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Humane Consequentialism: A Critical Note on Eyal Zamir & Barak Medina, Law, Economics, and Morality

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Avihay Dorfman

Abstract

This is Avihay Dorfman's contribution to the symposium on Eyal Zamir and Barak Medina's "Law, Economics, and Morality".

HUMANE CONSEQUENTIALISM:
A CRITICAL NOTE ON EYAL ZAMIR & BARAK MEDINA,
LAW, ECONOMICS, AND MORALITY (2010)

*Avihay Dorfman**

I. OUTLINING THE BOOK'S MAIN THEMES AND NOTING THREE CRITICAL POINTS

A. THE OVERALL STRUCTURE OF THE ARGUMENT

In their intriguing new book, Eyal Zamir & Barak Medina (hereinafter: Z&M) attempt to open up economic analysis of law to deontological commitments by means of incorporating these commitments into the formal model of cost-benefit analysis of law—in essence, they argue that traditional cost-benefit analysis fails to identify all the normatively relevant factors against which to assess the morality of any given action or rule.¹

To set the scene, using one of Z&M's stock examples, traditional cost-benefit analysis commands the killing of an innocent person to save the lives of two others. This calculus is flatly inconsistent with a deontological-based restriction against treating a person as a mere means to an end she may not share. Z&M call for adjusting the economic cost-benefit analysis so as to accommodate the deontological restriction just mentioned (and various other deontological restrictions). This accommodation, they argue, warrants the introduction of finite deontological thresholds below which the pursuit of the overall good is prohibited. But since these thresholds, recall, should be finite, they must give way to the overall good whenever enough overall good is at stake. To return to the example just mentioned, Z&M speculate that their proposed

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¹ Z&M contend that “much” of their proposed analysis of constrained cost-benefit analysis can be applied to morality as well. They focus, however, on legal actions and rules at the policy-making level. EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 80 (2010).

approach “may justify [killing the innocent person] only for the sake of saving many more people, perhaps hundreds or thousands”.²

This suggestion finds its methodological expression in a two-step approach offered by Z&M.³ The first fixes the content and contours of the relevant deontological *threshold functions* in order to rule out morally impermissible infringements of deontological commitments (an example is “a threshold is met whenever killing one person saves at least 90 lives”).⁴ These functions are filtering devices, sorting out the morally impermissible courses of action (thus, to return to the example just mentioned, any course of action that results in less than 90 saved lives is impermissible). The second step involves the application of a cost-benefit analysis to the remaining, morally permissible courses of action.⁵ Z&M dedicate substantial parts of the book to an effort to demonstrate and then illustrate the methodological possibility of formalizing deontological constraints—threshold functions—in ways that render plausible their incorporation in the cost-benefit analysis.

The centerpiece of Z&M’s elaboration of a deontologically constrained cost-benefit analysis lies at the construction of mathematical threshold functions. A threshold function models in mathematical terms the permissibility of an outcome. It determines the net benefit of an action (or rule) by introducing some factor that expresses in consequential terms the costs associated with infringing a deontological commitment of some sort. Z&M articulate several alternative formulations of this function in order to demonstrate the various mathematical ways to render the integration of deontology into cost-benefit analysis technically intelligible and manageable.⁶

An important part of the discussion focuses attention on certain important *substantive* considerations that apply at the stage of constructing threshold functions. These considerations, according to Z&M, express the deontological thought that there exist qualitative differences between certain *types* of costs or benefits, so that threshold functions must be able to accommodate, in some measure, these differences.⁷ For example, Z&M suggest that the normative priority of “human life”

² *Id.* at 2.

³ *Cf. id.* at 82-83.

⁴ ZAMIR & MEDINA, *supra* note 1, at 82.

⁵ Even though they focus on integrating deontological constraints into cost-benefit analysis at the first stage mentioned in the main text above, Z&M discuss the application of their integration strategy to the second stage as well. *Id.* at 149-50, 155-56, 169-70.

⁶ *Id.* at 84-86 (articulating additive, multiplier, and certain other derivative forms of threshold functions).

⁷ *Id.* at 85-86. To be sure, Z&M do not seek to engage in first-order moral theory. Rather, they purport to demonstrate the *compatibility* of their proposed framework with a variety of deontological

to “pecuniary loss”⁸ may be expressed in the threshold function by excluding, or assigning comparatively smaller weight to, the latter kind of cost.⁹ Accordingly, a threshold function that seeks to determine the permissibility of torture (in order to save others’ lives) may plausibly be constructed so as to give the distinction between the two types of cost their due. Z&M discuss some other types of costs and benefits that may resist mechanical incorporation into threshold functions. These include small benefits such as minor headaches; chronologically remote costs and benefits; and substantially uncertain costs and benefits. These types of costs and benefits may not be allowed to influence the permissibility of infringing a deontological constraint (say, against killing persons). Z&M extend their cautious integration of deontological commitments to cost-benefit analysis to include “a prevailing intuition”, according to which the costs of avoiding pain are more important (in the appropriate sense) than the costs of promoting happiness.¹⁰ As a result, threshold functions may be constructed so as to render (categorically, if necessary) impermissible the infringement of a deontological constraint for the purpose of promoting, as opposed to sustaining, social welfare.¹¹

Much of the remaining discussions in the book further demonstrate and illustrate the place of threshold functions in guiding policy-makers in as diverse contexts as national emergency law,¹² free speech,¹³ anti-discrimination law,¹⁴ contract,¹⁵ and legal paternalism.¹⁶ The discussions are fascinating and illuminating not just on the abstract level of constructing mathematical threshold functions to model otherwise highly complex issues of public concern, but also in the doctrinal detail and theoretical precision with which Z&M approach these very different contexts.¹⁷

Before I take stock of the argument, I shall set the stage by registering three points that are worth noting at present.

views concerning the differential normativity of certain types of cost and benefit. Note that Z&M acknowledge that the representation of some deontological commitments (what they call “notions of fairness”) within threshold functions may not be possible. They do not, however, explore this point in depth. *See id.* at 97 n.43.

⁸ *Id.* at 86.

⁹ ZAMIR & MEDINA, *supra* note 1, at 86-87.

¹⁰ *Id.* at 91.

¹¹ *Id.* at 92.

¹² *Id.* ch. 6.

¹³ *Id.* ch. 7.

¹⁴ *Id.* ch. 8.

¹⁵ ZAMIR & MEDINA, *supra* note 1, ch. 9.

¹⁶ *Id.* ch. 10.

¹⁷ I shall have the occasion to consider some of the main themes (national emergency and contract) in due course.

B. PRELIMINARY ASSESSMENT

First, Z&M are clearly aware of the incoherence objection, according to which their attempt to construct a theory of the morally relevant factors against which to assess the desirability of a particular course of action pulls in inconsistent directions—that is, toward deontological restrictions, on the one hand, and toward maximization of the overall good, on the other. Their response is that “it is quite coherent to maintain that . . . the goodness of outcomes is not the only factor, and that . . . constraints may be outweighed by enough good outcomes.”¹⁸ But this response seems merely to restate the objection. I return to this difficulty below.

Second, Z&M are equally aware of the arbitrariness objection, according to which their analytical framework threatens too much, perhaps even radical, flexibility: even if the argument against killing an innocent to save the lives of two others is convincing (for whatever reason), Z&M’s framework can elicit absolutely no answer to the question of what counts as meeting a deontological threshold. Disappointingly, they respond by conceding that this is the inevitable fate of pluralistic theories and that somehow (in ways that go unspecified) the costs of arbitrariness built into their approach are off-set by the advantages it may offer legal and policy analysts.¹⁹

The third and last observation I shall offer at this preliminary stage concerns Z&M’s presentation of deontological constraints. While they correctly acknowledge that there may be different deontological constraints on the pursuit of socially desirable ends, Z&M emphasize in several places that “the most central constraint is against harming other people.”²⁰ The potency of this position, which seems to be heavily influenced by Shelly Kagan’s interpretation of deontological constraints (and Kagan, mind you, is a consequentialist moral philosopher),²¹ is crucial for three different

¹⁸ ZAMIR & MEDINA, *supra* note 1 at 52.

¹⁹ *Id.* at 53.

²⁰ *See, e.g., id.* at 1, 42.

²¹ *See, in particular, Shelly Kagan, The Structure of Normative Ethics*, 6 PHIL. PERSP. 223, 229-30 (1992). I do not mean to suggest that a duty not to harm others provides a somewhat idiosyncratic approach to deontology. However, my point is that a harm-based account of deontology may fail to present deontology at its best, distinctive light. Part of the problem is that some of the core cases in which the harm-based approach is typically invoked are sensational cases, presenting agents with extraordinary dilemmas (such as the celebrated trolley case). A deontological alternative is to begin with everyday moral practice. It does not mean that focusing on ordinary cases must come at the expense of sensational cases; simply that the latter cases are not allowed to exert undue influence on the former cases and, most importantly, on the development of a general moral theory. For recent, impressionistic reflections on this point, *see* T. M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME ix-x (2008).

reasons: first, for the sake of delivering the best account of deontological constraints; second, although Z&M focus little attention on the matter, deontological constraints might pull in different directions—as a consequence, any comprehensive analytical framework that seeks the integration of deontological constraints into cost-benefit analysis must provide a precise account of these constraints and their relative weight; and third, insofar as Z&M will in the future seek to extend their present argument—which aims at normative analysis of law—to interpret current legal doctrines—a move from prescription to description—then I suppose that the category of harm will loom large in this move. Against this backdrop, however, there are reasons to believe that the category of ‘harm’ should not figure prominently in deontological accounts of morally and/or legally right actions, and certainly not as prominently as presented by Z&M.

To begin with, deontological morality that follows the Kantian tradition makes “the value of humanity”, rather than harm as such, “the foundation of all value”.²² It focuses on the right terms of interaction between free and equal persons—if anything, it gives rise to a constraint against wronging, not (necessarily) against harming another.²³ On this view, harm and even the suffering of pain as such are purely incidental to questions pertaining to the appropriate attitude and conduct on the part of the moral or legal agent, respectively.²⁴ It is not that harming persons is morally permissible (or at least not impermissible); rather, causing harm to another may be flatly immoral but only because, and only insofar as, it supervenes on wronging her.²⁵

²² CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 145 (1996). Elsewhere, Korsgaard explains that, for Kant, humanity is the “capacity to determine ends through rational choice”. CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 137 (1996).

²³ Lying may cause no harm to the listener (and, sometimes, may even benefit her). A deontological constraint against lying, it seems to me, is grounded in the view that a liar wrongs his listener, irrespective of whether doing so also involves harming (or benefitting) her. Z&M address this point in their discussion of pre-contractual deception where they elaborate on the integration of deontological commitments to the legal practice of contract. ZAMIR & MEDINA, *supra* note 1, at 278-79.

²⁴ The alternative picture, one which Z&M follow, is to start with the natural fact of harm as the basic normative category. But since a general constraint against harming others may (arguably) be morally unjustified or otherwise too demanding, the next stage in the harm-based account of deontological morality would be to limit the constraint in question by reference to distinctions such as between intentional and unintentional harming (or doing and allowing harm). It is beyond the scope of this paper to settle the dispute between the Kantian view sketched in the main text and the harm-based approach to deontology. *See also supra* note 21. The point of this sketch is merely to put on the table, as it were, an alternative way to develop deontological insights.

²⁵ I leave aside the question of why and in what way an action or an outcome would be wrong. There are any number of ways to cash out a Kantian account of wrong that fits the description in

Furthermore, law may not be adequately cast in terms of a set of prohibitions against harming others.²⁶ There are, of course, revisionist attempts to reduce the normativity of law to a duty against harming others. An example of a deontological elaboration of legal doctrine that takes harm to stand at the moral center of the law is the libertarian theory of strict liability most famously defended at some point (on non-consequentialist grounds) by Richard Epstein.²⁷ There, causing harm is both of harm is both necessary and sufficient to ground legal obligations (such as duties of repair in torts).²⁸ That said, the law, like most other deontology-based reconstructions of various legal fields, displays a far less enthusiastic approach to harm—that is, to the normativity of harm and its role in grounding legal rights and duties.²⁹

Consider torts, for example (and I take torts because, at least at first blush, the category of harm looms large in this legal practice). Two major areas within torts—trespass and negligence—vividly express the notion that any adequate deontological account of this legal field cannot turn on the centrality of a constraint against harming others. On the one hand, the happenstance of harm to the person or property of another is not necessary for liability in trespass torts to arise. Indeed, the generic tort duty against trespassing upon the person or property of another is enforceable even

the main text above. See, e.g., Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1422-29 (2004); Tamar Schapiro, *Kantian Rigorism and Mitigating Circumstances*, 117 ETHICS 32 (2006); Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215 (2006); SCANLON, *supra* note 21.

²⁶ Considering the place of a morally-grounded *legal* constraint against harming others is important for the following reason: Although Z&M's project draws on normative ethics, their project concerns the application of insights developed in this field of philosophical reflection to the domain of political institutions and legal doctrines.

²⁷ See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

²⁸ Note, however, that Epstein emphasizes that causing harm to another establishes a *prima facie* case of tort, so that certain defenses may later excuse the injurer from liability for the harm done. See Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

²⁹ One of Hohfeld's main contributions to legal thought was that of creating conceptual space for the category of "no-right" and its opposite "liberty". In that, Hohfeld sought to demystify the notion that harm (and loss, more generally) gives rise to legal rights and remedies. Legal liberty, in Hohfeld's view, entails that persons can act (including by injuring others) within the sphere of action specified by this liberty with impunity. For a comprehensive historical analysis of the development of the legal doctrine of *damnum absque injuria* (Latin for "loss without injury"), see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982). Strictly speaking, Immanuel Kant preceded Hohfeld in essentially making the same point, though from a very different perspective. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* chs. 3-5 (2009).

when no harm results.³⁰ On the other hand, harm to another is never sufficient to render an injurer liable under a theory of negligence. A crucial question in negligence concerns the *character* of the conduct, not just its consequences. For if the actor meets the bar of reasonable care, no harm befalling others can give rise to liability for negligence.

II. WHAT IS THE NATURE OF Z&M'S ARGUMENT FROM CONSTRAINED COST-BENEFIT ANALYSIS?

A. IS THERE A FREESTANDING THEORY OF MODERATE DEONTOLOGY ON WHICH Z&M DEVELOP THEIR ARGUMENT?³¹

As I mentioned in the preceding section, Z&M's response to the charges of incoherence and arbitrariness merely restates, rather than addresses, the problems at stake. I shall now seek to argue that this shortfall may not be a mere explanatory gap but rather a surface symptom of the ambition of their argument. In particular, the argument is best understood as purporting to convince *legal economists*, rather than the rest of the world (deontologists included), to approach legal and policy questions through the lens of a normative framework that I shall call *humane consequentialism*. The argument, I shall suggest, seeks to make a difference *within* consequentialist thought, not only at the factorial level, but more importantly at the foundational one. I shall seek to show this by investigating the structure of their respective arguments against consequentialism and "absolute" deontology, on the one hand, and for "moderate" deontology, on the other.

Z&M launch their attack on consequentialism by emphasizing its vulnerability to certain familiar powerful deontological views concerning morality and justice. They distinguish between two sets of vulnerability. First, consequentialism features an unconstrained zeal for outcomes, legitimizing (at least in principle) means by reference to the instrumental question of how apt—how optimal—they are in accomplishing

³⁰ See, e.g., *Entick v. Carrington*, 19 ST. TR. 1029, 1066 (1765) EWHC KB J98 (observing that "every invasion of private property, be it ever so minute, is a trespass.").

³¹ By *freestanding* theory of moderate deontology I mean (to use Z&M's terminology) a foundational moral theory providing reasons for action that do not collapse into either absolute deontology or consequentialism. Thus, a freestanding theory of this kind bears the burden of establishing a steady stopping-point between the two poles occupied by absolute deontology and consequentialism, respectively.

certain desirable goals. This tendency toward consequences, on the deontological view, is morally inadequate, since it runs afoul of the morally *intrinsic* worth of treating persons as free and equal agents.³²

Second, consequentialism is also morally vulnerable in the sense that it exerts rational pressure toward subordinating individuals to causes—viz., the general interest in maximizing welfare or other desirable outcomes—in ways that can undermine these individuals' distinctive status as free and equal agents. Consequentialism, the argument goes, generates reasons for displaying an unconditionally impartial concern for the general good. The most familiar argument in this direction is Bernard Williams's one-thought-too-many objection,³³ to the effect that categorical impartiality is incompatible with respecting persons as persons, that is, as constituting their own freestanding subjectivities through which they intend, reason, and act.³⁴ Moreover, Z&M push this deficiency *ad absurdum*, explaining that "consequentialism ... requires self-sacrifice when the expected benefit to another person (who may be as well-off as the agent) is only slightly larger than the cost to the agent".³⁵ This unreasonable "demandingness",³⁶ they report, "conflicts with one's obligations toward family, friends, and community" as well as to oneself.³⁷

But merely raising objections against consequentialism does not settle the case for moderate deontology. Indeed, the logical conclusion of a successful case

³² Can consequentialism accommodate the morally intrinsic value of action, say, by positing this value in the overall calculus of maximizing one's good? I doubt this. On the deontological view, the justification and, indeed, the definition of moral action are independent of people's welfare or good (however broadly defined). Thus, it is not that an act's intrinsic value cannot form part of the good that ought to be maximized; rather, the point is that what makes the value of an act intrinsic in the first place is that it obligates us *even when* it does not benefit us (or society) and even when its overall *moral* consequences are negative. Suppose that by lying, an agent can bring about (in the appropriate sense) the morally positive effect of reducing the total number of lies in a particular moral community. It seems that a consequentialist moral outlook should sanction the agent's lie. Whereas, a deontological approach should disregard the good that lying produces including when this good is cast in moral terms. The distinction between the two systems of morality is not merely one of *scope*—a generous reconstruction of the consequentialist view of the good may be able to capture certain deontological commitments by giving them appropriate weight in the list of goods that calls for maximization. Rather, it is one of structure, since deontological commitments do not turn (for their existence and demandingness) on the theoretical and practical success of rendering them integral elements of the good.

³³ Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK* 18 (1981).

³⁴ Although Z&M direct the demandingness objection against consequentialism, certain deontological theories may equally fall prey to this objection.

³⁵ ZAMIR & MEDINA, *supra* note 1, at 20.

³⁶ *Id.* at 33.

³⁷ *Id.* at 20.

against consequentialism is the deontological commitment to the importance of respecting persons by regarding them, separately, as free and equal agents.³⁸ Taking this commitment seriously, however, does not just reflect the repudiation of consequentialism (whenever and to the extent that there is a tension between the two); rather, *it expresses the endorsement of absolute deontology itself.*

Thus, the only live question at this stage of Z&M's argument is that which concerns the precise *deontological alternative* to consequentialism that they invoke, bearing in mind that their rejection of consequentialism might push the argument all the way to absolute deontology.³⁹ Z&M introduce, in addition to absolute deontology, moderate deontology.⁴⁰ The former "maintains that constraints [on the legitimate terms of interacting with others] must not be violated for any amount of good consequences", whereas the latter "holds that constraints ... may be overridden for the sake of furthering good outcomes or avoiding bad ones if enough good or bad is at stake".⁴¹ The authors prefer the latter version of deontology. At this point, those who could have followed Z&M's recommended trail away from the moral kingdom of consequentialism to that of deontology are left puzzled as to what, *from the perspective of moderate deontology*, is wrong with absolute deontology that means the notion of moderate deontology should be accepted in its stead. Furthermore, there arises a related puzzle concerning the question of whether their preferred version actually marks a departure from consequentialism. To this puzzle I now turn.

To be sure, Z&M do not aim at articulating a fully-fleshed moral, legal, or political theory. Their ambition is much more modest (at least in this respect). That is, they seek to formalize a moderately deontological view of morality into an economic framework of analysis to guide policy-makers in negotiating the world. But it is one thing to disavow philosophical development of moderate deontology; quite another to endorse moderate deontology by applying it to different legal or public contexts. Z&M seem to treat moderate deontology as obviously entailed by the critical arguments leveled against consequentialism, on the one hand, and absolute deontology, on the

³⁸ There are, of course, other ways to express basic deontological commitments (including the one preferred by Z&M, namely, a constraint against harming persons). The argument in the main text, however, does not turn on any particular commitment. For reasons outlined above (*see supra* text accompanying notes 20-25), I prefer the ideal of respecting others by regarding them as free and equal agents.

³⁹ I owe this way of expressing the last part of the sentence to the *JRLS* referee.

⁴⁰ ZAMIR & MEDINA, *supra* note 1, at 46.

⁴¹ *Id.* at 46.

other.⁴² However, there arises a suspicion, according to which Z&M's fail to *point out* whether, how, and in what ways moderate deontology can carve out a normative space, as it were, *between* consequentialism and absolute deontology. As mentioned above, the deontological argument that Z&M make against consequentialism exerts rational pressure toward embracing *absolute* deontology. And, *vice versa*, a consequentialist critique of absolute deontology pulls one back all the way to consequentialism.

Now, although Z&M do not purport to develop a theory of moderate deontology, they must, against *this* backdrop, at the very least point out the possible moral foundations of this theory. This is crucial for a variety of reasons, including reasons that engage Z&M's own interest in improving legal decision-making. Consider three such reasons on top of the one which calls for addressing the suspicion mentioned a moment ago. First, the reader of the book and surely the policy-maker to which it is addressed are entitled to know what moral reasons exist for making decisions that are compatible with, let alone *grounded in*, 'moderate deontology'. Second, some of the challenges that policy-makers must face when invoking a moderately deontological framework of analysis are not just extra-deontological; that is, that of striking the right balance between deontological commitments and consequential goals. Rather, some of the challenges will likely be *intra*-deontological; that is, that of adjudicating between competing deontological principles in general and, most importantly, in specific cases.⁴³ Perhaps some of the latter challenges can be solved without appealing to the foundations of moderate deontology, but it is suspicious to suppose that this must be the case generally.⁴⁴ Third, suppose that Z&M fail to point out the possible *deontological* foundations of moderate deontology (as I shall seek to show below).⁴⁵ In this case, consequentialism alone will have to bear the burden of underwriting moderate deontology. To the extent that it can, a new set of critical questions will have to be raised with respect to the nature of Z&M's argument. In particular, since Z&M

⁴² Z&M provide a critical discussion of deontology—absolute as well as moderate: *id.* at 49-51.

⁴³ See *id.* at 81 (noting that “[l]egal (and other) policy-making often involves not only conflicts between the promotion of the good and deontological constraints but also conflicts between deontological constraints.”). See also *id.* at 97, 104.

⁴⁴ A related challenge has been raised by Professor Re'em Segev during the symposium. As Segev rightly points out, policy-makers may not be able to articulate a complete theory of moderate deontology *even* on the factorial level without drawing on the foundational theory—the moral grounds—of moderate deontology. At one point, Z&M seem to come close to conceding this, saying that “[d]eontologically constrained CBA does not determine the pertinent constraints on maximizing social welfare based on people's preferences but rather on a normative judgment.”: *Id.* at 104.

⁴⁵ Their argument may alternatively collapse into absolute deontology as well. This would be the case if Z&M would allow cost-benefit analysis only in the extreme.

(supposedly) embrace consequentialism it would be important to understand, as I consider below, what renders their approach distinctive when compared with standard law and economics. Thus, even if they do not wish to engage in the development of moral first principles, the precise characterization of Z&M's argument—including the difference that it *can* make *vis-à-vis* standard cost-benefit analysis—is influenced by the (deontological or consequential) nature of these principles.

It would prove helpful to consider the several reasons Z&M provide in support of moderate deontology. None of them, I shall argue, makes good on the ambition to provide a sense—including a *very* rough sense—of the distinctively *deontological* foundations of moderate deontology.

One stated reason is “Kant’s universalizability” test, according to which “the key to determining the valid moral rules is that they may be applied universally”.⁴⁶ But this explanation is not good enough. The Universal Law formulation of the Categorical Imperative (“act only in accordance with that maxim through which you can at the same time will that it become a universal law”)⁴⁷ is widely understood by modern Kantians as a principle of *ruling out* maxims of action based on a practical contradiction test, rather than as a mechanism by which to fix the moral content of maxims.⁴⁸ In other words, a universality test cannot ground moderate deontology; it may, at best, help to show that moderate deontology is *compatible* with a principle of non-contradiction, so that the prescriptions it generates would not be self-defeating if universalized.⁴⁹

⁴⁶ ZAMIR & MEDINA, *supra* note 1, at 48. Kant’s formulation of this Categorical Imperative, the Universal Law formulation, reads: “act only in accordance with that maxim through which you can at the same time will that it become a universal law.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 421 (Mary Gregor trans. & ed., 1998).

⁴⁷ *Id.*

⁴⁸ KORSGAARD, *CREATING THE KINGDOM OF ENDS*, *supra* note 22, at 107-05. Another way to make the point is to say that, contrary to Kant’s own suggestion, the several formulations of the Categorical Imperatives offered in the *GROUNDWORK* are not equivalent in any important sense. (See, e.g., KORSGAARD, *THE SOURCES OF NORMATIVITY*, *supra* note 22, at 131-66). This means that other formulations of the Categorical Imperatives (perhaps the Formula of the End in Itself) may do the work Z&M expect the Universal Law formula to do. I doubt whether moderate deontology can be made compatible with them (say, with the demand to treat the humanity in any other person never simply as a means, but *always*, at the same time, as an end).

⁴⁹ Would this be enough for the purpose of grounding moderate deontology in a non-consequential fashion? Certainly not. It may be argued that, like the universalizability test, moderate deontological constraints rule out maxims, too. Accordingly, it may be thought that there is nothing wrong in deploying a procedure of ruling-out maxims in the service of grounding these constraints. But it is wrong, because the universalizability test is employed by Z&M not to rule out possible objections to moderate deontology, but rather to lay its moral foundations. As I explain in the main text above, the Universal Law formula does not provide *affirmative* foundations to morality (or to any other arena within morality).

Second, Z&M stipulate that moderate deontology may be grounded in “various brands of contractarianism”.⁵⁰ On the contractual approach, “the right moral system is the one to which everyone would reasonably agree”.⁵¹ However, Z&M do not explain how this approach could ground moderate deontology. In particular, they do not address the question of whether reasonable persons have compelling moral reasons to agree to being sacrificed by the state for the sake of promoting aggregate welfare or other desirable social outcomes (including when the gains to society from thus sacrificing are high).

Their third stated reason is that of returning to consequentialist foundational theory, presumably some version of rule-consequentialism.⁵² As I shall argue in more detail below, this way of grounding moderate deontology understates its seemingly distinctive conception of consequentialism—*humane consequentialism*. But this gambit is not helpful to the overall ambition of propounding moderate deontology as an *alternative* to consequentialism, since it concedes that moderate deontology is in fact a branch of consequentialist morality (on which more below).

The fourth stated reason that I shall mention here is arguably the one on which Z&M draw most heavily throughout the book: “More so than its rivals, factorial moderate deontology conforms to prevailing moral intuitions (common sense morality).”⁵³ Certainly, however, appeal to moral intuitions *as such* is hardly an argument for, let alone a systematic theory of, morality.⁵⁴ Prominent deontologists (such as Kant and Rawls) draw on moral intuitions and, indeed, purport to explain morality or justice in ways that settle a reflective equilibrium between moral intuitions and theory. But this ambition cannot get off the ground without the *theory*. Thus, even if most reasonable people do share Z&M’s intuitions about morality (a speculation that might turn out

⁵⁰ ZAMIR & MEDINA, *supra* note 1, at 48. I take it that Z&M actually mean contractualism, rather than contractarianism. Drawing on Rawls’s famous distinction between the reasonable and the rational, contractualism appeals to the former, whereas contractarianism to the latter. Prominent contractualist theories can be found in T. M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998); JOHN RAWLS, *A THEORY OF JUSTICE* (1971), both of which are cited in ZAMIR & MEDINA, *supra* note 1, at 48 n.27. A leading contractarian theory is developed in DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).

⁵¹ ZAMIR & MEDINA, *supra* note 1, at 48.

⁵² *Id.*

⁵³ *Id.* at 48. *See also* at 56.

⁵⁴ Z&M do seem to support their resort to moral intuitions partly by reference to Ross’s intuitionist theory of morality. *See id.* at 48 & 48 n.25. I am quite certain, however, that they do not mean to ground their argument for moderate deontology in mere intuitions, that is, without any theoretical foundations against which to settle their intuitions about what is the right (foundational and factorial) theory of morality.

to be false), it is impossible to *justify* these intuitions in the absence of a theory. It is likewise impossible to understand these intuitions in any systematic way so as to solve the conflicts that might—indeed, will likely—arise from the need to balance between the different components of this theory in general and in each and every particular case (say, between the deontological commitment to treat people as equal, on the one hand, and as free agents, on the other).

I conclude this stage of my argument by observing that Z&M's case against consequentialism falls short of providing compelling reasons to adopt moderate, rather than absolute, deontology as an *alternative* moral outlook. The only successful case (out of the four cases just mentioed) for moderate deontology may be none other than consequentialism itself.

To be sure, I do not argue that moderate deontology as such is necessarily an instance of consequentialism. Perhaps there are compelling grounds for moderate deontology which resist its reduction to consequentialism. The point is that Z&M have failed to present them to us (including even by *pointing out* these grounds, whatever they are). A deontologist who does not share Z&M's common sense morality (or who does share it, but insists that intuitions alone cannot give us reason for action) is, therefore, entitled to reject their approach to moderate deontology for being a variation on the consequentialist theme. And even if one does share Z&M's intuitions, it would still be necessary to find out whether the *explanation*, if not justification, of these intuitions *in terms of* 'moderate deontology', rather than, say, consequentialism, is not mistaken.

B. MODERATE DEONTOLOGY AS (HUMANE) CONSEQUENTIALISM

I shall now seek to take the preceding argument a step further, showing that, indeed, the way Z&M present it, moderate deontology *just is* a version of consequentialism.⁵⁵ Thus, the argument I shall be making is that, contrary to Z&M's contention that it "*may rest on consequentialism at the foundational level*",⁵⁶ moderate deontology as presented by them *cannot but* rest on consequentialism. The implication of this contention is that the nature of their argument in the book is limited to disagreements *within* consequentialism, and in particular within *humane consequentialism* (i.e., a consequentialist approach to morality which is self-consciously aware of its

⁵⁵ I say Z&M, in recognition of possible other ways to present (and defend) moderate deontology which can avoid the trouble of collapsing into consequentialism.

⁵⁶ ZAMIR & MEDINA, *supra* note 1, at 195 (the italics are mine).

normative limitation). These are second-order disagreements among proponents of consequentialism who acknowledge that promoting welfare and other desirable social outcomes do not exhaust our moral universe.⁵⁷ Disagreements of this sort, therefore, revolve around the question of the best *methodological* way of accommodating this acknowledgement into the consequentialist overall analysis: Z&M offer the mathematical formalization of this acknowledgment, whereas the competing approach would prefer a methodological *division of labor* between formal economic analysis and non-formalized moral or political deliberation. Or so I shall seek to argue in due course.

I shall begin by explaining why it is that the underlying moral foundations of the notion of moderate deontology, at least as presented in Z&M's book, are necessarily consequentialist. This explanation returns me to the authors' response to the charge that moderate deontology is incoherent. Recall that this charge suggests that moderate deontology 'flip-flops' on the lexical priority of approaches to the moral assessment of actions: it begins with the intrinsic worth of actions⁵⁸ but might end up with the good that these actions bring about.⁵⁹ In response, Z&M assert that "it is quite coherent" to adopt a view that is sympathetic to both approaches to the moral assessment of actions.⁶⁰ This counter-charge is at home with Z&M's "pluralistic"⁶¹ approach to normative questions. Value pluralism is of course perfectly sound as far as it goes. But it may not go far enough insofar as the plurality of values at stake—say, welfare and human dignity—exert rational pressure toward conflict. In this case, there arises the need to develop a *monistic* meta-theory in order to settle the conflict between the competing values.⁶² It is here—at the meta-theory level—that Z&M's notion

⁵⁷ An acknowledgement of this kind is made, for instance, in Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-To-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749 (2011).

⁵⁸ For more on the notion of intrinsic value from a deontological perspective, see *supra* note 32.

⁵⁹ ZAMIR & MEDINA, *supra* note 1, at 52.

⁶⁰ The complete passage reads:

"[I]t is quite coherent to maintain that (contrary to consequentialism), the goodness of outcomes is not the only factor, and that (contrary to absolute deontology), constraints may be outweighed by enough good outcomes. Recognizing that there is more than one morally relevant factor inevitably implies that under different circumstances, some factors outweigh others and that all factors should be taken into account."

Id. at 52.

⁶¹ *Id.* at 46 (observing that "[m]oderate deontological theories may thus be described as pluralistic.>").

⁶² Nothing I have said in the main text above rejects the notion that Z&M's analytic framework does not allow for a wide range of incommensurability and incomparability. That said, this range is

of moderate deontology loses (deontological) momentum, collapsing into a theory grounded in a consequentialist foundational theory.

To fix ideas, consider their claim that “[a]n infringement of a constraint is not yet another “cost” of the pertinent act or rule, to be considered along with other costs and benefits. Rather constraints must not be infringed unless a sufficiently large good (or bad) outcomes are at stake.”⁶³ Clearly, this claim begins with (at least) two competing values against which to assess the quality and scope of the constraint (say, against violating the moral equality of persons). To resolve this conflict, moderate deontology must invoke a meta-theory that could put the conflicting values together—that is, not just in terms of a pricing mechanism, but rather in terms of the conception of the good that this mechanism seeks to approximate or otherwise reflect and, thus, in terms of the substantive criterion against which to settle value conflicts in a principled fashion. Indeed, although Z&M insist that (deontological) constraints are no mere costs, it is not clear how they can move from the deontological value protected by the constraint in question to a *consequentialist* justification of its infringement without casting the former value in consequentialist terms. They may well be right that deontological constraints are disappointingly underpriced by many consequentialist theories, but their approach, *too*, employs a pricing mechanism in order to fix, at the meta-theory level, the contours of these constraints.⁶⁴

The necessarily consequentialist foundations of moderate deontology can be further elaborated by reference to some of the concrete discussions of moderate deontology in the context of countering terrorism and contract.⁶⁵ As I shall seek to show, the pluralistic theory of Z&M operates on a monistic meta-theory, which moral center originates in consequentialism.

Begin with the deontological constraint against torturing human beings. Z&M introduce a deontological insight, according to which “the act of torturing a defenseless person may be considered more disrespectful to his dignity” than the killing of a person.⁶⁶ They complete the pluralistic portrait, as it were, by observing that torture

not unlimited, and policy-makers—as anyone who ever went to law school (or just read John Stuart Mill or Isaiah Berlin) can attest—will likely find themselves in situations where different values compete against each other.

⁶³ *Id.* at 104.

⁶⁴ Z&M’s view that deontological constraints are unusually, though not necessarily prohibitively, costly does not overcome the initial difficulty of articulating an account of these constraints in terms *other* than costs and the consequentialist theory of moral permissibility on which it rests.

⁶⁵ Due to space limitation, I shall not discuss the application of moderate deontology to anti-discrimination and paternalism.

⁶⁶ ZAMIR & MEDINA, *supra* note 1, at 163.

can be beneficial insofar as it saves the lives of many.⁶⁷ Now, since its ambition is to capture both of these values, moderate deontology *must* cast one of them in terms of the other. Since casting the benefits of saving lives in terms of a moral principle against disregarding human dignity amounts to abandoning moderate deontology *altogether*, the only possible way to defend moderate deontology is to assess this principle (against disregarding human dignity) by reference to the extrinsic consequences of sustaining it. And, indeed, the reason that Z&M provide for infringing the constraint against some cases of torture is consequentialist in nature—“the expected net benefit is saving the lives of hundreds or even thousands”.⁶⁸ This means that the constraint against torture is in the first instance *not* grounded in the conviction that the action of torturing persons is wrong in itself. For if an action of this sort is wrong in itself, then variations in external circumstances—viz., “the expected net benefit” from saving the lives of many—cannot right this wrong. Rather, this constraint is grounded in the thought that *standard cost-benefit analysis underestimates the real costs of torture*, and that these costs—once they are properly sought⁶⁹—*can* right the wrong of torturing at least in some cases.⁷⁰ As I have announced above, Z&M’s moderate deontology makes the case for what may be called *humane* consequentialism, by which I mean being sensitive (in the appropriate sense) to sources of value that (arguably) standard consequentialist theories leave unaddressed. It is of course an open question, as I shall explain in a moment, whether this humaneness is a feature of the *theory* that Z&M articulate or, instead, a *sociological* fact about these distinguished scholars (or, perhaps, both).

Another place in which the consequentialist foundations of moderate deontology’s pluralistic approach can be discerned is the contract context. One of the areas within contract law in which moderate deontology proves illuminating, Z&M argue, is precontractual deception. Here, too, they begin with the deontological notion that “lying is inherently wrong even if it causes no harm”, and they attribute this view to Kant who “held that lying ... destroys the human dignity of the liar ... and fails to treat [the deceived promisee] as an end.”⁷¹ And from this supposedly deontological

⁶⁷ *Id.* at 164-65.

⁶⁸ *Id.*

⁶⁹ According to Z&M, the alternative cost of torturing a non-innocent person is in hundreds or thousands saved lives. *Id.* at 164-65.

⁷⁰ I say *in some cases* because Z&M carefully delineate the class of persons that, all else being equal, can be subject to torture. *See id.* at 164.

⁷¹ *Id.* at 274.

statement,⁷² Z&M move to acknowledging that precontractual deception may, nonetheless, be morally permissible. This otherwise impossible move is rendered plausible, because moderate deontology manages to bring together the immorality *and* the morality of deception by deploying a consequentialist mode of assessing both. Precontractual deception is morally permissible, despite its “inherently wrong” character, if “its net benefit [is] quite sizable”.⁷³ By implication, this form of deception is morally impermissible *not just* because of its “inherently wrong” character, but rather due to the fact that the stakes—the “net benefits”—are sufficiently small. The meta-theoretic attempt of moderate deontology to put the constraint against deception and the pursuit of desirable social goals under a *unified* normative framework reveals, once again, that consequentialism can be more attentive than standard consequentialist theories to the ways in which people can or should stand in relations of equality to others. It does not, however, amount to challenging the monistic, consequentialist grounds of moderate deontology.

C. Z&M’S NATURE OF THE ARGUMENT: IMPLICATIONS

Viewing moderate deontology as necessarily (foundationally) consequentialist has important implications at several, increasingly concrete, levels of analysis. At the most theoretically abstract level, Z&M’s heavy reliance on common sense morality or intuition as a moral compass that guides the development of their arguments at almost every turn can now be cast into sharp and perhaps surprising relief (it is surprising in the sense that Z&M’s appeal to ‘common sense morality’ is, to an important extent, used *against* consequentialist moral theories!). Thus, their repeated contentions that moderate deontology is rooted in common sense morality is another way to argue (quite controversially, to be sure) that our common sense morality is, at the very least, compatible with a consequentialist moral outlook.

At the more concrete level of analysis, and here I finally come to the point about the nature of Z&M’s argument in favor of a deontologically-constrained cost-benefit analysis, the intimate connection between moderate deontology and consequentialism brings us back to the book’s attack on consequentialism. As I have argued so far, this attack does not set out an alternative to consequentialist morality, and thus does not

⁷² Although the view that one must never lie is commonly attributed to Kant, I am not sure whether this is the most charitable interpretation of Kant’s moral theory. See, in particular, Schapiro, *supra* note 25.

⁷³ ZAMIR & MEDINA, *supra* note 1, at 288.

directly address scholars who do not share Z&M's (consequentialist) take on common sense morality. Rather, it offers a more humane version of consequentialist morality, by which I mean taking into account deontological considerations⁷⁴ through assigning them greater weight than most lawyer-economists (arguably) normally do. This in *itself* is an outstanding achievement, because it addresses consequentialist scholars on their own (consequentialist) terms and on their own (methodological) approaches.

That said, there are at least two charges that can be raised *by consequentialists* in response to Z&M's insistence on humane consequentialism. First, lawyer-economists may argue that, unlike Z&M's contention to the contrary, they already incorporate deontological insights into their cost-benefit analysis.⁷⁵ Consider one of Z&M's stock examples against the inhumane approach of standard cost-benefit analysis: that consequentialism may allow for the deliberate killing of an innocent person, to save the lives of two or more.⁷⁶ It is not clear, however, why "standard" cost-benefit analysis should use the *metric of human lives* (or head-counting) to make normative comparisons between the two alternatives (that of deliberately killing the one, on the one hand, and letting the other two die, on the other). In fact, employing this metric distorts the valuations that must be made in order to determine the net benefits of either alternative—that is, the productivity of the persons concerned, their talents, health condition, and various other factors that may be necessary to fix the (economic) value of the alternatives at stake. By implication, by adopting the metric of human lives, lawyer-economists (implicitly or explicitly) incorporate a deontological ideal concerning the fundamental equality of persons as such.⁷⁷ Their disagreement with Z&M is, therefore, a matter of degree, not of principle; that is, the disagreement concerns the question of *how much* deontological insights should figure in cost-benefit analysis, rather than the (different) question of whether they should figure there *at all*. But this concession on the part of lawyer-economists just proves Z&M's point concerning the need to make a systematic integration of deontological insights to economic analysis, arguably along the lines delineated in their book.

⁷⁴ I say *deontological considerations*, rather than *commitments*, to reflect the moderate stance that Z&M take toward them.

⁷⁵ According to Z&M, "[s]tandard CBA monetizes and aggregates *all* costs and benefits involved in an act." ZAMIR & MEDINA, *supra* note 1, at 86 (italics are mine). As I explain in the main text below, this may not be true, even on Z&M's presentation of what counts as standard cost-benefit analysis.

⁷⁶ *E.g.*, *id.* at 2.

⁷⁷ There may of course be pragmatic or second-order considerations that support this metric *despite* its economically distortive effects, but this explanation is unconvincing insofar as the proxy of human lives is not a perfect one (as surely is the case).

The second consequentialist challenge to the Z&M case for humane consequentialism is specifically directed at the (instrumental) advantages of incorporating deontology into cost-benefit analysis. Thus, lawyer-economists may grant that welfarist concerns are not the only ones that policy-makers should take into account, but that there is no overriding advantage to do this ‘accounting’ by means of incorporating the latter concerns into the economic analysis of the former. Indeed, embracing humane consequentialism can give rise to a practical deliberation division of labor between the economic and deontological departments of the deliberating agent’s mind. In principle, there is no reason to believe that this method of analysis will yield conclusions which are essentially different from the ones derived from the analytical framework proposed by Z&M. Perhaps it would even be better to drive a wedge between the two prongs of the analysis, so as to allow for specialization and analytical rigorism to flourish—this may even be truer in the institutional context.⁷⁸ Z&M partly concede this point, saying that whereas “politically accountable bodies” are in charge of constructing threshold functions at the get-go stage, regulatory agencies would then “employ” these functions in executing laws and policies.⁷⁹

It is not clear, however, why the benefits of this partial division of labor between political and regulatory bodies should not be extended to capture a more comprehensive separation between deontological and economic analyses. This suspicion arises in connection with the well-known observation, according to which regulatory agencies are no mere “transmission belts” for applying completely determined laws to concrete cases.⁸⁰ Rather, they routinely exercise some (non-trivial) measure of discretion and, thus, engage in ongoing deliberation, including deliberation concerning the point of their relevant administrative tasks in particular cases and in general. To this extent, no ready-made threshold function laid down by politically accountable bodies can do away with practical deliberation at the stage of applying the function to the matter at stake: The only live question is what sort of deliberation is allowed. It is one thing to narrow the scope of deliberation to the traditional cost-benefit analysis; quite another

⁷⁸ My point here is not just about *institutional separation* between an agency responsible for doing the economic analysis and one which does the moral deliberation, but rather an *acoustic separation* according to which the economist conducts her analysis without any regard to deontological considerations and, at a later stage in the process, the moral philosopher selects the most efficient policy that could be made compatible with deontological commitments. As Ed Rock pointed out at the symposium, resorting to a division of labor may also be necessary to counter a principal-agent problem between top executives (such as the President) and administrative agencies.

⁷⁹ ZAMIR & MEDINA, *supra* note 1, at 108.

⁸⁰ The *locus classicus* is Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

to require a regulatory agency to grapple with deliberation concerning deontological principles of action. Against *this* backdrop, a decision-making procedure based upon deontologically constrained cost-benefit may therefore invite, rather than avoid, constant appeal on the part of regulatory agencies to deontological theories of justice. And for this reason, it is not unreasonable to believe that a comprehensive division of labor—a strict separation between deontological and economic analyses—might prove more congenial to the lawyer-economist.⁸¹ Thus, even if Z&M succeed in convincing the consequentialist scholar to adopt a more humane approach to normative questions, they may fail to convince her that the best way to do so is by resorting to what seems to be standing at the center of their book, that is, a deontologically constrained cost-benefit analysis.

III. ANOTHER READING OF *LAW, ECONOMICS, AND MORALITY*

By way of concluding remarks, I shall seek to propose another, somewhat controversial reading of Z&M's argument. Whereas the former reading has sought to reconstruct their argument by reference to the *letter* of the book, the proposed reading focuses on its *spirit*. And the spirit of the argument, it may be thought, is neither against consequentialism nor against deontology in particular. Nor is it in favor of humane consequentialism, *tout court*. Rather, the argument is against absolutism *as such*—that is, consequentialist as well as deontological absolutism—and in favor of moderateness and pragmatism in our public affairs; that is, *the book is a (beginning of a) defense of normative moderateness as the first virtue of political institutions*. This is an approach, in other words, which is genuinely pluralistic in the sense that it does not presuppose a monistic, meta-theory of value. Both human dignity and human welfare are ineliminable regulative ideals for a just society.

Accordingly, the focus of this approach is on *what* sorts of considerations the state must address in order to solve normative questions and on *how* (in what analytical ways) to address them. Unlike both absolute deontology and consequentialism,

⁸¹ At various other points in their argument, the authors concede that the integrated approach they advocate might come at the expense of the scientific rigor of economics. See, e.g., ZAMIR & MEDINA, *supra* note 1, at 97 (“At a certain point, however, the disadvantages of such incorporation (in terms of clarity and manageability of the formal representation) outweigh the advantages.”). They respond to this worry by downplaying its significance, but do not substantiate this assertion. See, e.g., *id.* at 116 (“We submit that it is preferable to address deontological concerns as constraints on CBA rather than to either ignore them altogether or deal with them separately as secondary considerations.”).

it does not attempt to, nor can it, offer straightforward answers to these questions. Indeed, no genuinely pluralistic theory, certainly not Z&M's 'moderate deontology',⁸² can specify in a non-arbitrary fashion how many saved lives could, if at all, warrant the deliberate killing of an innocent person (or, for that matter, how much free speech can be allowed during periods of civil strife).

The current reading naturally invites the objection that Z&M's (reconstructed) approach threatens too much flexibility: it offers no concrete guidance in determining what policy to pursue and what actions to take, especially where human dignity and human welfare come into conflict. But this objection can be turned on its head. Z&M's embrace of value pluralism, because it does not offer a scientific method for eliciting results, forces the state to design its political and legal institutions in ways that foster deliberation and participation, which are the building blocks of the *legitimacy* of political and legal decisions in the face of substantive disagreements about questions such as counter-terrorism measures, free-speech rights, anti-discrimination policies, norms of contract-making and keeping, and legal paternalism. The lived experience of free, democratic societies affirms that these disagreements cannot simply be eliminated by recourse to a technical measurement problem (in the case of economic analysis) or *a priori* reason (in the case of deontological moral philosophy). Z&M's analytical framework—what they call constrained cost-benefit analysis—might prove particularly helpful insofar as it gives a non-reductive formal structure *within which* citizens and policy-makers could determine, based on a commitment to both human dignity and welfare, what course of action to adopt—say, how many saved lives, if any, justify the deliberate killing of an innocent person. The limited guidance of normative moderateness, on this reading, may turn out to be a powerful generator of *democratic legitimation*, even if not of justice.

⁸² See ZAMIR & MEDINA, *supra* note 1, at 53.