 8 examines discrimination in the marketplace and, more specifically, the legitimacy and appropriate scope of antidiscrimination legislation. Following a brief survey of current legal norms, it relies on positive economic analysis to explain possible motivations for discrimination. It then examines the efforts made to justify antidiscrimination legislation on standard efficiency grounds. These efforts correspond to the various attempts at defending consequentialism against the deontological critique discussed in chapter 1. It argues that these efforts are unsuccessful. Rather, the appropriate way to adequately capture the issues pertaining to market discrimination is to directly take into account a deontological constraint against harming people by discriminating against them. We analyze the deontological constraint against discrimination, examine the relationships between this constraint and distributive bases for antidiscrimination legislation, and demonstrate how current legal norms are best understood as resting on moderate deontology and embodying threshold constraints.

Chapter 9 discusses contract law. Ordinarily, market transactions do not involve infringements of deontological constraints. For this reason (and since they usually involve money or easily monetized goods), standard CBA

is particularly apt for analyzing contract law. Nevertheless, we maintain that certain deontological constraints apply to contracting behavior and that combining deontological constraints with economic analysis of contract law may be fruitful. The chapter briefly surveys the deontological constraints pertinent to contract law and critically examines the standard economic response to them. It then demonstrates how deontological constraints may be integrated with economic analysis of the contracting stage, focusing on the doctrines of mistake and misrepresentation. Last, it highlights the differences between economic and deontological analyses of contract performance and breach and discusses the difficulties facing integration of deontological constraints with the economic analysis of contract remedies, given the current state of the pertinent theories.

Finally, chapter 10 analyzes legal paternalism in its various manifestations. It first argues that contrary to prevailing notions, normative economics does not entail principled antipaternalism. In fact, the consequentialist nature of standard welfare economics—namely the absence of constraints on promoting good outcomes—opens the door to limiting people's freedom with a view to promoting their own good. Economists ordinarily object to paternalism, but rather than pointing to the intrinsic value of freedom, they base their antipaternalistic stance on various secondary considerations, thus missing the real dilemmas inherent in paternalism. Adding deontological constraints to the analysis better captures the pertinent issues and provides more accurate yardsticks with which to evaluate paternalistic legal norms and explain existing ones. We construct formal models to evaluate the desirability of paternalistic legal norms from both economic and moderate deontological perspectives.

## ▨ PART ONE

# Theory

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## The Consequentialist Nature of Economic Analysis

### A. General

THIS CHAPTER SETS OUT the motivation for incorporating deontological constraints into economic analysis of law. It first introduces, in section B, the basic tenets of welfare economics, the normative branch of economic analysis. These include the assumption of rationality, preference satisfaction as the underlying theory of human welfare, a limited regard for distributive issues, and the consequentialist nature of welfare economics. Focusing on the last feature, section C describes consequentialism and its main critiques. These include the lack of constraints on maximizing good outcomes and the lack of options not to maximize the good. Section D discusses, in some detail, the attempts to defend consequentialism against the claim that it allows too much (lacks constraints), and section E surveys the responses to the objection that consequentialism demands too much (lacks options). We conclude that none of the responses to the deontological critique of consequentialism are satisfactory, and that in fact, most of them imply that adding constraints (and sometimes options) to economic analysis is warranted.

### B. Normative Economics

Economics is conventionally divided into *positive* and *normative* fields. *Positive* economic analysis explains and predicts human behavior—and social outcomes—on the basis of rational choice theory, which assumes that people act “rationally.” This assumption includes both cognitive elements and motivational ones. Cognitive rationality (also known as *thin* rationality) entails that each person’s set of preferences conforms to formal requirements, such as transitivity and completeness, and that people make their decisions based upon all available relevant information, the exclusion of all irrelevant information, the correct use of the rules of probability, and



so forth.<sup>1</sup> Motivational rationality (or *thick* rationality) further assumes that each person aims to maximize her own well-being. It excludes both true altruism (actions aimed solely at furthering the well-being of others) and idealism or commitment (actions undertaken out of a sense of duty, even when they conflict with a person's self-interest and sympathetic preferences).<sup>2</sup>

Normative (or welfare) economics—which is the focus of our study—is a consequentialist theory, as it evaluates the desirability of acts, rules, policies, projects, etc., solely according to their outcomes. More specifically, normative economics is a welfarist theory. It contends that the only factor which ultimately determines the desirability of anything is its effect on individuals' welfare. The theory of the good underlying normative economic analysis is preference satisfaction, according to which people's well-being is enhanced to the extent that their desires are fulfilled. Like utilitarianism, it attributes equal weight to the welfare of every person. It focuses on incentives for future behavior.<sup>3</sup>

A central debate within normative economics has revolved around measures of welfare. The so-called "old-style" welfare economics—associated with Pigou's 1920 book *Economics of Welfare*<sup>4</sup>—was based on a rather vague notion of welfare. It did not take sides in the debate among utilitarian thinkers regarding the proper notion of utility that should be aggregated. The "new" welfare economics, in contrast, searches for welfare propositions that do not rest on direct, interpersonal comparisons of utility, happiness, or well-being. One can distinguish between three main schools of thought within this approach, all of which are based on a preference-satisfaction theory of welfare.

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1. Definitions of thin rationality vary with regard to the elements they include in the list. See, e.g., JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 1–15 (1983); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 14–17, 19 (1994). Some economic models, especially those relating to the behavior of firms, assume unlimited capacity to gather and process information. See, e.g., GREEN & SHAPIRO, *id.*
  2. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977); DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 51–65 (1996).
  3. On the normative foundations and main characteristics of welfare economics, see generally HAUSMAN & MCPHERSON, *supra* note 2.
  4. ARTHUR PIGOU, *THE ECONOMICS OF WELFARE* (1920; revised 1924, 1929, 1932).

The first school, identified with the *Pareto Principle*, avoids interpersonal comparisons altogether. According to this approach, an individual  $i$ 's preferences are described by a utility function  $u_i$ , such that  $u_i(A) > u_i(B)$  if and only if the individual  $i$  prefers  $A$  to  $B$ . Thus, the utility function is not a direct measure of well-being, happiness, or welfare, but only a description of the order in which the individual ranks different alternatives. According to the Pareto principle, state  $A$  is socially preferable (or *Pareto superior*) to state  $B$  if at least one person prefers  $A$  to  $B$ , and all others are either indifferent between the two states or prefer  $A$  to  $B$ . State  $A$  is a *Pareto optimum* if there is no other possible state that is socially preferable to  $A$  in the above sense. This principle is the basis of the two *fundamental theorems of welfare economics*. The first theorem states that under certain conditions, any competitive equilibrium satisfies the conditions for a Pareto optimum. The second theorem states that under other specific conditions, any Pareto optimum can be obtained as a competitive equilibrium after the agents' initial endowments have been modified by suitable lump-sum transfers.<sup>5</sup>

Applying only the Pareto criterion and the two theorems of welfare economics, economists are handicapped in providing policy recommendations. In practically every state, there are some people who are worse off compared to another state, and thus no policy is Pareto superior to any other.<sup>6</sup> This weakness spawned two different schools of thought within the "new" welfare economics. The more traditional approach uses a social welfare function (SWF) (also known as a Bergson-Samuelson welfare function).<sup>7</sup> The SWF is written as follows:  $W = f(z_1, z_2, \dots, z_n)$ , where  $z_i$ 's and  $f$  represent society's ethical values, such that  $W$  is a numerical representation of the social welfare in a given state of the world. Although in principle, any variable related to a society's well-being might be included in the SWF, economists have focused on SWF's in which the arguments in the welfare function are utility indexes of each individual, i.e.,  $W = f(u_1, u_2, \dots, u_n)$ . The SWF thus assigns a value to each possible distribution of individual utilities in society. Depending on its

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5. See, e.g., ALLAN M. FELDMAN & ROBERTO SERRANO, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 51–75 (2006).

6. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 858–59 (2002).

7. Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 314 (1938); PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1947).

form, the social welfare function will embody different normative judgments about distribution.<sup>8</sup>

The aim was that cardinal, interpersonally comparable utility functions would not be needed for SWF. However, it follows from Arrow's Impossibility Theorem that SWF must be based on cardinal rather than ordinal utility functions, and interpersonal comparability is required.<sup>9</sup> The only way to get a single outcome from a SWF whose arguments are ordinal utility indicators is to define it lexically, that is, to state that society prefers any increase in a certain person's utility, however small, to any increase in another person's utility, however large, and to have this hold true independently of the initial utility levels. From a normative perspective, however, this solution is utterly unacceptable.<sup>10</sup>

The alternative to this approach is the one identified with the Compensation Principle (also known as Kaldor-Hicks or Potential Pareto). It is an attempt to go beyond the Pareto Principle, while stopping short of utilitarianism, by measuring welfare in monetary terms rather than by happiness or well-being. This principle asserts that a state A is socially preferable to state B if those who prefer A to B gain, in monetary terms, from being in A rather than B, more than those who prefer B to A lose. Thus, a social change that does not meet the Pareto criterion should still be carried out if it is possible for the gainers from the change to compensate the losers and remain better off.<sup>11</sup> In accordance with the assumption that people's preferences are

8. For instance, consider the function  $W = \left( \sum_{i=1}^n u_i^{1-p} \right)^{\frac{1}{1-p}}$  where  $p$  is an inequality index. SWF in which  $p = 0$  represents a utilitarian aggregation. As  $p$  approaches infinity, we get a Rawlsian "maximin" function,  $W = \min(u_1, u_2, \dots, u_n)$ . When  $p=1$ , the function is a sum of the logarithms of the utility indexes,  $W = \sum_{i=1}^n \ln u_i$ .

9. According to Arrow's Theorem, when there are three or more discrete options to choose from, it is impossible to formulate a social preference ordering that satisfies a certain set of reasonable criteria such as transitivity, independence of irrelevant alternatives, and nondictatorship. See Murray C. Kemp & Yew-Kwang Ng, *On the Existence of Social Welfare Functions: Social Orderings and Social Decision Functions*, 43 *ECONOMICA* 59 (1976), which base their proof on KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951, rev. ed. 1963). See also DENNIS C. MUELLER, *PUBLIC CHOICE III* 563–68 (2003); Paul A. Samuelson, *Reaffirming the Existence of "Reasonable" Bergson-Samuelson Social Welfare Functions*, 44 *ECONOMICA* 81 (1977).

10. See, e.g., Douglas H. Blair & Robert A. Pollak, *Collective Rationality and Dictatorship: The Scope of the Arrow Theorem*, 21 *J. ECON. THEORY* 186 (1979).

11. See, e.g., RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 95–141 (2001).

complete (for any two alternative combinations of goods, services, or anything else (A and B), they prefer A to B, B to A, or are indifferent), it is assumed that every person can compare any entitlement to a sum of money. Preferences are therefore measured by people's willingness to pay (WTP) for their satisfaction.<sup>12</sup> In more technical terms, each person's gain or loss from a shift from state A to state B is measured by a compensating variation (CV): the subtraction (in case of a gain) or the addition (in case of a loss) that is required to each person's budget in the original state A, to ensure that he will be indifferent between the two states. The social decision should be based on an aggregation of all persons' CV's. This view is the basis of the procedure known as Cost-Benefit Analysis (CBA), which assumes that each person's CV (or her WTP) is an adequate representation of the difference in the person's utility as between the status quo and a given alternative state.<sup>13</sup> Like utilitarianism, the Kaldor-Hicks criterion and CBA thus ordinarily assess the desirability of any act, rule, policy, or project according to its effect on the total welfare of all people.

Each of these features of economic analysis is subject to criticism. To begin with, the very reliance on people's preference satisfaction as the yardstick for human welfare is problematic. People often err as to what is good for them. They make choices on the basis of partial information, psychological biases, and faulty reasoning. A myriad of empirical and experimental studies have demonstrated that people's preferences and choices significantly deviate from the standard assumptions of rational choice theory. While there is a considerable variance in the ways people perceive facts, process information, frame their decision tasks, and make choices, the deviations from the standard assumptions of cognitive and motivational

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12. Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205 (2004); Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L. Q. 59 (1993).

13. See ANTHONY E. BOARDMAN ET AL., *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* (1996). The term "cost-benefit analysis" has various meanings on different levels of generality (Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153–56 (2000)). It may refer to a particular decision procedure used by regulatory agencies (see generally CASS R. SUNSTEIN, *THE COST-BENEFIT STATE* (2002); MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006)), or more generally to the normative criterion of Kaldor-Hicks efficiency. In this book, we use CBA in the latter meaning. For a closer look at the differences between well-being maximization, the Kaldor-Hicks criterion, and CBA, see ADLER & POSNER, *id.* at 9–24.

rationality are rather systematic.<sup>14</sup> Moreover, people's preferences are sometimes objectionable, reflecting jealousy, sadism, racism, and so forth. Finally, people whose economic or health conditions are very poor may have limited aspirations—so limited that even their fulfillment will not necessarily make their lives much better.<sup>15</sup>

In recent years, the mounting evidence of people's bounded rationality has led some economists to endorse rational preference not merely as a proxy for actual ones but as a superior measure of well-being.<sup>16</sup> This endorsement usually refers only to *cognitive* rationality, i.e., taking into account preferences that satisfy such conditions as transitivity, completeness, and dominance, even if actual preferences do not. Other analysts go one step further and also examine the *motivational* rationality of people. They are willing to discount or disregard not only choices based on misinformation or cognitive biases but also choices based on, for instance, sadistic and prejudiced preferences.<sup>17</sup> Many economists insist, however, that the assumption of economic rationality approximates human behavior well enough, and that it is preferable to adhere to this assumption rather than encumber the analysis by making more realistic assumptions.<sup>18</sup>

More fundamentally, the theory of the good underlying economic analysis may be criticized for denying the intrinsic value of anything but human

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14. See generally ROBIN HOGARTH, *JUDGEMENT AND CHOICE* (2d ed. 1987); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000). See also *infra* pp. 319–20, 326.
  15. Amartya Sen, *Well-Being, Agency and Freedom: Dewey Lectures 1984*, 82 J. PHIL. 169, 191 (1985).
  16. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 410–13 (2002) (maintaining that it is only the satisfaction of rational preferences that enhances well-being). In fact, the standard assumption of mainstream economic models—that people behave rationally—sometimes leads to conclusions based on *rational* (rather than actual) preferences. See Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 246–51 (1998); *infra* pp. 323–25.
  17. See, e.g., John C. Harsanyi, *Problems with Act-Utilitarianism and with Malevolent Preferences*, in HARE AND CRITICS: ESSAYS ON MORAL THINKING 89, 96–98 (Douglas Seanor & N. Fotion eds., 1988); ADLER & POSNER, *supra* note 13, at 129–30; Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 179–96 (2000). In fact, agencies engaging in CBA already screen preferences in this way. See ADLER & POSNER, *supra* note 13, at 129–30. Other analysts oppose this idea. See, e.g., KAPLOW & SHAVELL, *supra* note 16, at 418–31.
  18. See, e.g., John D. Hey & Chris Orme, *Investigating Generalizations of Expected Utility Theory Using Experimental Data*, 62 ECONOMETRICA 1291 (1994); Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. R. 1551 (1998).

welfare, including the natural environment and the well-being of animals.<sup>19</sup> Its disregard for such notions as desert and fairness is likewise objectionable.<sup>20</sup> Economic analysis may consider such nonwelfare values and notions instrumentally through their effect on human welfare, that is, on the satisfaction of human preferences—but arguably, such treatment misses their intrinsic importance.

A distinctive advantage of economic analysis's use of WTP as a measure of human well-being is the facilitation of mathematical economic models and formalization of normative issues. However, measuring welfare in monetary terms raises several concerns. To begin with, the assumption that everything a person might desire is commensurable with money is controversial.<sup>21</sup> Even if the principled objection of incommensurability is rejected, the WTP criterion has been criticized for systematically favoring the rich. This is because the sum of money one is willing to pay for any entitlement depends on one's wealth.<sup>22</sup> This problem may be mitigated by shifting from WTP to WTA (Willingness to Accept), the minimum amount of money that one would accept to forgo any entitlement.<sup>23</sup> This response is, however, incomplete. A person who desperately needs money is likely to be willing to forgo an entitlement for a lower sum of money than a wealthy person, notwithstanding the greater happiness or satisfaction she would derive from the entitlement. WTA is also much more susceptible to manipulations.<sup>24</sup>

The regressive effect of monetization of preferences through WTP is connected to a much more fundamental critique of the Kaldor-Hicks criterion, namely its disregard for distributive concerns.<sup>25</sup> In its basic form, Kaldor-Hicks efficiency only measures total welfare, attributing no intrinsic value to

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19. See, e.g., DAVID DEGRAZIA, *TAKING ANIMALS SERIOUSLY* 36–74 (1996).

20. See generally SHELLY KAGAN, *NORMATIVE ETHICS* 54–59, 309 (1998).

21. See generally *infra* pp. 108–10, 113–16.

22. See, e.g., Ronald W. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Donald Hubin, *The Moral Justification of Benefit/Cost Analysis*, 10 ECON. & PHIL. 169 (1994); Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2127 (1996).

23. Hoffman & Spitzer, *supra* note 12, at 85–87.

24. Daniel Kahneman, Jack Knetsch & Richard Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1336 (1990) (suggesting that individuals habitually misstate WTA as greater than WTP because in many contexts they are rewarded for this misstatement).

25. See, e.g., Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 945–48 (2000).

its distribution among people. The Kaldor-Hicks criterion may favor redistribution of *resources* as a means to maximize aggregate social welfare due to the rule of decreasing marginal utility.<sup>26</sup> But this is a mere means to maximize total welfare, and it does not refer to distribution of *welfare* as such. Many economic analyses deviate from this characteristic of CBA by taking into account distributive concerns and incorporating them into predictive and normative economic models.<sup>27</sup>

Each and every feature of standard economic analysis merits detailed discussion. This book, however, concentrates on the consequentialist aspect of welfare economics. Hence, the remainder of this chapter focuses on consequentialism, its critique, and possible responses to the critique. Other features of economic analysis, including the assumption of rationality, monetization, and distribution will be addressed inasmuch as they relate to the main discussion.<sup>28</sup>

### ✂ C. Consequentialism and Its Critique

“Consequentialism” has a variety of meanings. It often refers to a normative theory which asserts that the only factor that ultimately determines the morality of an act or a rule (or anything else) is its consequences. In this book, we will use the term in a narrower sense to denote those theories that take into account the well-being of every person.<sup>29</sup> This definition excludes, for example, ethical egoism—the view that an act is right if and only if it leads to the best outcomes for the actor. It is not, however, committed to any specific

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26. R. Layard & A.A. Walters, *Income Distribution*, in COST-BENEFIT ANALYSIS 179, 192–97 (Richard Layard & Stephen Glaister eds., 2d ed. 1994).

27. See, e.g., Arnold C. Harberger, *On the Use of Distributional Weights in Social Cost-Benefit Analysis*, 86 J. POLITICAL ECON. s87 (1978); Alberto F. Alesina & Paola Giuliano, *Preferences for Redistribution* IZA Discussion Paper No. 4056. Available at <http://ssrn.com/abstract=1369802>.

28. See *infra* pp. 313–47, 108–16, and 246–51, respectively. Additional critique is leveled against the manner in which CBA has been used in recent decades by regulatory agencies in the United States. See, e.g., RICHARD L. REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 13–14 (2008).

29. On this conventional meaning of the term and on other definitions, see generally Samuel Scheffler, *Introduction*, in CONSEQUENTIALISM AND ITS CRITICS 1, 9 (Samuel Scheffler ed., 1988); KAGAN, *supra* note 20, at 59–64; Philip Pettit, *Consequentialism*, in A COMPANION TO ETHICS 230 (Peter Singer ed., 1991).

theory concerning the goodness of outcomes in general or human well-being in particular. Utilitarianism and normative economics are the most famous consequentialist theories.

While sharing these common features, consequentialist theories vary in many respects. First, they differ with regard to the underlying theory of the good and particularly of human well-being. Some versions of consequentialism, such as utilitarianism, posit that human well-being consists of enjoying positive mental states and avoiding negative ones; other theories, including welfare economics, consider the satisfaction of people's actual or ideal preferences as decisive; and others contend that well-being consists of attaining certain objectively defined elements (such as good health, meaningful social relations, and knowledge).<sup>30</sup> They also vary in the importance they attribute (if at all) to the distribution of well-being among members of society and to the well-being of future generations. The underlying theory of the good may or may not incorporate notions of equality, culpability, and desert (normative economics does not, in principle, incorporate any of these notions).<sup>31</sup> Consequentialist theories also differ regarding the appropriate focal point of analysis (actions, rules, motivations, virtues, etc.).<sup>32</sup> This book focuses on one consequentialist theory, namely normative economics, and more precisely, on the consequentialist character of normative economics.

Consequentialism in general, and normative economics in particular, have been the subject of two major critiques aimed at the absence of restrictions on pursuing the overall good and at the requirement to prefer the overall good over one's own interests. The first critique claims that consequentialism *allows* too much. Consequentialism imposes no restrictions on attaining the best outcomes, thus legitimizing and even requiring harming people, lying, and breaking promises to achieve desirable results.<sup>33</sup>

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30. On different theories of the good, *see generally* JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* (1986); KAGAN, *supra* note 20, at 25–69; DEREK PARFIT, *REASONS AND PERSONS* 493–502 (1984); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 108–43 (1998).

31. *See generally* KAGAN, *supra* note 20, at 48–59, 308–09. On complex theories of the good and consequentialism, *see also infra* pp. 30–32.

32. *See generally* *MORALITY, RULES, AND CONSEQUENCES: A CRITICAL READER* (Brad Hooker et al. eds., 2000); Shelly Kagan, *The Structure of Normative Ethics*, 6 *PHIL. PERSPECTIVES* 223, 236–42 (1992).

33. *See, e.g.*, Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM—FOR AND AGAINST*, 93–107 (1973); THOMAS NAGEL, *THE VIEW FROM NOWHERE* 175–88 (1986).



Consequentialism does not recognize the moral rights of people over their body, labor, and talents.<sup>34</sup> Thus, consequentialism arguably requires that we harvest the organs of one person to save the lives of two other people, that we torture the baby of a terrorist to force him to reveal information that may save lives, and so forth. According to the deontological critique, some values, such as autonomy and freedom, take precedence over the attainment of best results, and thus promoting the good (e.g., maximizing aggregate social welfare) should be subject to *constraints*. Deontological constraints usually include restrictions on violating fundamental rights (e.g., the rights to life and bodily integrity, human dignity, and freedom of speech), special obligations created by promises and agreements, and restrictions on lies and betrayal.<sup>35</sup>

The second critique is that consequentialism *demand*s too much. Consequentialism presumably requires everyone to do what would maximize overall good outcomes, rather than further one's own personal goals and interests or the interests of her loved ones or her community. It does not allow for *agent-relative options*. Thus, consequentialism arguably requires the well-off to contribute almost all of their money and dedicate a large portion of their time and energy, to promoting the well-being of the disadvantaged people around the world. It also requires self-sacrifice when the expected benefit to another person (who may be as well-off as the agent) is only slightly larger than the cost to the agent. This requirement of impartiality arguably conflicts with human nature and with the conception of people as separate entities. It also conflicts with one's obligations toward family, friends, and community.<sup>36</sup>

In arguing that consequentialism both allows too much (lacks constraints) and demands too much (lacks options), the deontologist calls attention to the fact that consequentialism focuses on outcomes while deontology

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34. Larry Alexander, *The Jurisdiction of Justice: Two Conceptions of Political Morality*, 41 SAN DIEGO L. REV. 949, 952 (2004) (making this observation regarding conceptions of justice characterized by "unrestricted impartialism").

35. See *infra* pp. 41–48.

36. See generally SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 1–130 (2001) (discussing people's "associative duties" and special responsibilities to their families and the social groups they belong to, including nations); NAGEL, *supra* note 33, at 164–75; TIM MULGAN, THE DEMANDS OF CONSEQUENTIALISM (2001); James Griffin, *Incommensurability: What's the Problem?*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 35, 40–48 (Ruth Chang ed., 1997).

focuses on the morality of actions. Consequentialism is not directly interested in the way a particular outcome has been brought about.<sup>37</sup> In the context of constraints, there is, for example, a prevailing notion that there is a substantial difference between *doing* harm and merely *allowing* it; between *intending* harm and merely *foreseeing* it (or the related distinction between harming a person as a *side effect* of aiding other people and using a person as *a means* to aiding others); between harming for the sake of avoiding comparable harm befalling others and harming for the sake of increasing others' well-being.<sup>38</sup>

Generally, the concern that consequentialism justifies terrible deeds is exacerbated when the theory of the good underlying a consequentialist normative theory is actual preference satisfaction and even more so if preferences are measured by people's willingness to pay for their satisfaction. People sometimes have prejudiced, xenophobic, and even sadistic preferences, and their willingness to pay for satisfying their preferences directly depends on their affluence. At least theoretically (and most probably not only theoretically), these features of any consequentialist theory resting on actual preferences theory of well-being may lead to justifying "efficient" rapes, murders, and even genocide.<sup>39</sup>

The next section critically analyzes attempts to defend consequentialism against the critique that it allows too much, and the subsequent section will analyze attempts to answer the critique that it demands too much.

## ✂ D. Responses to the Lack-of-Constraints Critique

Some analysts (including some economic analysts of law) are not overly concerned about the counterintuitive or even morally repugnant conclusions of unconstrained consequentialism,<sup>40</sup> but most are. To avoid such

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37. For a qualification of this statement, see *infra* pp. 30–32.

38. See *infra* pp. 41–46.

39. See, e.g., Williams, *supra* note 33, at 105; David Dolinko, *The Perils of Welfare Economics*, *Book Review of Fairness Versus Welfare*, by Louis Kaplow & Steven Shavell, 97 NW. U. L. REV. 351, 356–62 (2002); Harsanyi, *supra* note 17, at 96.

40. See, e.g., Samantha Brennan, *Moral Lumps*, 9 ETHICAL THEORY & MORAL PRAC. 249, 259 (2006) ("Counter-intuitive results aren't so bad if you are a consequentialist; they are your stock in trade"); Michael B. Dorff & Kimberly Kessler Ferzan, *Is There a Method to the Madness? Why Creative and Counterintuitive Proposals Are Counterproductive*, in

counterintuitive or abhorrent conclusions, consequentialists resort to various responses. This section briefly discusses five such responses: (1) demonstrating that, due to long-term and indirect effects, seemingly efficient arrangements that violate deontological constraints are not, in fact, efficient; (2) moving from act- to rule-consequentialism; (3) including “preferences” for deontological constraints within the preferences whose fulfillment constitutes people’s welfare; (4) taking into account people’s feelings of virtue when they act according to commonsense morality and feelings of remorse when they do not; and (5) replacing actual preferences with ideal preferences as the underlying theory of the good. We shall argue that none of these responses successfully addresses the deontological critique of consequentialism.

### 1. Long-Term and Indirect Effects

A common strategy of consequentialists is to demonstrate that the counterintuitive conclusions attributed to consequentialism rest on flawed analysis that disregards or underestimates relevant outcomes. A fuller analysis—so the argument goes—reveals that seemingly efficient arrangements that violate deontological constraints are not, in fact, efficient, and are thus unjustified on purely consequentialist grounds.

For example, a consequentialist may argue that killing one person in order to use her organs to save the lives of three other individuals is only seemingly desirable. If the victim were to be selected from among hospitalized patients, such a practice would, in the long run, deter people from being hospitalized lest their organs be harvested against their will. Such a fear might have a detrimental effect on the overall health of the population. Should physicians be allowed to choose the victim from the entire population, this may result in arbitrariness and cause general anxiety. Even if one could guarantee that the choice of the victim would be random and fair, such a scheme might dramatically reduce people’s incentive to look after their own health. In fact, assuming that sick people may not be suitable organ donors, such a general scheme may even create an incentive for people to become moderately sick.

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THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 21, 21–26 (Mark D. White ed., 2009) (discussing legal economists’ suggestions to legalize baby-selling, racial discrimination, and insider trading; and noting that the “startling quality” of these suggestions may be their “primary virtue” from a “careerist perspective”).

Rather than prolonging people's life span and enhancing their quality of life, this general program may, in fact, cause more deaths. This rough outline of one example suffices to demonstrate how a consequentialist may respond to at least part of the deontological critique.<sup>41</sup> Another well-known example is the framing and executing of an innocent person to prevent serious riots in which hundreds of people will be killed.<sup>42</sup>

A consequentialist may claim that in the majority of cases, a thorough and sophisticated analysis of an act's total consequences (direct and indirect, certain and probable) would lead to conclusions similar to those of moderate deontology.<sup>43</sup> As for the remaining cases, the consequentialist may claim that they are very rare<sup>44</sup> and may insist that in these cases, ordinary morality is simply wrong.<sup>45</sup>

The claim that a sophisticated analysis of the total set of consequences leads to conclusions that are akin to moderate deontology is more convincing in some contexts than in others. As Bernard Williams has noted, the hypotheses about possible effects that consequentialists often invoke in this debate are "so implausible that [they] would scarcely pass if it were not being used to deliver the respectable moral answer."<sup>46</sup> It is not at all clear

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41. The example follows Harris and Singer's exchange on the "survival lottery." See John Harris, *The Survival Lottery*, 50 *PHILOSOPHY* 81 (1975); Peter Singer, *Utility and the Survival Lottery*, 52 *PHILOSOPHY* 218 (1977).

42. See H.J. McCloskey, *An Examination of Restricted Utilitarianism*, 66 *PHIL. REV.* 466, 468–69 (1957); H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *INQUIRY* 249, 255–56 (1965); T.L.S. Sprigge, *A Utilitarian Reply to Dr. McCloskey*, 8 *INQUIRY* 264 (1965); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM—FOR AND AGAINST*, *supra* note 33, at 69–71. A less dramatic example is the forced, uncompensated transfer of property from its owner to a person who values it more highly. While at first glance this may appear efficient, an economist may argue that it is not so "when one considers the incentive effects . . . of allowing such transfers and the alternative of forcing the rich person to transact with the poor person." (Posner, *supra* note 13, at 1155).

43. For an account of moderate (or threshold) deontology, as opposed to an absolutist one, see *infra* pp. 46–48.

44. R.M. Hare, *Ethical Theory and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 23, 27, 30, 31, 33 (Amartya Sen & Bernard Williams eds., 1982); ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 6 (1995).

45. See, e.g., KAGAN, *supra* note 20, at 76–77; SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* 83 (rev. ed. 1994); ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 8–12 (1982).

46. Williams, *supra* note 33, at 100. Cf. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387, 398–400 (1981) (demonstrating how incorporation of indirect and remote effects ("externalities run wild") may result in CBA reaching any desirable conclusion).

that the cases in which consequentialism leads to horrifying conclusions are rare, especially if consequentialism rests on preference satisfaction as its theory of the good.<sup>47</sup> And even if these cases are rare, a moral theory that endorses abhorrent deeds even in rare cases is flawed. Finally, even in cases where long-term effects are likely to lead to a conclusion similar to that of threshold deontology, the deontologist would insist that our deeply held moral intuitions are much stronger than what consequentialist analysis indicates.<sup>48</sup>

## 2. Rule-Consequentialism

The strategy we have just discussed for defending consequentialism does not transcend act-consequentialism. A different strategy is to move from act- to rule-consequentialism. Even if killing one person to save the lives of two may bring about overall good results, it may still be advisable to adopt an absolute, or almost absolute, prohibition against killing people. Such a rule may bring about overall better results even if in some particular cases it may result in suboptimal outcomes.<sup>49</sup> By changing the focal point of a consequentialist theory from acts to rules, we may generate a set of rules that is not very different from commonsense morality.<sup>50</sup>

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47. For a critique of the claim that consequentialism (or utilitarianism) is problematic only in very rare cases, see Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 14 (1982); Chang, *supra* note 17, at 181.

48. See SCHEFFLER, *supra* note 36, at 111; JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 142–43, n.11 (1990). See also Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 295–96 (1989).

49. See, e.g., RICHARD B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979). As mentioned above (*supra* note 32 and accompanying text), acts and rules are not the only focal points available to moral theories. Adopting other focal points such as motives may also narrow the gulf between consequentialism and ordinary morality. Consequentialism may also refrain from choosing any single primary focal point and instead have a comprehensive structure taking into account all focal points at the same time. See Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 464–67 (1979) (advocating a comprehensive structure); Shelly Kagan, *Evaluative Focal Points*, in *MORALITY, RULES, AND CONSEQUENCES*, *supra* note 32, at 134. While character traits and motives are clearly less appropriate objects of economic analysis and legal policy-making, this subsection's observations on rule-consequentialism are at least partially applicable to other versions of consequentialism, including institution-consequentialism.

50. See, e.g., John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND*, *supra* note 44, at 39, 56–60; GOODIN, *supra* note 44, at 71.

As stipulated thus far, this argument is hardly persuasive. Assuming universal compliance with the rule, the command should not be, for example, "Thou shalt not kill," but rather "Thou shalt not kill unless—all things considered—killing would enhance overall human welfare." Put differently, under the assumption of universal compliance, rule-consequentialism collapses into act-consequentialism. In fact, the only appropriate rule is "Do whatever maximizes the best results."<sup>51</sup> Some of the critiques of rule-consequentialism, particularly its alleged collapse into act-consequentialism, may arguably be answered if rule-consequentialism is not conceived of as an indirect-act-consequentialism but rather as the moral code whose general internalization would produce the best outcomes.<sup>52</sup> This version, however, is still subject to some of the traditional critiques of rule-consequentialism and raises difficulties of its own.<sup>53</sup>

The move to rule-consequentialism is more compelling if one replaces the ideal, unrealistic assumption of universal compliance with more realistic assumptions. A *realistic* theory strives to formulate the best set of rules given that some people will not understand, accept, or obey the rules (or simply will not have the time and energy necessary to conduct a comprehensive cost-benefit analysis of every action or inaction). A realistic normative theory takes into account people's cognitive limitations, self-serving biases, etc. Under such assumptions, the set of rules that would maximize human well-being may be tantamount to threshold deontology (and possibly even to absolutist deontology).<sup>54</sup> This is not to say, however, that realistic rule-consequentialism is unproblematic. Inter alia, it faces considerable difficulties whenever the degree of actual compliance with the rules it advocates

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51. See J.J.C. Smart, *Extreme and Restricted Utilitarianism*, in THEORIES OF ETHICS 171 (Philippa Foot ed., 1967).

52. See BRAD HOOKER, IDEAL CODE, REAL WORLD (2000).

53. See Tim Mulgan, *Ruling out Rule Consequentialism*, in MORALITY, RULES, AND CONSEQUENCES, *supra* note 32, at 212.

54. Allan Gibbard, *Utilitarianism and Human Rights*, 1 SOC. PHIL. & POLICY 92 (1984). A somewhat different strategy is to distinguish between intuitive morality, applying to daily actions and decisions that must be taken without much deliberation, and critical morality, applying to extraordinary conditions and requiring thorough, in-depth deliberation. While intuitive morality resembles moderate deontology (based on foundational utilitarianism), the critical normative theory should be act-utilitarianism. For this theory, see Hare, *supra* note 44.