

Three Worries about Moderate Deontology

by

Tyler Blake Cook

A Thesis Presented in Partial Fulfillment  
of the Requirements for the Degree  
Master of Arts

Approved April 2017 by the  
Graduate Supervisory Committee:

Cheshire Calhoun, Chair  
Douglas Portmore  
Elizabeth Brake

ARIZONA STATE UNIVERSITY

May 2017

## ABSTRACT

Perhaps the most common and forceful criticism directed at absolutist deontological theories is that they allow for the occurrence of morally catastrophic events whenever such events could only and certainly be prevented by the violation of a deontological constraint. Some deontologists simply bite the bullet, accept this implication of their theory, and give their best arguments as to why it does not undermine absolutism. Others, I think more plausibly, opt for an alternative deontological theory known as ‘moderate deontology’ and are thereby able to evade the criticism since moderate deontology permits violations of constraints under certain extreme circumstances. The goal of this thesis is to provide a defense of moderate deontology against three worries about the view, namely, that it is more accurately interpreted as a kind of pluralism than as a deontology, that there is no non-arbitrary way of setting thresholds for deontological constraints, and that the positing of thresholds for constraints would lead to some problematic results in practice. I will respond to each of these worries in turn. In particular, I will argue that moderate deontology is properly understood as a deontological theory despite its partial concern for consequentialist considerations, that thresholds for deontological constraints can be successfully located without arbitrariness by democratic appeal to people’s commonsense moral intuitions, and that the alleged problematic results of positing thresholds for constraints can be effectively explained away by the moderate deontologist.

## ACKNOWLEDGMENTS

I thank Cheshire Calhoun, Douglas Portmore, and Elizabeth Brake for their incisive commentaries, handy advice, and kind words. They are remarkable philosophers and people who I admire greatly, and I have become a better philosopher because of them. I also thank the philosophy graduate students at Arizona State University for listening to and engaging with my many thoughts about moderate deontology and ethical theory more generally.

## TABLE OF CONTENTS

	Page
DEONTOLOGISTS CAN BE MODERATE.....	1
Smilansky.....	2
Primacy of Deontological Constraints.....	4
Deontology beyond Thresholds.....	13
Why Terminology Matters.....	18
LOCATING THRESHOLDS FOR DEONTOLOGICAL CONSTRAINTS.....	24
Ellis.....	24
The Structure of Moderate Deontology.....	26
Degrees of Wrongness.....	32
Invoking Intuitions.....	36
APPLYING MODERATE DEONTOLOGY.....	48
Alexander.....	48
Response to First Application.....	51
Response to Second Application.....	54
Response to Third Application.....	58
REFERENCES.....	61

## DEONTOLOGISTS CAN BE MODERATE

Moderate deontology, the view that deontological constraints can be permissibly violated when and only when doing so prevents the occurrence of sufficiently bad consequences, has become a popular alternative to absolutist forms of deontology, which hold that deontological constraints can never be permissibly violated.<sup>1</sup> It is a view that many find plausible because it accommodates commonsense deontological constraints, but it also permits commonsense violations of those constraints whenever very much is at stake (e.g. it permits one murder whenever committing a murder would prevent one million comparable murders). Considering the abundance of moderate deontologists, one would suspect that moderate deontology is probably a coherent, deontological position. However, with respect to its being a deontological position at all, Saul Smilansky (2003) maintains that the view is actually pluralist, not deontological, and that we should understand deontology only in its typical absolutist form.

My first objective in this thesis will be to show that, contra Smilansky, moderate deontology is properly understood as a deontological theory, and I hope to accomplish some conceptual clarification in the process regarding certain aspects of the theory. In particular, I will emphasize the primacy of deontological constraints in moderate deontology, discuss the normative implications of permissible constraints violations, and conclude with a succinct explanation of a point on which I partly agree with Smilansky concerning the significance of terminology in our normative theorizing.

---

<sup>1</sup> Moderate deontology is sometimes, perhaps more frequently, called ‘threshold deontology’ for its positing of a threshold (or thresholds) of bad consequences beyond which, as consequences get worse, deontological constraints can be permissibly violated to prevent the bad consequences.

## Smilansky

I will begin by briefly summarizing Smilansky's argument. Here is a quotation, which captures the crux of his view:

When a person combines consequentialist and (constraint-related) deontological elements in her thought, Kagan classifies her as a deontologist. The very existence of some deontological constraints suffices to make one a deontologist. But a person holding a 'half-and-half' position incorporating consequentialism and deontology, with the first sort of concern sometimes trumping the second and the second sometimes trumping the first, should not be called a deontologist, moderate or otherwise. The proper description of such a person is that she is a pluralist, plausibly combining concern for consequences with concern for deontological constraints. We should retain our understanding of the deontological element as pure and absolute, as far as it goes. Where it does not go (say, beyond a threshold), it does not somehow remain 'deontology' while going for the consequentialist considerations, but rather becomes consequentialist.<sup>2</sup>

The contention here is that the moderate deontologist considers both deontological constraints and consequences of actions to be morally relevant such that either kind of consideration can affect the normative status of an action, and so her position is not really a deontological one, but a pluralist one. Smilansky seems to think that we should reserve the term 'deontology' only for absolutist forms of deontology because those theories are purely deontological to the extent that they treat deontological constraints as inviolable. This is not to say that the absolutist must be indifferent to consequences (she can approve of actions that make the world a better place), but she must condemn those actions that violate constraints for the sake of consequences, something the moderate deontologist will not always do. Moderate deontology, on his understanding of it, is half-deontological and half-consequentialist, so pluralist.

---

<sup>2</sup> Smilansky (2003), p. 72. Smilansky is referring to Shelly Kagan's (1998) characterization of moderate deontology (p. 79.).

Smilansky offers an example of a conflict between a deontological constraint and consequentialist concern to help clarify the issue. Suppose that the only way to prevent terrorists from destroying a major city is to punish an innocent person. Here a deontological constraint against punishing the innocent conflicts with a consequentialist concern about the fate of a major city. Smilansky asserts that if we opt for unjust punishment, which the moderate deontologist would likely recommend, then we might be making the right decision, but it cannot be that we are making that decision as deontologists. Punishing the innocent, he says, is a “paradigm of injustice” and a “deontologist, *qua* deontologist, must oppose such a plan.”<sup>3</sup>

Smilansky worries that combining deontological and consequentialist considerations into one theory and dubbing it ‘moderate deontology’ risks not understanding the “pluralist predicament of normative ethics”, and it allows commonsense morality to be mischaracterized as deontological when, in reality, it is very much pluralist.<sup>4</sup> Although it may seem that the worry is merely a terminological one, according to Smilansky, terminology matters here. Describing moderate deontology as a deontological theory is simply incorrect owing to its theoretical commitments. He concludes that we should understand deontology only in its familiar absolutist way because doing so will allow us to see moderate deontology for what it really is, a kind of pluralism.

---

<sup>3</sup> Smilansky (2003), p. 73.

<sup>4</sup> Ibid. p. 75.

## Primacy of Deontological Constraints

Now that Smilansky's position has been presented I will argue that moderate deontology is suitably interpreted as a deontological theory despite its regard for consequentialist considerations.<sup>5</sup> First, the primacy of deontological constraints in moderate deontology will be examined. Recall that Smilansky describes the theory as "half-and-half" because it incorporates both deontological and consequentialist concerns to the extent that either type of concern may trump the other depending on the situation (i.e. depending on whether or not a threshold of bad consequences is surpassed). While it is true that one type of concern may sometimes trump the other, I contend, it does not follow that the theory is by any means half-and-half. Smilansky understates the functions that deontological constraints serve in moderate deontology, and consequently he misrepresents the view as half-and-half.

According to moderate deontology, typically constraints should not be violated because deontological constraints are much weightier than consequentialist considerations. In fact, it has been noted that the view is regularly interpreted to posit such a high threshold of bad consequences that it would frequently (almost always, I suggest) recommend the same action as an absolutist deontology would.<sup>6</sup> For example, in

---

<sup>5</sup> A quick clarification: by 'consequentialist considerations' I mean utilitarian-like considerations, and so these kinds of considerations conceptually exclude deontological ones. I state this to avoid any potential confusion about my discussion of consequentialist considerations since some consequentialist theories actually require that deontological matters (e.g. desert) be promoted.

<sup>6</sup> Larry Alexander and Michael Moore (Spring 2015 Edition) claim that moderate deontology is similar to the "*prima facie* duty" version of deontology but more closely mimics absolutist deontology in its verdicts. Also, Moore (2010) writes, "[T]here is a very high threshold of bad consequences that must be threatened before something as awful as torturing an innocent person can be justified. Almost all real-life decisions a GSS interrogator will face—and perhaps *all* decisions—will not reach that threshold of horrendous consequences justifying torture of the

Smilansky's terrorist scenario it would be permissible on moderate deontological reasoning to punish an innocent person in order to prevent the destruction of a major city, but it would be impermissible to punish an innocent person to prevent the punishment of, say, a few other innocent persons. Of course the absolutist would prohibit punishment of the innocent no matter the consequences, but the important point is that there would be many situations in which the absolutist and moderate deontologist would actually agree on what the right course of action is (or, at least, agree on which action it would be wrong to perform), namely, any situation in which a threshold of bad consequences is not surpassed, and since such a threshold would presumably be set quite high, agreement between the two would be much more common than disagreement. So, with regard to action guidance, we can see that moderate deontology is much closer to absolutism than it is to any normative middle ground between absolutism and act-consequentialism that might appropriately be called 'half-and-half', such as one that sets constraints' thresholds so low that deontological considerations win out approximately half the time and consequentialist considerations the other half.

But, the primacy of deontological constraints in the theory is not simply a matter of frequency. That is to say, it is not a matter of how often those constraints should be respected and how rarely they should be broken. Instead, the primacy consists in the various ways in which moderate deontology emphasizes the normative importance of constraints, and the rarity of permissible constraints violations just follows from one of these ways, namely, the theory's positing of the extreme weightiness of deontological considerations. That deontological constraints may occasionally be overridden by severe

---

innocent. Short of such a threshold, the agent-relative view just sketched will operate as absolutely as absolutism in its ban on torturing the innocent" (p. 722, his emphasis).

consequentialist considerations does not entail that those constraints do not have great weight in the theory; they are just not absolute, as in the absolutist's theory. Thus, not only is moderate deontology not half-and-half in terms of frequency, but it is not half-and-half in terms of what matters morally from the perspective of the theorist. The simple fact that the involvement of morally disastrous consequences, such as the destruction of a major city, is required to override a deontological constraint is by itself enough to demonstrate this point.

A threshold of bad consequences beyond which it becomes permissible to violate some constraint, then, must be high enough to reflect the moderate deontologist's theoretical commitment to the primacy of deontological constraints. If the threshold were set so low that the possibility of trivially bad consequences could justify violations of such a constraint, then it would seem to follow that deontological constraints are not so critical to the moderate deontologist, and her theory might be accurately characterized as pluralist after all. I will not yet discuss what the exact location of a constraint's threshold may be, but suffice it to say for now that because deontological constraints are given much more weight than consequentialist considerations, the moderate deontologist would have to set a threshold reasonably high. Consider, for instance, Nagel (2012):

“[D]eliberately killing an innocent is impermissible unless it is the only way to prevent some very large evil (say the deaths of fifty innocent people). Call this the *threshold* at which the prohibition against murder is overridden.”<sup>7</sup> The positing of high thresholds is a

---

<sup>7</sup> Nagel (2012), p. 62, emphasis his. Notice that he characterizes the threshold as the decisive point at which a deontological constraint can be permissibly violated, which differs from my characterization of it as the point beyond which a constraint can be permissibly violated; this difference has no bearing on my argument. Also, I do not mean to suggest that Nagel is clearly a moderate deontologist, although the view does seem to be implicit in much of his discussion. For

necessary condition for a moderate deontological view to qualify as deontological. To deny this claim and assert that there can be low thresholds for constraints would be to simply admit the point to Smilansky that such a view might be better understood as a kind of pluralism in light of its giving substantial weight to more than one sort of normative concern (the lower a threshold is set, the higher the amount of weight that is given to consequentialist considerations).

While it is true that the moderate deontologist's deontological commitments must be much weightier than her consequentialist commitments, it might be submitted that I am making too much of Smilansky's phrase "half-and-half" and that his argument does not rely on a half-and-half or 50:50 ratio actually obtaining with regard to the balance of deontological and consequentialist considerations in moderate deontology. A 70:30 or 80:20 ratio might also be open to Smilansky's criticism of such a view being described as deontological when it would be more properly described as pluralist. This is because such a theory would still combine deontological and consequentialist concerns together, and it would give some amount of weight to both kinds of concern.

Not only do I agree with this interpretation of Smilansky's view, but I also agree that a 70:30 or 80:20 ratio might be problematic for a theorist who professes deontology yet endorses one of these ratios regarding the weightiness of deontological to consequentialist considerations. Nevertheless, this should not bother the moderate deontologist precisely because neither these ratios nor anything close to them accurately represents her theory, and furthermore it is questionable whether or not Smilansky's use

---

example, he writes, "[I]t seems to me certainly right to adhere to absolutist restrictions unless the utilitarian considerations favoring violation are overpoweringly weighty and extremely certain" (Ibid. p. 56.).

of ‘pluralism’ in this context is a good one, a point to which I will return. Concerning the ratio of weightiness of deontological to consequentialist considerations, no card-carrying deontologist would endorse any of the aforementioned ratios. Of course there will be disagreement among moderate deontologists about what the correct ratio might be, but I have already noted that theorists like Moore and Nagel are confident that constraints’ thresholds must be set very high, which indicates a quite different ratio than 70:30 or 80:20. For example, Nagel suggests that murdering one innocent person is impermissible unless it is the only way to prevent a very large evil, such as the deaths of *at least* fifty innocent people (‘at least’ because he considers this the threshold for the constraint against murder). If we take this suggestion seriously, then we get something like a 50:1 or 100:2 ratio of weightiness of deontological to consequentialist considerations.<sup>8</sup>

Is a 50:1 or 100:2 ratio enough to resist the charge of pluralism? I think that it must be, and there are further details to be discussed about deontological constraints, besides their extreme weightiness in comparison to consequentialist considerations, and some remarks to be made about philosophers’ standard applications of ‘pluralism’ to certain theories that give us even more reason to think that ‘pluralism’ just gets moderate deontology wrong. What about others who may consider themselves moderate deontologists yet endorse a ratio that is closer to 70:30 or 80:20? Those theorists may have a more difficult time defending their views as deontological ones, especially since,

---

<sup>8</sup> Applying this ratio to other kinds of deontological constraints and consequentialist considerations, I presume, would get very complicated, and so I leave it to the reader to consider how that might go.

as I have claimed, the setting of high thresholds is a necessary condition for a theory to count as deontological.<sup>9</sup>

Michael Moore's (2010) analogy, which likens moderate deontology to a dam, provides a useful way of illustrating the primacy of deontological constraints in the theory (although this is not his aim with the analogy).<sup>10</sup> Moore asks us to imagine water rising behind a dam that eventually reaches the threshold of the dam's height and spills over. Like a dam's threshold, the point beyond which water spills over, a threshold in moderate deontology serves as a marker for determining when a constraint can be permissibly violated because of a spillover of negative consequences. However, unlike a dam's threshold, the location of which largely depends on facts about the water it is built to confine, the location of a deontological constraint's threshold does not depend on some already known set of facts about impending consequences. Determining a constraint's threshold must begin with attention to the constraint itself rather than some set of consequences, but let me say more about the location of a threshold first.

It would seem that thresholds would have to either be consistently the same no matter the constraint in question, or the location of a threshold would have to depend on

---

<sup>9</sup> Suppose that one endorses a theory that posits only one deontological constraint and sets an extremely low threshold on that constraint such that trivially bad consequences could override it, and further suppose that the theory is consequentialist in all other respects. According to some theorists, even though such a theory has only one constraint and that constraint's weightiness in comparison to consequentialist considerations is very low, it is still a kind of deontology because of the existence of at least one deontological constraint. Both Smilansky and I object to this sort of philosophical thinking. Really such a theory would be more accurately characterized as consequentialist!

<sup>10</sup> Moore (2010), p. 723. He attributes the analogy to Joseph Raz.

the nature of the constraint in question.<sup>11</sup> For example, would the threshold for permissible lying be different or the same as the threshold for permissible murder? Could I permissibly lie to save the lives of a few innocent persons, but not permissibly commit murder to do so? I take it that most moderate deontologists (and commonsense morality) will affirm that the threshold differs in relation to the constraint in question.<sup>12</sup> Thus, the threshold for permissible murder is probably much higher than the threshold for permissible lying. That is to say, locations of thresholds vary with constraints, and this is certainly another way in which the primacy of deontological constraints is manifest since while it is true that the moderate deontologist is concerned with what sort of consequences it would take to override a constraint, that question can only be answered by first examining the constraint in question, and once the theorist makes some determination about the degree of stringency of a constraint, only then can she ask questions about when the constraint can be permissibly violated.<sup>13</sup>

---

<sup>11</sup> Alexander and Moore (Spring 2015 Edition) call these two versions of moderate deontology the “simple version” and “sliding scale threshold deontology” respectively.

<sup>12</sup> For instance, Samantha Brennan (1995) writes, “I think the amount that must be at stake to justify killing a person is different than the amount that must be at stake to justify punching them in the nose. A great deal less must be at stake when the right in question is the right not to have one’s nose punched. This is the intuition that the more serious the right, the more that must be at stake before its infringement can be justified” (p. 148.).

<sup>13</sup> A question could be raised concerning how the theorist goes about determining the stringency of a constraint, and she might even be accused of making this kind of determination on the basis of consequentialist considerations. That is to say, she might be accused of determining the stringency of a constraint strictly in terms of severity of consequences that could override it, and if this allegation were true, it would certainly undermine my claims about the primacy of deontological constraints in moderate deontology. But, the allegation is false. As a deontologist, the theorist must treat the stringency of a constraint as being intrinsic to it, and not dependent on any consequentialist considerations, although it is true that the theorist is forced to make some determination (or, perhaps, estimation) regarding at what point severity of consequences would override the stringency of a given constraint.

It might be objected that it goes the other way too for the moderate deontologist. Only by examining the consequences in question will she be able to determine whether or not a constraint should be violated, and so consequences are just as fundamental to her evaluations of actions as deontological constraints are. In response, consequences are absolutely relevant to the theorist's evaluations, but they are not fundamental in the way that constraints are. To see this, one must observe the difference between the treatment of constraints and the treatment of consequences. Constraints are the theory's first concern, as they are what the theorist focuses on when it comes to setting thresholds by evaluating the stringency of each constraint and thereby limiting what we can permissibly do for the sake of consequences. In contrast, with regard to constraints' thresholds, consequences are only of concern to the theorist whenever they are severe, and the locations of deontological constraints' thresholds must reflect that fact. The normative function of consequences in moderate deontology is that of overriding constraints, and so they would only appropriately enter into the theorist's evaluations of actions whenever that function is either realized or comes close to being realized, which, as I have noted, is rare due to the locations of thresholds being set quite high.<sup>14</sup>

A final way in which the primacy of deontological constraints in moderate deontology is evident has to do with our everyday moral lives. Throughout the course of an agent's life, she must make decisions about which actions to perform and which to abstain from performing. Since moderate deontology tells us that there are constraints against performing certain types of actions unless sufficiently bad consequences are at

---

<sup>14</sup> In addition to constraints' thresholds, consequences may also have normative significance beyond options' thresholds. Another normative function of consequences, then, is that of overriding options. For an excellent discussion of options' thresholds and their different possible relations to constraints' thresholds, see Brennan (2009).

stake, it is plausible that the agent who subscribes to moderate deontology is guided through her everyday moral life by a constant, though not always conscious, awareness of such constraints and that it is this awareness that generally allows her to know which actions are and are not permissible. Of course this is not to suggest that in every situation she will consciously deliberate about whether or not she should perform some action, and then she will generally arrive at a conclusion about what she ought to do on the basis of deontological considerations. This would be an extremely implausible picture of her moral decision-making, given what most people's moral experiences are actually like. Rather, in light of the foregoing discussion about locations of thresholds, the moderate deontologist's moral experience is probably such that her moral judgments about what she ought to do in most cases are automatically deontological and that she would only engage in deeper deliberation about what she ought to do in cases where a threshold is either exceeded or comes close to being exceeded because these are the cases in which deontological and consequentialist considerations conflict in a significant way.

Now one might object that she must have an awareness of consequences too since they are also relevant to the normative status of actions, and this is true, but the difference between the two kinds of consideration with respect to the agent's moral experience cannot be ignored. It cannot be reasonably asserted that an awareness of consequences is what *guides* the agent through her moral life, although such an awareness may guide her prudentially speaking or in certain cases in which there is no deontological constraint in play.<sup>15</sup> From time to time, she may be confronted with critical situations in which she is

---

<sup>15</sup> Regarding supererogatory actions, the agent may face situations in which there is no deontological constraint in play, and although she is not obligated to promote the good, she may still deliberate about whether or not she will do so. These are atypical situations for the agent,

forced to deliberate about whether or not she ought to violate a constraint to prevent some set of consequences, but these situations will only occur whenever the consequences are very bad and would require the breaking of a deontological constraint in order to be prevented. Any situation in which the consequences are not severe and a constraint is in play will likely be one in which the agent respects the constraint without paying any attention to the consequences of the performance of the action. This is not to say that the potential consequences of her actions will never be noted by her beforehand, even when they are nowhere close to meeting a threshold, only that they will not be concentrated on as part of her decision to respect a constraint. Therefore, we can see that deontological constraints play another central role in the theory insofar as they guide, much of the time automatically, the moderate deontologist through her everyday moral life.

#### Deontology beyond Thresholds

So far I have argued that the primacy of deontological constraints in moderate deontology is manifest in a number of different ways, and I have shown that the theory cannot reasonably be considered half-and-half, as suggested by Smilansky. Now I will discuss the nature of constraints violations that occur beyond deontological constraints' thresholds, and in doing so it will be seen that moderate deontology remains deontological in an important sense even when it goes for consequentialist considerations. Here is another quotation from Smilansky:

---

though, since she will not always be deliberating about promoting the good whenever doing so would not involve violating a constraint. An agent may be characteristically benevolent such that she performs supererogatory actions on a regular basis, but characteristic benevolence would not require constant deliberation. She would perform those actions by her very nature, and if she were a moderate deontologist, then she would be guided by an awareness of constraints such that she would not be violating constraints for reasons of benevolence.

We should reject the possibility of ‘moderate’ or ‘sensible’ deontologists of the sort Kagan, Nussbaum and many others describe: such people need to be re-described as pluralists who, when consequentialist and deontological concerns conflict, are ready to make room for consequences-indifferent concern for deontological constraints (e.g. before the threshold) as well as for deontological-constraints-defeating concern with consequences (e.g. beyond the threshold). Because they are sensible, such pluralists suspend their partial deontological commitments in specific cases.<sup>16</sup>

There are two points that I wish to make here. The first concerns Smilansky’s assertion that when consequentialist and deontological considerations conflict, the theorist is ready to make room for both “consequences-indifferent concern” for constraints and “deontological-constraints-defeating concern” for consequences.

With regard to consequences-indifferent concern for constraints, I think that Moore’s dam analogy is particularly apt for explaining this. The water counts, but there is no damage done unless the water spills over the dam’s threshold. Analogously consequences count, but there is no moral wrongness in abstaining from violating a deontological constraint for the sake of consequences unless the consequences are so severe that they exceed the constraint’s threshold. So, while it is true that consequences always count inasmuch as they always count toward a threshold, the moderate deontologist need not be concerned (normatively speaking) with consequences at any point before a threshold is surpassed. However, with respect to deontological-constraints-defeating concern for consequences, the moderate deontologist could plausibly maintain both that it would be wrong to violate a constraint at any point before the constraint’s threshold is surpassed and that there is some degree of moral wrongness even when a constraint is violated beyond its threshold, although the violation is itself permissible. In

---

<sup>16</sup> Smilansky (2003), p. 74. Smilansky is referring to Nussbaum’s (2001) mention of “sensible deontologies” (p. 101.).

this way, moderate deontology can be said to remain deontological beyond its constraints' thresholds due to its emphasis on the wrongness of violating constraints even when an agent permissibly does so. The difference here, then, between the moderate deontologist's concern for constraints and her concern for consequences is that the former is always a normative concern for her insofar as constraints violations are always to some extent wrong, whereas the latter is a concern for her only whenever a threshold is surpassed. Now this is not to suggest that moral dilemmas arise whenever consequences are so severe that they exceed a threshold and require the breaking of a constraint to be prevented. The claim is not that an agent will fail morally no matter what she does in these situations; there is an all things considered right action for her to perform, namely, preventing severe consequences from occurring. However, since doing so requires a constraint violation, the moderate deontologist could assert that there is some intrinsic wrongness in violating a constraint even when doing so is instrumentally good and is the all things considered right action to perform because the instrumental goodness simply outweighs the intrinsic wrongness.<sup>17</sup>

There is no inconsistency in the suggestion that an agent may perform the all things considered right action by violating a constraint in order to prevent the occurrence of severe consequences and that by doing so the agent is committing some degree of wrongdoing insofar as she is violating some constraint. For example, the all things considered right action in the terrorist scenario may be to punish an innocent person to prevent the destruction of a major city, but to the extent that an innocent person is

---

<sup>17</sup> Accordingly, it seems that it would not be inappropriate for an agent to feel some tinge of regret whenever she permissibly violates a constraint or for her to make reparations for it after the fact.

punished and a deontological constraint is thereby violated, the moderate deontologist could assert that there is some degree of wrongdoing that consists in someone being used as a means to a greater good.<sup>18</sup> Thus, the theorist could reasonably conclude that any violation of a constraint amounts to some intrinsic wrongdoing being performed even when performing the violation is the all things considered right action in light of the severity of some set of consequences.

At this point one might object that there is some degree of moral wrongness whenever a deontological constraint competes with consequentialist considerations for the all things considered right action, but the constraint's threshold is not surpassed and accordingly bad consequences are allowed to occur by an agent in lieu of her violating a constraint to prevent them. This objection is especially problematic, one might claim, when we consider that there will be situations in which consequences are almost severe enough to override a constraint, but not quite sufficient. If violating a constraint is in some respect wrong both before and beyond its threshold, then why not think that allowing the occurrence of bad consequences is in some respect wrong both before and beyond a threshold?

The moderate deontologist could respond to this objection by pointing out that her theory is a deontological one, and so it mainly (at least, before a threshold is exceeded) evaluates actions only on the basis of deontological, not consequentialist, considerations

---

<sup>18</sup> Recall that Smilansky accurately characterizes punishing the innocent as a “paradigm of injustice”, although he reaches the wrong conclusion when he says that a “deontologist, *qua* deontologist, must oppose such a plan” since the absolutist must always oppose it, but the moderate deontologist must only conditionally oppose it. However, the moderate deontologist (*qua* deontologist!) will agree that punishing the innocent is a paradigm of injustice, and so she could still believe that punishing the innocent is intrinsically wrong even when the constraint against punishing the innocent is overridden by consequentialist considerations.

(e.g. considerations about respecting/not violating constraints). So, this explains why it is not wrong in any regard whatsoever to respect deontological constraints before their thresholds are exceeded. Furthermore, the entire purpose of positing thresholds is to indicate at what point consequentialist considerations begin to have normative significance whenever they conflict with deontological ones. It was noted above that consequences always count toward thresholds, but it would only be wrong for an agent to allow the occurrence of severe consequences if those consequences were to exceed a constraint's threshold. The reason it can be plausibly asserted by the moderate deontologist that a constraint violation is always to some extent wrong but allowing bad consequences to occur is only wrong beyond a threshold is that the theory is deontological at its core, and accordingly it treats all constraints violations as intrinsically wrong whether or not they are the all things considered right actions, whereas consequences only have normative significance in the theory beyond thresholds. In other words, constraints violations are always intrinsically wrong, although sometimes the intrinsic wrongness may be outweighed by instrumental goodness, but allowing bad consequences to occur is only wrong whenever the consequences have normative significance.<sup>19</sup>

---

<sup>19</sup> It may be the case that sometimes the occurrence of consequences is wrong before a threshold, but only because of the action(s) that constitute(s) the consequences and not because an agent allows them to occur. Suppose, for instance, that an honest criminal tells you that the only way you can prevent him from committing the murders of two innocent people is to commit one murder yourself. It would be right on moderate deontological reasoning for you to abstain from committing one murder in order to prevent him from committing two others, and there would be no wrongness in you thereby allowing the other murders to occur, but there would be wrongdoing on the part of the criminal who commits the two murders. So, this is an instance of wrongness in the occurrence of consequences before a threshold, but the wrongness does not consist in the consequences being allowed to occur by an agent. Rather, it consists in the actions that constitute the consequences, which in this case are violations of a deontological constraint against murder.

The second point to be made concerns Smilansky's claim that the moderate deontologist suspends her "partial deontological commitments" in certain situations (viz. any situation in which a threshold is surpassed). Smilansky is not the first to make this kind of assertion. Larry Alexander writes, "The threshold deontologist [(i.e. moderate deontologist)] would have us believe that we switch from not being resources for others to being resources for others when  $N$  [(i.e. a threshold)] is reached."<sup>20</sup> In light of the foregoing, though, it should be obvious that neither of these claims should bother the moderate deontologist because they are, at best, dubious. The theorist need not suspend her deontological commitments since she can plausibly maintain that violating a deontological constraint is always intrinsically wrong, even when the wrongness is counterbalanced by consequentialist considerations, and she can also retain the deontological presumption that persons are not resources for others while admitting that beyond a threshold a person might permissibly be used as a means to an end because she can assert that there is some intrinsic wrongness to using the person despite its being an all things considered right action, given the circumstances.

#### Why Terminology Matters

By clarifying both the primacy of deontological constraints in moderate deontology and the normative implications of permissible constraints violations I have sought to show that moderate deontology is fundamentally deontological. It is a deontology that makes some room for consequentialist considerations in its normative framework, but to the extent that whenever they conflict with deontological considerations, consequences must be sufficiently bad to override a constraint and

---

<sup>20</sup> Alexander (2000), p. 912.

thereby render its violation permissible. Whether or not moderate deontologists will agree with every aspect of my discussion, I think that they should agree with most of it, especially my emphasis on the deontological component of the theory and how the theory can be seen to be importantly deontological in various ways. If the moderate deontologist reasons otherwise and does not underscore the deontology of her theory, then she might just fall prey to the charge of disguising a kind of pluralism in deontology's clothing, which brings the discussion of this topic to its final question: why does terminology matter?

Why does it matter whether the theory is called 'moderate deontology' or 'pluralism' (of some kind)? Smilansky contends that "terminology is significant here since the theoretical misinterpretation masks the degree to which common-sense morality is radically pluralist."<sup>21</sup> He then goes on to point out that people generally make room for both kinds of considerations in their moral decision-making, and so we should retain our understanding of deontology as absolute in order for us to recognize this plurality.

I agree with Smilansky that the terminology is significant and that people do normally make room for both deontological and consequentialist considerations, but our agreement ends there. Concerning terminology, I reach the opposite conclusion. I maintain that if moderate deontology were re-described as a kind of pluralism, then this would mask the degree to which commonsense morality is radically deontological and opposed to consequentialist justifications of deontological wrongdoing. Of course this is to assume that moderate deontology represents the morality of common sense, which I am ready to accept, but even if there is disagreement on this point it must still be admitted

---

<sup>21</sup> Smilansky (2003), p. 75.

that calling moderate deontology ‘pluralism’ would be inappropriate, given the extent to which the theory is deontological. ‘Moderate deontology’ is a perfectly suitable name for a deontological theory that is moderate in its treatment of the violability of deontological constraints.<sup>22</sup> In the same way, ‘absolutist deontology’ is a fitting name for a deontological theory that is absolutist in its treatment of constraints. And ‘deontology’ is just a name for a theory or family of theories that has primarily deontological elements (e.g. constraints, duties, rights). There is no need to revise our terminology since ‘moderate deontology’ captures both the fact that the theory is, at its core, a deontological theory and that the theory is moderate or non-absolutist.

In general, accurate terminology is critical to our normative theorizing because labeling theories in certain ways distinguishes them as having certain qualities and belonging to certain classes of normative theories. So, there might be a further question about whether moderate deontology properly belongs to the set of deontological theories (although it obviously does on my definition of ‘deontology’). Why should a theory that allows consequentialist considerations to sometimes affect the normative status of actions be considered a deontology? I believe that I have adequately answered this question already in the previous two sections, and I have nothing more to add on the matter. However, a more troubling question might be put: why should a theory that posits more than one kind of normative consideration not be considered pluralist?

The term ‘pluralism’ in philosophy is normally used to signify the existence or validity of more than one  $x$ , where  $x$  can be substituted with whatever the pluralist theory concerns. For example, value pluralism says that there exists more than one kind of

---

<sup>22</sup> Because the theory is sometimes called ‘threshold deontology’, it could also be submitted that such a name is appropriate since it is a deontology that sets thresholds for its constraints.

irreducible value. It is this sort of routine philosophical thinking that seems to lend credence to the argument against moderate deontology being considered a deontological theory and for its being re-described as a kind of pluralism. One might argue that even if the position is not half-and-half with regard to action guidance or the weight of what matters, it is still half-and-half inasmuch as it treats two types of consideration as ones that can affect the normative status of actions. Thus, because it treats more than one type of consideration as having an impact on the normative status of actions, the theory is pluralist, not deontological.

First, while it is true that moderate deontology does make room for both deontological and consequentialist concerns, as I have done throughout the course of this discussion, I will only emphasize that the deontological component is primary and that close inspection of the theory reveals that this is so in a number of different ways. To the philosopher that clings to a strict definition of ‘pluralism’, such that any theory that posits more than one kind of thing is itself a type of pluralism, my only response is that such a definition is broadly applicable to many philosophical (and not just ethical) theories. Therefore, it might be better applied to theories that stress the primacy and/or fundamentality of more than one thing, but this is merely a suggestion.

Secondly, from the perspective of the moderate deontologist who is committed to the notion that morality is, at bottom, deontological, it is difficult to imagine that the theorist would find such a re-describing of her theory attractive. Certainly her finding the re-description unattractive would not itself be evidence that the theory should not be re-described as pluralist, but given that the deontological features of her theory are so central and manifest both before and beyond constraints’ thresholds (unlike

consequentialist considerations), it can safely be concluded that her theory really is and should be interpreted as a deontological theory.

Finally, as previously noted, I am sympathetic to the idea that both deontological and consequentialist considerations are ones that people do take into account in their commonsense ethical thinking. In light of this, there does appear to be a need to explicitly address this plurality in our normative theorizing, and one might argue like Smilansky does and claim that ‘moderate deontology’ is a misleading way of representing commonsense morality, which both masks its pluralist reality and ignores the challenge of pluralism facing normative ethics.

In response, the challenge of pluralism is one that must be answered by considering various normative concerns and trying to develop a plausible theory that best accommodates those concerns. One could go about answering this challenge in different ways. For example, one might develop a consequentialist theory (e.g. a rule-consequentialism) and thereby attempt to accommodate constraints as rules that prohibit certain actions but are chosen on the basis of consequentialist considerations, or one could develop a moderate deontological theory and thereby attempt to accommodate consequentialist considerations as ones that are secondary to deontological concerns but can nevertheless build up to severe degrees and override deontological matters. Thus, moderate deontology does not ignore the challenge of pluralism. Rather, it convincingly addresses it in such a way that it both retains the centrality of its deontological component and simultaneously allows for the relevance of other non-deontological considerations. Also, ‘moderate deontology’ signifies the notion that morality is primarily deontological but not absolutely so. Accordingly, it is not misleading because it indicates

the theory's commitments and arguably the fundamental commitments of commonsense moral thinking.

Perhaps Smilansky might desire something else, though, from ethical theorists. Perhaps what we should be doing is trying to develop a pluralist theory that accommodates deontological matters, consequentialist considerations, virtue ethical ones, and so on, but does not disguise itself, so to speak, as any one species of normative theory. One could certainly go in for such a theory if one were attracted to this idea of pluralism and the centrality of various normative concerns, but for theorists who are committed to a different notion of morality, that morality has a distinct structure of some sort or another and that some kinds of consideration are more prevalent or critical than others, it seems reasonable that those theorists should endeavor to construct theories that accommodate whatever normative concerns they deem necessary within the frameworks of their preferred ethical theories.

## LOCATING THRESHOLDS FOR DEONTOLOGICAL CONSTRAINTS

So much for the first worry about moderate deontology. The second worry to be addressed concerns a theoretical difficulty for the positing of thresholds for deontological constraints. Anthony Ellis (1992) reasons that there is no non-arbitrary way of setting thresholds for constraints due to the fact that deontological and consequentialist concerns are incommensurable. Surprisingly, given the prevalence of moderate deontologists, Ellis's contention has not received much attention in the literature, although Samantha Brennan (1995) has begun to give an account of how one might reasonably go about locating thresholds.<sup>23</sup> In what follows I will present Ellis's argument, suggest a solution to the worry he raises, and respond to objections along the way. Also, while I think that some of Brennan's ideas about our commonsense moral intuitions are on the right track, I will argue that the moderate deontologist should take a different approach to locating thresholds for deontological constraints than Brennan's.

Ellis

After making some preliminary comments and describing the sort of theory that he intends to raise problems for, namely, moderate deontology (he labels it 'non-absolutist deontology'), Ellis straightaway gives an example of how the view is supposed to work. He has us imagine that terrorists have kidnapped someone (presumably innocent) and have threatened to kill the person unless we murder someone else (also innocent, I presume). On a moderate deontological view, he observes, it would be

---

<sup>23</sup> Judith Jarvis Thomson (1990) also develops an account of thresholds, but for the sake of brevity I will focus my attention on Brennan's discussion. I believe that much of what I will have to say about Brennan's account would apply equally to Thomson's anyway since both have strong commitments about what can count toward overriding deontological constraints, and I think that such commitments are misguided. Furthermore, both accounts are incomplete to the extent that they are unable to resolve Ellis's worry.

impermissible for us to kill the one person to prevent the terrorists from killing the other. However, the matter becomes quite different if we alter the example to include many lives being at risk. Accordingly, Ellis then has us imagine that the terrorists have hijacked a plane carrying 400 people and will blow it up unless we kill someone. Now the moderate deontologist will probably assert that we are permitted to kill the one to save the many. Here is Ellis:

Let 'Act 1' mean, in the example, murdering one person to save one;  
Let 'Act 2' mean, in the example, murdering one person to save two; and  
so on to  
'Act 400', which will mean, in the example, murdering one person to save 400.

Non-absolutist deontologists say that it is wrong to murder unless the consequences of refraining would be sufficiently bad. In the example, I am imagining that they would agree that Act 1 would be wrong but that somewhere along the line from Act 1 to Act 400 it would become right to commit the murder.<sup>24</sup>

What is lacking in moderate deontology, and what must be provided if the theory is to be effectively action-guiding or a plausible normative theory at all, is an acceptable account of what Ellis calls “the sufficiency condition”.<sup>25</sup> The sufficiency condition is the condition that must be met for a deontological constraint violation to become permissible. It is what is supposed to make sense of the location of a constraint’s threshold, whatever the particular location may be. In the context of the example, we need an account of the sufficiency condition that will tell us at what point, between Act 1 and Act 400, the murder becomes permissible and how this is so.<sup>26</sup> According to Ellis, the deontologist

---

<sup>24</sup> Ellis (1992), p. 858.

<sup>25</sup> Ibid. p. 859.

<sup>26</sup> Larry Alexander (2011) asks, “Is the threshold for killing 2 lives saved, 20 lives saved, 200 lives saved, or 2,000 lives saved—and why?” (p. 88.).

cannot give a satisfactory account of the sufficiency condition because any account she gives will be inevitably arbitrary in its specifying of a threshold (or thresholds) for constraints, and it will be arbitrary because the two sorts of consideration (viz. deontological and consequentialist) are simply incommensurable. There is no way of weighing them against each other to determine at what point extreme consequences would override deontological matters.

The reason for the incommensurability is fairly straightforward. As Ellis rightly points out, the deontologist believes that the wrongness of violating a constraint is intrinsic or non-goal-directed, whereas “the concern with consequences that is supposed at some point to generate the rightness of an otherwise wrong action *is* goal-directed.”<sup>27</sup> In other words, violating a constraint is wrong in itself, independently of any consequences of doing so, but consequentialist considerations are instrumental considerations, that is, they are considerations that are supposed to affect the normative status of actions in view of what those actions would bring about. It is this difference that is the source of the incommensurability.

### The Structure of Moderate Deontology

My argument will proceed in three steps. First, I will describe and defend the structure of moderate deontology that we will need to resolve Ellis’s worry. It is not the only possible structure for a moderate deontological view, but for reasons that I will soon mention, I believe that it is the best structure for the theory to have.

Moore’s (2010) dam analogy gives us an implausible picture of moderate deontology. A dam has an exact threshold at which, when the water rises high enough,

---

<sup>27</sup> Ellis (1992), p. 862, his emphasis.

the water reaches the threshold and spills over. If we apply that sort of picture to moderate deontology, then we obtain a view that seems committed to saying that there is an exact threshold for a deontological constraint at which, when the consequences become severe enough, the consequences can reach and surpass that threshold, and they will override the constraint. I will call this the ‘tipping point structure’. The implausibility of the tipping point structure lies in the fact that it would imply that violating a constraint is wrong at any point before the constraint’s threshold, and then suddenly (and very mysteriously) it becomes right to violate a constraint whenever the consequences reach a certain level of severity, the tipping point. According to this kind of structure, in Ellis’s example there is some point between Act 1 and Act 400 at which the consequences become severe enough, and the murder suddenly becomes the right thing to do. Act 49 is wrong, but Act 50 is right, say. What could possibly explain this shift? I do not think that a satisfactory answer could be given to this question, but I also do not think that the moderate deontologist has to give one. This is because moderate deontology need not have the tipping point structure in the first place. It should be rejected for a more reasonable alternative.

In order to avoid this kind of problematic shift, the moderate deontologist needs to represent constraints’ thresholds differently. Instead of treating thresholds as tipping points, I contend that she should treat them as ranges of permissible options. I will call this the ‘range structure’. Here is how it would work. Before a threshold is reached, deontology rules as absolute, and so respecting any deontological constraint before a threshold is obligatory. But, once a threshold is reached, respecting the constraint becomes merely permissible, and the same goes for violating the constraint. On the range

structure, there will be a range of cases in which either respecting or violating some constraint would be permissible. In the example, we might say that any of the acts between Act 50 and Act 100 are permissible, but none of them are obligatory because one would also be permitted to abstain from performing the murder. And finally, to complete the structure, once some set of consequences becomes so severe that a threshold is exceeded (e.g. beyond Act 100), violating a constraint would no longer be merely permissible, but required, and abstaining would be impermissible.

An immediate concern about the range structure is that it may be ad hoc. One might wonder why we should accept this structure for moderate deontology since it seems that the only reason for positing it in the first place was to avoid the issue of problematic shifts in the normative status of actions, which the tipping point structure is vulnerable against (and that very issue may still remain with the range structure, but I will get to that). We need some justification for the structure besides its being able to explain away mysterious shifting. If the range structure has no further explanatory power, then we should conclude that it must be ad hoc, or so one might claim.

Fortunately, this concern can be removed because there is no ad hocery in positing the range structure, as an appeal to commonsense morality will show us.<sup>28</sup> According to commonsense morality, murdering an innocent person, for example, is wrong even if it will prevent the murder of a few other innocent persons. Here we are considering murdering the innocent before the threshold for the constraint against murder

---

<sup>28</sup> The appeal to commonsense morality is appropriate because, as stated earlier (p. 19.), I take it that moderate deontology represents the morality of common sense. Furthermore, that moderate deontology does represent commonsense moral thinking is essential to my solution of Ellis's worry, which will become clear as the argument moves forward.

has been reached, and as the range structure suggests, one is obligated not to murder.<sup>29</sup> So far, so good. However, as the number of innocent lives at stake increases, there will come a point at which commonsense moral thinking tells us that murdering one innocent person to save much more than a few is permissible, but unless the number of innocent lives at stake has reached an extreme amount, commonsense morality might also tell us that it is permissible still to abstain from murdering the one. This is because intuitively there will come a point at which the two kinds of consideration, deontological and consequentialist, will seem to be equally weighty, and so we would not blame someone for choosing to murder or for choosing to abstain. Either action would be permissible, and the range structure is able to make sense of this commonsense intuition since it allows for a range of permissible options.

The notion of a range is especially helpful here because our intuitions will begin to get fuzzy within some range, and this fuzziness, I suggest, results from the weightiness of the two kinds of consideration beginning to match up, although we have no straightforward way of weighing the two against each other. The fact of the matter is that commonsense morality does give weight to both deontological and consequentialist considerations, but since they are incommensurable, we can only rely on our intuitions for guidance with regard to how much weight one has in relation to the other (I will say more about this later). Also, it should be noted that this is where the tipping point structure fails. Because the tipping point structure does not allow for a range of

---

<sup>29</sup> I am assuming here that the threshold for the constraint against murder is at least high enough to prohibit violations of that constraint for the sake of saving a few innocent lives. It is not an unwarranted assumption, though, since the moderate deontologist and commonsense moralist (are these the same?) will very likely be in agreement about the threshold being located at least this high.

permissible options, it fails to account for the fuzziness of our intuitions within some range.

Finally, if the number of innocent lives at stake becomes very great, then it is probable that our intuition will then be that murdering the one innocent person to save very many just is morally required. This is because there will come a point at which our intuitions will lose their fuzziness, and this is indicative of the range, which constitutes the threshold, coming to an end. At such a point we would no longer say that either murdering or abstaining is permissible because too much would be at stake; abstaining would be impermissible. The consequentialist considerations would override the constraint against murder, and thus, in accordance with the range structure, beyond the constraint's threshold the murder would be obligatory.

The range structure for moderate deontology, then, is not ad hoc. Not only does it resist the issue of mysterious shifting in the normative status of actions, but it also comports with common sense to the extent that it provides a framework for understanding commonsense moral intuitions. Still, an objection looms: the range structure does not successfully resolve the issue of mysterious shifting. Rather, it merely relocates it. This is because the range structure allows for shifting in the normative status of actions at the lower and upper boundaries of the threshold. What makes this shifting any less mysterious than the shifting that would take place within the tipping point structure?

This objection should not concern us. What makes it the case that the shifting that would occur within the range structure is not mysterious is just the fact that our commonsense intuitions would be tracked by it. There is nothing strange or problematic

about the kind of shifting that would occur at the lower and upper boundaries of a range because this is how moderate deontology is able to explain the gain and loss of fuzziness of people's intuitions. However, there is another way of interpreting the objection that may raise some difficulties for the range structure. The fuzziness of our intuitions certainly comes in degrees, and so where would the shifting take place? Would it be exactly when they begin to become fuzzy at the lower boundary, and exactly when they completely lose their fuzziness at the upper boundary, or would it happen some other way? To make matters worse, people's intuitions will probably vary quite significantly when it comes to their gaining and losing of fuzziness in different situations, and so how could we reasonably go about determining at what point thresholds (qua ranges) begin and end for different constraints, given this probability of widespread variation in people's intuitions?

I will answer these questions in due course, but first I should discuss how we could make sense of the idea that commonsense moral intuitions behave in ways that the range structure for moderate deontology is able to track. Specifically, we need some explanation for the lack of fuzziness of people's intuitions both before and beyond thresholds, and for the presence of fuzziness within ranges. The explanation will be one that Ellis himself criticizes, because he thinks that it does nothing to resolve his worry about the locations of thresholds being arbitrary, but I will argue that it is correct and then turn to the final step of my solution to Ellis's worry, which will confront the charge of arbitrariness.

## Degrees of Wrongness

Our moral intuitions can lack fuzziness, and they can also become fuzzy whenever consequentialist considerations build up enough to begin to offset deontological ones, and both the lack of fuzziness and the presence of it can be accounted for theoretically by postulating that there are varying degrees of wrongness that accompany the violation of different deontological constraints and allowing for the occurrences of different sets of consequences. The more stringent the constraint, the more wrong it would be to violate it, and the more severe the consequences, the more wrong it would be to let them occur.<sup>30</sup> This is just to say that some constraints are more serious than others, and so, all else being equal, it would be worse to violate the more serious ones than it would be to violate the less serious ones, and the same goes, *mutatis mutandis*, for allowing different sets of consequences to occur. Also, by ‘worse’ I just mean ‘more wrong’, and thus we have degrees of wrongness.

Before turning to how the notion of degrees of wrongness is supported by our commonsense intuitions, I should examine how the range structure allows for degrees of wrongness. The explanation is quite simple. There is some fixed amount of wrongness of violating a given constraint, and this is reflected by the location of the threshold for that constraint. But, since different constraints have different degrees of stringency, there are different amounts of wrongness of violating constraints that correspond to their different degrees of stringency (or their different threshold locations; the higher the threshold, the

---

<sup>30</sup> That different constraints can have different degrees of stringency is tantamount to saying that different constraints can have different threshold locations. We encountered this idea earlier in Alexander and Moore (Spring 2015 Edition) who discuss “sliding scale threshold deontology” and in Samantha Brennan (1995) who discusses “killing a person” versus “punching them in the nose” (p. 148.).

more stringent the constraint, the more wrong it would be to violate it). Now, regarding consequences, the degree of wrongness of letting some set of consequences occur just corresponds to how severe the consequences are, but these degrees of wrongness only begin wherever a threshold begins (since it is not wrong to allow consequences to occur before a threshold is reached), although the consequences build in or have weightiness before a threshold is reached. As a set of consequences becomes more severe and approaches the threshold for some constraint, the normative weightiness of the constraint in question begins to match up with the weightiness of the consequences. Then, once the threshold is reached, it would be just as wrong to violate the constraint as it would be to let the consequences occur within some range, and once the threshold is exceeded it would be more wrong to let the consequences occur by not violating the constraint than it would be to violate the constraint and thereby prevent the consequences from occurring.

We can see, then, how the range structure allows for varying degrees of wrongness in both violating constraints and allowing sets of consequences to occur, and how the structure makes sense of the relation between the two kinds of consideration when it comes to their counterbalancing each other by having different degrees of wrongness at stake of being realized. However, in light of my previous discussion of moral wrongness, in which I claimed that it is always in some respect wrong to violate a deontological constraint yet it is only wrong to allow a set of bad consequences to occur beyond a threshold (p. 14.), one might object that there is an inconsistency between this claim and the present characterization of varying degrees of wrongness, but this is not so. As a deontological theory, moderate deontology is rightly committed to holding that violations of constraints are always intrinsically wrong, even when the intrinsic

wrongness is offset by the instrumental goodness of preventing the occurrence of some set of severe consequences. In addition, that it is only wrong to allow severe consequences to occur at or beyond a threshold is compatible with the claim that consequences can build in weightiness until they reach this point without it ever being wrong to allow them to occur. In this way, they contrast with deontological concerns. The intrinsic nature of the wrongness of violating a constraint is plainly unlike the instrumental nature of the wrongness of allowing bad consequences to occur, and for this reason the moderate deontologist can coherently treat the wrongness of violating constraints differently than the wrongness of allowing for bad consequences. In particular, she can maintain with consistency that violating constraints is always intrinsically wrong yet allowing bad consequences to occur is only instrumentally wrong whenever they meet or exceed a threshold. Furthermore, there is intuitive motivation for describing the difference in wrongness this way. An example will help to illustrate this.

Suppose that the only way I could prevent the torture of some innocent person would be to torture one innocent person myself. From a moderate deontological and commonsense point of view, I should not torture the one to prevent the torture of the other, all else being equal. So, suppose I do not commit the torture. If the other person is tortured because I refused to torture, then I have allowed bad consequences to occur that I could have prevented by violating the deontological constraint against torture, but there is no instrumental wrongness here for which I am responsible and might be expected to make amends for. Rather, there is intrinsic wrongness in the act of torture itself. This is where the wrongness lies, not in my allowing it to occur, and if I were to apologize to the tortured person, then it would seem that I should be apologizing for what the torturer has

done, not for what I have allowed (“I’m sorry he did that to you!” versus “I’m sorry I allowed that!”). In contrast, if I tortured one innocent person to prevent the torture of an entire city of innocent persons, then although I would have performed the all things considered right action by committing the torture, intuitively we think that I should apologize or make amends for torturing the one because the person was innocent after all, and I used her as a means to an end. In this case, the intrinsic wrongness is overridden but not eliminated, whereas in the first case there just is no instrumental wrongness because the wrongness is solely intrinsic on the part of the torturer’s actions. And if I failed to torture the one innocent person to prevent the torture of the city, then my failing to do so would have instrumental wrongness that I would be responsible for. Thus, we can see that it is reasonable to treat intrinsic wrongness differently than instrumental wrongness such that the former always arises whenever a constraint is violated, but the latter is present only if one fails to prevent consequences at or beyond a constraint’s threshold.

Concerning the lack and presence of fuzziness in people’s moral intuitions, positing degrees of wrongness helps to explain why our intuitions may lack fuzziness whenever it would clearly be wrong to violate some constraint (e.g. whenever there are no bad consequences to take into consideration) or to allow some set of severe consequences to occur (e.g. whenever there are extremely bad consequences that could only be prevented by violating some not-very-stringent constraint). In these kinds of cases, our intuitions are not fuzzy because the degree of wrongness of violating some constraint or of letting some severe consequences occur is apparently high or at least not even close to being overridden by any other kind of consideration. On the other hand, our intuitions may be fuzzy whenever we are uncertain about whether we should violate a

constraint or let some consequences happen. In these cases, the degree of wrongness of violating some constraint may begin to match up with the degree of wrongness of letting some bad consequences occur, and so our intuitions would become fuzzy.

### Invoking Intuitions

The first two steps of the solution to Ellis's worry are complete. I have argued for a particular structure for moderate deontology, the range structure, and shown that both the range structure and the changing character of our moral intuitions can be adequately explained by positing degrees of wrongness. The third and final step will be to give a plausible and non-arbitrary account of the "sufficiency condition," as Ellis calls it, the condition that must be met for a deontological constraint violation to become permissible.

The account of the sufficiency condition must involve an appeal to people's commonsense moral intuitions in order to resist the charge of arbitrariness. This is because Ellis is right that deontological and consequentialist considerations are incommensurable, but while it is true that there can be no principled way of weighing them against each other, it is also still true that commonsense morality does give normative weight to both kinds of consideration, and moderate deontology is supposed to be a commonsense theory. So, because commonsense morality does give weight to both kinds of concern and moderate deontology is intended to track commonsense intuitions, the account need not be arbitrary; there is nothing arbitrary about invoking commonsense intuitions for guidance in locating thresholds since these intuitions are exactly what the theory is designed to account for. It would of course be arbitrary, in Ellis's example, to just choose some act out of thin air between Act 1 and Act 400 as the point at which the murder becomes right, but the moderate deontologist can do better than that. It seems that

the only reason Ellis is able to arrive at the conclusion that any account of the sufficiency condition will be unavoidably arbitrary is that he seems to assume that the only plausible account would have to be one that shows that deontological and consequentialist considerations are commensurable on some scale, and there does not appear to be any scale available for that purpose. If I am right, though, then we can have a non-arbitrary account of the sufficiency condition without having any such scale. All that we will need for the account that I will present is a procedure for invoking people's moral intuitions, and this procedure, I will claim, will effectively enable us to locate thresholds for deontological constraints.

I noted at the beginning of this discussion of the second worry about moderate deontology that Samantha Brennan (1995) has begun to develop an account of thresholds for constraints ("rights" is her preferred term).<sup>31</sup> Since she is one of very few that have addressed the subject, before giving my own account of the sufficiency condition, I should briefly discuss why I think that Brennan's approach could not succeed at locating thresholds for constraints.

The three central features of Brennan's account are what she calls the "total requirement," the "universal constraint," and the "existential constraint." The total requirement is "the total amount required to be at stake before you can justifiably infringe a right."<sup>32</sup> The universal constraint "dictates a minimum that *each and every* of those who benefit from the right infringement must have at stake, if what they have at stake is to

---

<sup>31</sup> I say that she has "begun" to do so because she writes, "[I]t is my hope to *begin* to remedy this omission in right's theory with the development of a structure which I believe helps us think more clearly about rights and their thresholds" (p. 146, her emphasis.). The omission is one "of a worked out account of thresholds" (Ibid.).

<sup>32</sup> Ibid. p. 147.

count towards the total.”<sup>33</sup> And “a plausible version” of the existential constraint “would say that there must be at least one person among the beneficiaries who has at least as much at stake as the rights bearer.”<sup>34</sup> The total requirement is useful because, for any given deontological constraint, there must be some total amount of consequences that could be at stake that would justify a violation of the constraint, as this is just what the moderate deontological position on constraints is (according to Brennan and Thomson, all constraints violations are unjustified infringements, but not all infringements are unjustified; some, for example, are overriding, but this is merely a terminological difference between us). The universal and existential constraints are constraints on what consequentialist considerations can count toward the total requirement. These two features of Brennan’s account, I believe, are what get her into trouble.

First, regarding the universal constraint, why should we think that there is some minimum that must be at stake for each person in order for what is at stake for him or her to count at all towards the total requirement? Brennan seems to think that the universal constraint is just intuitive, that some consequences are just too trivial to count. For example, she claims that no number of minor headaches at stake could justify (or even count in favor of) a violation of the deontological constraint against murder. You simply cannot justifiably murder someone to prevent the occurrence of any number of minor headaches. Even if we agree with Brennan on this point, though, it does not follow that the headaches do not count in favor of the murder at all. That my murdering someone would prevent a million headaches from occurring must be at least some moral reason in

---

<sup>33</sup> Ibid. p. 151, her emphasis.

<sup>34</sup> Ibid. p. 153.

favor of the murder, even if we grant that it is relatively weak and does not override the constraint against murder. To illustrate this point further, consider a case in which murdering one person would prevent one hundred other comparable murders and a million headaches, and suppose that the threshold for the constraint against murder is such that only fifty innocent lives need be at stake to justify a violation of the constraint against murder. What, in this case, counts in favor of murdering the one? Of course it is not just fifty lives being at stake because one hundred lives are actually at stake, but should the million headaches not count too? I think that our response should be that the headaches do count in favor of the murder, even though they probably would not count as enough all on their own to justify the murder, and this is because the fact that one could prevent a million headaches by performing any given action would count as a moral reason in favor of that action, whether or not it decisively requires the performance of the action.

Secondly, regarding the existential constraint, things only get worse for Brennan's account. On Brennan's preferred version of the existential constraint, "as much or more must be at stake for at least one beneficiary [as there is at stake for the rights bearer]."<sup>35</sup> For instance, if one million people's thumbs would be removed unless I removed one person's arm (and add the assumption that it is worse to lose an arm than it is to lose a thumb), then if Brennan is right, I could not permissibly remove the one person's arm because no single beneficiary of the arm removal would have as much as or more at stake than the person who would lose his or her arm. If, given this implication, you are not already inclined to reject the existential constraint, then consider some even more

---

<sup>35</sup> Ibid. p. 154.

problematic results. Suppose that, in the example, Brennan's universal constraint would be met by having a thumb at stake. If this were true, then the one million thumbs being at stake would count in favor of removing the one person's arm, but unless at least one person's arm were added to what is at stake, the one million thumbs would effectively count for nothing because the existential constraint would not be met, and minimally both the universal and existential constraint must be met to satisfy the total requirement. That is to say, unless an arm being at stake is added to the consequentialist considerations, the million thumbs will make no moral difference, but once the arm is added in and the existential constraint is thereby met, then suddenly the million thumbs can make a difference because each thumb being at stake would meet Brennan's universal constraint and thus count toward the total requirement for removing the one person's arm. Or suppose that each of the million thumbs being at stake did not satisfy Brennan's universal constraint. Then, we get the dubious result that the million thumbs being at stake would not count in favor of removing the one person's arm whatsoever, with or without the inclusion of at least one person's arm being at stake.

Brennan's account must ultimately fail at locating thresholds for deontological constraints not only because of the implausible constraints on consequentialist considerations (especially when they are considered together), but also because it does not even begin to address Ellis's worry, especially as it is presented in his example (at what point between Act 1 and Act 400 does the murder become right?). I should point out that Brennan does not intend to answer Ellis with her discussion, but this is beside the point. The universal and existential constraints are too strong and cannot successfully capture our commonsense moral intuitions. Thus, if the moderate deontologist hopes to

both capture commonsense intuitions and resolve Ellis's worry, then she will need to take a different approach to locating thresholds than Brennan's.

As Ellis puts it, the sufficiency condition is "the condition that allows that an action which is, at least normally, intrinsically wrong will be right given that its consequences would be sufficiently good."<sup>36</sup> I will have to rephrase the sufficiency condition because Ellis assumes a tipping point structure for moderate deontology to which his sufficiency condition would apply, but I have already concluded that the range structure is a more reasonable structure for the theory since it more accurately accounts for our intuitions and their tendency to gain and lose fuzziness. There will be two sufficiency conditions for the range structure, one for the lower boundary and one for the upper boundary of a threshold. At the lower boundary, there will be a condition that must be satisfied for a constraint violation to become merely permissible; call it the 'permissibility condition'. And at the upper boundary, there will be a condition that must be satisfied for a constraint violation to become obligatory; call it the 'obligatoriness condition'. If the moderate deontologist gives an acceptable account of these two conditions, then she gives an acceptable procedure for locating thresholds for deontological constraints, and Ellis's worry is no more.

So, how could the moderate deontologist give a plausible account of these two conditions? One might think that the best way to go about it would be to simply examine people's considered moral judgments and develop an account of the two conditions on that basis, but certainly there will be a variety of judgments about, for example, at what point between Act 1 and Act 400 the murder becomes merely permissible and at what

---

<sup>36</sup> Ellis (1992), p. 859.

point it becomes obligatory. Notwithstanding this difficulty, I believe that examining people's considered moral judgments must be the correct way to locate thresholds for constraints. This is because moderate deontology is supposed to give structure to our commonsense moral judgments, which are informed by our intuitions about specific cases. Whatever our considered judgments about when it is permissible and when it is obligatory to violate particular deontological constraints are, these judgments, I maintain, are what signify the locations of thresholds.<sup>37</sup> When is it merely permissible to violate some constraint? That is, what is the permissibility condition for that constraint? When is it obligatory to violate some constraint? That is, what is the obligatoriness condition for that constraint? Answer: whatever our considered moral judgments are in cases in which the constraint and some consequentialist considerations are in play, those are what indicate when the constraint can be permissibly violated and when one is required to violate the constraint. The intuitions that inform these judgments, after all, are the very content of morality! They are a reflection of what the group values, and the best way to conceptualize what the group values is to observe and give structure to their considered moral judgments.

The solution to Ellis's worry, then, is democratic in nature. The group gets to decide what matters to them, what they value, and there will have to be group agreement about the locations of thresholds, or at least some kind of averaging of the group's judgments. The permissibility condition will be met whenever people's moral intuitions,

---

<sup>37</sup> Let me be clear about what I am claiming. I am claiming that people's considered moral judgments are what should *indicate* to the moderate deontologist the locations of thresholds for deontological constraints because those judgments are informed by the moral intuitions of the group, which are what *determine* the locations of thresholds since moderate deontology is supposed to track people's intuitions.

on average, become fuzzy, as this indicates the point at which people are uncertain about what the right thing to do is since they value (to different extents) both deontological and consequentialist considerations, and these are beginning to match up according to their best intuitive judgments. The same goes for the obligatoriness condition, which is met whenever people's intuitions, on average, lose their fuzziness, and it becomes clear that the right thing to do is to prevent the occurrence of some bad consequences. This allows us to answer one of the questions posed earlier. At what point does the shifting of the normative status of violating some constraint happen, given that the fuzziness of people's intuitions will come in degrees? According to our democratic solution, the shift just happens whenever the group, on average, is comfortable with saying that it happens. Again, this is a reflection of what the group values, and the content of morality is supplied by the values of the group, which are implicit in their intuitive judgments.

How large is the group? Is it an entire nation, a small community, or everyone in the world? What counts as commonsense moral thinking in one culture may be quite different than what counts in another. Given this fact, I submit that the democratic solution should be applied to different cultures in order to determine what the locations of thresholds for deontological constraints are within the context of each culture.<sup>38</sup> Different cultures will value deontological and consequentialist considerations to different extents,

---

<sup>38</sup> It is essential to my characterization of moderate deontology that constraints' thresholds are high, and one may worry that postulating this kind of cultural relativity when it comes to locating thresholds could result in there being low thresholds. In response, while I believe that moral intuitions about the significant weightiness of deontological constraints in relation to consequentialist considerations are quite consistent across cultures (such that people from different cultural backgrounds consistently agree on constraints being much weightier than consequences), I have no empirical evidence on hand to support this claim. Unfortunately I cannot give a full treatment of the issue here, so I will set it aside. A complete account of the democratic solution will have to address this concern, though, and I plan to do just that in future work.

and although it is widely believed to be a tenet of commonsense morality that one is not permitted to violate a deontological constraint unless very much is at stake, some groups may give more or less weight to constraints than others do. Can one group be closer to the moral truth than another, depending on the weight those groups give to each kind of normative consideration? I doubt it because I doubt that when it comes to morality, there is one set of correct judgments regarding what one ought to do in situations involving thresholds, and so no one culture will have all the right judgments since whether a given judgment about what one ought to do in a situation involving a threshold is correct will depend on the values of the group, which the person making the judgment is a part of.

While I have no detailed methodology for how we could gather information about people's considered moral judgments, I do have an explanation for why we should think that such information would give the moderate deontologist what she requires for an account of the permissibility and obligatoriness conditions. Such information, if it were carefully and thoroughly gathered, would provide the moderate deontologist with the data that she would need to precisely locate the point at which violations of particular constraints become merely permissible, in accordance with the group's average intuitive judgment, and the point at which violations become obligatory, again in accordance with the group's average judgment. A complete procedure for gathering this kind of information would include, among other things, inventing a variety of hypothetical scenarios for people to consider that would elicit their intuitions about the ratio of weightiness of deontological to consequentialist considerations in an assortment of cases. Of course there are numerous different kinds of deontological and consequentialist

concerns that would have to be addressed, but this is hardly an objection to attempting to uncover people's intuitions about what matters.

Now for some objections to this approach. First of all, why should we care about what people's considered moral judgments are? Is it not true that people could just be getting it wrong whenever they judge that it is merely permissible or obligatory to violate some constraint? With respect to the reliability of people's intuitions, Alexander (2008) writes, "[E]ven if almost everyone's intuition ran in favor of [moderate deontology] and a [threshold number] of 56, I would require some deeper explanation for why that intuition should be thought determinative."<sup>39</sup> But, I ask, what further explanation could we give and why think that one is necessary? In the first place, moderate deontology, as I have repeatedly pointed out, is supposed to be a commonsense moral theory, and so to ask for some deeper explanation of the contents of people's commonsense moral intuitions is simply to ask for something that should be of no concern to the moderate deontologist since her theory is meant only to systematize people's intuitions; she just takes the intuitions for granted. Whether or not people's intuitions are a reliable guide to moral truth is an entirely different matter that I cannot even begin to tackle here, but suffice it to say that we should at least consider it *prima facie* reasonable that people's intuitions about what matters and the ratio of weightiness of deontological to consequentialist considerations are a reliable guide to locating thresholds for deontological constraints, especially since those intuitions are what moderate deontology is intended to capture.

A related objection, due to Ellis, is that locating thresholds cannot (or should not) be based on group agreement "for the simple reason that it has to be possible for the

---

<sup>39</sup> Alexander (2008), p. 102, note 15.

agent to assess the morality of the group to which he belongs—and at the deepest level.”<sup>40</sup> Nothing in what I have said, though, would imply that agents could not undertake an assessment of the group’s considered moral judgments or the intuitions that would inform those judgments. What the democratic solution implies, and plausibly so, is that the locations of thresholds are open to revision. This is because people’s moral intuitions may very well change over time, or at least they may be reconsidered, as people become more informed and reflect more deeply about their moral convictions and engage in moral discourse with others, and this will undoubtedly affect how the group values and weighs different kinds of normative consideration.

Ellis also goes on to assert the following: “Suppose that everyone did in fact agree, on the number 50 say, *but no-one could give any reason why it should be 50 and not some other number*. This would not tell us anything about moral theory; it would simply be an utterly bizarre mystery.”<sup>41</sup> He is right, I think, to declare that it would be mysterious if everyone agreed on some exact number, but he cannot be right that such agreement would tell us nothing about moral theory. Indeed, it would tell us a great deal! In particular, if everyone agreed in this way, then it would tell us that people’s moral intuitions are such that they all agree on the normative weight of deontological and consequentialist considerations, and if everyone similarly valued these two kinds of consideration, then we would have the necessary data to locate thresholds.

The last and most challenging (and, perhaps, most obvious) objection to the solution of Ellis’s worry is that there will almost certainly be vast disagreement about

---

<sup>40</sup> Ellis (1992), p. 870.

<sup>41</sup> Ibid. Ellis’s emphasis.

when it is merely permissible and when it is obligatory to violate constraints in order to prevent bad consequences. At one extreme, some people may have very strong deontological intuitions to the extent that they deny that violating a constraint is ever merely permissible. At the other, some people may have very strong consequentialist intuitions to the extent that they believe that constraints violations are always obligatory whenever doing so would have better consequences than not doing so. Fortunately I do not think that we have to worry about these characters, not because they are rare, but because they would have intuitions that are contrary to common sense. Commonsense morality, after all, prohibits violating constraints for the sake of preventing trivially bad (or ensuring trivially good) consequences, and it permits constraints violations whenever those violations are necessary to prevent severe consequences. Since moderate deontology is a commonsense moral theory, it is concerned with giving structure to our commonsense intuitions, not those of absolutists or act-consequentialists. While there might still be widespread disagreement among commonsense moralists, I doubt that the disagreement could be nearly as dramatic as the one with absolutists or act-consequentialists, and for this reason we should be confident that our democratic solution could adequately account for people's commonsense intuitions and help us to successfully locate thresholds for deontological constraints.

## APPLYING MODERATE DEONTOLOGY

The third worry about moderate deontology is that the positing of thresholds for deontological constraints would have counterintuitive implications whenever the theory is applied to certain kinds of cases. This worry, then, takes for granted that thresholds can be successfully located in order to draw our attention to a few other challenges for moderate deontology. I will examine three cases that involve these challenges, which are due to Larry Alexander (2000), and argue that they can be answered by the moderate deontologist.

### Alexander

Alexander considers a number of different applications of moderate deontology to specific cases, which invite some difficult questions for the moderate deontologist. I will start by presenting the applications and Alexander's comments about each one. While he focuses on thresholds for both deontological constraints and affirmative duties (e.g. a duty to rescue), I will choose to focus on the examples involving constraints since much of the discussion in this thesis has been about thresholds for constraints. Also, because the applications take for granted, for the sake of argument, that there are precise thresholds for deontological constraints, Alexander assumes in his examples that the threshold for the constraint against torturing an innocent person is such that at least 100 lives must be at stake for torturing an innocent person to be permissible.

Here is Alexander's first application of moderate deontology:

A terrorist has captured and hidden 100 hostages in a number of locations. At each location he has planted a bomb that will automatically detonate at noon. The terrorist reveals this to the police and demands certain concessions from the government before noon; otherwise, he will allow the bombs to kill the hostages.

Luckily, the police have grabbed the terrorist's mother, who is in no way implicated in her son's terrorism. If they torture her, however, they believe that the terrorist will relent. And because 100 lives are at stake, the mother's right not to be tortured is overridden. So they begin torturing her on live television. Sure enough, after some severe suffering by his mother, the terrorist calls the police asking them to relent. The police ask him for the location of the hostages and the bombs, and he tells them where one, and only one, hostage and bomb are located. Because only 99 hostages now remain at risk, the police can no longer torture the terrorist's mother.<sup>42</sup>

According to Alexander, two troubling implications follow from this sort of case. The first is that the stopping of the torture suggests that the lives of the rest of the hostages are mere counterweights that serve no moral purpose other than to count toward overriding the constraint against torture so that at least one person's life could be saved. Drawing on Moore's dam analogy, Alexander asserts that the rest of the hostages are like water below a dam's threshold. They only serve to boost others above the threshold so that others can be saved.

Secondly, what Alexander thinks this sort of case (i.e. a case in which the threshold is barely met) reveals is that the constraint against torture could actually be overridden for the sake of saving just one innocent life. This is because as soon as the police become aware of the location of one of the hostages and are then able to save him, they can no longer torture the terrorist's innocent mother since the constraint's threshold is no longer met. But, per Alexander's stipulation, one cannot be permissibly tortured for the sake of saving only one innocent life, and so it seems that cases like this one are paradoxical.

Here is Alexander's second application of the theory:

Suppose this time that the terrorist has hidden only one bomb and ninety-nine hostages. Because  $N_{\text{torture/lives}}$  is 100, the police are stymied. However, they do

---

<sup>42</sup> Alexander (2000), pp. 900-901.

know approximately where the bomb and hostages are located, and they can, through some deception, lure a handicapped man in a wheelchair into that area. Presently, he is far enough from the bomb to escape death, though there is some risk that he will be injured when it explodes. If lured close to the bomb, he will be unable to wheel himself out quickly enough to escape death from the noon blast. The police proceed to lure him into harm's way, at which point they begin torturing the terrorist's mother, with the result that the terrorist reveals the location of the bomb and hostages.<sup>43</sup>

In this case, Alexander is careful to observe, although it may seem that the handicapped man has been wronged (presumably by having his right not to be lured into harm's way violated), it actually turns out that the man's welfare was quite possibly increased. This is because had he not been lured, he would have been open to the risk of injury whenever the bomb exploded, but since he was lured close enough to the bomb, the police were permitted to torture the terrorist's mother and consequently gain the necessary information to prevent the bomb from exploding (or at least get everyone out of harm's way).

Alexander also points out that if the handicapped man had been asked by the police to wheel himself closer to the proximate location of the bomb, then he might have very well done so with the expectation that the torture would begin and everyone would ultimately be saved. However, as Alexander correctly asserts, the moderate deontologist should deny that there can be voluntarily created thresholds for deontological constraints. If many people were to voluntarily put themselves in harm's way, for example, moderate deontology should not allow (much less require) in such a case that a torture be carried out that would rescue those people. It follows that the police could not have permissibly tortured the terrorist's mother had they asked the handicapped man to wheel himself closer to the bomb, and absent any other way of rescuing the hostages, the police could

---

<sup>43</sup> Ibid. p. 902.

only permissibly torture the terrorist's mother by first luring the handicapped man closer to the bomb.

Here is the third application:

Again, Terrorist has hidden a bomb and 100 hostages, and  $N_{\text{torture/lives}} = 100$ . This time, the police have captured Terrorist's innocent brother and sister. Because they are unsure whether Terrorist will break if only one of his siblings is tortured, they torture both until Terrorist reveals the location of the bomb and hostages.

By hypothesis, the police have acted immorally. One person may be tortured to save 100, but not two. But are they guilty of violating the rights of *both*, or only one, of the siblings? If the latter, whose?<sup>44</sup>

In addition to posing these difficult questions regarding whose rights were violated, Alexander contends that in this sort of case the conduct of the police causes great harm (since it causes two innocent people to be tortured), but the immorality of their conduct causes much less harm (since only one innocent person is impermissibly tortured). The reason for this, according to Alexander, is that moderate deontology treats the terrorist's innocent brother and sister as expendable resources since the threshold for the constraint against torture has been reached, and so one of them can be permissibly tortured, but not both.

#### Response to First Application

Recall that Alexander thinks that there are two problematic implications that follow from the first kind of case in which the police are forced to stop the torture of the terrorist's innocent mother since the threshold is no longer met. The moderate deontologist can resist the first implication, that ending the torture suggests that the rest of the hostages are treated as *mere* moral counterweight, by simply denying it and pointing out that nothing in her theory commits her to this view of moral agents. That the

---

<sup>44</sup> Ibid. p. 904, Alexander's emphasis.

hostages are treated as moral counterweight may be accurate, but that they are treated as *mere* moral counterweight is not. This is because moderate deontology can retain typical deontological presumptions about persons, such as that persons are ends-in-themselves and are to be respected and have equal moral status, and at the same time hold that persons may sometimes have to be counted as moral weight whenever a deontological constraint is in play and is being considered against consequentialist considerations that include the lives of persons being at risk. So, while it is true that persons may sometimes be treated as moral weight, it does not follow from this that persons must be treated *merely* as moral weight in these situations. It is not as if moral agents suddenly lose their intrinsic worth whenever they are included in some set of consequentialist concerns. They just acquire the property of having moral weight in addition to the other features that deontologists usually ascribe to persons, and none of those features are incompatible with the property of having moral weight when included in consequentialist considerations. In fact, it seems that the very reason that moral agents have moral weight in situations involving thresholds is that they have these aforementioned morally relevant features that deontologists attribute to them.

Furthermore, Alexander's use of Moore's dam analogy is flawed. The lives of the hostages are not comparable to water below a dam's threshold. Dam water has a certain spatial location, and so water below a dam's threshold does serve to boost water located above it over a dam's threshold. Only water that is elevated high enough to go over a dam's threshold will go over it, though. In Alexander's example, and in general, none of the lives at stake occupy any spatial location in relation to the constraint's threshold. The terrorist does inform the police of the location of one of the hostages, but it could have

been any one of them. Out of the 100 hostages, the rescued hostage just happened to be the one that the terrorist let go. He was not located above the other hostages such that only he could be rescued in virtue of his being above the threshold.

Regarding the second implication, that the case is paradoxical because the police are permitted to torture in order to save 100 hostages but have to stop the torture after saving only one hostage since the threshold is no longer met, the moderate deontologist can resolve this by stating that the torture should not be stopped. This is not a case in which the constraint against torture is overridden for the sake of saving one hostage. What justified the torture in the first place was the fact that there were 100 innocent lives at stake and those lives could be saved by performing the torture, and thus if the police were to stop the torture after saving only one person, then they would be acting impermissibly. Suppose that the torture did go on after the terrorist revealed the whereabouts of just one hostage. If the terrorist continued to disclose information to the police until all 100 hostages were saved, then the torture would have been justified because it would have prevented the deaths of 100 innocent lives. Stopping the torture at any point before all of the hostages are no longer at risk would be impermissible, and to claim that the police must stop after one hostage is saved is to claim that the police must do something impermissible. Even though there are no longer 100 lives at stake after one hostage is saved, the torture is still justified because it is an ongoing process that will save all 100 lives.

Although it is true that only 99 lives are at stake once the first hostage is saved and 99 lives being at stake would not justify a torture, the 99 lives at risk are not what justifies the torture as it continues on. The torture is justified from start to finish by the

fact that it is necessary to save the 100 hostages. When there is only one hostage left to be saved, the police have to continue with the torture because it is the end result that 100 lives will be saved by the torture that makes it the case that the torture is permissible throughout.

We could also suppose that the terrorist decided that he would stop disclosing information to the police after revealing the whereabouts of, say, fifty hostages, and consequently the rest of the hostages could not be saved. This would imply that the torture was never permissible in the first place since it would not have resulted in the 100 hostages being saved. Not even the first hostage could be saved in this sort of case because, per Alexander's assumption, the torture could only be permissibly carried out if it would save all 100 hostages.

#### Response to Second Application

By luring the handicapped man into the area in which the bomb was located, the police did become able to permissibly torture the terrorist's mother, but the luring itself was impermissible, or so I will argue. I will not argue directly for this conclusion, but rather I will do so by considering two arguments for the position that the luring was permissible and concluding that both of those arguments fail. That luring the handicapped man was impermissible will come out of the discussion of the two arguments.

First, one might reason that the luring was permissible because a deontological constraint against luring people into harm's way was overridden by severe consequentialist considerations. The minimal degree of severity of consequences that would justify a violation of the constraint against luring people into harm's way, one might contend, is lower than the minimal degree of severity of consequences that would

justify a violation of the constraint against torture. So, since the constraint against luring people into harm's way is less stringent than the constraint against torture, luring the handicapped man closer to the bomb was permissible, as it was justified by the fact that the luring ultimately resulted in 100 lives (including the man's life) being saved from certain death. If torturing the terrorist's mother was permissible because performing the torture resulted in 100 lives being saved, then surely luring the handicapped man into the area in which the bomb was located was permissible for the same reason.

This argument fails to establish that the luring was permissible. In the first place, it inaccurately describes the consequentialist considerations in favor of the luring. The luring did not result in 100 lives being saved, but it did result in 99 lives being saved and one handicapped man avoiding probable injury. This is because, prior to the luring, only 99 lives were at risk of death and one handicapped man was at risk of probable injury, and if the luring had not occurred, then 99 people would have died and the man would have likely been injured.

We will grant for the sake of argument, though, that luring someone into harm's way is justified if it is the only way to prevent the deaths of 99 people and the probable injury of one person, *all else being equal*. Now, we can point out a different issue. The moral reasons in play were not just the foregoing that counted in favor of the luring. There was also a consideration that counted against the luring, namely, the fact that it involved using a person to allow for a torture. The police lured the handicapped man into harm's way so as to bring about the consequence that they could permissibly torture the terrorist's mother, and they tortured the terrorist's mother so as to bring about the

consequence that the 99 hostages and handicapped man would be saved.<sup>45</sup> Although it is true that if we ignore fact that the handicapped man was used to justify the torture, then we might conclude that the luring was justified by the fact that it saved 99 lives and one person from probable injury, we cannot simply ignore his being used. The handicapped man was clearly used as a means to a torture, and in this case it was wrong to use someone as a means to permissibly using someone else. That is to say, in this case it was wrong to violate a deontological constraint as a means to permissibly violating another deontological constraint. Even though the latter violation was permissible because it prevented the occurrence of severe consequences, this does not entail that the first violation was permissible, and the first violation cannot be justified solely by appeal to some set of consequences that count in favor of its violation if those consequences could only be brought about by a separate constraint violation that was just barely warranted.<sup>46</sup>

Another argument for the position that the luring was permissible might appeal to the fact that the handicapped man was already in danger of serious injury, and so on the assumption that a luring is permissible if it results in the lured person escaping risk of

---

<sup>45</sup> It should be noted that the morally relevant consequence of the torture is different than the morally relevant consequences of the luring, and the morally relevant consequences of each could be determined by considering the relevant counterfactuals. If the torture had not occurred, then the 100 people near the bomb would have died, so the consequence of the torture is that 100 people were saved. If the luring had not occurred, then the 99 people near the bomb would have died and the handicapped man would have probably been injured, so the consequences of the luring are that 99 people were saved and the handicapped man avoided probable injury.

<sup>46</sup> The moderate deontologist should be willing to allow that some constraints violations may be permissible whenever they allow for other constraints violations, which are required in order to prevent very severe consequences. In Alexander's example, luring the handicapped man would have been permissible if there were one million lives at stake, say, and this is because one million lives at stake would justify the two constraints violations required to save those lives. In the original example, though, Alexander stipulates that a torture is permissible only if it is the only way to save at least 100 lives, and so violating the constraint against luring someone into harm's way and violating the constraint against torture could not both be justified by 100 lives being at stake since this is the minimum that must be at stake to justify a torture on its own.

injury, luring him was permissible because by luring him he escaped the risk of injury. He was of course lured into an area in which a bomb was located and would have killed him if it had exploded, but he was not lured into harm's way because the police were certain that the terrorist would relent if the terrorist's mother were tortured. Thus, luring the handicapped man was justified since it prevented a risk of serious injury to him, or so one might claim.

This argument is similar to the first one in that it attempts to justify the luring by appeal to the consequences of doing so, but it is different because it restates the constraint against luring someone, making it less stringent by specifying that it is luring someone, but not into harm's way. It also restates the consequences that justify the luring. We will grant for the sake of argument that since the constraint against luring someone, but not into harm's way, is less stringent than the constraint against luring someone into harm's way, violating the former constraint may be justified by an appeal to less severe consequences (e.g. a risk of serious injury) than the minimally severe ones that would justify a violation of the constraint against luring someone into harm's way. Thus, we will grant that if luring the handicapped man had been the only way to prevent the risk of serious injury to him, then, *all else being equal*, the luring would have been permissible.

Like the first argument, the "all else being equal" phrase causes problems for this second argument. The luring may have been the only way to prevent the risk of injury to the man, but while the fact that the luring would prevent the risk of injury to him was a moral reason that counted in favor of the luring, that moral reason only existed because of the fact that the police would be able to permissibly torture the terrorist's mother once the handicapped man was close enough to the location of the bomb. The moral reason that

counted against the luring was the fact that a handicapped man would be used to justify a torture. So, the luring certainly prevented the risk of injury, but only because it allowed for a torture that kept the terrorist from detonating the bomb and thereby killing the handicapped man, which invites a further question about the argument's restating of the constraint against luring. Was the man lured into harm's way or not? I submit that he was lured into harm's way because even if the police were certain that the torture of the terrorist's mother would compel the terrorist to relent, the torture was what prevented the death of the handicapped man, and so he must have been in harm's way, which is what constituted part of the severe consequences that justified the torture. And because the man was lured into harm's way, one cannot justify the luring by appealing to the fact that he avoided the risk of serious injury since 'harm's way' here just means a risk of death, which could only be avoided by a separate constraint violation. That is to say, one cannot justify luring the man by stating that he was lured away from a risk of injury when the luring was one that put him at risk of death.

#### Response to Third Application

Alexander makes clear in the example that the police were uncertain about whether or not the terrorist would relent if only one of his siblings were tortured, and for this reason they tortured both his brother and sister. Let us suppose, first, that torturing only one of his siblings would have been insufficient, and so the police had to torture both of them to save the 100 hostages. In this case, the police have acted immorally because they have impermissibly violated the deontological constraint against torture twice over. Neither violation was permissible on its own because neither would have compelled the terrorist to relent, and although the conjunction of the constraint violations

was necessary to save the hostages, given Alexander's assumption that 100 lives must be at stake to justify one torture, the two violations were impermissible.

Now, we will suppose that torturing only one of the terrorist's siblings would have been sufficient to compel the terrorist to relent, and if this is the case, then the result that the 100 hostages were saved was overdetermined by torturing both of the siblings. This case invites Alexander's question of whose rights were impermissibly violated because one of the tortures must have been permissible on the assumptions that it was enough to compel the terrorist to relent all on its own, and the threshold had been met to justify one torture. Two constraint violations occurred, but only one was permissible, so which one?

The question arises for Alexander because of the way that he characterizes the moral harm done. As he presents the case, there was an impermissible *rights* violation, and discussion of rights often assumes a certain way of understanding moral harm, namely, moral harm as a kind of personal harm. On this account, there is a problem of locating the moral harm in cases of overdetermination such as the one we are presently considering, and this is because either the terrorist's brother or his sister's right not to be tortured was impermissibly violated, but whether it was the brother or sister who had his or her right impermissibly violated is indeterminate. One cannot, without arbitrariness, pick out the brother or sister's right not to be tortured as the one that was impermissibly violated.

Fortunately the moderate deontologist can sidestep Alexander's question by relying on a different account of moral harm. Throughout this thesis, I have continually spoke of deontological constraints, not rights or duties, and this was to avoid committing myself to an agent or patient-centered deontological view that might assume a certain

account of moral harm. My suggestion, now, is that the moderate deontologist should characterize the moral harm of violating deontological constraints as a kind of impersonal harm. In Alexander's example, then, the police are guilty of an impersonal harm that was brought about by impermissibly violating one deontological constraint.<sup>47</sup> They are not guilty of a personal harm that was brought about by impermissibly violating someone's (whose?) right not to be tortured. So, there is no puzzle about whether the right of the brother or sister was impermissibly violated since the moral harm done was impersonal and thus would not be attached to either of the terrorist's two siblings. Of course, as Alexander points out, the police are responsible for *physically* harming both the brother and sister, and these harms are correctly understood as personal harms, but they are guilty of only one moral harm, and that harm is an impersonal one that consisted in the impermissible violation of the deontological constraint against torture.

---

<sup>47</sup> We could even maintain that they are responsible for the impersonal harms brought about by violating two deontological constraints, although one of the two harms was justified by the severe consequentialist considerations. Therefore, they are culpable because one of the impersonal harms was unwarranted.

## REFERENCES

- Alexander, Larry. "Deontological Constraints in a Consequentialist World: A Comment on *Law, Economics and Morality*." *Jerusalem Review of Legal Studies* 3.1 (2011): 75-90.
- Alexander, Larry. "Deontology at the Threshold." *San Diego Law Review* 37 (2000): 893-912.
- Alexander, Larry. "Scalar Properties, Binary Judgments." *Journal of Applied Philosophy* 25.2 (2008): 85-104.
- Alexander, Larry, and Michael Moore. "Deontological Ethics." *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N. Zalta (ed.), <<http://plato.stanford.edu/archives/spr2015/entries/ethics-deontological/>>.
- Brennan, Samantha. "Moderate Deontology and Moral Gaps." *Philosophical Perspectives* 23.1 (2009): 23-43.
- Brennan, Samantha. "Thresholds for Rights." *The Southern Journal of Philosophy* 33.2 (1995): 143-168.
- Ellis, Anthony. "Deontology, Incommensurability and the Arbitrary." *Philosophy and Phenomenological Research* 52.4 (1992): 855-875.
- Kagan, Shelly. *Normative Ethics*. Boulder: Westview Press, 1998.
- Moore, Michael S. *Placing Blame: A Theory of the Criminal Law*. Oxford: Oxford UP, 2010.
- Nagel, Thomas. *Mortal Questions*. Cambridge: Cambridge UP, 2012.
- Nussbaum, Martha C. "Comment." *Goodness and Advice*. Ed. Amy Gutmann. Princeton: Princeton UP, 2001. 97-125.
- Smilansky, Saul. "Can Deontologists Be Moderate?" *Utilitas* 15.1 (2003): 71-75.
- Thomson, Judith J. *The Realm of Rights*. Cambridge: Harvard UP, 1990.