LAW, MORALITY, AND ECONOMICS: INTEGRATING MORAL CONSTRAINTS WITH ECONOMIC ANALYSIS OF LAW

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Eyal Zamir and Barak Medina*

ABSTRACT

Economic analysis of law is a powerful analytical methodology. However, as a purely consequentialist approach, which determines the desirability of acts and rules solely by assessing the goodness of their outcomes, standard cost-benefit analysis (CBA) is normatively objectionable. Thus, for example, it presumably approves the deliberate killing of one innocent person to save the lives of two, and the breaking of a promise whenever it would produce slightly more net benefit than keeping it.

Moderate deontology prioritizes such things as autonomy, basic liberties, truth telling, and promise keeping over the promotion of good outcomes. It holds that there are constraints on promoting the good. Such constraints may be overridden only if enough good (or bad) is at stake. Thus, it may justify killing an innocent person only for the sake of saving many more (perhaps hundreds or thousands) people, and breaking a promise only to avoid considerable losses. Moderate deontology conforms to prevailing moral intuitions. At the same time, it is arguably lacking in methodological rigor and precision.

Can the normative flaws of economic analysis be rectified without relinquishing its methodological advantages? Can deontological moral constraints be formalized and modeled so as to make their analysis more rigorous? This Article examines the possibility of combining economic methodology and deontological morality through explicit and direct incorporation of moral constraints into economic models. The Article discusses various substantive and methodological choices involved in modeling deontological constraints. It proposes to determine the permissibility of any act or rule infringing a deontological constraint by means of mathematical threshold functions. The Article presents the general structure of threshold functions and analyzes their elements. It then illustrates the implementation of constrained CBA in several contexts, including discrimination in the marketplace, legal paternalism, and risking innocent people while fighting terrorism. It then addresses possible objections to our proposal.

Since the more sophisticated consequentialist responses to the deontological critique (i.e., the move from act- to rule-consequentialism) actually recognize that sound CBA should incorporate constraints for instrumental reasons, a consequentialist who embraces one of these responses should welcome our proposal even without converting to deontology.

Deontologically constrained CBA is more complex than standard CBA. Yet, we maintain that it is superior to its alternatives. It rectifies the normative flaws of conventional CBA without significantly compromising its methodological rigor. Concomitantly, it improves deontology by making the analysis of threshold constraints more precise and its policy implications potentially more determinate. Constrained CBA also better explains people's behavior and prevailing legal doctrines.

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INTRODUCTION

Economic analysis has transformed the way we think about law. Even its opponents 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 think of the interrelations between goals, means, and outcomes in a systematic and sophisticated way. It assists analysts and policymakers in identifying false intuitions and cognitive biases, thus rationalizing decision-making. 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. 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 hold that whereas the goodness of outcomes counts, it is not the only morally relevant factor. The pursuit of good consequences is subject to constraints. Certain acts are inherently wrong and are therefore impermissible even as a means to furthering the overall good. The central constraint is against harming other people. Additional constraints

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1 The term “cost-benefit analysis” (CBA) 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 (or some variation thereof) used in welfare economics to evaluate options, policies, and legal norms. In this Article we loosely 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.


3 See, e.g., Lewis A. Kornhauser, On Justifying Cost-Benefit Analysis, 29 J. LEGAL STUD. 1037, 1037 (2000) (noting that the justificatory foundations of cost-benefit analysis are “at best suspect and at worst in ruins”); Posner, supra note 1, at 1154 (conceding that the Kaldor-Hicks approach “must be defended because of its well-known normative inadequacies”).

4 See, e.g., John Rawls, A Theory of Justice 26 (rbsd. ed. 1999) (“deontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness.”); Shelly Kagan, Normative Ethics 60, 64, 70-78 (1998) (same); Frances M. Kamm, Morality, Mortality, Vol. I: Death and Whom to Save from It 76 (1993) (same).

5 This Article 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
prohibit such things 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. Thus, while consequentialism (at least presumably) approves 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 (perhaps hundreds or thousands) people. Similarly, while consequentialism supports the breaking of a promise whenever it would produce slightly more net benefit than keeping it, 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). Moderate deontology conforms to prevailing moral intuitions (“commonsense morality”). At the same time, it arguably lacks the methodological rigor and determinacy characteristic of economic analysis. Therefore, the argument goes, policy-makers and legal academics should better ignore non-efficiency considerations, or at most consider them separately, outside of the economic model.

Can the normative flaws of standard economic analysis be rectified without relinquishing its methodological advantages? Can deontological moral constraints be formalized and modeled so

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6 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).

7 See, e.g., Samantha Brennan, Thresholds for Rights, 33 SOUTHERN J. PHILO. 143, 145 (1995) (“The view that (many if not all) rights have thresholds is … an extremely common one, both among the general public and among philosophers engaged in moral theory”); Samuel Scheffler, Introduction, in CONSEQUENTIALISM AND ITS CRITICS 1, 9 (Samuel Scheffler ed. 1988) (“Indeed, most would agree that [deontological constraints and options] mirror everyday moral thought much more closely than consequentialism does”). Even critics of threshold deontology readily admit that it comports with commonsense morality much better than do rival theories. See, e.g., SHELLY KAGAN, THE LIMITS OF MORALITY 1-5 (1989).


9 See, e.g., ADLER & POSNER, supra note 1, at 154-158 (along with the possibilities of considering deontological considerations separately from CBA or by a different governmental branch, the authors mention the possibility of a “superprocedure” through which both deontological and welfarist considerations 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”). Clearly, when talking about scholarly analysis of law, an institutional separation between economic and deontological analysis is implausible. See also Posner, supra note 1, 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 Section VI.A.
as to make their analysis more rigorous? This Article examines the possibility of combining economic methodology and deontological morality through explicit and direct incorporation of moral constraints into economic models. 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 quick to disqualify economic analysis as a fruitful analytical methodology.10

Most of the Article is thus devoted to developing a detailed framework for incorporating threshold constraints into CBA. It addresses the challenges facing the formulation of threshold functions, and illustrates their application to several major legal issues. Deontologically constrained CBA is more complex than standard CBA. Yet, we maintain that it is superior to its alternatives. It rectifies the normative flaws of conventional CBA without significantly compromising its methodological rigor. At the same time, it 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) 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 (other consequentialist responses to the deontological critique, such as the “preferences for fairness” argument, are conceptually unsound and potentially self-defeating).

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 into consideration. The same is true with regard to 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

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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.
infringement is necessary to promote a compelling governmental interest.\textsuperscript{11} Thus, threshold constraints are essential to understanding and explaining existing legal doctrines.

To illustrate, Richard Posner has analyzed the regulation of free speech using a formula which takes into account the total benefits of a certain speech, its expected harm, the probability that the harm will actually ensue if the speech is allowed, a discount rate for future harms, the disutility experienced by disinterested people from knowing about the speech, and the administrative costs of regulating or protecting it.\textsuperscript{12} While some elements of Posner’s formula may be questioned, it clearly contributes to identifying the pertinent factors and clarifying their interrelations. At the same time, the formula disregards the intrinsic value of liberty, and is thus likely to lead to underprotection of free speech. To avoid this result, Posner resorts to second-order considerations, focusing on the difficulties of estimating the costs and benefits of free speech, combined with extreme distrust of governmental authorities.\textsuperscript{13} However, such manipulation blurs the real issues rather than highlighting them. A much more fruitful solution would be to explicitly incorporate into the formula a constraint against curtailing people’s freedom of speech, thus legitimizing its infringement only if it is necessary to promote good outcomes (or avoid bad ones) exceeding a certain threshold. Such incorporation would combine the advantages of economic methodology with the normative plausibility of deontological morality (and would better cohere with existing legal notions).

The Article proceeds as follows. Part I provides a general survey of consequentialism and its critique. It opens with a concise description of consequentialism (Section I.A) and its critique (Section I.B), focusing on welfare economics and economic analysis of law. It then analyzes the standard responses of consequentialists (and economists in particular) to the deontological critique (Section I.C). It concludes that none of the responses is satisfactory, and that in fact most

\textsuperscript{11} This principle, which is an integral part of the doctrine of strict scrutiny, applies, for example, whenever the government employs a suspect classification (see, e.g., Johnson v. California, 543 U.S. 499, 505 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003)) or adopts a content-based regulation of speech (see, e.g., Republican Party of Minnesota v. White, 536 U.S. 765, 774-75 (2003)). As explained by Justice O’Connor, whenever the government infringes a person’s fundamental right, that person has suffered an injury, and the application of the strict scrutiny standard “determines whether a compelling governmental interest justifies the infliction of that injury.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995).

\textsuperscript{12} RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 62, 67-94 (2001). For a fuller exposition, see infra notes 194-201 and accompanying text.

\textsuperscript{13} Id., at 70-75.
of them imply that it is instrumentally desirable to add deontological constraints to economic models.

Part II outlines the main critiques of threshold deontology and possible responses. Part III addresses the claim that even if moderate deontology is a superior moral theory for individuals, legal policy-makers (and academic policy analysts) should be guided by consequentialism. It rejects such a dichotomy between personal and public morality.

Part IV discusses various substantive and methodological choices involved in modeling deontological constraints. It proposes to determine the permissibility of any act or rule infringing a deontological constraint by means of a threshold function. Section IV.A 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. Section IV.B presents the general structure of threshold functions. Section IV.C demonstrates that, to capture the essence of deontological constraints, threshold functions may have to take into account only certain types of costs and benefits involved in the infringing act or rule. Section IV.D discusses different ways to model the size of the threshold itself. Part V then illustrates possible applications of constrained CBA. It discusses discrimination in the marketplace (Section V.A), legal paternalism (Section V.B), and risking innocent people’s lives while fighting terrorism (Section V.C). Further applications are illustrated in the concluding Section (V.D).

Finally, Part VI tackles some methodological and principled objections to the incorporation of deontological constraints into economic analysis. We discuss the claims that such incorporation would adversely affect the normative neutrality of economic analysis (Section VI.A); that monetizing deontological constraints faces insurmountable obstacles (Section VI.B); and that it would lead to setting thresholds too low (Section VI.C). We conclude that most of these objections are unpersuasive and none is conclusive.¹⁴

¹⁴ Two interrelated cautions about our proposal seem in order. First, while we argue that constrained CBA is both normatively and methodologically warranted, we do not claim that it is necessarily the most attractive (or even an acceptable) moral theory. To make such a claim, one has to analyze other features of standard CBA, and such analysis lies beyond the scope of this Article. Second, we do not claim that constrained CBA excludes other modes of thinking about legal and policy issues. Obtaining a better and broader view of the cathedral does not exclude other viewpoints.
I. CONSEQUENTIALISM AND ITS CRITIQUE

A. CONSEQUENTIALISM

“Consequentialism” has different meanings. In this Article we take consequentialism to denote a normative theory which asserts that the only factor that ultimately determines the morality of an act or a rule (or anything else) is their consequences, and which rests on a theory of the good that takes into account the well-being of every person. This definition excludes, for example, ethical egoism, but is not committed to any specific theory concerning the goodness of outcomes in general or human well-being in particular. Utilitarianism and welfare economics are the most famous consequentialist theories.

While sharing these common features, consequentialist theories vary in many respects. They differ with regard to the underlying theory of the good, particularly regarding human well-being. Some versions of utilitarianism hold that human well-being consists of having positive mental states and avoiding negative ones; other theories take the satisfaction of people’s actual or ideal preferences as decisive criteria; and others hold that well-being consists of attaining certain objectively-defined elements (good health, meaningful social relations, knowledge, etc.). The underlying theory of the good may or may not incorporate notions of equality, culpability, and desert. Consequentialist theories also differ regarding the appropriate focal point of analysis (actions, rules, motivations, virtues, etc.).

Normative economics is a consequentialist moral theory. Like utilitarianism, it ordinarily attributes equal weight to the well-being of every person and focuses on the total or average well-being of all people. An act or a rule is desirable if it is efficient, i.e. if the sum of well-being (utility) it generates is greater than the sum of its costs (disutility). The standard criterion economists use for measuring human well-being is preference satisfaction. Standard CBA circumvents the problem of comparing and aggregating utilities by using money as a universal

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15 On this conventional meaning of the term and on other definitions, see generally Scheffler, supra note 7; Kagan, supra note 4, at 59-64; Philip Pettit, Consequentialism, in A COMPANION TO ETHICS 230 (Peter Singer ed., 1991).


17 See generally Kagan, supra note 4, at 48-59, 308-309. On complex theories of the good and consequentialism, see also infra Subsection I.C.5.

means for measuring utilities and disutilities. Preferences are measured by people’s willingness to pay for their satisfaction. Standard economic analysis (whether normative or positive) is also characterized by the assumption that people are rational actors, both motivationally (they strive to maximize their own well-being) and cognitively (their preferences and choices conform to formal requirements such as transitivity and completeness).\(^\text{19}\) It focuses on incentives for future behavior.\(^\text{20}\)

**B. THE CRITIQUE OF CONSEQUENTIALISM**

Consequentialism has been the subject of several major objections, revolving around its distributive implications,\(^\text{21}\) its requirement to prefer the overall good over one’s own interests, and the absence of restrictions on pursuing the overall good. This article focuses on the third critique. While the second objection is that consequentialism **demands** too much,\(^\text{22}\) the third is that it **allows** too much. It imposes no restrictions on attaining the best outcomes, thus

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\(^{19}\) For a brief overview of these characteristics of standard economic analysis and further references, see Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 248-50 (1998).

\(^{20}\) On the normative foundations and main characteristics of welfare economics, see generally DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* (1996).

\(^{21}\) This objection refers to theories, such as utilitarianism and Kaldor-Hicks efficiency, which define good outcomes as the maximization of overall welfare regardless of its distribution, and may thus endorse extremely unfair distribution of utilities and wealth (*see, e.g.*, RAWLS, *supra* note 4, at 23-24; SAMUEL SCHEFFLER, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* 10-13 (rvsd ed. 1994)). In principle, economic analysts are ready to address this concern by defining a social welfare function that takes into consideration the distribution of welfare. CBA may, for example, attribute different weights to the willingness-to-pay of different people according to their wealth. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 28-38 (2002); RICHARD O. ZERBE, JR. & DWIGHT D. DIVELY, *BENEFIT-COST ANALYSIS IN THEORY AND PRACTICE* 236-54 (1994) (analyzing different techniques of incorporating distributional concerns into CBA); Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PA. L. REV. 1419, 1450-52 (1998).

\(^{22}\) Consequentialism presumably requires everyone to do almost 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. 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 towards family, friends, and community. *See generally* SCHEFFLER, *supra* note 21 (proposing a moral theory that allows for agent-relative options while not incorporating agent-relative constraints); 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); THOMAS NAGEL, *The View from Nowhere* 164-75 (1986); James Griffin, *Incommensurability: What’s the Problem?, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 35, 40-48 (Ruth Chang ed., 1997). This objection is less compelling in the context of economic analysis of law. The legal system only regulates certain aspects of human life, leaving much room for decisions and actions that are not governed by legal norms. Thus, the fear of demanding too much is less troubling in the legal context. Furthermore, a striking feature of welfare economics—the focus of our discussion—is its contention that under a relatively broad range of circumstances, the best way to maximize overall welfare is by each person rationally pursuing her own interests. Even absent a competitive market, economists rarely, if ever, suggest that people should consciously aim at maximizing overall utility. Rather, they look for ways to correct market failures or to mimic the outcomes of competitive markets.
legitimizing and even requiring the harming of people, lying, and promise breaking as means to achieve desirable results. Consequentialism does not recognize the moral rights of people over their body, labor, and talents. Thus, consequentialism arguably requires that we chop up one person and harvest her organs to save the lives of five other people; that we torture the baby daughter of a terrorist to force him to reveal information that may save lives; and so forth.

The constraint against harming people does not apply to each and every interest an individual may have (had it been so inclusive, we would be left with the Pareto principle, which practically blocks any move from the legal status quo). The exact list of deontological constraints is debatable, but it usually includes restrictions on violating fundamental rights (e.g., the rights to life and bodily integrity, human dignity, freedoms of religion and speech), special obligations created by promises and agreements, and restrictions against lying and betrayal. Possibly, there is also a “deontological requirement of fairness, of evenhandedness or equality in one’s treatment of people”.

In arguing that consequentialism both demands too much (lacks options) and allows too much (lacks constraints) the deontologist calls attention to the fact that consequentialism focuses on outcomes while deontology focuses on the morality of actions. Consequentialism is not directly interested in the way a particular outcome has been brought about. In the context of constraints, there is, for example, a prevailing notion that there is a substantial difference between actively harming a person and not aiding her (often labeled the doing/allowing distinction).

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23 See, e.g., Bernard Williams, A Critique of Utilitarianism, in J.J.C. Smart & Bernard Williams, CONSEQUENTIALISM – FOR AND AGAINST, 93-107 (1973); Nagel, supra note 22, at 175-88.
26 Nagel, supra note 22, at 176. See also Kagan, supra note 4, at 84-94 (a general discussion of the scope of the constraint against harming people), 106-52 (discussing lying, breaking promises, failing to meet special obligations, conventions, and duties to oneself); Christopher McMahon, The Paradox of Deontology, 20 Phil. & PUB. AFF. 350, 354-68 (1991) (defining deontological constraints through the notion of unfair treatment of others). Deontological notions of fairness feature prominently in Kamm, supra note 4. The question of how to establish a defensible list of constraints is part of the broader question as to how a normative theory is to be established and defended, which lies beyond the scope of this Article. On this question, see Brad Hooker, IDEAL CODE, REAL WORLD 4-23 (2000); Kagan, supra note 4, at 4-6, 11-17; Rawls, supra note 4, at 15-19 (introducing the notion of “reflective equilibrium”).
27 For a qualification of this statement, see infra Subsection I.C.5
28 A useful collection of philosophical studies of the doing/allowing distinction is KILLING AND LETTING DIE (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994). Drawing the line between doing and allowing is analytically much more difficult than meets the eye. See, e.g., Jonathan Bennett, The Act Itself (1995). The doing/allowing distinction is sometimes reformulated as a distinction between interfering and not interfering with a person’s welfare.
distinction is essential to deontological theories, but plays a very minor role (if any) in consequentialist analysis. Consequentialism may similarly be criticized for ignoring the distinction between intending harm (which seems to be immoral even if the harm was merely allowed), and foreseeing harm (which is not necessarily immoral); and the related distinction between harming a person as a side effect of aiding or saving other people, and using a person as a means to aiding or saving others. Finally, consequentialism seems to disregard the intuitive distinction between harming a person with a view to prevent comparable harms befalling other people, and harming a person with a view to further improve other people’s well-being. In CBA, forgone benefits are but one type of costs, and forgone costs are simply benefits.

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. This is because people sometimes have prejudiced, xenophobic, and even sadistic preferences, and because people's willingness to pay for satisfying their preferences directly depends on their affluence. At least theoretically (and most probably not only theoretically), these features of standard economic analysis may lead to justifying “efficient” rapes, murders, and even genocide.

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For a critical discussion of this suggestion, see Kagan, supra note 7, at 92-101. For psychological studies substantiating the prevalence of this intuition, see, e.g., Ilana Ritov & Jonathan Baron, Reluctance to Vaccinate: Omission Bias and Ambiguity, in BEHAVIORAL LAW AND ECONOMICS 168 (Cass R. Sunstein, ed. 2000).

Had deontological constraints applied equally to acts and omissions, the prohibition to kill one person in order to save two would prohibit both killing the person and not killing her (thereby killing the two).


On this distinction, see Kagan, supra note 7, at 128-82; Nagel, supra note 22, at 179-80; Bennett, supra note 28, at 194-225.

This distinction is often discussed in reference to the trolley problem. Should a person divert an uncontrolled trolley that is expected to kill 5 people to another track in which it will kill only one person? Should a person push another individual to block the trolley, thus killing that person to save the five? Many would find diverting the trolley’s path morally permitted, perhaps even required, while the pushing of the one person morally forbidden, grounding the difference in the distinction between killing as a side-effect (in the first scenario) and killing as a means (in the latter). See Philippa Foot, The Problem of Abortion and the Doctrine of the Double Effect, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 23 (1978); Judith Jarvis Thomson, The Trolley Problem, 94 YALE L.J. 1395 (1985); F.M. Kamm, Harming Some to Save Others, 57 PHIL. STUD. 227 (1989).


See, e.g., Williams, supra note 23, at 105 (arguing that utilitarianism is likely to favor the “removal” of a racial minority if the minority is small enough and the majority is severely prejudiced); 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) (demonstrating that the anti-Jews policies of the Nazi regime in 1933 Germany were most
C. ATTEMPTS AT DEFENDING CONSEQUENTIALISM

Some analysts (including some economic analysts of law) are not overly-concerned about the counter-intuitive or even morally repugnant conclusions of unconstrained consequentialism; but most are. To avoid such counter-intuitive or abhorrent conclusions, consequentialists resort to different responses. This Section briefly discusses five such responses, and argues that none of them is successful in addressing the deontological critique of consequentialism.

1. Long-Term and Indirect Effects

A common strategy of consequentialists is to demonstrate that the counter-intuitive conclusions attributed to consequentialism rest on partial or flawed analysis that disregards or underestimates relevant outcomes. For example, a consequentialist may argue that a suggestion to kill 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 may have a very 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. So rather than prolonging people’s life-span and enhancing quality of life, such a general scheme may in fact cause more deaths.

35 See, e.g., Eric Rasmusen, Of Sex and Drugs, and Rock’n’roll: Does Law and Economics Support Social Regulation?, 21 HARV. J. L. & PUB. POL’Y 71 (1997) (advocating a simple aggregation of actual preferences, including other-regarding ones, measured by each person’s willingness to pay). See also 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”).
This rough outline of one example suffices to demonstrate how a consequentialist may respond to at least some of the deontological critique. 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 threshold deontology. As for the remaining cases, the consequentialist may claim that they are very rare, and she may insist that in these cases ordinary morality is simply wrong.

The claim that a sophisticated analysis of the total set of consequences leads to conclusions that are akin to threshold deontology is more convincing in some contexts than in others. As Williams notes, 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.” It is not at all clear that the cases in which consequentialism leads to horrifying conclusions are rare, especially if it rests on preference satisfaction as its theory of the good. And even if these cases were 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

36 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). 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 (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 CONSEQUENTIALISM – FOR AND AGAINST, supra note 23, at 69-71; cf. Russell L. Christopher, Deterring Retributivism: The Injustice of “Just” Punishment, 96 NW. U.L. REV. 843, 871-73 (2002). 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 1, at 1155).


38 See, e.g., KAGAN, supra note 4, at 76-77; SCHEFFLER, supra note 21, at 83; ROBERT E. GOODIN, POLITICAL THEORY AND PUBLIC POLICY 8-12 (1982).


40 For a critique of the claim that consequentialism (or utilitarianism) is problematic only in very rare cases, see Sen, supra note 34, at 14; Dolinko, supra note 34, at 359; Howard F. Chang, A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle, 110 YALE L.J. 173, 181 (2000).
conclusion similar to that of threshold deontology, the deontologist would insist that our deeply-held moral intuitions are much stronger than what consequentalist analysis indicates.\textsuperscript{41}

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 sub-optimal outcomes.\textsuperscript{42} 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.\textsuperscript{43}

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”.\textsuperscript{44} The move to rule-consequentialism is more compelling if one replaces the ideal,

\begin{itemize}
\item \textsuperscript{41} See Scheffler, supra note 21, at 111 (describing the thought experiment of the “Infallible Optimizer” machine).
\item \textsuperscript{42} See, e.g., Richard B. Brandt, A Theory of the Good and the Right (1979) (advocating rule-utilitarianism). As mentioned above (supra note 18 and accompanying text) acts and rules are not the only focal points available to moral theories. Adopting other focal points, such as character traits or 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 18, at 134 (suggesting that a consequentialist theory should examine all focal points directly, and in case of conflict between them make the choice on consequentialist grounds). While character traits and motives are clearly less appropriate objects of economic analysis and legal policymaking, this Subsection’s observations on rule-consequentialism are at least partially applicable to other versions of consequentialism, including institution-consequentialism.
\item \textsuperscript{43} See, e.g., John C. Harsanyi, Morality and the Theory of Rational Behaviour, in Utilitarianism and Beyond, supra note 37, at 39, 56-60 (“As compared with act utilitarianism, rule utilitarianism will be much closer to traditional morality …”); Goodin, supra note 37, at 71 (“the rules that utilitarians would adopt are virtually identical to those that deontologists recommend”).
\item \textsuperscript{44} See J.J.C. Smart, Extreme and Restricted Utilitarianism, in Theories of Ethics 171 (Philippa Foot ed., 1967). 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 (see Hooker, supra note 26). This version, however, is still subject to some of the traditional critiques of rule-consequentialism and raises difficulties of
\end{itemize}
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 won’t have the time and energy necessary to conduct a comprehensive cost-benefit analysis of each and 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). 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 deviates from the degree of compliance initially assumed, either downwards or upwards.

While the move to rule-consequentialism—coupled with realistic assumptions about people’s behavior—reasonably answers the deontological critique in some instances, it is unsatisfactory in others. Often, institutional arrangements and procedural safeguards may dramatically reduce the risks of miscalculation and bias that serve to instrumentally justify constraints. In such cases, even a rule-consequentialist would not avoid conclusions that are in clear contradiction with ordinary morality. In fact, an avid consequentialist would not aspire to set rules that correspond to ordinary morality, but would rather aim to free herself from its constraints. Generally, since rule consequentialism treats constraints merely as a means to achieving overall best outcomes, there is no guarantee that it would endorse a factorial moral theory that is identical to any form of threshold deontology.

In any event, even if rule-consequentialism of some sort were a valid foundational moral theory, it would not imply that CBA should not include deontological constraints. On the contrary—the more sophisticated versions of rule-consequentialism are more acceptable precisely

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45 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 37.


because they strive to explain and justify the role of deontological constraints on the *factoral* level.\(^{48}\) Thus, CBA should take these factors into account as well.

3. “Preferences for Constraints”

A third response to the anti-consequentialist critique is available only to consequentialist theories—such as welfare economics—whose underlying theory of the good is preference satisfaction. The argument is straightforward: Welfare economics strives to maximize the overall satisfaction of people’s preferences without passing judgment on their content or distinguishing between different objects of preferences. Thus, if people have preferences for “fairness”—including a preference for prohibitions against harming others—then these preferences should count in the cost-benefit analysis. Louis Kaplow and Steven Shavell have popularized this argument in the legal literature.\(^{49}\)

For some economists, the reluctant acknowledgment of the relevance of people’s preferences regarding “fairness” or “justice” seems little more than lip service. Others—particularly but not exclusively those interested in the economics of environmental protection—take such public preferences more seriously and make room for them in their positive and normative analyses.\(^{50}\) Notably, Richard Zerbe has proposed a modified version of the Kaldor-Hicks criterion, in which moral sentiments play an important role.\(^{51}\) Zerbe defines “moral sentiments” as other-regarding preferences that people are willing to pay for their satisfaction even when they are not directly affected by the relevant project, act, or rule. Such sentiments include preferences regarding the

\(^{48}\) In distinguishing between foundational and factoral moral theories, we follow Shelly Kagan’s taxonomy (Kagan, *supra* note 18, at 224-36). A *factoral* moral theory defines the factors that determine the morality of an act, their relative weight and interaction. Such factors may include the costs and benefits of an act, whether it involves harming other people, and the relationships between the actor and the people affected by the act. In and of itself, a factoral theory neither explains nor justifies the relevance of the various factors and their interaction. This is the role of *foundational* theories. Interestingly, there is no necessary match between the kind of theory one adopts on the factoral level and the theory one favors on the foundational level. As we have just seen, foundational consequentialism may endorse threshold constraints on the factoral level.


\(^{50}\) See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-12 (1972) (explaining inalienability of some rights as grounded in the unhappiness experienced by disinterested persons who resent seeing slaves or people who die because they have sold a kidney).

fairness and efficiency of rules and the ethical value attached to actions. To measure the “existence value” or “non-use” value of things such as environmental protection and wildlife conservation, economists have developed various techniques, including *contingent valuation methods* (CV or CVM) based on public polls. Such methods may in principle be used to elicit information about people’s attitudes to human rights and morality in general.

As several scholars have pointed out, however, the “taste for fairness” or “preferences for constraints” argument is methodologically problematic and conceptually unsound. Methodologically, it is difficult to ascertain, quantify, and aggregate people’s disinterested preferences, whether for ecological values or for moral norms. Conceptually, a judgment regarding the morality of a rule (or an act), based on all relevant factors, must not be confused with one such factor, namely the rule’s (or act’s) effect on the well-being of the person making the judgment. There is a fundamental difference between preferences and normative judgments. Individuals have the final say on the content of their preferences, while judgments may be right or wrong. The soundness of a judgment depends on the validity of the arguments underlying it, not on the number of its supporters or the intensity of their support.

Arguably, pooling together self-interested preferences and judgments (as well as other disinterested, other-regarding preferences) also gives rise to the concern of “double counting.” Rather than giving equal weight to the well-being of every person, it encompasses also the

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52 ZERBE, ECONOMIC EFFICIENCY, supra note 51, at 24-25. See also Zerbe, Bauman & Fikle, supra note 51, at 451.
54 See sources cited in supra note 53 (analyzing and criticizing CVM).
57 See generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 234-37, 275-77 (1977); Chang, supra note 40, at 183-94.
“preferences” people might have regarding the well-being of other individuals and groups. Moreover, if the political process is a mechanism for aggregating preferences and normative judgments, than almost by definition any existing legal regime in any society is efficient.\textsuperscript{58} In fact, if enough people object to consequentialism, aggregating their “preferences” may lead to abandoning consequentialism altogether!\textsuperscript{59} Including “tastes for fairness” or preferences for deontological constraints within CBA is therefore methodologically problematic, conceptually wrong or tautological, and potentially self-defeating.

4. Feelings of Virtue and Remorse

The previous argument in defense of consequentialism rests on disinterested “preferences.” A related but different argument rests on people’s self-regarding preferences or feelings. Most people derive pleasure from behaving morally. For example, people who keep a promise typically feel virtuous while those who break a promise might feel remorse. The preference for this positive feeling is a component of people’s well-being, and—as Shavell notes—“that in turn means that to maximize social welfare, promises should be kept somewhat more often than would be optimal if the measure of social welfare did not reflect this utility that individuals experience from keeping promises.”\textsuperscript{60} This conclusion sounds similar to adding a (rather weak) constraint to the cost-benefit analysis of keeping promises. In fact it is not.\textsuperscript{61} As already noted, the validity of a deontological constraint is independent of people’s feelings about it. It is an empirical question whether and to what extent people feel remorse when behaving contrary to ordinary morality. It stands to reason that at least some people do not experience this feeling.\textsuperscript{62}

\textsuperscript{58} As Zerbe explicitly writes, this is a corollary of incorporating prevailing moral norms into CBA (the exception being periods of rapid changes in which norms are unsettled). \textit{See ZERBE, ECONOMIC EFFICIENCY, supra note 51} (for example, at 239, he notes that “a rule which adopts uncontentious norms is necessarily efficient”).

\textsuperscript{59} For the argument that taking external preferences into account is potentially self-defeating, \textit{see DWORKIN, supra note 57, at 235. On the match between ordinary morality and threshold deontology, see supra note 7 and accompanying text. On the prevailing aversion to CBA, see, e.g., W. Kip Viscusi, Corporate Risk Analysis: A Reckless Act?, 52 STAN. L. REV. 547 (2000) (describing an experiment in which juror-eligible citizens imposed significantly higher punitive damages on firms who engaged in CBA); W. Kip Viscusi, The Challenge of Punitive Damages Mathematics, 30 J. LEGAL STUD. 313 (2001) (providing experimental evidence of people’s unwillingness to use consequentialist formulae for computing punitive damages); Jonathan Baron & Ilana Ritov, Intuitions about Penalties and Compensation in the Context of Tort Law, 7 J. RISK & UNCERTAINTY 17 (1993) (discussing experimental evidence of people’s unwillingness to base decisions as to penalties and compensation on consequentialist considerations).}

\textsuperscript{60} \textit{STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW} 609 (2004).

\textsuperscript{61} In fairness to Shavell, it is not clear that he intends for this argument to serve as a response to the deontological concerns. However, since the argument is made in the context of the morality of welfare economics and appears to present a practical answer to the deontological concern, it is worth discussing.

\textsuperscript{62} SHAVELL, supra note 60, at 624-25, 628-29 (discussing the problem of “amoral individuals”).
constraints, in contrast, are determined *normatively*. Thus, while people’s feelings of virtue and remorse, as well as their “preferences for constraints” (discussed above) may and should constitute part of positive analysis aimed at explaining and predicting human behavior, they do not address the deontological *normative* critique.

Moreover, according to the remorse argument, the fact that a breacher feels bad after breaching a contract makes the breach less efficient—that is, less morally justified—than if breaching the contract made her happy. In contrast, from a deontological perspective (as well as ordinary morality), to the extent that the breacher’s feelings matter at all, their effect on the morality of the breach is reverse. The fact that the breacher derives pleasure from harming the promisee makes the breach *less*—rather than *more*—justifiable. Finally, the remorse argument is likely to become circular. Once we’ll all turn into (act-) consequentialists, we’ll no longer feel any remorse for breaking a promise or harming another person, if such conduct enhances overall well-being.

5. Improved Theory of the Good: Ideal Preferences

A well-known strategy for defending consequentialism is to adopt a complex conception of the good with a view towards imitating deontological constraints. As David McNaughton and Piers Rawling vividly described this strategy, “whenever an opponent of a particular consequentialist theory asserts that existing consequentialist theories have ignored some value, the consequentialist can meet the challenge by simply sucking the alleged value into what we might call the consequentialist vacuum cleaner.” For example, a theory of the good may take into

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63 For a recent proposal to incorporate deontological moral judgments into economic models of personal decision-making, see Mark D. White, *Can homo economicus follow Kant’s categorical imperative?*, 33 J. SOCIO-ECONOMICS 89 (2004).


65 See Williams, * supra* note 23, at 101; Kelman, * supra* note 64, at 34.

66 A possible reply to this argument is that there should be an “acoustic separation” between ordinary morality for “ordinary individuals” and consequentialism for academics and government decision-makers. *See* KAPLOW & SHAVELL, * supra* note 21, at 381-402. But this (partial) reply is problematic in a democratic legal system. Another reply may possibly be to change the focal point and move from act-consequentialism to virtue-consequentialism or character traits consequentialism. *Cf.* SHAVELL, * supra* note 60, at 608-09 (arguing that the functionality of notions of morality supports investing in their inculcation).

consideration not only end-results but also the acts leading up to them.\textsuperscript{68} Furthermore, as suggested by Amartya Sen, the goodness of outcomes (or possible \textit{world histories}) to be maximized may include the realization of moral rights as well as considerations of actions, agency, control, and agent-relativity.\textsuperscript{69}

Such a sophisticated theory of the good is unavailable to economic analysis, which rests on a rather simple theory of human well-being: preference satisfaction.\textsuperscript{70} Thus, the closest one can get to defending normative economics by improving its underlying theory of the good (without dramatically changing its basic features) is by moving from satisfaction of \textit{actual} preferences—the traditional measure of well-being in economic analysis—to \textit{ideal} ones. An ideal preferences theory of the good holds that a person’s well-being consists of the satisfaction of those preferences she would have had if only she calmly and rationally considered any issue, paying heed to all relevant information without any external pressure, bias, or prejudice.\textsuperscript{71} 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.\textsuperscript{72} This endorsement usually refers only to \textit{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 examine also the \textit{motivational} rationality of people. They are willing to discount not only choices based on misinformation or cognitive biases, but also choices based on, e.g., sadistic and prejudiced preferences.\textsuperscript{73}


\textsuperscript{69} \textit{See}, e.g., Sen, \textit{supra note} 34; Sen, \textit{supra note} 68.


\textsuperscript{71} \textit{See generally}, Griffin, \textit{supra note} 16, at 10-17; Daphna Lewinsohn-Zamir, \textit{The Objectivity of Well-Being and the Objectives of Property Law}, 78 NYU L. Rev. 1669, 1677-1700 (2003).

\textsuperscript{72} \textit{See}, e.g., Kaplow & Shavell, \textit{supra note} 21, at 410-13 (maintaining that it is only the satisfaction of rational preferences that enhances well being). \textit{See also} Jules L. Coleman, \textit{The Grounds of Welfare}, 112 Yale L.J. 1511, 1540 (2003) (reviewing Kaplow & Shavell, \textit{supra note} 21). In fact, the standard assumption of mainstream economic models, that people behave rationally, leads to conclusions based on \textit{rational} (rather than actual) preferences. See Zamir, \textit{supra note} 19, at 246-51.

\textsuperscript{73} \textit{See}, e.g., Harsanyi, \textit{supra note} 34, at 96-98; Adler & Posner, \textit{supra note} 55, at 129-30, 138-40; Chang, \textit{supra note} 40, at 179-96; Michael Ashley Stein, \textit{The Law and Economics of Disability Accommodations}, 53 Duke L.J. 79, 122 (2003) (“[I]t is atypical when calculating social good to give weight to preferences arising from socially
However, neither sophisticated theories of the good, nor the more modest move from actual to ideal preferences, satisfactorily answer the deontological critique. Focusing on the move to ideal preferences, while excluding antisocial preferences indeed reduces the likelihood that purely consequentialist economic analysis would endorse truly deplorable conclusions, it still does not respond to many of the deontologist’s concerns. In contrast to deontology and corresponding with other consequentialist theories, CBA based on ideal preferences would support violating a constraint now to prevent two similar violations in the future (e.g., murdering one person to prevent two future murders). Furthermore, like the more sophisticated theories of the good, the technique of “laundering” morally-objectionable preferences actually aims at imposing constraints on welfare maximization. It is unclear if an ideal preferences theory of the good can incorporate such distinctions as doing/allowing or intending/foreseeing, but even if it could, the result would be a recognition that threshold constraints are indispensable on the factoral level.

D. SUMMARY

The above discussion has demonstrated that attempts to downplay, deny, or circumvent the deontological critique of consequentialism within a consequentialist factoral framework are doomed to fail. The main response that comes closest to actually addressing the deontological critique is rule-consequentialism. But this success comes at a price. To the extent that it answers the critique, it does so by endorsing deontological constraints on the factoral level. This response—as well as, to a considerable extent, the preference for constraints and ideal preferences responses—clearly implies that policy analysis should in fact incorporate deontological constraints.

undesirable criteria”). In fact, agencies engaging in CBA already screen preferences in this way. See Adler & Posner, supra note 55, at 129-30. Other analysts oppose this idea. See, e.g., KAPLOW & SHAVELL, supra note 21, at 418-31.

74 On the critique of such “hybrid consequentialism” from the point of view of non-consequentialist moral theories, see ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 79-86 (1993); KAGAN, supra note 4, at 216-18; ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 28-35 (1974); Kamm, supra note 32, at 251-56; Moore, supra note 33, at 289-90, 293-94.

75 Cf. Lewinsohn-Zamir, supra note 71, at 1699 (arguing that the laundering technique may assume that satisfying antisocial preferences might contribute to a person’s well-being, but then disregards them in shaping social policy).

76 Consequentialists may recognize constraints for additional reasons. Thus, for example, at least some elements of well-being (e.g., people’s dignity and privacy) accrue only if they are respected by others as rights, and not merely as means to maximize overall well-being. Thus, to maximize overall well-being, a consequentialist should recognize them as rights! See Philip Pettit, The Consequentialist Can Recognise Rights, 38 PHIL. QUART. 42 (1988).
This is not to say—and we need not say—that deontology is superior to consequentialism. There may be other aspects of deontology that make it unacceptable or unattractive. To balance the picture, the next Part summarizes the major critiques of moderate deontology.

II. THRESHOLD DEONTOLOGY, ITS CRITIQUE, AND RESPONSES

Since deontology is to a great extent defined in contradistinction to consequentialism, and since the aforementioned critiques of consequentialism reveal the main features of deontology, we shall focus in this Part on the critique of threshold deontology. To recapitulate, deontological theories view the goodness of outcomes as a morally relevant factor but not as the only inherently important one. They prioritize values such as autonomy, human dignity, basic liberties, truth telling, and keeping one's promises over the promotion of good outcomes. They contain constraints on attaining the best outcomes and at the same time allow people to (sometimes) pursue their own interests and the interests of people dear to them or belonging to their group, even if such a pursuit conflicts with attaining the overall good. Deontological theories thus recognize agent-relative constraints and agent-relative options. In this context, they draw various distinctions, such as: 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 for the sake of increasing others’ well-being.\(^77\)

While *absolutist* deontology maintains that constraints must not be violated for any amount of good consequences, *moderate* deontology holds 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. Our focus is on moderate deontology.

A general critique leveled against deontological constraints—moderate and absolutist alike—is that they are irrational. Assuming that there is something intrinsically bad in harming a person or using her as a means to some end, it seems irrational to oppose such harming or such use when the outcome of not harming or not using the person is a greater amount of equally severe harming

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\(^{77}\) *See supra* Section I.B.
or uses of other people.\textsuperscript{78} One response to the so-called “paradox of deontology” critique is that constraints are necessary to cope with people’s biases, shortsightedness, and cognitive limitations.\textsuperscript{79} This reply corresponds to one of the arguments available to the consequentialist in response to the deontological critique, namely combining constraints on the factorial level with rule-consequentialism on the foundational level.\textsuperscript{80} It thus calls for a parallel rejoinder, i.e. the difficulty to justify obeying the deontological constraint when it is \textit{known} that it would actually increase the overall violations of the constraint. A different reply would be to reject the implicit consequentialist assumption that the desirability of actions is ultimately determined by their outcomes, or to divorce the right from the good. Thus, a deontologist may claim that duties of special relations (e.g., between parents and their children) as well as prohibitions against being in certain relations (e.g., between a torturer and her victim) take precedence over the duty to maximize the good (even in terms of the relative value of state of affairs).\textsuperscript{81}

Another line of attack on moderate as well as absolutist deontology, that focuses on the constraint against harming people (the central deontological constraint), points to the great difficulties in systematically and generally characterizing the content and nature of the constraint. Shelly Kagan, among others, has powerfully demonstrated that none of the conventional distinctions—between doing harm and merely allowing it, between intending harm and merely foreseeing it, or between interference and non-interference with the welfare of others—provides a coherent and intuitively acceptable criterion for setting the constraint in all circumstances.\textsuperscript{82} While some philosophers believe it is nevertheless possible to come up with such a systematic criterion,\textsuperscript{83} others concede that such unique and general criterion may not exist, yet maintain that

\textsuperscript{78} KAGAN, \textit{supra} note 7, at 24-32; SCHEFFLER, \textit{supra} note 21, at 80-114. This critique refers to the victim of harm and other potential victims, but it also applies to justifications of constraints that focus instead on the agent, the relations between the agent and the victim, and so forth. \textit{see} KAGAN, \textit{supra} note 7, at 24-32.

\textsuperscript{79} \textit{Id.}, at 32-39.

\textsuperscript{80} See supra Subsection I.C.2.


\textsuperscript{82} KAGAN, \textit{supra} note 7, at 83-182. \textit{See also} BENNETT, \textit{supra} note 28 (criticizing the very distinction between doing and allowing, as well as the normative significance of this distinction and the intending/foreseeing one); KILLING AND LETTING DIE, \textit{supra} note 28 (an anthology of discussions of the doing/allowing distinction).

\textsuperscript{83} \textit{See}, e.g., Kamm, \textit{supra} note 32; Frances M. Kamm, \textit{Shelly Kagan’s The Limits of Morality}, 51 PHIL. & PHENOMENOLOGICAL RES. 903 (1991) (reviewing KAGAN, \textit{supra} note 7).
this lack is not fatal to deontology. It may be the case that different factors play different roles in different contexts. 84

Focusing on moderate deontology, it may be argued that setting thresholds is incoherent: either deontological constraints are prior to the good—in which case they should never be violated; or they can be overridden by the goodness of results—in which case one becomes a consequentialist. 85 The response to this critique is that there is nothing incoherent in maintaining that (contrary to consequentialism) the goodness of outcomes is not the only factor, and that (contrary to absolutist deontology) constraints may be outweighed by enough good outcomes. Recognizing that there is more than one morally relevant factor inevitably implies that under different circumstances some factors outweigh others and that all factors should be taken into account. Indeed, if the point of deontology is to make some acts (such as intentional torture) morally taboo, threshold deontology knowingly “misses” this point. 86

A more serious challenge is that it is impossible to set the deontological threshold at any particular point in a non-arbitrary manner. 87 This is arguably due to the incomparability of consequentialism and deontology: the first is goal-oriented, committed to maximizing good results while the latter holds that some acts are intrinsically wrong. In reply, one can concede that while any cutoff point is indeed “arbitrary” in the sense that it could have been set higher or lower, this is an inevitable feature of any pluralist normative theory incorporating more than one morally relevant factor. 88 Seemingly arbitrary rules are often set by the legal system when the benefits of having a bright line rule offset its obvious costs. At other times, institutional

84 See, e.g., James Griffin, Book Review: The Limits of Morality by Shelly Kagan, 99 MIND 128, 128-29 (1990) (arguing that the moderate may do without “a simple, fully explanatory moral theory,” instead admitting that “morality is a messy, unsystematic affair, that justifications for moral norms are varied, incomplete, and not articulable in a way that will suit all cases”); Frances M. Kamm, Morality, Mortality, Vol. II: Rights, Duties, and Status 49-60 (1996) (indicating that the same factor may have different moral significance in different contexts, possibly because the factors interact differently in each context); Samuel Freeman, Utilitarianism, Deontology, and the Priority of Right, 23 PHIL. & PUB. AFF. 313, 349 (1994) (concluding that deontology relinquishes complete rational systematization for the sake of plurality of values and principles).
85 See, e.g., Nancy (Ann) Davis, Contemporary Deontology, in A COMPANION TO ETHICS, supra note 15, at 205, 215-16 (arguing that recognition of thresholds undermines deontology). See also Russell L. Christopher, The Prosecutor’s Dilemma: Bargains and Punishments, 72 FORDHAM L. REV. 93, 153-54 (2003) (approvingly citing Davis’s critique); Christopher, supra note 36, at 877-80 (arguing that in permitting an innocent person to be punished once the threshold is met, threshold deontology is no better than consequentialism).
86 KAGAN, supra note 4, at 80-81; Moore, supra note 33, at 329-30. See also infra Section VI.C.
87 Anthony Ellis, Deontology, Incommensurability and the Arbitrary, 52 PHIL. & PHENOMENOLOGICAL RES. 855 (1992); Larry Alexander, Deontology at the Threshold, 37 SAN DIEGO L. REV. 893, 905-10 (2000); Christopher, supra note 85, at 154.
88 KAGAN, supra note 4, at 80-81. See also Moore, supra note 33, at 332. On incomparability, see infra Section VI.B.
arrangements are established, which give policy-makers or individuals discretion to set the threshold within a rather broad range.

Another critique of threshold deontology is that it requires a morally-inappropriate aggregation of harms to people. Since we are not concerned with loss of objects, but with loss to people, and since for every person the loss of life, liberty, or anything comparable is equally painful, there is arguably no reason to prefer the lives of the many to the life of the one. One should preferably decide whether to let the one or the many die by tossing a coin, thereby giving all people an equal chance of survival.\(^89\) Most commentators, however, reject this counter-intuitive argument.\(^90\) It should be noted that the “innumerability” argument does not rule out threshold deontology\(^\text{tout court}\). Accepting the argument would indeed rule out the killing of one person to save the lives of any number of other people (or any other infringement of a constraint aimed at protecting comparable interests), but it would not rule out, for example, breaking a promise or causing mild pain to one person for the sake of saving the life of another.\(^91\) In any event, since in the context of adding constraints to CBA we necessarily assume that interpersonal comparisons and aggregation of human well-being are meaningful and feasible, the present critique may be set aside.

Finally, it was pointed out that the discontinuity brought about by thresholds leads to strange puzzles. Suppose, for example, that it is morally correct to torture a terrorist’s mother (thereby putting pressure on the terrorist to reveal where he planted a bomb) to save the lives of \(x\) people but not to save the lives of \(x-1\). Must the torture stop the moment the terrorist (or anybody else) does something that reduces the number of threatened people from \(x\) to \(x-1\)? And if only \(x-1\) people are at risk, could the police lure one more person into the dangerous area, thus legitimizing the torture and saving the lives of all people?\(^92\) These somewhat gimmicky examples do not seem decisive within the legal context, where a myriad of normative, pragmatic, and institutional considerations either justify somewhat troubling discontinuous outcomes, or lead to the setting of more or less vague standards to be applied on a case-by-case basis. The problem of


\(^{90}\) See, e.g., Derek Parfit, \textit{Innumerate Ethics}, 7 PHIL. \& PUB. AFF. 285 (1978); KAMM, \textit{supra} note 4, at 75-143 (analyzing nonconsequentialist grounds for counting the number of people whose interests may be sacrificed); SCANLON, \textit{supra} note 16, at 229-41; James A. Montmarquet, \textit{On Doing Good: The Right and the Wrong Way}, 79 J. PHIL. 439 (1982); Brennan, \textit{supra} note 7, at 149-50.

\(^{91}\) See also THOMSON, \textit{supra} note 5, at 166-67; \textit{infra} Section IV.C.

\(^{92}\) On these and other puzzles, see Alexander, \textit{supra} note 87, at 900-905.
transforming gradual, quantitative differences into discontinuous, qualitative outcomes would have pervaded the legal system even if it were purely consequentialist.

While we recognize the challenges that threshold deontology faces, our conclusion is that threshold constraints are still an indispensable part of any acceptable factoral moral theory. Before proceeding to show how such constraints may be combined with economic methodology, we examine whether in this regard there is a difference between personal morality and legal policy-making and policy analysis.

III. PRIVATE AND PUBLIC MORALITY

It has been argued that even if moderate deontology is the right personal moral theory, consequentialism is the appropriate moral theory for legal policy-makers such as legislators, judges, and regulators (and for academic policy-analysts). While the impersonal nature of consequentialism may be irreconcilable with the notion of people as separate, autonomous agents, impartiality and impersonality are desirable virtues of the state and legal policy-makers, whose role is to advance the general good. Further, it has been argued that distinctions that play a central role in at least some versions of deontology, such as the doing/allowing and intending/foreseeing, are not relevant in the public sphere. This is because, unlike a private person, the state bears responsibility for the well-being of everyone, and because the motivations for collective and institutional decisions are often unclear and even conflicting.

93 The above list of critiques of threshold deontology is not exhaustive. Another critique is that any non-consequentialist concern is incompatible with the Pareto principle (Louis Kaplow & Steven Shavell, The Conflict between Notions of Fairness and the Pareto Principle, 1 AM. L. & ECON. REV. 63 (1999)). Plausible responses to this claim include the following: 1. Deontological theories do not necessarily conflict with the Pareto principle (Chang, supra note 40; Richard Craswell, Kaplow and Shavell on the Substance of Fairness, 32 J. LEGAL STUD. 245, 246-57 (2003)); 2. The conflict is tautological and may actually point to the weakness of the Pareto principle (Amartya Sen, The Impossibility of a Paretian Liberal, 78 J. POL. ECON. 152 (1970) (referring to a special case of Kaplow & Shavell’s general argument). See also Coleman, supra note 72, at 1523-24; Dolinko, supra note 34, at 363-64 (pointing to “blatant circularity” in Kaplow & Shavell’s argument); Dorff, supra note 25, at 860-61); 3. In the context of deontological constraints the argument holds only behind an imaginary contractarian veil of ignorance because in real life it is the removing a constraint against harming people that necessarily violates the Pareto principle (Cf. Waldron, supra note 56, at 284-85 (explaining that Kaplow & Shavell’s argument is “refutation by a single case, and a hypothetical case at that.”)). For additional challenges facing deontology, see Alexander, supra note 24, at 962-66.

94 GOODIN, supra note 37, at 60-77.

95 See Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 STAN. L. REV. 703, 716-28 (2005) (making these arguments in the context of capital punishment);
Though attractive, this argument is ultimately unsuccessful. To begin with, the distinction between individuals and public authorities is less clear than it first appears. One reason for this is that there is no sharp dividing line, but rather a continuum, between private and public entities.\(^6\) The other reason is that in the absence of a world government, state governments (and even more so local authorities) raise the same agent-relative concerns in terms of both options and constraints as do individuals.\(^7\)

To further examine this argument, one should distinguish between the role of the state (and other governmental authorities) as an actor and its role as the provider of legal norms applying to other actors (and to itself). As an actor, the state’s position is parallel to that of a moral agent. Some of the differences between the state and a private person indeed weaken the justification for deontological constraints, but others strengthen it. On the one hand, it may be argued that the state cannot evade responsibility for bad outcomes on the basis of such distinctions as the intending/foreseeing (because mental states are hardly relevant for the state) or doing/allowing (because the state is equally responsible for the well-being of all people). On the other hand, given realistic assumptions about possible errors and biases of government officials, the risks involved in allowing governmental bodies to violate people’s basic liberties, to treat people unevenly, or to lie, are much greater than those involved in allowing private people to do such things. Given the enormity of these risks, and assuming (as we do at this stage) that act-consequentialism is unacceptable as a personal morality, it is at least equally unacceptable for the state. At most, consequentialism may serve as a foundational theory, underlying desirable constraints on state’s actions. Like other agents, the state must not kill one person to save the lives of two.\(^8\)

David Enoch, *Intending, Foreseeing, and the State* (unpublished manuscript, on file with the authors) (focusing on the intending/foreseeing distinction).


\(^7\) Alexander, *supra* note 24, at 953. For further critique of the proposition that consequentialism (particularly utilitarianism) is defensible as a normative theory for public decision-makers even if not for individuals, see James P. Sterba, *Utilitarianism as a Public Philosophy*, 108 ETHICS 223, 224 (reviewing GOODIN, *supra* note 37); Dan Brock, *Utilitarianism as a Public Philosophy*, 59 PHIL. & PHENOMENOLOGICAL RES. 265, 266 (same).

\(^8\) See also Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 756-64 (2005). Steiker argues that Sunstein & Vermeule (*supra* note 95) miss the fundamental distinction between purposeful killing—capital punishment—and nonpurposeful killing—not
Turning to the role of the state as a provider of legal norms (including norms applicable to itself) it may be noted that both the content of many legal norms and the decision-procedures of legislatures are often deontological. Substantively, violating basic civil rights cannot be justified on the grounds that the violation produces slightly more overall good. Procedurally, liberal democracies invariably impose constraints on primary and secondary legislation—many of which correspond to moderate deontological constraints. True, it is possible that both the deontological form of legal rules and the deontologically-constrained legislation procedures rest on foundational consequentialism. Yet, it is equally plausible—and given the serious flaws of consequentialism, even more plausible—that the deontological legal system and the constrained legislation procedure are and should be grounded in a deontological foundational theory. In any event, even if one’s foundational moral theory is consequentialist, one may have good (consequentialist) reasons to endorse deontology as a preferable decision procedure for legal policy-making (as well as for legal scholarship).

IV. MODELING THRESHOLD CONSTRAINTS

A. INTRODUCTORY REMARKS

Having established the necessity of integrating deontological constraints with economic methodology, this Part demonstrates how such integration may actually be done. Given the vast variety of contexts to which deontological constraints are applicable, the considerable diversity within theories of moderate deontology, and the multiplicity of modeling possibilities, we shall not try to provide a complete array of plausible mathematical models. Rather, we shall present the central substantive and methodological choices involved in such modeling. We submit that the very use of stylized mathematical representation facilitates a more definite and less ambiguous description of constraints, their scope, and the type of benefits and costs they take into account. Mathematical models bring to light the implications of alternative definitions of a constraint, and may thus contribute to the normative debate concerning such definitions. A formalized definition creating sufficient deterrence against murders or failing to lay down life-saving regulations. Indeed, while motivations and mental states are sometimes unclear when it comes to state actions, they are often detectable and verifiable.

99 Constitutional protection of basic liberties often includes provisos that are akin to deontological thresholds. One example is the doctrine that only “compelling interests” can justify infringements of fundamental rights. See supra note 11.
of a threshold constraint may then be integrated into an otherwise standard economic analysis, thus redefining its target function. Before getting into the details of the choices involved in the modeling of threshold constraints, some clarifications regarding the goals and scope of the following discussion are in order.

**Focus on Methodology.** While this Part describes the implications of different variations of deontological constraints for constrained CBA, it does not discuss in any detail the substantive arguments for and against these variations. Rather than directly engaging in the philosophical debate, the goal of this Part is to demonstrate the methodological plausibility of integrating deontological constraints into economic analysis. Sometimes, however, the methodological discussion sheds new light on the substantive issues as well.

**Object of Analysis.** In principle, the following analysis applies to both acts and rules, to both moral and legal questions, and to both private and public choices. Of these pairs, our primary focus is on public (rather than private) decisions concerning legal (rather than moral) issues. Our analysis applies to rules as well as to actions (such as resolving a particular legal dispute). To avoid repetition, we shall mostly refer to “acts” and “actors”, but these terms should be understood as covering both legal rule-making and particular decisions. In fact, much of the analysis is relevant to morality and to individual choices as well.

**Standard CBA as the Default.** The following discussion takes the standard features of conventional CBA (e.g., its underlying theory of the good and economic monetization methods) as the default. We shall not discuss these features unless adding threshold constraints to CBA requires modification thereof. Similarly, we shall not discuss the incorporation of distributive concerns into the social utility function underlying CBA. It is not that distributive concerns are

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100 The analysis of legal issues is often more complex than a comparable analysis of moral issues. In normative ethics any act (or omission) is morally required, prohibited, or optional (and in the latter case either praiseworthy or condemnable). The typology of the legal status of actions is considerably richer. In addition to determining the normativity of acts, the legal system also provides for sanctions and remedies for violations. Thus, a violation of a legal prohibition may result in criminal, administrative or civil sanctions, which vary in their severity, intrusiveness, monetary or non-monetary character, the identity of the enforcer (public or private), and so forth. Moreover, a prohibited act may be void, voidable, unenforceable, or valid—and each of these adjectives bears different meanings in different contexts. Thus, the law may reflect deontological constraints not only by prohibiting certain activities (e.g., enslavement), but also by restricting their legal effect (e.g., rendering enslavement contracts void). Finally, since legal norms are produced, interpreted, revised, and enforced by governmental authorities, institutional considerations loom large on almost any legal issue.
not important; Rather, they are important whether or not deontological constraints are considered.  

*Conflicting Constraints.* Legal (and other) policy-making often involves not only conflicts between promoting the good and deontological constraints, but also conflicts between deontological constraints. Thus, for example, the constraint against harming people’s reputation sometimes conflicts with the constraint against limiting (other people’s) freedom of speech. Similarly, the constraint against harming one’s dignity by discriminating against her in the marketplace conflicts with the constraint against limiting (other people’s) freedom to choose whom to interact with. In such cases, policy-makers need not only weigh the goodness of outcomes against deontological constraints but also (or even primarily) balance or prioritize between the constraints themselves according to some normative theory. We touch upon such conflicts in Section V.A below. However, we do not suggest that the *threshold functions* discussed below contribute to resolving conflicts between constraints, and do not explore such conflicts in any detail.

*Choosing among Permissible Options.* The models described below aim at determining whether acts or rules infringing a deontological constraint produce a sufficiently large net benefit to override the constraint. At times, this is the sole (or primary) question facing the decision-maker. For example, when a court decides whether a certain statute is constitutional, the only question may be whether the good produced by the statute is large enough to override a certain constraint. There are instances, however, in which determining whether one or more of the available options violate a deontological constraint is only part of the inquiry. Consider the choice between the following options: (1) deliberately killing 2 innocent people to save the lives of 280 people (out of 500 facing death); (2) deliberately killing 3 innocent people to save the lives of 290 (out of the same 500); (3) letting all 500 die. If the threshold of the constraint against actively/intentionally killing innocent people is sufficiently high, only the third option would be permissible. If, alternatively, the threshold is met whenever at least 100 people are saved by killing each person, then options (1) and (3) (but not (2)) are permissible. The choice between (1) and (3) may be made using standard CBA, and since option (1) results in net saving of 278 lives and options (3) with the saving of none, option (1) should be chosen. Finally, if the threshold is

101 There may indeed be interesting interactions between introducing deontological constraints and incorporating distributive concerns into CBA, but this issue exceeds the scope of our analysis.
met whenever killing one person saves at least 90 lives, then all three options are permissible. Using standard CBA to choose among them, option (2) ranks first (net saving of 287 lives), option (1) second (net saving of 278 lives), and option (3) last (no lives saved). In situations like this, the decision process consists of two stages: sorting out those options that do not infringe, or that override, the deontological constraint, and then using standard CBA to choose the one that brings about the best outcomes.\textsuperscript{102} The separation between the two stages is necessary because—as demonstrated below—the factors taken into account in each stage and their interrelations are not similar.

It does not follow, however, that whenever a decision-maker faces more than one deontologically permissible option, the choice between them should necessarily rest on standard CBA. Consider the choice between the following options: (1) deliberately killing one innocent person to save 101 people; (2) spending $10,000,000 to save the same 101 people; (3) letting the 101 people die. Presumably, the only option infringing a deontological constraint in this example is (1). If option (1) overrides the constraint against deliberately killing innocent people, then all three options are permissible. The net outcomes of the options are as follows: (1) net saving of 100 lives; (2) saving of 101 lives at a cost of $10,000,000; (3) no lives saved and no costs borne. At this point, there seems to be two ways to proceed. One way is to employ standard CBA, monetize the value of a person’s life, and choose between options (1) and (2) (both of which produce much more good than option (3)) according to whether one life is valued at more or less than $10,000,000. Another approach is to maintain that, whenever an infringement of a deontological constraint is involved (but not necessarily in other contexts), human life is lexically more important than monetary losses, and thus to rank option (2) higher than option (1), regardless of the money value attributed to human life.\textsuperscript{103}

Be that as it may, the following discussion focuses on formulating \textit{threshold functions} to determine whether the good outcomes of a certain act or a rule are sufficiently large to override a deontological constraint (the first stage).

\textsuperscript{102} The order of the two stages is not crucial. The critical point is that the chosen option both brings about the best outcomes and does not violate any deontological constraint.
\textsuperscript{103} \textit{Cf.} THOMSON, \textit{supra} note 5, at 164 (arguing that whenever a large increment of good may be achieved by infringing a person’s right, such infringement is impermissible if there exists a way to produce a comparable increment without infringing any right); Steiker, \textit{supra} note 98, at 783-85 (submitting that the availability of alternative means to prevent future murders renders capital punishment impermissible).
B. GENERAL STRUCTURE OF A THRESHOLD FUNCTION

Incorporating deontological constraints into economic analysis entails the characterization of a threshold function, $T$, such that an act is permissible only if the product of this function is positive. According to one approach, the infringement of a deontological constraint should be expressed by adding to the act’s harms, $C$, some factor $K$ (where $K>0$), such that an infringing act is permissible only if its total benefit, $B$, exceeds the sum of $C$ and $K$:

$$ (1) \quad T = B - (C + K) $$

Alternatively, the infringement can be expressed by multiplying the act’s harms by some factor $K'$, such that an infringing act is permitted only if its total benefit, $B$, exceeds its weighted harms, $K'\times C$ (where $K'>1$):

$$ (2) \quad T = B - K'\times C $$

The threshold function may also combine these two forms, to include both $K$ (a constant constraint) and $K'$ (a multiplier), and it may take other mathematical forms. However, the threshold function determines not only the size of net benefits required to justify overriding the constraint but also the types of benefits and costs that should be considered in this regard. To highlight this aspect, we propose that, as a general matter, a threshold function consists of two elements: $B = b(\ldots)$, the infringing act’s relevant net benefit, and $D = d(\ldots)$, the size of the minimum amount of benefits that is required to justify the infringing act (the threshold). Thus, in its general form the threshold function is:

$$ (3) \quad T = B - D = b(\ldots) - d(\ldots) $$

To illustrate, assume that the only type of benefit that can justify overriding the constraint against actively/intentionally killing an innocent person is the saving of human lives. The permissibility of such an act may thus be determined according to the following threshold function:

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104 Note that when $K=0$ and $K'=1$ the threshold function reflects consequentialism, and when either of these factors is prohibitively high the function reflects absolute deontology. Moderate deontology entails intermediate levels of $K$ and $K'$.

105 For instance, the logarithmic function $T = \ln(B - C) - K$ narrows the spectrum of the possible outcomes, and enables to define $K$ in a different scale than $B$ and $C$. For example, if the costs and benefits are measured in monetary terms, setting $K=10$ entails that the infringing act is permissible only if its net benefit exceeds approximately $22,000; if K=12, the required net benefit is approximately $163,000; and if K=14, the net benefit should exceed $1,200,000.
(4) $T = (x - y) - K'y$

where $x$ is the number of persons that will be saved if the act is committed, $y$ is the number of those that will be killed as a result of the act, and $K'$ is a multiplier expressing the magnitude of the constraint against actively/intentionally killing innocent people. For instance, if $K' = 100$, this function entails that killing one person ($y = 1$) is justified only if the act results in saving at least 101 persons, regardless of the act’s other possible costs and benefits.

To assess more realistic scenarios (particularly when the objects of assessment are rules), one would have to use more sophisticated threshold functions. The following Sections describe the main choices required in formulating such functions. We start by discussing what types of benefits and costs are deemed relevant according to the threshold function (Section IV.C). We then move to assess what size of net benefit is required to justify an infringement (Section IV.D).

C. RELEVANT TYPES OF BENEFITS AND COSTS

Standard CBA monetizes and aggregates all costs and benefits involved in an act. If, for example, an act involves the killing of some people and saving others, body injuries, damage to property, and pecuniary gains and losses, all these costs and benefits are taken into account. While a threshold function may similarly take into account all such costs and benefits (thus deviating from standard CBA only in adding a threshold $D$), such inclusiveness arguably misses significant distinctions between different costs and benefits. Following the philosophical literature, this Section examines several limitations on the types of benefits and costs bearing on the permissibility of infringing deontological constraints. The possible excluders of costs and benefits mentioned below may be endorsed alternatively or cumulatively.

**Lexical Priority.** According to commonsense morality, certain values take lexical priority over other values. For instance, human life may be thought of as lexically superior to pecuniary losses. Under this view, one should sort out those types of benefits (and costs) that are not lexically inferior to the harm prohibited by the constraint. Accordingly, an infringement of the constraint against torture may be justified only if it is absolutely necessary to generate a sufficient amount of benefits such as saving of lives and avoiding comparable tortures, but not for

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generating pecuniary benefits, regardless of their size. Similarly, such characteristics as a
person’s life-expectancy may be classified as irrelevant in assessing the legitimacy of saving
one’s life while infringing a constraint.\textsuperscript{107} Given the great variety of types and intensity of harms,
however, lexically ranking values in the abstract may be misleading.\textsuperscript{108} One may therefore use
constrained CBA without embracing lexical priorities. In any event, such priorities need not apply
outside of the realm of deontological constraints. Even if it is impermissible to deliberately kill an
innocent person for any amount of money, it may still be permissible—in fact inevitable—to
trade safety measures against other uses of money.

\textit{Small Benefits.} A more controversial claim is that even benefits similar in nature to the harms
prohibited by the deontological constraint (in the sense that they both belong to the same sphere,
e.g., the sphere of bodily injuries) should not be considered if they are too small compared to the
prohibited harm. An oft-discussed example is whether it is ever permissible to
actively/intentionally kill an innocent person in order to avoid a vast number of minor headaches.
A consequentialist would reasonably hold that a world with a vast (but finite) number of
temporary, moderate headaches could be worse than a world lacking those headaches and
containing one more premature death. There is, in other words, some finite number of headaches,
such that it is permissible to kill an innocent person to avoid them.\textsuperscript{109} A deontologist, in contrast,
may believe that the number of (at least certain types of) headaches that can be avoided by killing
an innocent person is irrelevant in assessing the permissibility of such killing.\textsuperscript{110} Thus, to be
included in the threshold function, any single benefit must—according to this view—bear some
proportion to the harm whose active/intentional infliction is prohibited by the constraint.\textsuperscript{111}

\textsuperscript{107} On the question of whether it is permissible to actively/intentionally kill people who are doomed to die anyway, in
order to save the lives of others, see infra Section V.C.
\textsuperscript{108} Craswell, supra note 21, at 1456-57; Theodor Lenckner, \textit{The Principle of Interest Balancing as a General Basis of
Justification}, 1986 BYU L. REV. 645, 645-51 (demonstrating this concern in the context of the criminal defense of
justifying necessity).
\textsuperscript{109} Alastair Norcross, \textit{Comparing Harms: Headaches and Human Lives}, 26 PHIL. & PUB. AFF. 135 (1997); Dan W.
\textsuperscript{110} For a discussion of this excluder, see THOMSON, supra note 5, at 166-69 (labeling it “the distributive constraint”);
Brennan, supra note 7, at 149-53, 160-65 (denoting it “the universal constraint”); Brennan, supra note 35; KAMM,
supra note 4, at 101-102, 144-64 (discussing the “principle of irrelevant utilities”, focusing on competing claims to
be saved and competing claims not to be sacrificed, as distinguished from the decision whether to sacrifice the few to
save the many); SCANLON, supra note 16, at 235-41 (addressing the question from a contractualist perspective). For a
critique of the exclusion of small benefits, see Alastair Norcross, \textit{Rights Violations and Distributive Constraints:
Three Scenarios}, 76 PACIFIC PHIL. Q. 159 (1995); Brock, supra note 109.
\textsuperscript{111} If both harms and benefits are monetized, this proportion may straightforwardly be represented in mathematical
terms.
Some deontologists may want to exclude rather significant benefits, perhaps even benefits whose magnitude is greater than the harm whose active/intentional infliction is prohibited by the constraint. For example, a deontologist may hold that nothing less than the saving of human life can justify the brutal torture of an innocent person. According to this position, anything less than a saved life (including the prevention of a brutal torture of other people) should be excluded from the threshold function.\footnote{Brennan, supra note 7, at 152. Brennan discusses the possibility that the smallest single benefit which is large enough to be taken into account equals the total benefit required to override the constraint ($D$ in function (3) above). This would be the case, for example, if only preventing a person’s death is significant enough to justify the torture of an innocent person, but no more than one human life is necessary. This is, in fact, Thomson’s position (THOMSON, supra note 5, at 166-69). According to this position, it may be permissible to inflict some pain on some people to save others from premature death, but it is impermissible to kill one person to save any number of people, or even to inflict one minor pain to alleviate any number of similar pains. For a critique of this position, see Brennan, supra note 7, at 154-65; Richard J. Mooney, *The Realm of Rights, by Judith Jarvis Thomson*, 90 Mich. L. Rev. 1569, 1972 (1992) (Book Review).}

The Existential Constraint.\footnote{The title of this excluder follows Brennan, supra note 7, at 153-54.} Whether or not the elimination of a vast number of small harms can ever justify the active/intentional infliction of a major harm, one may hold that to override a constraint, at least one of the benefits produced by the act should bear a certain proportion to the inflicted harm. The one benefit should be, for instance, at least as large as (or nearly as large as)—and possibly of the same nature as—the inflicted harm.\footnote{Thus, even if there is no number of moderate headaches whose elimination justifies the deliberate killing of an innocent person, such killing is possibly justified for the sake of, say, the saving of one person’s life and eliminating 100,000 moderate headaches. As Brennan (supra note 7, at 152-53, 154) points out, the existential constraint is meaningful only if it is higher than the “universal constraint” (excluding altogether too small benefits) and lower than the total benefit. Otherwise it converges with either of them, and even all three may converge.}

Chronologically Remote Benefits and Costs. Standard CBA employs discount rates to determine the present value of future benefits (and costs).\footnote{On the normative and methodological difficulties involved in CBA’s use of discount rates (especially discount rates for future lives), see generally Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 Vand. L. Rev. 267 (1993); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 Yale L.J. 1981 (1998); John J. Donohue III, *Why We Should Discount the Views of Those Who Discount Discounting*, 108 Yale L.J. 1901 (1999); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 Colum. L. Rev. 941, 943-48, 987-1017 (1999).} Such discount rates may be part of constrained CBA as well. However, ordinary morality and threshold deontology may go one step further and exclude chronologically remote benefits from the threshold function altogether.\footnote{Alexander, supra note 87, at 905.} Thus, for example, even if it is permissible to actively and intentionally kill one person to immediately save the lives of 101 other people, arguably no number of people who will be saved
in twenty years from now justifies such intentional killing. This claim may rest on the typical uncertainty of future events and the fear of errors;\textsuperscript{117} but it may also manifest people’s myopia.\textsuperscript{118} The threshold function may reflect any substantive moral judgment regarding the treatment of chronologically remote benefits by employing a suitable discount rate. For instance, in calculating the act’s net benefit any of the act’s relevant consequences is multiplied by $\frac{1}{(1+r)^t}$, where $r$ is some per-period (e.g., one year) discount factor, and $t$ is the number of periods. Applying a sufficiently high discount rate will result in marginalizing the weight of future outcomes. Different discount factors may correspond to different types of costs and benefits.

\textit{Probabilistic Costs and Benefits.} A threshold function should plausibly take into account the probabilistic nature of harms and benefits.\textsuperscript{119} A simple approach would be to calculate the act’s net benefit according to the expected value of the act’s consequences, i.e., to multiply all relevant harms and benefits by the probability of their occurrence. The probability may reflect either the risk that the infringing act will not generate the anticipated benefits, or the chance that the benefit will be achieved without infringing the deontological constraint.

Arguably, such multiplication does not fully capture prevailing moral intuitions. Ordinary morality and threshold deontology plausibly hold that it is permissible to actively/intentionally cause a serious harm to a person (even as a \textit{side-effect} of saving others, and certainly as a \textit{means} to saving them) only if the probability of saving the others is quite high. For instance, assuming it is permissible to intentionally kill one innocent person to save 100 lives, it is arguably impermissible to kill one person to save 400 people with a probability of 0.25, or even 200 with a probability of 0.5. This intuition may also be justified on a second-order consideration pertinent to low-probability costs and benefits. The further one is from absolute certainty, the more one is

\textsuperscript{117} The reluctance to consider remote benefits is particularly strong when their probability is relatively low. \textit{See Alexander, \textit{id}.}

\textsuperscript{118} \textit{See Farber & Hemmersbaugh, supra note 115, at 281-84} (reviewing contradictory studies of people’s discount rates for future lives, ranging from \textit{negative} to \textit{infinite} rates). On people’s tendency to attribute too little weight to future benefits and costs, as compared to present ones, \textit{see, e.g.}, Martin Feldstein, \textit{The Optimal Level of Social Security Benefits}, 100 Q.J. ECON. 303, 307 (1985).

\textsuperscript{119} \textit{See Kagan, supra note 7, at 87-91} (discussing probabilistic harms); \textit{Thomson, supra note 5, at 170-74} (concluding that probabilistic benefits should be taken into account even if the benefit has not materialized ex post). Possibly, there is a constraint against actively/intentionally exposing people to a \textit{risk of harm}, at least when they are aware of this exposure—a constraint that is infringed even if the risk never materializes. Such exposure is certainly a cost that should be taken into account in choosing among those acts that override the constraint or do not infringe it. \textit{See David McCarthy, Rights, Explanation, and Risks, 107 Ethics} 205, 208-212 (1997).
prone to misjudge expected outcomes. Various studies have documented people’s systematic errors in dealing with low-probability events.\textsuperscript{120} This consideration calls for extra caution in assigning to decision-makers the task of calculating and considering such effects, taking into account the decision-maker’s sophistication.

Thus, the threshold function must determine how uncertain outcomes (both costs and benefits) are discounted in calculating the act’s net benefit, \( B \). As indicated above, it may reflect ‘risk-neutrality,’ by calculating outcomes based on their expected value; but it may well attach different discount factors to uncertain outcomes. Assume, for instance, that there is some probability \( p \) that if a person’s right not to be tortured is not infringed, \( x \) persons will be killed. The net benefit of infringing the constraint against torture can be zero for low levels of risks, and may be only partially sensitive to changes in the level of risk. For instance, the act’s net benefit, \( B \), can be calculated according to the following non-continuous function:

\[
0 \quad \text{if } p < 5\
0.5px \quad \text{if } 5\% \leq p \leq 50\%\
px \quad \text{if } p > 50\%
\]

According to this function, if the probability of saving lives is less than 5\%, no number of expected saved lives would render the torturing of a person permissible, and the expected number of saved lives is discounted by half if the probability of saving lives is between 5\% and 50\%.

Alternatively, low probabilities may be discounted using a continuous function such as:

\[
(6) \quad B = p^2x.
\]

Defending the (admittedly challengeable) normative judgments underlying such functions lies beyond the scope of our discussion.\textsuperscript{121} Once again, even if low probability outcomes are excluded


\textsuperscript{121} For the claim that even imposing low-probability risks should be considered an infringement of moral rights (i.e., constraints), see McCarthy, \textit{supra} note 119, at 212-15.
or discounted in the threshold function, they need not be similarly excluded or discounted when choosing between those acts that do not infringe, or that override, the deontological constraint.\footnote{Both standard CBA and constrained CBA may of course reflect risk aversion.}

Lastly, commonsense morality also possibly distinguishes between saving an entire population from harm that would be inflicted on unidentified persons out of the population and saving specified persons from the same harm. For instance, whereas from a consequentialist viewpoint, an act that would harm one unknown person out of a group is identical to an act that would inflict the same harm on a specific person (since the result in both cases is harm to one person), deontology may well distinguish between the two acts, and find the latter more objectionable.\footnote{See, e.g., Sanford H. Kadish, Respect for Life and Regard for Rights in the Criminal Law, 64 Calif. L. Rev. 871, 893-94 (1976) (making this claim in the context of criminal law). See also Alon Harel, Zvi Safra & Uzi Segal, Ex-Post Egalitarianism and Legal Justice, 21 J. L. Econ. & Org. 57 (2005) (discussing trade-off between utility maximization and ex-post egalitarianism).}

Promoting the Good v. Eliminating the Bad. Contrary to standard economic wisdom, there is a prevailing intuition that normatively, increasing one’s utility is not as important as decreasing one’s disutility.\footnote{See, e.g., Karl R. Popper, The Open Society and Its Enemies, Vol. 1, 284-85, n.2 (5th ed. (rvsd) 1966). This intuition is reflected, for example, in Model Penal Code § 3.02 (setting out that conduct that the actor believes to be necessary “to avoid harm or evil”—but not to produce benefit or good—is justifiable under certain circumstances).} This moral judgment—often phrased in terms of avoiding pain versus promoting happiness—is embedded in deontology,\footnote{This distinction is related to the doing/allowing distinction (discussed in supra Section I.B and Parts II and III). Were promotion of the good as compelling as eliminating the bad, the doing/allowing distinction would have collapsed. Whenever an actor abides by the prohibition against actively doing harm (e.g., refraining from killing one person), because the good produced by such harm is not large enough (e.g., saving the lives of two), she simultaneously avoids doing harm (to the one) and avoids doing good (to the two). Therefore, there must be an underlying notion that promoting the good is less morally compelling than eliminating the bad. On this distinction, see Kagan, supra note 7, at 121-25 (a critique); F.M. Kamm, Non-Consequentialism, the Person as an End-In-Itself, and the Significance of Status, 21 Phil. & Pub. Aff. 354, 381-82 (1992) (a reply to the critique). On the relationship between the doing/allowing distinction and the benefit/do not harm distinction, see N. Ann Davis, The Priority of Avoiding Harm, in Killing and Letting Die, supra note 28, at 298.} though it is applicable to consequentialism as well.\footnote{James Griffin, Is Unhappiness Morally More Important than Happiness?, 29 Phil. Quart. 47, 47 (1979). In fact, this judgment is often labeled “negative utilitarianism”, See, e.g., R.N. Smart, Negative Utilitarianism, 67 Mind 542 (1958); A.D.M. Walker, Negative Utilitarianism, 83 Mind 424 (1974).} This judgment may vary from absolute denial of the moral duty to promote happiness, to a slight preference for the avoidance of unhappiness over the promotion of happiness.\footnote{See Griffin, supra note 126 (critically discussing different versions of the “negative doctrine”).} A plausible version may refer to some reasonably acceptable level of well-being, and attribute greater weight to bringing the worse-off to this level than to promoting people beyond this
level.\textsuperscript{128} All versions are subject to serious objections,\textsuperscript{129} yet at least the weaker versions reflect widely held intuitions.\textsuperscript{130} Thus, for instance, while it may be permissible to actively and intentionally torture one person as a means to preventing the premature death of \(x\) people, it seems impermissible to torture one person in order to prolong the lives of \(x\) (or more) people beyond their regular life expectancy. In a similar fashion (and more realistically), while preventing a large pecuniary loss may sometimes justify the unauthorized use of another person’s property or the breach of a contractual promise, such use or breach would not be permissible for the sake of making a comparable (or even larger) gain.

To reflect this moral judgment, one may exclude gains from the threshold function altogether. Alternatively, and less drastically, one may attribute different weights to losses and gains: full weight to the disutilities avoided by the act and a reduced weight to the utilities it produces. Another (indirect but often powerful) way to take this distinction into account would be to use willingness to pay (WTP) to measure the gains the infringing act yields, and willingness to accept (WTA) to measure the losses it prevents.\textsuperscript{131}

**D. SIZE OF THE THRESHOLD**

Following the proposal to model threshold functions as \(T = B – D\), and the discussion in the previous Section of the net benefit of the infringing act, \(B\), this Section focuses on \(D\), the numerical representation of the threshold that has to be met for the act to be permissible. \(D\) reflects the strength of the relevant deontological constraint. The threshold can be quantified as some function of (plausibly certain types of) the harm(s) that the act inflicts, but may also embody the general importance of the relevant deontological constraint.

\textsuperscript{128} Griffin, supra note 126, at 49-51 (discussing the “PAR version”).

\textsuperscript{129} See, e.g., Smart, supra note 126 (powerfully criticizing the strong version of negative utilitarianism); R.I. Sikora, *Negative Utilitarianism: Not Dead Yet*, 85 MIND 587 (1976) (criticizing Walker’s weak version of the doctrine, supra note 126); Griffin, supra note 126 (concluding that no version of the negative doctrine is plausible).

\textsuperscript{130} For psychological evidence of this intuition, see, e.g., Jonathan Baron & Mark Spranca, *Protected Values*, 70 ORG. BEHAV. & HUMAN DECISION PROC. 1, 10-11 (1997) (people are much more supportive of medical intervention aimed at increasing newborns’ IQ from sub-normal to normal than from normal to superior).

\textsuperscript{131} Numerous studies have demonstrated that people’s WTP for an entitlement is often much smaller than their WTA regarding the same entitlement. On this phenomenon (sometimes called “the endowment effect”), see generally Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507 (1984); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980); David W. Harless, *More Laboratory Evidence on the Disparity Between Willingness to Pay and Compensation Demanded*, 11 J. ECON. BEHAV. & ORG. 359 (1989).
An important question is to what extent the size of threshold is a function of actual (or probable) harm inflicted by the infringing act. As indicated above, according to one approach, the threshold is set independent of actual harm, such that some value \( D \) is simply added to the act’s consequential harms (“additive threshold”); alternatively, the level of threshold can be some increasing function of actual harm, for instance a multiplier \( K \) of the harm (“multiplier threshold”). To illustrate, the threshold function in the case of the constraint against active/intentional killing of innocent people may be additive, for instance:

\[
T = x - y - 100
\]

where \( x \) is the number of persons that will be saved if and only if the act is committed, \( y \) is the number of those that will be killed as a result of the act, and \( K \) (100 in this example) is the constant threshold. Alternatively, the function may be based on a multiplier, for instance:

\[
T = (x - y) - 100y
\]

where \( K' \) (100 in this example) is the multiplier. A third option is a combination of these two, such as, for example:

\[
T = (x - y) - (50 + 50y)
\]

In many contexts multipliers or combined functions better capture the intuitions underlying threshold deontology. For instance, all of the above three functions yield that it is permissible to kill one person (\( y=1 \)) to save the lives of at least 101 people (\( x \geq 101 \)). However, when the actual harm (i.e., the number of people who are killed) is higher, the additive function (7) yields counter-intuitive results. For instance, it yields that it is permissible to kill 10 to save at least 110 people, and to kill as many as 10,000 to save just 10,100 people. In contrast, according to the multiplier function (8), it is permissible to kill 10 to save at least 1,010, and to kill 100 to save 10,100 people. According to the combined function (9), it is justified to kill 10 to save no less than 560, and to kill 197 to save 10,100 people. Indeed, the prevailing view seems to be that the “strength” of the deontological constraint—and thus, the magnitude of the threshold—is an increasing function of the (expected) harm inflicted in the specific circumstances.\(^{132}\)

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\(^{132}\) See, e.g., Alexander, supra note 87, at 898-900 (arguing that a multiplier function, a “ratio” threshold, is more plausible than an additive one); Brennan, supra note 7, at 157 (discussing a multiplier function).
A conspicuous shortcoming of a multiplier function is that whenever an infringement of a deontological constraint causes no harm, the threshold will be zero.\(^{133}\) Thus, for example, there would practically be no constraint against breaking promises when breaking the promise does no harm to the promisee. Furthermore, even if an act (be it a promise breaking or the intentional infliction of physical pain) does cause harm to another person, there would be practically no constraint against such act so long as the actor is willing to fully compensate the injured person (assuming such compensation is possible). While perfectly compatible with consequentialism and economic efficiency,\(^{134}\) this conclusion conflicts with deontological morality and with the prevailing conception of moral and legal rights.

A defender of multiplier threshold functions may respond that the very infringement of the constraint, the very fact that a lie is told or a promise is broken, constitutes some harm to the right-holder (and thus \(D\) is necessarily positive).\(^{135}\) Similarly, she may argue that compensation very rarely put the injured person in as good a position as she would have occupied but for the breach, and multiplying this remaining harm would thus result in a positive threshold. These arguments carry some weight, but do not seem wholly persuasive—which may lead one to the conclusion that the combined function (9) is superior to both the additive and the multiplier ones.

The application of a function that sets the level of threshold as an increasing function of harm requires one to determine what types of harms should be counted in this respect. The question is then, which of the concrete elements of the infringement of the constraint are relevant in setting the size of the threshold. As indicated above, one plausible consideration is the probability of harm. Arguably, if the probability of harm does not reach a certain minimum (either since there is a chance that the act won’t engender harm after all, or that the same harm would come about anyway), the act does not infringe the constraint and the threshold should indeed be zero (despite the fact that the infliction of the low-probability risk of harm was both active and intentional).

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\(^{133}\) Samantha Brennan, How is the Strength of a Right Determined? Assessing the Harm View, 32 AM. PHIL. Q. 383, 388-90 (1995). However, the infringement of the deontological constraint would still require that \(B \geq 0\) for the act to be permissible. Since \(B\) typically includes only some of the act’s costs and benefits, it is at least theoretically possible that the act would be considered efficient under standard CBA, but deontologically impermissible.

\(^{134}\) A well-known example is the “efficient breach” doctrine, according to which remedies for breach of contract should urge the promisor to perform and take precautions to avoid breach so long as performance and such precautions are efficient, and to breach and avoid such precautions if breach is efficient. See, e.g., Richard A. Posner, Economic Analysis of Law 118-31 (6th ed. 2003); Shavell, supra note 60, at 304-14, 342-62, 375-80 (2004); Steven Shavell, Damage Measures for Breach of Contract, 11 Bell. J. Econ. 466 (1980).

\(^{135}\) Brennan, supra note 133, at 390.
In addition, certain types of harms should plausibly not count in quantifying the threshold. For example, it may be argued that in determining the size of the threshold of the constraint against actively/intentionally killing people, the only relevant factor is the number of people that will be killed, and no other costs engendered by the infringing act should be considered.\textsuperscript{136} Such additional costs may possibly be relevant in calculating the act’s net benefit (and certainly in choosing between several acts that meet the threshold).\textsuperscript{137} Even costs that involve infringements of deontological constraints may seem irrelevant when they are much smaller than the major infringement considered. Suppose that to save the lives of some people, one must not only kill one person, but also break a promise or inflict a short, mild pain on another person. While promise breaking and the infliction of a mild pain are infringements of deontological constraints, one may hold that they should not affect the size of the threshold determining the minimal number of saved people necessary to meet the constraint against active/intentional killing.

E. MISCELLANY

Deontological moral theories are varied and complex. Some of the claims made by deontologists are quite compelling whereas others rest on questionable intuitions.\textsuperscript{138} To illustrate, the causal connection between an infringing act and its expected benefits (or costs) may be indirect. It may be, for example, that one or more of the people saved by an infringing act will then be able, thanks to their unique qualifications, to save the lives of additional people. A deontologist may or may not view the fact that some outcomes are not \textit{directly} produced by the act as morally significant.\textsuperscript{139} Similarly, a deontologist may or may not distinguish between cases according to the allocation of benefits produced by the act (e.g., between a case in which the

\begin{footnotes}
\item[136] \textit{Cf.} KAMM, \textit{supra} note 4, at 146. Kamm argues that according to the principle of irrelevant utilities, when considering whether to redirect a threat away from five people in the direction of either Joe or Jim, the fact that directing the threat at one of them would also involve destroying a patch of beautiful flowers which gives pleasure to many people, should not be taken into account in choosing between the two individuals. For a critique of Kamm’s principle of irrelevant utilities, and specifically the claim that it dovetails with commonsense morality, see Brock, \textit{supra} note 109, at 966.
\item[137] One type of disutility that must not count in determining the size of the threshold is the disutility experienced by disinterested people from knowing that other people are harmed or that moral norms are infringed, lest the threshold reflect double counting (\textit{see also supra} Subsection I.C.3). The feelings of disinterested people may possibly count in calculating the act’s net benefit.
\item[138] \textit{See, e.g.}, John Broome, \textit{Kamm on Fairness}, 58 PHIL. & PHENOMENOLOGICAL RES. 955, 958 (1998) (characterizing some of the arguments in KAMM, \textit{supra} note 4, as depending entirely on the author’s intuitions, and thus as powerless against people who do not share these intuitions).
\item[139] KAMM, \textit{supra} note 4, at 104, 107-12 (favorably discussing the distinction between directly saving the larger group of people and indirectly saving more people by saving a person who would then save others).
\end{footnotes}
infringing act saves 10 people from a moderate, temporary pain and the case in which it saves 5 people from two occasions of such pain each).\textsuperscript{140}

Additional complexities are involved when a single act infringes more than one constraint. For example, it may be that in preventing a person from expressing certain views I not only infringe her freedom of speech, but also break my promise not to act in this way. Plausibly, the accumulative effect of the two constraints requires that a greater amount of good be produced by the infringing act (compared to the case where only one constraint were infringed),\textsuperscript{141} yet the resulting threshold need not necessarily be a simple sum or a simple multiplication of the two separate thresholds.

In principle, almost any distinction between different costs and benefits, any notion of fairness, and any approach to the accumulative effect of different constraints may be incorporated into a threshold function.\textsuperscript{142} At a certain point, however, the disadvantages of such incorporation (in terms of clarity and manageability of the model) outweigh the advantages. As in economic modeling in general, there is no simple recipe for making such methodological decisions.

\section*{V. ILLUSTRATIONS}

This Part illustrates the two main arguments set forth above: the deficiency of purely consequentialist cost-benefit analysis of legal issues and the fruitfulness of adding deontological constraints to standard CBA. A detailed analysis of any of the issues discussed in this Part would have required a separate article. We hope that the relatively brief outline provided below suffices nevertheless to demonstrate the significance and desirability of adding constraints to economic analysis, thus triggering further analysis of these and other issues along similar lines.

The following three Sections discuss discrimination in the marketplace, legal paternalism, and harming innocent people while fighting terrorism. The analysis of the first issue closely

\footnotesize
\textsuperscript{140} Brennan, \textit{supra} note 7, at 151 (concluding that, in the context of excluding small benefits, each benefit should be considered separately, even if a single person gets more than one benefit). For a list of other “candidate factors”, see Brennan, \textit{supra} note 133, at 390-91.
\textsuperscript{141} Brennan, \textit{supra} note 133, at 390.
\textsuperscript{142} Some notions of fairness—particularly those opposing the aggregation of harms or those that deny the feasibility of interpersonal comparisons of costs and benefits—are, however, incompatible with the very use of CBA, whether bounded by deontological constraints or not. An obvious example is Taurek’s objection to aggregating harms to people (see \textit{supra} notes 89-91 and accompanying text).
follows existing legal norms while the other issues are discussed on a more abstract level. Deontologically constrained CBA may give insight into many more issues, some of which are mentioned in the concluding Section of this Part.

A. DISCRIMINATION IN THE MARKETPLACE

The legitimacy and the appropriate scope of antidiscrimination legislation—most notably Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act of 1990 (ADA)—has been subject to extensive economic analysis. In this Section we first demonstrate the inadequacy of the standard economic analysis of the issue, and then indicate how adding constraints to the analysis makes it much more inclusive and illuminating.

Standard economic analysis examines discriminatory practices according to their effect on aggregate social welfare and justifies their prohibition only if their costs outweigh their benefits. In an influential book, *The Economics of Discrimination*, economist Gary Becker argued that discrimination in the marketplace is irrational since it inevitably conflicts with profit-maximizing strategies and that as a result discriminatory firms will eventually be driven out of the market.145 This argument has mostly been interpreted as suggesting that a practice that survives in a

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144 42 U.S.C. §§ 12,111-12,117.
competitive environment is inevitably rational,\textsuperscript{146} and efficient; and that proscribing it would impair social welfare.\textsuperscript{147}

Those who find this conclusion morally unacceptable try to demonstrate that antidiscrimination legislation is in fact efficient. One line of argument—following the \textit{long-term and indirect effects} strategy discussed in Subsection I.C.1 above—focuses on the negative externalities of discriminatory practices (or the positive externalities produced by its elimination). This argument points to costs that are not internalized through bargaining due to transaction costs or other market failures—costs that may well exceed the practice’s benefits.\textsuperscript{148} The efficiency argument against prohibiting discrimination assumes that the parties’ freedom to bargain is the best way to realize their preferences.\textsuperscript{149} However, those who suffer from these negative effects of

\textsuperscript{146} Discrimination may be a “rational” business strategy for three reasons: 1. Statistical discrimination—discriminatory business practice is often based on the existence of a statistical correlation between the applied classification (e.g., race or gender) and relevant characteristics of (potential) employees or customers. Saving in information costs may render the classification profitable, even when the correlation between the classification and the relevant characteristics is only partial. See, \textit{e.g.}, Arrow, \textit{supra} note 145, at 24 (noting that “[s]kin color and sex are cheap sources of information” for distinguishing between different groups of workers); RICHARD A. EPSTEIN, \textit{FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS} 32-41, 52-53 (1992); Andrea Moro & Peter Norman, \textit{A General Equilibrium Model of Statistical Discrimination}, 114 J. ECON. THEORY 1 (2004). 2. Other employees and customers’ preferences—given the “group status production” or prejudice against specific minorities by substantial number of the firm’s employees or customers, a firm may increase its profits by excluding or otherwise discriminating against a certain group. See, \textit{e.g.}, Richard H. McAdams, \textit{Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination}, 108 HARV. L. REV. 1005 (1995). 3. Discriminatory preferences—the business owner’s (or manager’s) non-pecuniary discriminatory preferences and prejudices. See, \textit{e.g.}, BECKER, \textit{supra} note 145, at 14-18, 39-54; MILTON FRIEDMAN, \textit{CAPITALISM AND FREEDOM} 108-15 (1962); William Landes, \textit{The Economics of Fair Employment Laws}, 76 J. POL. ECON. 507 (1968); EPSTEIN, \textit{id.}, at 480-94; RONALD G. EHRENBERG & ROBERT S. SMITH, \textit{MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY} 407-32 (9th ed., 2006).


\textsuperscript{149} For instance, it was argued that Title I of the ADA, which requires employers to make “reasonable accommodations,” is unjustified since the employer and the disabled employee can contract for efficient accommodations, e.g., by agreeing on a lower wage that would compensate the employer for her accommodation costs. The ADA compels the employer to make accommodations that it would not have made otherwise, i.e., inefficient ones. \textit{See, e.g.}, Ron A. Vassel, \textit{The Americans with Disabilities Act: The Cost, Uncertainty and Inefficiency}, 13 J.L. & COM. 397, 406-10 (1994) (promoting a free market solution to disability-based employment discrimination); EPSTEIN, \textit{supra} note 146, at 59-78. Similarly, if bigots are willing to forgo profits for the freedom to discriminate, the best way to verify that the discriminatory practice is efficient is to let those who suffer from it to “purchase” from the bigot the latter’s freedom to discriminate. \textit{See, e.g.}, Richard A. Posner, \textit{The Efficiency and the
discrimination cannot be expected to purchase the bigots’ freedom to discriminate, because the benefits of such a bargain have the characteristics of a public good: transaction costs in coordinating employees or customers to make such a bargain might prevent the attainment of the efficient outcome.\footnote{John J. Donohue III, Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, 56 U. CHI. L. REV. 1337, 1352 (1989).} In addition, the very act of bribing the misogynistic firms “will undermine the self-esteem that is necessary to make the move…welfare-enhancing.”\footnote{Id.} An additional negative externality of discrimination on the basis of race or gender is that it might induce members of the discriminated-against group to under-invest in their own human capital, making the use of the stereotype a self-fulfilling prophecy.\footnote{David A. Strauss, The Law and Economics of Racial Discrimination in Employment, 79 GEO. L.J. 1619, 1640 (1991); Stein, supra note 73, at 155-61 (same); Stewart J. Schwab, Is Statistical Discrimination Efficient?, 76 AM. ECON. REV. 228 (1986); Jeffery G. MacIntosh, Employment Discrimination: An Economic Perspective, 19 OTTAWA L. REV. 275 (1987). Stereotypes may also adversely affect the willingness of members of minority group to invest resources in negotiations. See Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817 (1991).} In the same vein, commentators have indicated various positive externalities of employing persons with disabilities.\footnote{See, e.g., Stein, supra note 73, at 104-108 (2003) (outlining several positive—though hard to measure—externalities such as public cost savings, including the reduction of disability-related public assistance obligations); Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform, 44 WM. & MARY L. REV. 921 (2003) (suggesting that a motivating factor in the Court’s decisions is the desire to keep people with disabilities in the workplace rather than on welfare); J. Hoult Verkerke, Is the ADA Efficient?, 50 UCLA L. REV. 903 (2003).}

Another line of argument—resembling the move to rule-consequentialism discussed in Subsection I.C.2 above—has been to interpret Becker’s analysis as justifying the prohibition of discrimination in the marketplace, since its persistence is a result of obstructions to the free market.\footnote{John J. Donohue III, Is Title VII Efficient?, 134 U. PA. L. REV. 1411, 1431 (1986) (“antidiscrimination legislation may be thought of as a tool to perfect the market response to employer discrimination”); Stewart J. Schwab & Steven L. Willborn, Reasonable Accommodation of Workplace Disabilities, 44 WM. & MARY L. REV. 1197, 1218 (2003) (same).} A third line of argument—along the preferences for constraints idea discussed in Subsection I.C.3 above—has been to focus on the psychic harm that third parties suffer from living in a society that tolerates discriminatory practices.\footnote{See John J. Donohue III, Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner, 136 U. PA. L. REV. 523, 531 (1987) (arguing that Title VII would be efficient, even under very conservative assumptions, if every American was willing to pay five dollars to live in a society that limited racial discrimination); Donohue, supra note 150; Schwab & Willborn, supra note 154, at 1218.} The fourth strategy for bringing the consequentialist analysis closer to commonsense morality—people’s feelings of virtue when they “do the right thing” and remorse when they don’t (Subsection I.C.4 above)—is particularly

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unhelpful in the present context because at least some instances of market discrimination stem from prevalent racial and prejudiced sentiments of business’s owners, managers, employees, or customers. To address this difficulty, some commentators have suggested excluding such antisocial preferences, thus resorting to the fifth strategy of replacing actual preferences with ideal ones (Subsection I.C.5 above). It has been argued that discriminatory preferences and prejudices should be ignored because they are socially undesirable, or cognitively biased. It has been further argued that these preferences will be eliminated once an antidiscrimination legislation is implemented, thanks to the law’s “expressive” effect.

At the end of the day, none of these responses is satisfactory. The market failure and externalities arguments are contingent and context-dependant. Relying on disinterested preferences for equal treatment is highly manipulable, and even the move to ideal preferences does not rule out “statistical discrimination,” which is based on statistical correlation between race or gender and relevant characteristics of (potential) employees or customers. The only way to fully capture the issues pertaining to market discrimination is to take into account the deontological concerns. We submit that adding deontological constraints would improve the normative analysis and also better suit commonsense morality and current legal norms.

The relevant deontological constraint is the prohibition against harming people’s dignity by discriminating against them. Clearly, this constraint holds for only certain types of activities. For instance, one is free to choose his or her spouse and intimate friends even on the basis of race,

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156 Stein, supra note 73, at 122; Schwab & Willborn, supra note 154, at 1216. See also supra note 73 and accompanying text.

157 For instance, statistical discrimination often reflects irrational stereotypes as proxies of productivity. See, e.g., Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that many prejudiced, employment-based decisions result from categorization-related decision errors); Michael Spence, Market Signaling: Informational Transfer in Hiring and Related Screening Processes 99 (1974) (“if we were to force some members of the currently excluded group into the market, employers would eventually learn that a given level of education implies more talent for that group”); Stephen Coate & Glen C. Loury, Will Affirmative Action Policies Eliminate Negative Stereotypes?, 83 AM. ECON. REV. 1220, 1224 (1993) (suggesting that “negative prior beliefs will bias the [work] assignment process”).

gender, and religion. In these types of cases the conflicting deontological constraint against limiting people’s freedom—including the freedom to choose whom to interact and contract with—outweighs the constraint against discrimination.\textsuperscript{159} However, in commercial settings, the constraint against harming people by discriminating against them takes precedence over the constraint against limiting the freedom of choice (note that in the present context, the first constraint applies to people and the latter to the state). Substantiating this assertion regarding the relative weight of the different constraints requires more analysis than we can provide here, but since we do not aim to resolve conflicts between deontological constraints, and since our discussion is limited to the commercial context, we shall proceed on the basis of this plausible judgment.

According to threshold deontology, discrimination on the basis of race, gender or other protected statuses can be justified only if non-discrimination involves sufficiently high costs. To assess the permissibility of discrimination, one needs a threshold function that determines the size of the threshold and the pertinent types of costs and benefits. In fact, it seems that a straightforward, verbal formulation of such a threshold function, applying to a certain type of discrimination in the marketplace, is provided by Title I of the ADA.

Under the ADA, an employer is considered to be discriminating if it fails to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” According to standard CBA, an accommodation would be reasonable if its overall benefits exceed its total costs, and unreasonable otherwise.\textsuperscript{160} A constrained CBA calls for a different interpretation. As noted by Judge Posner, “it would not follow... that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly.”\textsuperscript{161} The constraint against discrimination mandates that an accommodation is required not only if its net social benefit is positive but sometimes even if it is

\textsuperscript{159} See also Donohue, supra note 150, at 1342 (“the courts have...grant[ed] exceptions to the antidiscrimination laws when significant privacy interests are at stake. ...Furthermore, Title VII's inapplicability to firms with fewer than 15 employees also represents an attempt ... to accommodate privacy and associational concerns”).

\textsuperscript{160} See, e.g., Stein, supra note 73, at 178.

\textsuperscript{161} Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995). Judge Calabresi applied a similar approach, noting that an accommodation is reasonable “if its costs are not clearly disproportionate to the benefits that it will produce”: Borkowski v. Valley Central School District, 63 F.3d 131, 138 (2d Cir. 1995). See also Stein, supra note 73, at 178 (noting that if one endorses the view that “society ought to look beyond economics and instead be motivated by concerns for human dignity and well-being,” the state may well be required to fund even accommodations that are socially inefficient).
negative. The ADA sets an additional threshold by providing that an employer is exempt from the obligation to make an accommodation (even a reasonable one), if making it “would impose an undue hardship on the operation of the business.” As in the case of the reasonableness threshold, the undue hardship threshold does not draw the line at “no profit.” Workplace accommodations constitute an undue hardship only when they require “significant difficulty or expense,” as measured against the totality of an employer's financial circumstances.162

The rule set forth in Title I of the ADA determines the threshold—undue hardship—irrespective of the actual harm that the discriminatory practice inflicts on the disabled person. In this sense, the ADA rule can be interpreted as incorporating an additive threshold, by setting some (possibly high) value $K$ that represents the harms that generally result from not making reasonable accommodations. Yet, the undue hardship standard may also be interpreted as laying down a multiplier threshold in which the threshold size is determined by the extent of the harm inflicted by the infringing act.163 The size of the threshold may also depend on the form of discrimination, which serves as a proxy for the size of the harm. Plausibly, the extent of non-pecuniary harm inflicted when an employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin” (Title VII of the Civil Rights Act) is significantly lower than when she refuses to hire or otherwise discriminates against an individual directly on one of these grounds. This variation explains the difference in the size of the threshold that has to be met in each of these cases.164

As regards the types of costs and benefits relevant to measuring whether the threshold is met, the central question is whether discriminatory preferences and prejudices (of either the owner or the firm’s customers or other employees) should be taken into account. As we have seen, disregard for antisocial preferences is possible even within a purely consequentialist theory, and

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162 See, e.g., Vande Zande, 44 F.3d at 542 (Posner, J.) (“it [is not] necessary to quantify an undue hardship ceiling… So long as the cost was proportionate, it could, in theory, be one which ‘exceeded the benefit however slightly’”).

163 Judge Posner noted in this respect that the assessment whether an accommodation imposes an “undue burden” should be made “in relation to the benefits of the accommodation to the disabled worker as well as to the employer’s resources”: Vande Zande, 44 F.3d at 543. See also Borkowski, 63 F.3d at 139 (Calabresi, J.) ([“the concept of undue hardship] looks not merely to the costs that the employer is asked to assume, but also to the benefits to others that will result”). On additive and multiplier thresholds, see generally supra Section IV.D.

164 In the disparate impact case the threshold is rather low. Title VII determines that it is sufficient to show that an “alternative employment practice,” that could have resulted in a less discriminatory outcomes, does not serve the employer’s “legitimate interest in efficient and trustworthy workmanship” or that it is not “substantially equally valid for a given purpose.” In the direct discrimination cases the threshold is much higher.
has in fact been advocated by some economists. However, this view is more likely to be part of a deontologically constrained CBA. The constraint against discrimination entails that satisfying racial or otherwise discriminatory preferences should not constitute part of the social good. This constraint may also be relevant in determining whether WTP should serve as the measure of the non-pecuniary harm generated by a discriminatory practice. Finally, within the deontological threshold function, chronologically remote and uncertain costs and benefits—such as the concern that some antidiscrimination measures might in the long-run create disincentives to employing disabled people—may be discounted.

More generally, recognition of the deontological constraint against harming people by discriminating against them in the marketplace may have additional, indirect implications. Specifically, the efficacy of current antidiscrimination legislation is limited due to the fact that accommodation costs are borne by the employer, without any legal mechanism for distributing these costs amongst all employers or even amongst all members of society. Such a mechanism may be justified on deontological grounds.

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165 See supra Subsection I.C.5.
166 See Landes, supra note 146, at 548. Landes argues that by passing fair employment laws, society is stating that discriminatory preferences should not enter society’s welfare function. It has been argued that this argument is circular, since it relies on the law itself to justify disregarding certain costs as a basis for justifying the law (Donohue, supra note 150, at 1343-44). Our argument is not based on the law itself, but on the deontological constraint against discrimination.
167 See supra note 151 and accompanying text. The ADA and Title VII, as well as other rigidities in the labor market, make it illegal or impractical for employees to bargain by accepting lower wages. For similar reasons, several scholars have objected to state subsidies to employers who refrain from discrimination. See, e.g., Stein, supra note 73, at 177 (“funding all disability accommodations by subsidies rather than through private employers… detracts from the notion of people with disabilities being entitled, as equally valued human beings, to civil rights”); MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE 195-226 (1997).
168 See, e.g., Vande Zande, 44 F.3d at 545 (Posner, J. noting that placing the employer that already invested in accommodating a disabled worker under any further obligation would ultimately “hurt rather than help disabled workers”); Christine Jolls, Accommodation Mandates, 53 STAN. L. REV. 223 (2000) (accommodation mandate may reduce a given group’s employment level or wages); Daron Acemoglu & Joshua D. Angrist, Consequences of Employment Protection? The Case of the Americans with Disabilities Act, 109 J. POL. ECON. 915, 931 (2001).
169 Some scholars suggest that the state should fund all necessary accommodations, while others argue that it should fund only those reasonable accommodations that “would impose an undue hardship” on the employer. For the first view, see, e.g., Scott A. Moss & Daniel A. Malin, Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA, 33 HARV. C.R.-C.L. L. REV. 197 (1998); Sue A. Krenek, Beyond Reasonable Accommodations, 72 TEX. L. REV. 1969, 2009-13 (1994). For the more modest suggestion, see, e.g., Stein, supra note 73, at 174-77 (suggesting that when both the individual worker with a disability and society in general benefit, but the employers lose, the state should compensate losing employers for making the accommodations). See also Michael A. Stein, Empirical Implications of Title I, 85 IOWA L. REV. 1671, 1684 (2000) (“providing extra-reasonable accommodations could overcome existing market inequities borne by the most stigmatized among the disabled”).
B. LEGAL PATERNALISM

Paternalism pervades the law. 170 Contrary to prevailing notions, normative economics does not entail principled anti-paternalism. In fact, it is the consequentialist feature of standard welfare economics—the absence of constraints on promoting good outcomes—that opens the door to limiting people’s freedom with a view to promoting their own good. 171 Within a consequentialist framework, legal paternalism is justified whenever its expected benefits exceed the expected costs. The benefits are generated from those instances in which compelling an agent to act differently than she would have acted otherwise increases her utility; and the costs result primarily from those cases in which it decreases her utility. Additional costs that may be incurred include the agent’s disutility from being treated paternalistically and the paternalist’s total costs involved in establishing and implementing the paternalistic rule (including legislative, administrative, and judicial costs).

Formally, a paternalistic rule that limits agents’ choice to X (whenever they face a binary choice between X and Y) is efficient if and only if its net benefit, $B$, is positive. $B$ is calculated as follows: 172

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(10) \quad B = \sum_{i=1}^{n} (P_l i L_i - P_g i G_i - F_i) - C > 0
\]

where $N = \{1, 2, \ldots n\}$ is the set of instances in which any of the agents faces a choice between X and Y; $P_l i$ is the probability that in the $i$-th case, absent the paternalistic rule the agent would have incorrectly chosen Y, and as a result would have suffered a loss $L_i$; $P_g i$ is the probability that in the $i$-th instance, absent the paternalistic rule the agent would have correctly chosen Y, and would have consequently gained $G_i$ (in comparison to her utility from choosing X); $F_i$ is the agent’s

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170 See Zamir, supra note 19, at 230 (mentioning the following examples of legal paternalism: “limitations on the legal capacity of minors, the mentally disabled, and intoxicated people; prohibitions on the use of some drugs; compelled use of various safety measures...; exclusion of victim consent as a defense to certain criminal offenses; inalienability of certain basic liberties; compulsory social security and pension arrangements; compulsory elementary education; cooling-off periods in door-to-door sales; certain applications of the undue influence and unconscionability doctrines; and limited enforceability of some contract terms, such as forfeiture clauses and liquidated damages”); Dale Carpenter, The Antipaternalism Principle in the First Amendment, 37 CREIGHTON L. REV. 579, 580 (2004) (providing additional examples).
171 Zamir, supra note 19, at 233-54.
172 Id, at 254-67.
disutility from being treated paternalistically in each instance $i$; and $C$ is the paternalist’s total costs involved in establishing and implementing the paternalistic rule.\(^{173}\)

In assessing the efficiency of paternalistic legal rules, this model ascribes no intrinsic value to personal freedom and contains no constraint against its infringement.\(^{174}\) These missing elements are arguably crucial to understanding the moral dilemma inherent in paternalism.\(^{175}\) A consequentialist may use (or rather misuse) the model to limit paternalistic interventions in various ways. She may, for example, overestimate the total disutility to agents resulting from being treated paternalistically, $F = \sum F_i$. Feelings of displeasure and frustration are hard to measure and monetize, and are therefore susceptible to manipulation. However, if one believes that legal paternalism is morally objectionable on liberal (or libertarian) grounds and should thus be limited to cases in which non-intervention would result in a large or even huge loss, the better way to do so is to add a constraint to the model. Manipulating other variables only obscures the real issues.\(^{176}\)

To incorporate a constraint against limiting people’s freedom, a threshold function may deviate from the original model in two respects. One modification would be to require that $B$ should not only be positive, but greater than some value $K$, representing the inherent value of

\(^{173}\) For a detailed analysis of the model, the interrelations between its variables, possible relaxation of its assumptions, suggested extensions, and illustration of its application to forfeiture clauses in credit sales, see id. An unconventional feature of the model is that it measures the losses to the agent from an incorrect choice of $Y$, $L_i$, and her gains from a correct choice of $Y$, $G_i$, according to the preferences she would have had if only her thin rationality were perfect, whereas her disutility from being treated paternalistically, $F_i$, is measured according to her actual preferences. For recent discussions of legal paternalism, see also Colin F. Camerer et al., Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”, 151 U. PA. L. REV. 1211 (2003) (proposing “asymmetric paternalism,” which would benefit those who would otherwise make poor decisions, but imposes little or no costs on those who behave optimally); Cass R. Sunstein & Richard H. Thaler, Libertarian Paternalism Is Not an Oxymoron, 70 U. CHI. L. REV. 1159 (2003) (justifying paternalism on the ground that preferences are unstable and susceptible to manipulations).

\(^{174}\) People’s possible aversion to paternalism affects the model’s variables in two indirect ways. First, the greater people’s aversion to paternalism, the more subjective disutility, $F_i$, they are likely to experience whenever they are treated paternalistically; Second, the larger the aversion to paternalism, the higher the costs of enforcing the paternalistic policy, $C$, are likely to be. The model attributes no weight to disinterested, “moral preferences” about paternalism.

\(^{175}\) See, e.g., Gregory Mitchell, Libertarian Paternalism Is an Oxymoron, 99 NW. U. L. REV. 1245, 1260-68 (2005) (suggesting that libertarianism can justify paternalism only to improve decision-making competence or to prevent liberty-restricting, irrational choices).

\(^{176}\) For an example of such manipulation, see Yuval Feldman, Control or Security: A Therapeutic Approach to the Freedom of Contract, 18 TOURO L. REV. 503 (2002). Within the framework of behavioral economics, Feldman argues that paternalistic limitations on freedom of contract are undesirable because paternalism adversely affects people’s sense of control over their life, which is essential to psychological well-being. This argument ignores the fact that an overwhelming majority of contracts made by individuals—and practically all, or almost all, contracts subject to paternalistic regulation—are standard-form contracts over whose content individuals have no control anyway.
personal freedom. The other modification—or rather a set of possible modifications—concerns
the type of benefits and costs taken into account. Following the discussion in Section IV.C above,
any of the following excluders may be incorporated into the threshold function (and others may
be considered as well):

Small benefits. One may hold that respect for autonomy mandates that frustrating an agent’s
choice is permissible only if the expected loss to her from incorrectly choosing Y (absent the
rule) surpasses a certain threshold, $k$. In practical terms, this may be reflected in limiting the
applicability of a paternalistic rule to instances in which the expected loss from incorrectly
choosing Y surpasses a certain threshold. For example, a central function of the statute of fraud is
to paternalistically caution people against acting hastily. Assuming that there is a correlation
between the scope and importance of a transaction and the risks involved in making the
transaction hastily, limiting the statute’s application to important and relatively large transactions
may thus rest on the present conception.

The existential constraints. Instead of (or in addition to) excluding any expected loss from
incorrectly choosing Y ($L_i$) that is smaller than $k$, it may be required that in at least one instances
the loss, $L_i$, would exceed a (higher) threshold $h$. For example, a risky activity may be prohibited
if in at least one instances it may result in a serious physical harm to the actor, even if under most

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177 Sometimes, infringing on one’s right for her own good plausibly calls for a lower threshold compared to the case in which a constraint is infringed in order to promote the interests of another person. Thus, breaking into one’s property in order to save it from damage (assuming it is impossible to get the owner’s approval on time) is more easily permitted than breaking into one’s property to save someone else’s property from damage (Samantha Brennan, *Paternalism and Rights*, 24 CAN. J. PHIL. 419 (1994)). These are not, however, cases of paternalistic intervention, because they involve infringement of property (and possibly privacy) rights, but not infringement of the agent’s freedom. A higher threshold should plausibly be set in truly paternalistic cases, i.e., when the actor ignores the agent’s choice. At times (e.g., when saving one’s life requires amputating her leg against her will), an action simultaneously infringes the constraint against curtailing a person’s autonomy and other constraints. Plausibly, a greater amount of good is necessary to justify the cumulative infringement of two constraints (see supra Section IV.E). The last proposition assumes that cutting off a person’s leg to save her life constitutes harming her, but one may argue that such a case involves no harm at all, because the agent is actually benefited on balance. On this and related questions, see KAGAN, supra note 4, at 86-90; Brennan, id.

178 In support of this proposition, see, e.g., Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 76-84 (1972); Jeffrie G. Murphy, *Incompetence and Paternalism*, 60 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 465, 479, 483 (1974). For a critique of this position, see John D. Hodson, *The Principle of Paternalism*, 14 AM. PHIL. Q. 61, 64, 65 (1977). Instead of requiring that $L_i$ would exceed $k$, it may be argued that paternalistic rule is justified only if the expected loss from incorrectly choosing Y exceeds some threshold, taking into account both the magnitude of the loss and its probability ($P(L_i > k)$. For this proposition, see Eric D. Johnson, *Sounds of Silence for the Walkman Generation: Rock Concerts and Noise-Induced Hearing Loss*, 68 IND. L.J. 1011, 1026-27 (1993).

179 On the cautionary function of formal requirements, see, e.g., Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

180 On the Statute’s scope of applicability, see generally Restatement (Second) of Contracts § 110.
circumstances its expected harm is not serious. The lesser harms, however, would still be taken into account.

*Chronologically remote and probabilistic costs and benefits.* A threshold function may plausibly exclude some chronologically remote or low-probability costs or benefits of the paternalistic rule. For example, respect for personal freedom may militate against prohibiting activities involving risks with a very low probability. At the same time, the argument that paternalism adversely affects the development of judgment skills may similarly be excluded in at least some contexts as too remote. 181

*Promoting the Good v. Eliminating the Bad.* Following the prevailing economic convention, the original model equates losses with foregone gains and gains with foregone losses. In contrast, there seems to be a prevalent notion that limiting people’s freedom for their own sake is much more justifiable when done to prevent loss and suffering than when it is done to ensure greater gains and enjoyment. 182 A threshold function may take this consideration into account by discounting (or even disregarding) the benefits of a paternalistic rule belonging to the latter type.

### C. Risking Innocent People While Fighting Terrorism

Military and criminal confrontations often involve risking the lives, body and property of innocent people. Consider, for example, the following difficult question: Under what circumstances is the government allowed to risk the lives of, or even knowingly kill, innocent civilians taken as hostages or used by terrorists as a human shield, to save the lives of other civilians or to deter future terrorist attacks?

Answering this question through standard CBA requires comparing the expected direct and indirect consequences of an action against the terrorists with the consequences of inaction, including their expected effects on the motivation of future terrorists and on demoralization. 183 Standard economic analysis does not differentiate between active infliction of harm by the government on a particular group of innocent people and the harm suffered by as yet unspecified

181 On long-term effects of being treated paternalistically and their speculative nature, *see* Zamir, *supra* note 19, at 276-77.

182 For example, prohibiting the manufacturing, dissemination, and use of dangerous food seems much more legitimate than compelling the manufacturing, dissemination, and consumption of particularly healthy food.

group of innocent people due to the terrorist activity and the government’s inaction. This view conflicts with ordinary morality and prevailing constitutional legal norms.

For instance, in a 2006 decision, the Federal Constitutional Court of Germany struck down the German Air Traffic Security Act, which authorized the German air force to shoot down aircrafts that are intended to be used as weapons in crimes against human lives, based on the view that killing innocent people for the sake of saving others violates basic human rights to life and human dignity. The court noted that an assessment that the passengers are doomed at any rate (because the terrorists plan to crash the aircraft into their target) would not change the outcome, because human life and human dignity enjoy the same constitutional protection regardless of the duration of an individual human being’s physical existence.

Focusing on the question of whether state officials should be authorized to order the shooting down of an airplane suspected as being used as a weapon against human lives, we submit that both the absolutist’s unqualified negative reply (endorsed by the German Court) and a pure consequentialist CBA are unsatisfactory. On the one hand, it should be permissible—and even required—to shoot down an airplane carrying a few innocent passengers to prevent an airplane from crashing into a dam or a nuclear plant which would certainly kill tens of thousands of people (and causing secondary environmental damage and other losses). Contrary to the court’s depiction of such action as treating the passengers as a means to save the lives of others, killing the innocent passengers under these circumstances is merely a side effect of shooting down the airplane to save the lives of the intended victims. While such killing infringes a constraint, this infringement is sometimes justified. On the other hand, it seems immoral to shoot down an

184 Judgment of the Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] Feb. 15, 2006, BVerfGE, 1 BvR 375/05. The court refrained, however, from determining whether criminal liability should be imposed on an official that would order the shooting down of an airplane in the absence of statutory authorization.
185 We shall not discuss other institutional, legalistic, and second-order arguments addressed by the German Court, such as the significant risk of error due to the lack of information in situations in which the statute applies. The risk-of-error consideration is perfectly compatible with a consequentialist analysis.
186 See, e.g., DAVID ORMEROD, SMITH & HOGAN CRIMINAL LAW 322 (11th ed., 2005); Michael Bohlander, Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity, 70 J. CRIMINAL LAW 147, 157-58 (2006) (“[N]o one would seriously doubt that shooting down a plane with 50 passengers would be the right thing to do, if the plane was aimed at a busy shopping mall where thousands of people were going about their business”).
airplane carrying 400 passengers to save the lives of 401 other innocent people, at least if it is expected that otherwise the passengers have a reasonable chance to survive.

In an emergency situation, conducting an elaborate CBA subject to constraints may be impossible. Yet, such constrained CBA may underlie pre-formulated guidelines for handling such situations. Incorporating the deontological constraint against active/intentional killing of persons into the CBA requires the structuring of a threshold function. Assume, first, that absent the preventive measure, the passengers are expected *to survive*, and that the government activity will certainly kill the passengers and prevent the harm to others.\(^\text{189}\) Under these assumptions, one may use the following threshold function:

\[
T = (px - qy) - (K + K'y)
\]

where \(x\) is the expected number of people who will be killed or severely wounded as a result of the terrorist attack; \(y\) – the expected number of innocent people killed or severely wounded as a result of the preventive action;\(^\text{190}\) \(p\) – the probability that the terrorists will successfully carry out their plan if no preventive action is taken; \(q\) – the probability that the preventive action will kill the passengers; and \(K\) and \(K'\) – two constants, jointly constituting a combined, additive and multiplier, threshold.

This function is based on the view that in determining the permissibility of the preventive act, only lost lives and severe physical harms to innocent people are taken into account. It thus excludes the well-being of the terrorists, lesser bodily harms to innocent people, the nationality and other characteristics of the civilians involved, damages to property, and monetary losses. The proposed threshold function further excludes long-term effects of the preventive action, such as its deterrent effect on future terrorist attacks. All, or at least most, of these (and similar) considerations may, however, be considered when choosing among the deontologically permissible options (including the option of doing nothing). At this different stage, the choice between the deontologically permissible options may either rest on standard CBA or reflect lexical priorities between competing values.\(^\text{191}\)

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\(^{189}\) *See* Bohlander, *supra* note 187, at 158 (describing such possible scenarios).

\(^{190}\) These consequences can be represented by a monetary value or by the product of an aggregation of the harms that are weighed according to their relative severity.

\(^{191}\) *See supra* Section IV.A.
We now turn to the possibility that the passengers and crew are likely to die irrespective of the preventive action (e.g., because the terrorists plan to crash the airplane into their target). Contrary to the German Court’s ruling, the prevailing view among (English speaking) philosophers and jurists seems to be that killing a person who is doomed to die anyway, as a side-effect of saving others, is permissible or at least less objectionable than killing a person who is not similarly doomed.\textsuperscript{192} Threshold function (11) may be modified to capture this judgment by adding a variable \( r \) – the probability that the passengers will survive absent the preventive act, as follows:

\[
T = (px - ry) - (K + rK' y)
\]

In the extreme case in which it is certain that all passengers will die anyway \((r = 0)\), a consequentialist would hold that (other things being equal) shooting down the airplane is required even for the sake of saving one person on the ground. In contrast, according to (12), the preventive action will be permissible only if \( px - K > 0 \). This function requires that the net benefit of shooting down the airplane will exceed a certain threshold, \( K \), to overcome the deontological constraint against actively/intentionally killing innocent people (as distinguished from letting them die).\textsuperscript{193}

D. ADDITIONAL ILLUSTRATIONS

There are countless legal contexts in which deontological constraints are potentially relevant. In addition to the numerous examples mentioned throughout the Article and the few examples discussed in some details in this Part, this Section briefly mentions three additional issues where standard economic analysis fails to provide a satisfactory descriptive or normative account. We

\textsuperscript{192} See, e.g., BARUCH A. BRODY, ABORTION AND THE SANCTITY OF HUMAN LIFE: A PHILOSOPHICAL VIEW 12-25 (1975); KAMM, supra note 84, at 54 (“killing someone who is under a threat of death may be better than killing someone who is not, when the person is certainly doomed anyway (no one can help him”)); Id., at 248-49 (discussing “the doomed victim”); JOHN P. REEDER, JR., KILLING AND SAVING: ABORTION, HUNGER, AND WAR 58-63, 164-68 (1996); Moore, supra note 33, at 302-304; Michael Bohlander, In Extremis—Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law, 2006 CRIM. L. REV. 579, 580; Bohlander, supra note 187, at 158.

\textsuperscript{193} In addition to the probability that the harmed people will die anyway, one may wish to consider such factors as qualitative differences between the inflicted death and the otherwise expected one (e.g., violent v. peaceful death), and the time period by which death is accelerated. While these factors do not loom large in the context of a terrorist attack, they are significant in other contexts. Thus, for example, in the famous case of the conjoined twins (In Re A (Children) (Conjoined Twins: Surgical Separation), [2001] Fam. 147 (CA) (U.K.), the British Court of Appeal authorized the separation of twins—a procedure which was known to cause the death of one of them—when otherwise both were expected to die within three to six months. Despite the fact that the inflicted death shortened the lifespan of one of the twins by several months, a central ground of the court’s decision was that she was doomed to die anyway (id., at 196-97). On this judgment, see Bohlander, supra note 187, at 155-57; ORMEROD, supra note 187, at 321-22.
believe that adding threshold constraints to the analysis may solve these apparent puzzles, thus we shall indicate the direction in which such an improved analysis may proceed. The examples will be taken from constitutional, criminal, and evidence law.

*Freedom of Speech.* Several economists and economists of law have analyzed the “speech market” and its regulation.\(^{194}\) Most notably, Richard Posner has proposed a formula for an economic evaluation of any regulation banning free speech.\(^{195}\) Posner’s analysis is purely instrumental, weighing the benefits and costs of regulation/protection of free speech without attributing any priority to people’s freedom of expression (that is, without any constraint on the state’s power to limit this freedom).\(^{196}\) This disregard for the intrinsic value of autonomy and liberty is likely to result in under-protection of free speech.\(^{197}\) This concern is exacerbated by Posner’s unqualified incorporation of the disinterested preferences of people annoyed by the mere knowledge of the speech.\(^{198}\) To avoid this troubling outcome, Posner resorts to second-order

\[ B \geq \frac{pH}{(1 + d)^n} + O - A \]

where \(B\) is the total (social, scientific, aesthetic or other) benefit of a certain speech, \(H\) – the speech’s expected harm; \(p\) – the probability that the harm will actually be materialized if the speech is allowed; \(d\) – some per-period (e.g., one year) discount factor for future harms; \(n\) – the number of periods between the time that the speech takes place and the harm from it materializes; \(O\) (for offensiveness) – the disutility experienced by disinterested people from merely knowing about the speech; \(A\) – the administrative costs of the regulation. See Posner, supra note 194, at 67-94 (analyzing the formula’s elements and implications).


\(^{195}\) According to Posner’s formula, a speech should be allowed if but only if


\[^{197}\] See also Hammer, supra note 196, at 517-23 (criticizing Posner’s claim that localities should be afforded greater authority to suppress speech than the central government).

\[^{198}\] On the problematic nature of such incorporation, see generally supra Subsection I.C.3. Interestingly, Posner neither mentions the costs to disinterested people annoyed by the mere knowledge of limitations being imposed on free speech, nor considers the frustration experienced by people whose freedom of speech is curtailed (beyond losing the benefit they expect to derive from the speech).
considerations, particularly the difficulties of estimating the costs and benefits of free speech. In line with his general distrust of the government, Posner approves of restrictions of freedom of speech only if it may be shown “with some degree of confidence” that the benefits of the restrictions exceed their costs. In contrast to a non-consequentialist endorsement of free speech, this argument, along with the effect of the administrative costs of regulation, is likely to lead to undesirable conclusions, especially in instances where government intervention is necessary to actively protect freedom of speech. We therefore maintain that better understanding of the pertinent normative factors and legal issues requires to incorporate a constraint against limiting people’s freedom of speech into the CBA.

Harsh Punishment. Standard economic analysis associates criminal sanctions with deterrence. The expected sanction should exceed the benefit that the would-be perpetrator expects to derive from crime. Harsher sanctions enable one to save in apprehension costs, and in many cases the social costs are minimized by setting the sanction at the highest possible level. This recommendation clearly contradicts commonsense morality by ignoring retributive values and the importance of limiting maximum sanction severity. It therefore seems essential to incorporate deontological constraints that refer to both acceptable types of sanctions (mainly capital punishment) and to retributive values.

Burden of Proof. In criminal law, the burden of proof determines the ratio between the risk of erroneously convicting an innocent suspect (‘false positive’) and the risk of erroneously acquitting a criminal (‘false negative’). For the consequentialist, adjudicative fact-finding needs

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199 See Posner, supra note 194, at 70 (doubting that the benefits and costs of free speech could be estimated). This is even more conspicuous in Posner’s earlier version of the model: Posner, supra note 194, at 24-29 (discussing the various sources of errors in estimating the costs and benefits of speech).

200 See, e.g., Posner, supra note 194, at 75 (rejecting the notion that the government may be trusted in some spheres of free speech more than in others, he declares: “The government cannot be trusted, period”).

201 Posner, supra note 194, at 71.


203 See, e.g., Sunstein & Vermeule, supra note 95, at 147 (arguing that if capital punishment leads to a net savings of innocent lives, it may be morally required on consequentialist grounds).

204 Economic theory addresses this difficulty through the concept of “marginal deterrence”—the severity of sanction for an offense is limited by the level of sanction for a more mischievous offense. See, e.g., Bentham, supra note 202, at 168 (“where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less”). However, this argument raises several difficulties. See, e.g., Neal K. Katyal, Deterrence's Difficulty, 95 Mich. L. Rev. 2385 (1997) (suggesting that the economic model is thin, and many qualifications and enhancements must be made).

205 See, e.g., Steiker, supra note 98 (challenging the argument that threshold deontology justifies capital punishment).
to minimize the total cost of errors and error-avoidance. Accordingly, the burden of proof should minimize the aggregate costs of the two types of errors.\textsuperscript{206} For instance, if both types impose the same social cost, the optimal decision rule is ‘preponderance of the evidence’. In criminal trials, requiring a higher standard is justified only as far as the harms generated by false convictions exceed the harms generated by acquittals of guilty criminals.\textsuperscript{207} This view ignores, however, notions of injustice of erroneously convicting an innocent person, as well as the individual’s right to fairness and equality. These notions may yield a ratio between the two types of errors—and thus a certain burden of proof—that exceeds the one endorsed by a standard CBA.\textsuperscript{208} Incorporating a deontological constraint against (risking) false convictions may thus yield a more satisfactory analysis.

\textbf{VI. POSSIBLE OBJECTIONS}

Thus far, we have established the justifications for incorporating deontological constraints into CBA, demonstrated how threshold constraints may be modeled, and illustrated the potential fruitfulness of such incorporation in various legal contexts. We now turn to considering possible objections to our proposal. These objections are principled, methodological, or both. Some of them may be raised by economists, some by deontologists, and some by both.

\textbf{A. NORMATIVE NEUTRALITY OF ECONOMIC ANALYSIS}

While conceding the normative flaws of standard CBA, economists may still endorse a division of labor between economic analysis and deontological concerns to preserve the alleged value-free and objective nature of economic analysis. However, as many commentators have long pointed out, the idea that standard CBA is a value-free, “scientific” mode of analysis is false.\textsuperscript{209}


\textsuperscript{207} See, e.g., ALEX STEIN, \textit{FOUNDATIONS OF EVIDENCE LAW} 141-53 (2005) (“cases falling into the civil liberty category feature risks of error that are manifestly asymmetrical”).

\textsuperscript{208} STEIN, supra note 207, at 172-83 (suggesting that the burden of proof should be based on the “equal best” standard); NOZICK, supra note 74, at 96-108 (discussing procedural rights mandated by the principle of fairness).

\textsuperscript{209} See, e.g., HAUSMAN & MCPHERSON, supra note 20, at 209-20 (refuting the claim that positive economics—let alone normative economics—is value-free); Dorff, supra note 25, at 863-88 (describing the inevitable value judgments involved in choosing a social welfare function); Philip Harvey, \textit{Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously}, 33 COLUM. HUMAN RIGHTS L. REV. 363, 411-18 (2002)
The choice between competing notions of distributive justice within the consequentialist framework (mere maximization of utility, a Rawlsian maximin, etc.) is anything but value-free. The same is true regarding the choice of the underlying theory of the good.\textsuperscript{210} Even the Pareto criterion entails non-trivial normative judgments.\textsuperscript{211} Thus, while adding deontological constraints to economic analysis obviously reflects a normative judgment, so does disregard of such constraints. There is nothing more “subjective” in setting objectively defined constraints to maximizing well-being than in not setting such constraints.

Rather than claiming that standard economic analysis is free of normative judgments, one may argue that it is neutral in the more limited sense that it rests on \textit{uncontroversial} normative judgments. Indeed, very few would deny that maximizing human well-being is a worthwhile goal. Such a consensus is, however, beside the point. What deontologists deny is not that outcomes count, but that outcomes are the \textit{only thing} that ultimately counts; and it is this \textit{very controversial} claim that lies at the center of our discussion.\textsuperscript{212}

Another objection may be that even if standard CBA reflects (possibly controversial) normative judgments, once these judgments have been made, the routine use of CBA requires merely empirical, value-neutral investigations.\textsuperscript{213} In response, it should first be noted that many of the normative questions underlying CBA are not yet settled. For example, it is unclear whether the theory of the good underlying standard CBA should be satisfaction of actual preferences or satisfaction of rational or ideal ones.\textsuperscript{214} Second, the current state of standard CBA reflects (pointing to the value judgments involved in determining the group of people—a nation, the entire world, etc.—whose welfare counts, and in choosing between different social welfare functions).

\textsuperscript{210} Cf. David Lyons, \textit{The Moral Opacity of Utilitarianism, in Morality, Rules, and Consequences, supra note 18}, at 105 (making a similar argument in response to the claim that utilitarianism rests on “objective grounds” and its dictates determined by “empirically determinable facts”).

\textsuperscript{211} See, e.g., Sen, \textit{supra} note 93 (demonstrating the potential incompatibility of the Pareto principle with liberal values, and concluding that the former is unacceptable as a universal rule); Kaplow \& Shavell, \textit{supra} note 93 (demonstrating the potential incompatibility of the Pareto principle with non-consequentialist concerns, and concluding that the latter should be ignored); Chang, \textit{supra} note 40 (arguing that it is possible to construct a deontological theory subject to the constraint that every constraint would be overridden if following it would infringe the Pareto principle). \textit{See also supra} note 93.


\textsuperscript{213} Cf. Partha Dasgupta, \textit{What do Economists Analyze and Why: Values or Facts?}, 21 ECON. \& PHIL. 221, 221-22, 225 (2005) (“the ethical foundations of \textit{[modern economics]} were constructed over five decades ago and are now regarded to be a settled matter”).

\textsuperscript{214} \textit{See supra} notes 70-73 and accompanying text. The non-neutrality of CBA is particularly conspicuous when long-term and indirect effects are brought into the picture (see \textit{supra} Subsection I.C.1, and particularly \textit{supra} note 39), and when “tastes for fairness” are deemed relevant (see \textit{supra} Subsection I.C.3).
decades of methodological refinement. Similar experience in developing models of constrained
CBA may sort out many of the normative questions. More precisely, the emergence of
methodological conventions regarding the handling of these questions is likely to make the
pertinent normative judgments less conspicuous (as has been the case with standard CBA).

A related objection is that even if standard CBA reflects normative judgments, and even if
some of these judgments are still debated, economists do not have the philosophical expertise
necessary to engage in the moral deliberation necessary for setting deontological constraints. In
considering this argument, one should distinguish between academic use of CBA and its use by
governmental agencies. As regards academic analysts and particularly those engaging in
economic analysis of law, to the extent that one can distinguish between normative and positive
analyses, constrained CBA is primarily germane to the former (though it may contribute also to
positive analysis of people’s behavior, influenced by ordinary morality, and the legal system,
embodying such constraints). Inasmuch as economic analysis of law aims at enhancing the
normative discussion of legal issues, consideration of deontological concerns seems both
essential and feasible. Just as mainstream legal theory has embraced the economic perspective,
and as mainstream economic analysis of law is gradually embracing the insights of cognitive
psychology (the so-called “behavioral law and economics”), there is no compelling reason why
economic analysis of law should not pay heed to moral concerns and incorporate them into CBA.
Constrained CBA would contribute to the operationality of moderate deontology and may even
enrich the philosophical debate about threshold constraints.

As regards regulatory agencies, the requirement to conduct CBA restricts the agencies’
discretion and reduces the risk of error. Authorizing the agencies to engage in philosophical
inquiries would arguably broaden their discretion and make it more difficult to oversee their
decisions. According to this view, deontological constraints should not be incorporated into CBA,
but rather set by other governmental authorities (primarily the legislature), along with other
constraints imposed on agencies. Indeed, constitutional and institutional considerations entail

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215 In actuality, this distinction is very often blurred. See HAUSMAN & MCPHERSON, supra note 20, at 214-20.
216 Sunstein, supra note 2. Cf. ADLER & POSNER, supra note 1, at 101-23 (arguing that a more stringent enforcement
of agencies’ duty to conduct CBA would improve the overall quality of regulation).
217 Cf., PETER G. SASSONE & WILLIAM A. SCHAFFER, COST-BENEFIT ANALYSIS 160-161 (1978) (“A project must
satisfy a number of diverse constraints. Such constraints may be budgetary, legal, social, political or institutional.
These [constraints] exclude projects that obviously are not feasible. …[For example] benefits and costs cannot be
divided along racial lines”).
that constructing threshold functions (either mathematically or verbally) should not be done independently by regulatory agencies, but rather by politically accountable bodies such as Congress. It does not follow, however, that—inasmuch as agencies face decisions involving deontological constraints—these constraints cannot or should not be incorporated into CBA. Once the ethical and policy judgments are made and a threshold function is constructed, it may and should be routinely employed by the regulatory agencies and other governmental branches. Agencies specializing in measuring and evaluating costs and benefits are well suited to employ threshold functions requiring assessment of (certain elements of) the regulation’s harms and benefits. Rather than broadening their discretion, such functions may actually facilitate greater transparency and accountability of agencies’ activities.

B. QUANTIFICATION AND MONETIZATION DIFFICULTIES

Another objection to incorporating deontological constraints into economic models has to do with the difficulty in quantifying and expressing such constraints in monetary terms. Standard economic models assume that people have a complete ordering of preferences regarding anything that may affect their well-being, and that they are able to attribute dollar value to any entitlement (or lack thereof). Thus, at least in principle, economic models may rest on empirical, factual examination of people’s willingness to pay for anything (WTP) or the sum for which they would be willing to give away something they already have—their willingness to accept (WTA). It may be argued that deontological constraints cannot be monetized in the same way.

One possible response to this concern is that quantification and measurement problems are not unique to deontological constraints. Even in distinctively market contexts the above assumptions

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219 Arguably, constrained CBA is compatible with Executive Order 12,866, directing the activities of regulatory agencies (Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (1994)). The Order provides that “in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits.” “Net benefits” include “distributive impacts” and “equity.” Presumably, the term “equity” encompasses more than “distributive impacts”, and is vague enough to include moral constraints (Cf. Robert W. Hahn & Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis, 150 U. PA. L. REV. 1489, 1526-27 (2002) (distinguishing between distributive concerns and equity and criticizing the vagueness of the latter)). At the same time, the Order’s instruction to “maximize” these “net benefits” may seem inconsistent with deontology.

220 Cf. Calabresi & Melamed, supra note 50, at 1111-12 (arguing that when moral sentiments such as the resentment of slavery are involved, the reason for making certain entitlements inalienable, rather than protecting them by liability rules, is the nonmonetizability of the external costs incurred by third people holding these moral sentiments). Note that Calabresi and Melamed refer to moral sentiments, rather than to deontological constraints per se.
of standard economic analysis are problematic. It is often practically impossible to determine, for instance, the market value (or even the value for a certain person) of a specific contractual term (which may be of particular interest to lawyers). This difficulty is exacerbated when economic analysis addresses nonmarket issues such as the hearsay rule in evidence law and criminal liability. Despite the impossibility of filling in the equations with actual dollar amounts, economic analyses of such issues often yield important insights. As Richard Posner notes about his model of the regulation of free speech: “I offer these formulas as a heuristic, a way of framing and thinking about the regulation of speech, rather than as an algorithm for use by judges.”221 Economic models may highlight the crucial factors and their interrelations, explain and predict the way people would act under different legal regimes, and indicate what rules or standards may bring about the largest social utility under specified conditions. Rigorous, qualitative economic analysis is not necessarily less revealing than a quantitative one (in fact, it is often more revealing), and the same holds true for constrained economic analysis.

Another possible response is that deontological constraints need not be expressed in monetary terms. As demonstrated above, threshold functions often disregard some or many of the costs and benefits involved.222 The more costs and benefits are excluded from the function, the less it is necessary to commensurate different costs and benefits. For example, if under a certain threshold function, the only benefit that may ever justify the active/intentional killing of innocent people is saving the lives of at least $K$ times $x$ people, then no monetization of either human life or of $K$ is necessary.

The above-mentioned two responses bypass the objection that deontological constraints are not monetizable by indicating that a meaningful economic analysis subject to deontological constraints may (at least sometimes) be conducted without such monetization. But is the claim that deontological constraints are not monetizable warranted? Indeed, since deontological constraints rest on normative judgment, the usual technique economists use to monetize goods, legal entitlements and other things—people’s WTP or WTA—is inappropriate in the present context.223 In this respect, even a move from actual to ideal preferences would not overcome the difficulty. If one can sensibly translate deontological constraints into monetary terms, the

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221 POSNER, supra note 194, at 68.
222 See supra Sections IV.C and V.C.
223 See supra Subsection I.C.3.
additional step of imputing the resulting measure to people’s ideal judgments is largely fictitious and essentially superfluous (and if one cannot sensibly make this translation, no reference to “ideal preferences” would do the work).

So, can threshold constraints be sensibly translated into monetary terms? The objection we need to address is that such monetization is impossible or undesirable because deontological constraints are incommensurable with well-being, or at least with the ordinary measure of well-being used in economic analysis, i.e. money. There is indeed a deeply held intuition about the incommensurability of different spheres of values and relations, including the incommensurability of wealth and deontological constraints. Not only such things as human life, trust, and liberty cannot and should not be traded in market transactions, people strongly resent even considering such questions as what is the monetary worth of one’s child or of one’s sexual autonomy. 224 Preserving the separation between different spheres of valuation, in particular between the market and nonmarket spheres, is arguably essential for human identity and human flourishing. 225 Beyond these general intuitions, there are three more concrete claims that can be made against monetizing deontological constraints: anti-commodification, incomparability, and incommensurability. We shall take these claims in turn. 226

**Anti-Commodification.** It has been argued that monetization might bring about commodification: the expansion of the market domain by turning more and more objects into tradable commodities, or at least making people view them as such, thus ignoring their nonmarket, intrinsic value. 227 Such expansion of the market domain is considered detrimental to

224 See, e.g., Baron & Spranca, *supra* note 130 (documenting people’s resistance to trade-offs between deontological concerns and economic values); Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions That Transgress Spheres of Justice*, 18 POLITICAL PSYCHOLOGY 255 (1997) (arguing that people find questions regarding the monetary worth of one’s children or one’s loyalty to her country morally offensive).


227 See Radin, *supra* note 225, at 95-122 (critically discussing the “domino theory”, according to which one “cannot both know the price of something and know that it is priceless” and therefore commodification of an object precludes coexistent noncommodified understanding of the same object).
human flourishing. However, this thesis rests on debated philosophical claims regarding human nature and flourishing, and on questionable empirical assumptions regarding the effect of monetization on people’s perceptions of goods, values, and relations.\textsuperscript{228} For our purposes, it is sufficient to point out that there is no necessary link between monetization and commodification. When deontological constraints are translated into money for the purpose of incorporation into CBA, this is not done with a view to transform the values underlying these constraints into tradable goods. On the contrary, it is done to restrain an otherwise unconstrained economic analysis that views anything as commensurable with anything else. When monetization is based on normative deliberation rather than on market prices (or people’s preferences more generally), it is perfectly compatible with maintaining the non-tradability and even inalienability of the monetized object. Thus, courts routinely award monetary damages for loss of limb or life in tort actions, without thereby transforming them into tradable goods,\textsuperscript{229} or necessarily committing to a commodified conception of compensation.\textsuperscript{230} In a similar fashion, CBA subject to constraints may quantify deontological constraints in monetary terms without turning them into commodities.

We then turn to the \textit{incomparability} and \textit{incommensurability} arguments. Following Ruth Chang’s suggestion, we shall use the former term to denote the inability or undesirability of ranking two options or items, and the latter to denote the inability or undesirability of precisely measuring two options or items by some common scale of units of value.\textsuperscript{231} Two options are thus \textit{incomparable} if it is neither true that one of them is better (or worthier, or preferable, etc.) than the other, nor true that they are of equal value.\textsuperscript{232} Two options may be comparable, that is

\textsuperscript{228} A nuanced analysis of the conflicting arguments and assumptions may be found in RADIN, \textit{supra} note 225. See also Scott Altman, \textit{(Com)modifying Experience}, 65 S. CAL. L. REV. 293 (1991) (expressing skepticism about commodification and comparable arguments regarding the effects of medical technologies on people’s sensibilities); Eric Mack, \textit{Domino and the Fear of Commodification}, in NOMOS XXXI: MARKETS AND JUSTICE 198 (John W. Chapman & J. Roland Pennock eds., 1989) (casting doubts on the theory of universal commodification); Nussbaum, \textit{supra} note 67, at 1031 (questioning the empirical assumption of the commodification argument).


\textsuperscript{232} See, \textit{e.g.}, RAZ, \textit{supra} note 68, at 322 (Raz refers to “incommensurability” while we use his formulation to define incomparability). As some commentators have pointed out, there may be an additional relation between two options (apart from one being better than the other, the two being equally good, or incomparable), namely that of \textit{rough equality}. See generally Chang, \textit{supra} note 231, at 4-5, 23-27; \textit{GRIFFIN, supra} note 16, at 79-81, 96-98. While the
ordinally compared, even if a cardinal comparison between them is impossible (i.e., they are incommensurable). Thus, incomparability entails incommensurability but the reverse is not necessarily true. Note, that even incomparabilists do not claim that people do not actually choose among “incomparable” options; their only claim is that such choices cannot be justified on the basis of meaningful ranking of the options.233

Incomparability. While incomparability between options is intuitively appealing, there are strong arguments against this notion. Even if the compared options or values are different in kind and are not reducible into one scale, a comparison may still be possible. For example, it seems morally permissible to touch someone’s elbow (or even to push him) to save another person’s home from burning down, and impermissible to torture an innocent person to save another person’s car from being destroyed. These judgments rest on comparisons. Even when it is asserted that no monetary gain whatsoever justifies the deliberate killing or enslavement of a person, it does not imply that human life or liberty is incomparable with money. Rather, it means that life and liberty are thought of as lexically more valuable than any sum of money.234 Making a personal choice between a career opportunity and family commitments, or a public choice between different policies having both monetary implications and health and safety effects, may be an agonizing process. But this anguish does not prove that the values involved are incomparable. On the contrary, it ordinarily indicates that the stakes are high and that a cautious weighing of the alternatives is warranted. Had the alternatives been truly incomparable, one could have flipped a coin.235 Finally, even if incomparability is a valid notion, it is neither available to consequentialists nor to moderate deontologists. Global comparability is a characteristic feature of consequentialism, and threshold deontology presupposes comparability between constraints and promoting the good (or avoiding the bad).

Incommensurability. We thus arrive at the argument that deontological constraints are incommensurable with money. To put this argument in perspective, recall that money commensurability is a standard feature of CBA. Arguments of incomparability and

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233 See, e.g., RAZ, supra note 68, at 335-40; Craswell, supra note 21, at 1423-24.
234 Chang, supra note 106, at 19-21; Griffin, supra note 22, at 35; Regan, supra note 106, at 1058-59.
incommensurability are thus often intertwined with critiques of consequentialism and economic analysis, whereas objections to the notion of incommensurability are frequently made by proponents of the economic methodology.\textsuperscript{236} Drawing the battle lines in this way can be misleading, however. Although economists regularly monetize such things as human lives and body integrity, the method they use to that end—aggregation of WTP or WTA—is inapplicable to deontological constraints, which rest on a normative judgment and not on aggregation of preferences. An economist may thus hold that there is no acceptable way to monetize deontological constraints. At the same time, the moderate deontologist’s objection to consequentialism need not entail a belief in the incommensurability of constraints with money. To be sure, many deontologists object not only to consequentialism but also to a theory of the good based on preferences satisfaction, and all the more so to quantifying preferences by a monetary scale. Yet, as far as we can see there is no necessary connection between these positions.

The following arguments are meant to convince the economist and the deontologist that monetizing deontological constraints is both feasible and worthwhile, at least sometimes. As regards the economist, it is not inconceivable to attribute money value to a deontological constraint. First, when it comes to issues such as the monetary value of freedom of speech or truth telling, the supposedly strict division between factual identification and aggregation of preferences, and between normative determinations, is rather illusive. The methodological difficulties of identifying people’s preferences almost inevitably entail the exercise of discretion, and such discretion may well reflect normative choices. In any event, we have already addressed—and rejected—the idea that economic analysis can ever be value-free.\textsuperscript{237} Just as it regularly monetizes such things as human lives, personal injuries, and the existence value of wild

\textsuperscript{236} See Radin, \textit{supra} note 230, at 64 (“[The] notion of incommensurability is a broad strategy for attacking utilitarianism”); Jeanne L. Schroeder, \textit{The Laconomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability}, 15 \textit{Yale J. L. & Human}. 347, 352 (2003) (noting that within the legal literature, “the arguments for or against commensurability have been presented largely as arguments about the validity or appropriateness of the economic analysis of law”). Instances of such correlation include FRANK ACKERMAN & LISA HEINZERLING, PRICELESS 39-40 (2004) (criticizing CBA of health and environmental issues); ANDERSON, \textit{supra} note 74 (discussing incommensurability in the context of critique of economics); Craswell, \textit{supra} note 16 (arguing that even if theories of incommensurability are correct with regard to individual decisions, as long as individuals do make choices, these theories need not affect legal policy-making based on people’s revealed preferences).

\textsuperscript{237} See \textit{supra} Section VI.A.
ecosystems, economic analysis should also be able determine the money value of deontological constraints based on a normative judgment. On a higher level of abstraction, economists should feel more comfortable with monetization of deontological constraints if threshold constraints on the factorial level are conceived of as resting on consequentialism on the foundational level.239

From a different angle, the scope of any threshold constraint in a given legal system may (at least theoretically) be derived from a comparison between the existing rules and the rules that would have been set on a purely consequentialist basis. For example, assume (counterfactually) that standard CBA unequivocally calls for breaching contracts whenever performance is inefficient (the “efficient breach doctrine”).240 The extent to which existing contract law deviates from the efficient breach doctrine by “excessively” deterring breaches may reflect a deontological constraint against promise breaking. If all other variables are monetized, then one should be able (at least in theory) to extract the money value of the legally imposed constraint as well.241

As for the moderate deontologist, since she acknowledges that enough good (or bad) outcomes may override a deontological constraint, she cannot deny the comparability of constraints and the goodness (or badness) of outcomes. In the legal context, she may deny that it is possible or desirable to set a deontological constraint ex ante in very exact terms, and prefer a vague standard. Yet, just as a court must ex post determine the monetary damages for loss of life or limb, so too it must determine ex post the legality, validity, or enforceability of an action according to whether the deontological constraint has been violated or overridden.

In general, the notion that such values as basic freedoms and human life are incommensurable with money at least partially stems from the fact that unlike the former, money has no intrinsic value. It is merely a means to achieve other goals. Moreover, money often bears a negative symbolic significance, connecting greed, materialism, and base motives. Money “can’t buy me love.” It can only buy material goods. However, this is a distorted perception. Money can be used (and is often used) to promote the most intrinsically valuable and sublime goals, including saving

238 Even fear and anxiety have been priced for the purpose of CBA, and it has been argued that they should be monetized and taken into account on a more regular basis: Matthew D. Adler, Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety, 79 CHI.-KENT L. REV. 977 (2004).
239 See Alexander, supra note 87, at 910-11; supra Subsection I.C.2.
240 On the efficient breach doctrine, see sources cited supra note 134.
241 Cf. Sugden & Williams, supra note 53, at 178-97 (discussing the inference of valuations underlying actual policies).
lives, legally protecting human rights, and acquiring tools to create inspiring works of art. This is true for governments just as it is true for individuals. As annoying (and sometimes even tragic) as it may be, tradeoffs between things such as safety and money (representing any alternative use) are unavoidable. This recognition is one reason to prefer moderate to absolutist deontology.

Since it is difficult to draw a boundary between a willingness to monetize things such as physical pain and unwillingness to monetize deontological constraints against actively/intentionally harming people, arguably one should either reject money commensuration tout court, or concede to it entirely (at least under appropriate circumstances). A principled anti-monetization implies that CBA and economic methodology should only apply to market issues (and even in this context they would face considerable difficulties). Taking this position seriously would not only rule out the incorporation of threshold constraints into CBA, but also the very use of CBA in such spheres as health and safety regulation and environmental protection (not to mention family law, criminal law, and human rights). To be sure, a world without economic analysis of nonmarket issues is not inconceivable; it existed only several decades ago and still exists in most parts of the globe. But whatever the normative deficiencies of economic analysis, doing away with CBA as a governmental decision procedure and with economic analysis of law seems most undesirable.

To conclude, while monetization poses a difficulty regarding incorporating deontological constraints into economic analysis, such monetization is not necessarily essential to modeling constraints, and monetization based on normative deliberation is not impossible. We submit that it is preferable to address deontological concerns as constraints on CBA rather than to either ignore them altogether or deal with them separately as secondary considerations.

C. SETTING CONSTRAINTS TOO LOW

While moderate deontologists should find economic analysis subject to constraints more acceptable than standard economic analysis, they may object to it nevertheless on the grounds that it would lead to setting constraints too low. As a matter of pure logic, deontological

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243 The difficulties stem from the fact that, both descriptively and normatively, even market behavior is subject to various non-consequentialist moral and social norms. See HAUSMAN & MCFHERSON, supra note 20, at 214-20 (demonstrating how people’s moral dispositions affect, and are affected by, economic outcomes); RADIN, supra note 225, at 102-14 (analyzing the pervasive interactions between values of personhood and community, and the market).
thresholds may be set at any point higher than zero (consequentialism) and lower than infinity (absolutist deontology). However, deontological constraints are ordinarily thought of as violable only in unusual cases. The deontologist believes that values such as human life and basic liberties take priority over the good, and should not be routinely traded off against satisfaction of preferences. The very idea that deontological constraints are commensurable with well-being may push in the direction of lower thresholds, and the incorporation of constraints into economic models is likely to reinforce this tendency. As a practical matter, one would not go to the trouble of calculating costs and benefits against a deontological threshold if it is only in circumstances of colossal catastrophe that the analysis would deem relevant. The deontologist’s concern that our proposal would lead to setting lower thresholds is therefore not groundless.

In response, one may point out that in certain contexts, such as the constraints against lying or promise breaking, rather low thresholds may actually capture prevailing moral intuitions. Moreover, even in the context of the constraint against harming people, facing the questions when and why extremely high constraints are justified may not be such a bad idea. Finally, nothing in our proposal necessitates lower thresholds.

D. SUMMARY

This Part considered principled and methodological objections to incorporating deontological constraints into CBA. The objection that such incorporation would adversely affect the alleged normative neutrality of economic analysis turned out to be more apparent than real, and the objection that such incorporation would result in setting constraints too low hasn’t proved dispositive either. The most serious objection was that it is either impossible or undesirable to

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244 See, e.g., NOZICK, supra note 74, at 29, n.* (if constraints may ever be infringed, it would be only “to avoid catastrophic moral horror”); CHARLES FRIED, RIGHT AND WRONG 10 (1978) (maintaining that constraints may be infringed to avoid “the catastrophic”); KAGAN, supra note 7, at 113 (arguing that moderate deontologists believe the threshold of the constraint against harming is “quite high”); Steiker, supra note 98, at 783-84 (arguing that ordinarily deontological constraints may be overridden in “emergency situations” only).

245 Moore, supra note 33, at 330-31. Cf. Frederick Schauer, Instrumental Commensurability, 146 U. PA. L. REV. 1215 (1998) (discussing the likely effects of decisionmakers’ dispositions regarding commensurability (or incommensurability) of values and options on their decision procedures and actual decisions); supra notes 85-86 and accompanying text.


247 In general, the present concern is considerably less compelling if the justification for threshold constraints on the factorial level rests on foundational consequentialism (See supra Subsection I.C.2). At the same time, considerations of long-term and indirect effects make even act-consequentialists rather cautious in allowing infringements of commonsensical moral prohibitions (See supra Subsection I.C.1).
monetize threshold constraints in order to incorporate them into economic models. In response, we indicated that economic models could significantly contribute to organizing thinking and to highlighting important variables and their interactions even when no actual sums of money are used. We further pointed out that, depending on the scope of costs and benefits that are deemed relevant in formulating the threshold function, monetization may not be necessary at all. Finally, we discussed and rejected the commodification, incomparability, and incommensurability arguments against such commensuration, thus opening the way to monetizing constraints.

**CONCLUSION**

Economic analysis of law (and of human behavior in general) is a powerful analytical methodology. At the same time, standard CBA is normatively objectionable on various grounds. This Article focused on the consequentialist aspect of welfare economics, specifically on the lack of constraints on promoting the best outcomes. Moderate deontology is more in accord with commonsense morality and existing legal doctrines, but is less determinate and rigorous. We argued that integrating threshold constraints with cost-benefit analysis would overcome both deficiencies, and that it is compatible with (and perhaps even mandated by) the more sophisticated versions of foundational consequentialism. Such integration raises principled and methodological concerns, but we believe that these concerns can all be met. Adding threshold constraints to economic analysis would make it not only normatively more acceptable, but also descriptively more valid, without significantly compromising its methodological rigor. The advantages of constrained CBA are particularly conspicuous in the analysis of non-market spheres, such as constitutional, criminal, tort, and family law, where deontological constraints loom large, but they are significant in market contexts as well. Hopefully, such integration would contribute to bridging the increasing gulf between economic analysis and other approaches to law and legal theory.

We presented our proposal in relatively general terms. As illustrated in Parts IV and V above, additional work is required for implementing it in any specific context. We have neither provided a complete list of deontological constraints, nor guidelines to resolve conflicts between them. We have listed the major distinctions between different types of costs and benefits that should be considered in formulating threshold functions and proposed plausible ways to formalize the size
of the threshold within such functions; but specific choices among the different possibilities have
to be made and defended in any specific context. Finally, we focused on determining the
permissibility of acts and rules, and not on the choice between permissible options.

Deontologically constrained CBA is more complex than standard CBA. But this normative
complexity exists anyway. One may ignore this complexity or try to cope with it by manipulating
or distorting other elements of the analysis. However, the first option seriously decreases the
fertility and relevance of the analysis, and the second blurs the real issues instead of clarifying
them. Incorporating deontological constraints into CBA is clearly a superior solution.