

The Rationality of Threshold Deontology

Michael S. Moore

22.1 INTRODUCTION

There is a pretense in much academic writing that many of us have been guilty of fostering at one time or another. This is the pretense of certitude that many academics affect even when, in their scholarly hearts, they harbor serious doubts about their conclusions or their arguments. Larry Alexander's well-known article,¹ written in response to my theory of threshold deontology,² is free of this common pretense. For, as a practicing deontologist himself, Alexander shares with me the bottom-line judgment that absolutist versions of deontology are implausible in the extreme.³ Kant's version of the famous Latin saying that justice should be done even though the Heavens fall was: "Better the whole people should perish" from the earth than that an injustice be done.⁴ This is the kind of stirring hyperbole that gets people to the barricades; but it is surely utter rubbish if taken as the kind of moral philosophy that any of us should actually live by.

- ¹ Larry Alexander, "Deontology at the Threshold," *San Diego Law Review* 37, no. 4 (2000): 893–912.
- ² Alexander's article was written in response to Michael Moore, "Torture and the Balance of Evils," *Israel Law Review* 23, no. 2/3(1989): 280–344, revised and reprinted as Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997), chap. 17. I have since elaborated my view of deontology in Michael Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009), chap. 3, and in Michael Moore, "Targeted Killings and the Morality of Hard Choices," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed., Andrew Altman, Claire Finkelstein, and J.D. Ohlin (Oxford: Oxford University Press, 2012), 434–66.
- ³ We jointly say so in Larry Alexander and Michael Moore, "Deontological Ethics," *Stanford Encyclopedia of Philosophy* (Winter 2016), ed. Edward N. Zalta, <https://plato.stanford.edu/entries/ethics-deontological/>.
- ⁴ Kant, *Metaphysical Elements of Justice*, 2nd ed., trans. J. Ladd (Indianapolis: Hackett, 1999), 100.

Given Alexander's need to have thresholds in any plausible deontology, his own included,⁵ his critique of threshold deontology should be seen in the spirit in which it was written: as an invitation to help in overcoming objections to threshold deontology that Alexander was honest enough to say he could not answer alone. I thus see the present article as answering that invitation.

When I teach Alexander's deservedly influential article on threshold deontology in my ethics seminars, I usually have my students tease out the roughly fifteen or so overlapping problems raised for threshold deontology by Alexander. In their contributions to this volume, Kevin Cole⁶ and Dick Arneson⁷ do a good job of combining these related problems into just two or three items. Cole sees Alexander as raising two problems: (1) the arbitrariness problem, which is that there seems to be no nonarbitrary way of specifying the threshold (of awful consequences, the avoidance of which justifies violating deontological norms); and (2) the moral ballast problem, which is the seeming problem that everyone's harms that are below the threshold are mere "moral ballast," ("moral ballast" consists of items without moral import save that they allow those whose harms are threatened to occur once the threshold has been reached, to justify violating deontological norms to prevent those above-the-threshold harms). Arneson raises both of these problems, although he characterizes the moral ballast problem as the more general problem of the supposed "weirdness" of threshold deontology's treatment of cases where the bad consequences prevented are very close to the threshold. Arneson goes on to distinguish a third problem for threshold deontology that he sees Alexander as raising: this is (3), the problem of incommensurability between the badness of states of affairs (the focus of consequentialist ethics) and the wrongness of an agent violating a norm (the focus of deontological ethics).

The adequacy of Arneson's and Cole's taxonomies of Alexander's fusillade of problems for threshold deontology, and the cogency of Cole's and Arneson's responses to those problems, free me to do what I intended to do in this essay anyway – which is to answer a doubt about threshold deontology that is something of a generalization of those raised explicitly by Alexander or by Cole's and Arneson's interpretations of Alexander. This is the doubt that I shall call the "ad hocery" doubt.⁸ The worry is that nothing supports the existence of the thresholds posited to

⁵ Alexander's patient-centered version of deontology is laid out in his "The Means Principle," in *Law, Morals, and Metaphysics: The Philosophy of Michael S. Moore*, ed. Kimberly Ferzan and Stephen J. Morse (Oxford: Oxford University Press, 2016).

⁶ Kevin Cole, "Real-World Criminal Law and the Norm Against Punishing the Innocent: Two Cheers for Threshold Deontology," this volume.

⁷ Richard Arneson, "Deontology's Travails," this volume.

⁸ "Ad hocery" was Jonathan Schaffer's charge against my use of a closeness doctrine to distinguish causal from noncausal relations (if x caused y, and if z is *close* to y, then x caused z too). Such use of closeness was ad hoc, Schaffer complained, because it was only an afterthought added on

exist by threshold deontology, except naked, isolated intuitions in particular cases. More particularly, the worry is that the existence of such thresholds is not demanded or even supported by any deep nature of deontology but is rather an alien, ad hoc add-on posited in order to avoid the absurdity of Kantian absolutism.

This more general concern involves the three more specific concerns investigated by Arneson and Cole. As we shall see, incommensurability (of deontological and consequentialist obligations) figures centrally in what follows. Also, both the charge of arbitrariness and the charge of weirdness at the border are involved in the more general charge of ad hocery; I intend my answer below to the ad hocery charge to also aid in the disposal of these more particular charges as well. The ad hocery worry is in a sense a charge of arbitrariness, but the arbitrariness worried about is not, or is not only, the arbitrariness in picking some determinate level at which to set a threshold; nor is it the supposed weirdness that results once one does that. Rather, the worry focused on here is whether there can be any support for the idea that there is some threshold (of awful consequences) over which one is permitted to do what otherwise one is categorically forbidden to do, some support that flows naturally from the nature of deontology itself and not just from a desire to avoid the counter-intuitive implications of that nature.

22.2 THE NON-ALIEN NATURE OF THRESHOLDS IN DEONTOLOGY

In what follows, I shall lay out seven features of morality that, I shall urge, render the idea of thresholds unsurprising and untroubling. Moreover, I shall urge that these features combine with an eighth to make thresholds in deontology not only unsurprising and untroubling but also to make the existence of such thresholds a necessary implication of deontology's true nature. I shall treat these features seriatim.

22.2.1 *Deontic Morality Consists of Consequentialist as well as Deontological Obligations*

It is not plausible to think that the agent-centered restrictions and prerogatives that constitute deontology exhaust our objective reasons for action. Most decisions in our life are not governed by such heavy-duty moral machinery. This is surely true of

to my theory of causation to avoid otherwise troublesome counterexamples; it was not a principled doctrine based on my theory of the nature of the causal relation. Jonathan Schaffer, "Disconnection and Responsibility," *Legal Theory* 18, no. 4 (2012): 399–435, 413. I responded to Schaffer's use of the "ad hocery" objection in the causal context, as well as expanded the discussion of ad hocery in relation to the closeness doctrine's use in the context of intentions rather than causation, in Moore, "Four Friendly Critics: A Response," *Legal Theory* 18, no. 4 (2012): 491–542.

those many decisions not governed by obligations of any sort, such as our decisions about where to go to lunch, whom to marry, whether to have children, etc. But it is as surely true of actions that are governed by that subspecies of reasons for action we call obligations.⁹

As an example, consider positive duties of rescue. Except for a few, unregenerate libertarians (which may include Alexander), most of us think that we have a positive duty to rescue strangers when we can do so at little risk or inconvenience to ourselves. This duty is deontic and not merely aretaic.¹⁰ Yet this positive duty seemingly cannot be a deontological obligation, because it lacks categorical force. We know this latter fact because we can justify not saving one person by directing our resources anywhere else where they will produce consequences better than the prevention of the loss of one innocent life; for example, we can forego saving one in order to both save another's life and to prevent a third person's arm from being broken.¹¹

Deontic ethics – the ethics of choice and action, as distinguished from the aretaic ethics of disposition and character – is thus comprised of consequentialist obligations as well as deontological obligations. On this Larry Alexander and I have long agreed. I have urged that the right way to see this combination is to regard consequentialist reasons as omnipresent in life and thus to see deontological reasons as a kind of side-constraint or override. There are two kinds of such overrides, obligations and prerogatives:¹² (1) sometimes our deontological obligations (not to torture an innocent, for example) override the good reasons we may have to torture on this occasion (say, the prevention of even more torture by others in the future by our torturing one now); (2) sometimes our deontological permissions (to defend ourselves against a culpable aggressor, for example) override the good reasons we may have not to

⁹ I argue for this in Moore, *Causation and Responsibility*. Alexander shares with me this eclectic view of deontic morality. See Alexander, "The Means Principle."

¹⁰ On the notion of aretaic duties, see Heidi Hurd, "Duties Beyond the Call of Duty," *Annual Review of Law and Ethics* 6 (1998): 3–39.

¹¹ I adopt this test for when an obligation is consequentialist from Heidi Hurd, "What in the World Is Wrong?," *Journal of Contemporary Legal Issues* 5 (1994): 152–216. Deontological obligations "patrol the borders of permissible consequentialist calculations," in this view of things, so if an obligation does no such patrolling, it is a consequentialist obligation. See Michael Moore, "Patrolling the Borders of Consequentialist Calculation," *Law and Philosophy* 27, no. 1 (2008) 35–96.

¹² Moore, *Causation and Responsibility*, chap. 3. Phil Montague accurately perceives that this way of combining deontology and consequentialism owes much to Bob Nozick's view in his *Anarchy, State, and Utopia* (New York: Oxford University Press, 1974) that deontological obligations operate as "side-constraints" on achieving consequentially desirable states of affairs. Phil Montague, "Moral Dilemmas and Moral Theory: Towards a Viable Deontology," in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan and Stephen J. Morse (Oxford: Oxford University Press, 2016). Montague is critical of this Nozick-inspired way of seeing deontic ethics, but I seek to defuse such criticisms in Michael Moore, "Responses and Appreciations," in *Legal, Moral, and Metaphysical Truths*, ed. Kimberly Kessler Ferzan and Stephen J. Morse (Oxford: Oxford University Press, 2016).

defend ourselves on this occasion (say, the fact that we will have to inflict a greater harm on the attacker than he (or they) would inflict on us if we forego self-defense). On either of these occasions, the right action is not what it usually is – a maximizing of good consequences and a minimizing of bad consequences.¹³ Rather, the right action is to conform to the deontological norms of obligation or permission.

Notice that on this picture the surprise offered up by threshold deontology is not the surprise that deontological obligations and permissions often compete with consequentialist obligations. Rather, the surprise is that sometimes the consequentialist obligations are not overridden by deontological obligations and permissions; what usually overrides (deontology) is on these occasions itself overridden, and what is usually overridden (consequentialist reasons) on these occasions does the overriding. What needs explaining about threshold deontology is how this reversal of priority can be conceptualized and justified.

22.2.2 *Conflict of Obligations Is Endemic to Everyone's Moral Experience*

A basic principle of Freudian psychology was that conflicts between the mental states of belief, desire, intention, and emotion that constitute our subjective reasons for action were endemic in our mental life.¹⁴ An analogous principle of ethics is that conflict of objective reasons is also endemic to the morality that governs how we should choose and act, and that such conflict also exists between those stringent, objective reasons for action we call obligations. True enough, Kant famously proclaimed that conflicts in our obligations was “inconceivable.”¹⁵ Yet what he meant was that conflict in our end-of-the-day obligations was unacceptable. And in this he was surely right. If we are obligated both to do some action A at time t, and to refrain from A-ing at t, then morality demands the impossible from us. It thus guarantees our moral failure, no matter what we do. While some malevolently playful Greek

¹³ The vagueness in specifying the consequentialist principle is deliberate. Neither Alexander nor myself have worked out in detail what the consequentialist part of deontic morality looks like. The deontological part interests us more, and besides, there is an extensive literature written by those with a more exclusive interest in consequentialism than we have. The one aspect that we do take a position on, naturally enough for deontologists, is a firm rejection of rule (or any other form of two-level) consequentialism. See Larry Alexander, “Pursuing the Good – Indirectly,” *Ethics* 95, no. 2(1985): 315–32. While I early-on rejected indirect consequentialism in my “Torture and the Balance of Evils,” my most detailed rejection of it will be found in my email debate with Dan Dennett more recently, reproduced verbatim in Moore, *Mechanical Choices: The Responsibility of the Human Machine* (New York: Oxford University Press, forthcoming), chap. 10.

¹⁴ The role conflict plays as an organizing principle of Freudian psychology is examined by me in Moore, “Mind, Brain, and Unconscious,” in *Mind, Psychoanalysis, and Science*, ed., Peter Clark and Crispin Wright (Oxford: Basil Blackwell, 1988).

¹⁵ Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 16.

God might foist off such an unfair morality on the human race, it is surely too unfair to be taken seriously in the absence of such malevolently divine origins.¹⁶

So when we say that conflict of obligations is a familiar feature of morality, we do not mean that all-out or end-of-the-day obligations can and do conflict. Rather, such situations of conflict – usually called “moral dilemmas” – exist in the sense that a familiar feature of moral experience is the seeming or experienced conflict in the demands of two or more obligations. The standard, decades-old example is Jean Paul Sartre’s: Sartre’s student was obligated to join the Resistance and in this way fight injustice, and he was obligated to stay home to help his ailing mother; the student could not do both, and he knew that.¹⁷ Sartre’s famous injunction to his student does exemplify the kind of conflict of ultimate obligations that Kant feared: “Just decide,” Sartre told his student, because there was no answer to be found in such conflicting obligations.

Few serious moral philosophers would accept Sartre’s existentialist answer to moral dilemmas. Rather, one obligation or the other is thought to prevail in such situations of conflict. There are two different ways one obligation can prevail over another: (1) by creating an exception to the content of the losing obligation, which exception has the content of the prevailing obligation; or (2) by outweighing (or being in some other sense prior to, such as excluding, preempting, etc.) the losing obligation. The first is the route of the “specificationist”;¹⁸ the second is the route of those holding all obligations to be of “prima facie” or “pro tanto” force only.¹⁹

Notice that on the specificationist view, Kant was right: Obligations never really conflict. For if in cases of seeming conflict the content of one of the obligations contains an implicit exception making that obligation not applicable to the situation at hand, then the other obligation unproblematically governs and dictates the right course of action. For example, if the obligation is not simply to take care of a parent

¹⁶ Heidi Hurd and I explore why a morality countenancing conflict of obligations when they apply to one and the same person, or countenancing conflict of obligations when they apply to two or more persons, would be an unfair morality, the possibility of which a properly conceived deontic logic should reject. Heidi Hurd and Michael Moore, “The Hohfeldian Analysis of Rights,” in *The Legacy of Wesley Newcomb Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries*, ed. Shyam Balganes, Ted Sichelman, and Henry Smith (Cambridge: Cambridge University Press, 2018).

¹⁷ Jean Paul Sartre, “Existentialism is a Humanism,” Paris lecture, 1945, translated into English and published as *Existentialism and Humanism* (London: Methuen, 1948).

¹⁸ Although this strategy for dealing with apparent conflict of obligations is at least as old as Kant (see Barbara Herman, *The Practice of Moral Judgment* (Cambridge, MA: Harvard University Press, 1993)), the label “specificationist” appears to originate with Judy Thomson. See Judith Thomson, “Self-Defense and Rights,” the 1976 Lindley Lecture at the University of Kansas (Lawrence: University of Kansas Press, 1977).

¹⁹ The tradition begun in modern ethics by Sir W. David Ross, *The Right and the Good* (Oxford: Oxford University Press, 1930).

in need, full stop, but is rather an obligation to care of such a parent unless one can significantly aid the world in ridding itself of an unjust regime, Sartre's student faces no real conflict; he has his answer in the one obligation that applies to his particular situation.

I have in the past speculated that some degree of specificationism is called for.²⁰ Yet I doubt that one can be specificationist enough to show that all apparent conflicts of obligation are not real conflicts. For the content adjustments needed to render our obligations nonconflictual would be as rich as the highly nuanced moral world itself. Ethics would then be like a cartography that eschews the simplifications of traditional maps in favor of "maps" that are full size reproductions of the world mapped.

So some recourse needs be had to the second strategy showing seeming conflicts of obligation to be resolvable: hold all obligations – even categorical ones – to be *prima facie* ("defeasible," "pro tanto") only. Then one's overall, all-out obligation can be univocal even though it is created by a balance between two or more *prima facie* obligations in conflict. For this second strategy to work it needs to be the case that *prima facie* obligations have differential degrees of stringency (or obligating force). Such differential stringency is what allows one *prima facie* obligation to outweigh (override, take precedence over, be prior to) another. The nature of such stringency of obligation is the third aspect of morality needed to sustain threshold deontology as not being *ad hoc*.

22.2.3 *Stringency of Obligation Is Required Independently of Its Ability to Resolve Moral Dilemmas*

There is a well-known conundrum in the philosophy of mind about how one conceptualizes and measures the comparative strengths of different desires.²¹ In explaining intentional action, one often wants to explain why that action was chosen and done in terms of the actor most wanting the good(s) served by the action chosen. Yet, for this explanation to be significant, what is most wanted – the strongest desire – cannot simply be defined in terms of its propensity to win out in situations of conflict. Some independent definition of "strength" must be supplied, or else the supposed empirical truth that we generally do what we most want to do when we act intentionally becomes a mere tautology.²²

²⁰ Moore, *Placing Blame*, 706.

²¹ A.C. Ewing, "Can We Act Against Our Stringent Desire?," *The Monist* 44, no. 1 (1934): 126–43.

²² I pursue the ways in which, in cases of volitional excuse, we do not do what we most want to do, even though we do what we do intentionally, in Michael Moore, "The Neuroscience of Volitional Excuse," in *Philosophical Foundations of Law and Neuroscience*, ed. Dennis Patterson and Michael Pardo

Likewise, in ethics we need some independent specification of strength (“stringency”) of obligation for it to be significant to explain (in terms of the greater strength or stringency of the prevailing obligation) why one obligation overrides another in situations of conflict between the two. Fortunately, that independent account of stringency of obligation is ready to hand. It is a well-known and accepted feature of deontology that, despite the uniformly categorical nature of deontological obligations, breaches of such obligations are constitutive of various degrees of wrongdoing, which differential wrongdoing in turn demands differential punishments.²³ Greater wrongdoing demands greater punishments, on any plausible rendering of the principle of proportionate punishment. Intentional killing demands more punishment than intentional theft, for example.

Such differential wrongdoing, when holding the conditions of breach constant, can only be explained by the differential stringency in the obligations breached: the more stringent the obligation breached, the greater the wrongdoing involved in breaching that obligation and vice versa. This familiar feature of our punishment practices gives us the independent specification of stringency of obligation which we need for present purposes.

*22.2.4 Stringency of Consequentialist Obligations to Do or Not Do
Some Action Is a Direct Function of the Net Goodness/Badness
of the Consequences of That Action*

Consequentialist obligations are founded on the avoidance of bad consequence/promotion of good consequences. Each bad consequence avoided and each good consequence promoted creates a prima facie consequentialist obligation to do such an act, the degree of stringency of each such prima facie obligation being a direct function of the degree of badness/goodness of the relevant consequence. It should thus be no surprise that the stringency of an all-out consequentialist obligation is directly a function of the net goodness/badness of the consequences of any act. The worse the net consequences of some act, the more we are obligated not to do such act. When the downside costs are held constant, we are more stringently obligated to rescue two drowning stranger babies than we are obligated to rescue one.

(Oxford: Oxford University Press, 2016), 179–230. I accordingly pursue a definition of strength of desire that is not simply behavioral.

²³ Alexander and I present this as one of the well-known puzzles of deontology, in Larry Alexander and Michael Moore, “Deontological Ethics.”

22.2.5 *Stringency of Deontological Obligations Not to Do Some Action Is Only Imperfectly Correlated with the Net Badness of Consequences of Doing That Action*

As the literature on the theory of criminal legislation has examined in detail, actions that cause harm to other people, and actions that are (deontologically) wrong to do, are extensionally overlapping sets in the sense that many harm-causings are wrong and many wrongs are harm-causings.²⁴ Yet the relationship is one of overlap only,²⁵ not of congruence; there are, after all, both harmless wrongs and wrongless harm-causings.

The stringency of deontological obligation is thus only partly a function of the badness of states of affairs caused (or failed to be prevented, in the case of positive obligations) by an actor subject to such obligation. What else goes into the determination of stringency of deontological obligations is an interesting question. Joel Feinberg's "free-floating evils" provide convenient examples with which to work:²⁶ When one defames the reputation of the dead, or when one tortures an animal, abuses a corpse, sponsors a dwarf-tossing contest, or despoils a pristine lake, these can be done in circumstances where no nonconsenting person is harmed. Yet these can be seriously wrongful actions to perform, nonetheless. Of course, one might urge that there still are bad states of affairs (making the actions causing them wrong) in these examples. Yet in some of such examples, at least, the badness of the state of affairs is just the doing of the wrongful action. And even in cases where there are independently bad states of affairs, the degree of wrongness of the action seems imperfectly responsive to the degree of badness of those states of affairs.

An alternative construal of such examples would be to think that the degree of wrongness for each of them is largely a function of the degree of aretaic failure (lack of virtuous character or disposition) necessarily present in the actor who does such actions. Such construal is not the view that these are only instances of aretaic failure and that these are not instances of deontic failure (breach of obligation). This last idea would be contrary to our common sense about these actions: We are obligated not to torture animals, not to defame the dead, etc.; it is not just that we

²⁴ Joel Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988).

²⁵ Insofar as the stringency of deontological obligation not to do some action A *does* depend on the badness of the consequences of A, that involves no contradiction or even unseemliness for the deontologist. As Phil Montague nicely lays out, one can allow consequences of an act to be wrong-making features of that act without turning one's obligation not to do such an action into a consequentialist obligation. Montague, "Moral Dilemmas and Moral Theory: Towards a Viable Deontology."

²⁶ Joel Feinberg, "Legal Moralism and Free-Floating Evils," *Pacific Philosophical Quarterly* 61, no. 1/2 (1980): 122–55.

lack virtue when we do these things. The idea considered here is thus not that the aretaic displaces the deontic but rather that the aretaic measures the deontic. More precisely, the idea is that the stringency of the admittedly existing deontic obligation depends on the strength of the virtue flouted by actions breaching such an obligation. Yet this construal requires a reduction or dependency of the deontic on the aretaic that many, including myself, have rejected.²⁷

This last construal suggests a third: Perhaps the degree of stringency of a deontological obligation is partly dependent on the degree of agential involvement of the actor breaching such obligation. Agent-relative obligations depend mightily for their scope on a specification of when human agency is involved in their violation. Constituting such agency (as I have urged elsewhere in detail)²⁸ are factors such as: acting (versus failing to prevent); doing (versus allowing); intending (versus foreseeing or risking); causing (versus merely accelerating); causing by initiation (versus causing by redirecting); causing (versus enabling another to cause); etc. The standard take on these factors defining agential involvement is that they operate bivalently, so that the actor who acts (not omits or allows) so as to cause (not accelerate, enable, or redirect) an evil he intends (not foresees or risks) to bring about violates the relevant deontological norm. An alternative, nonstandard take, however, is to construe such factors as operating in a scalar manner: The more one acts, causes, or intends, the more agential involvement there is and the more stringently one is obligated not to do the act in question.

My own form of deontology does not construe these agential involvement factors as scalar in their implications for the scope of obligation.²⁹ Yet, even if one went the other way here, such a construal would not fully answer the puzzle about the stringency of deontological obligation. Something besides degree of harm done and degree of agential involvement would still be necessary to fully determine stringency of deontological obligation.

So what the properties are on which the stringency of deontological obligation rests is a bit of a mystery. Undeniable, however, is the fact that we assign differential stringency to deontological obligations and that such stringency is not simply a function of the badness of consequences.

²⁷ I have long resisted any Hume-like reduction of the deontic to the aretaic. See, e.g., Moore, "Choice, Character, and Excuse," *Social Philosophy and Policy* 7 (1990): 219–48, reprinted and revised as Moore, *Placing Blame*, chap. 11. In Michael Moore, "Liberty and Supererogation," *Annual Review of Law and Ethics* 6 (1998): 111–43, I explore the distinctively aretaic categories of evaluation – the supererogatory, the suberogatory, the quasi-erogatory, and the indifferent – and argue for their nonreducibility to the deontic categories of evaluation, the obligatory and the permissible.

²⁸ For a convenient overview with citations to other writings, see Moore, "Responses and Appreciations."

²⁹ Moore, *Causation and Responsibility*.

22.2.6 *Because of Their Common Possession of the Property of Stringency, Obligations Are Not Incommensurable When They Conflict So That the Most Stringent Obligation Determines Right Action*

The obvious thing to say about how one should act when facing a conflict of obligations such as that faced by Sartre's student is that one should obey the most stringent obligation. If the obligation to fight injustice is more stringent than the obligation to take care of an ailing parent, then doing the former and not the latter is the right course of action. This obvious enough recommendation does not depend on there being some general, lexical ordering of all obligations. Sometimes there may be a lexical ordering between two obligations, but even when there is not, one obligation, given the features present on some particular occasion, may be more stringent than another. My old analogy for this point was with weight: Even if it is indeterminate whether Frenchmen are on average heavier than Englishmen, that would be no ground on which to doubt that some particular Frenchman is either heavier or lighter than some particular Englishman.³⁰

Larry Alexander worries that this happy resolution of conflicting obligations is impossible because the obligations in conflict are incommensurable with one another. Presumably Alexander does not think this about conflicts *inter se* between prima facie consequentialist obligations – for in such cases the common coin is the goodness/badness of the consequences governing the stringency of each prima facie obligation, so that one can simply net out the balance of consequences to see what one ought to do. Likewise, presumably Alexander does not think that conflicts *inter se* between prima facie deontological obligations are incommensurable either – for, as a monist in his deontology (where all deontological obligations and permissions are governed by one principle, the means principle), Alexander is seemingly committed to there being no unresolvable conflicts of obligations here either.³¹

The main incommensurability worry relevant here is thus about conflicts between consequentialist obligations and deontological obligations. The worry, crudely put, is that this involves comparing apples and oranges to determine, say, the best fruit. Put less metaphorically: Although both deontological and consequentialist obligations

³⁰ Michael Moore, "Moral Reality," *Wisconsin Law Review* 1982, no. 6 (1982): 1061–156, 1152n204, reprinted in Moore, *Objectivity in Law and Ethics: Essays in Moral and Legal Ontology* (Aldershot: Ashgate, 2004), 3–98.

³¹ For deontologists, such as myself, who are pluralists and not monists about the variety of our deontological obligations, things are not so happily unproblematic. The incommensurability of conflicts *inter se* of deontological obligations, however, is not the main worry relevant to the ad hoc worry about threshold deontology. (Incidentally, monists like Alexander may well have to say something more about conflicts of prima facie deontological duties – for even their one deontological principle can lead to conflicts, such as those created by inconsistent promises.)

come with differential degrees of stringency, what determines that stringency for each is different, as we have seen. The stringency of consequentialist obligation is wholly a function of the goodness/badness of consequences, whereas the stringency of deontological obligation is only partly a function of such consequences.

One cannot eliminate this difference between the two kinds of obligation by transforming the non-consequence-based determinants of deontological stringency into some agent-neutral values. Suppose, for example, one were to urge that the degree of agential involvement (a determinant of deontological stringency on the scalar view described earlier) simply be added to the badness of a state of affairs to produce a composite, a kind of agency-weighted badness for states of affairs. This would be the view that the state of affairs of Jones being killed by Smith is worse than the state of affairs of Jones dying – for the former state of affairs has the killer’s agential involvement adding to the badness of Jones’ death, whereas the latter has only the badness of the death.

This is a hopeless reconciliation because it transforms deontological obligations into consequentialist obligations. It purchases a common denominator for stringency of obligation at the price of eliminating deontology. For what such a move produces is a kind of agency-weighted consequentialism.³² Whereas a truly deontological view of ethics – on either the bivalent or scalar view of agential involvement – does not cash out the determinants of deontological stringency into the goodness or badness of states of affairs. To keep deontology intact, one needs to preserve the “paradox of deontology,”³³ viz., that an agent is categorically obligated not to do some act A even if A produces the best consequences, all things considered.³⁴

So we are unable to cash out the bases of deontological stringency to some bad states of affairs (which one could then net out against the bad states of affairs determining the stringency of conflicting consequentialist obligations). Still, the familiar moral experience of all of us is that we treat the stringencies of these two kinds of obligations as commensurable. We do this when we make decisions in situations of conflict: If two children, both strangers to me, are drowning, but I can satisfy my (consequentialist) obligation to save them only if I breach my (deontological) obligation to save my own child, we are not bereft of an answer as to what we should do. My own view is that my agent-relative obligation to my own child is more stringent than my agent-neutral obligation to the two stranger children, so I ought to save my

³² Amartya Sen “Rights and Agency,” *Philosophy and Public Affairs* 11, no. 1 (1982): 3–39.

³³ Alexander and Moore, “Deontological Ethics.”

³⁴ This feature of deontology is why there is such a difference between one’s obligation not to *do* some forbidden action (such as torture) and merely noncausally enabling another to do such an action. In the latter case, your obligation is consequentialist because you treat the other violating the deontological norm against torture as just a bad state of affairs you are obligated not to cause but not as an act of yours that you were categorically obligated not to do or enable.

kid.³⁵ Even if you disagree with me here, such disagreement would show that you too commensurate your consequentialist obligation against your deontological obligation. The only disagreement that wouldn't show this is for you to adopt Sartre's maddeningly unhelpful stance: You must just decide because there is no prioritizing one obligation over another.

The other part of our moral experience relevant here is how we regard degrees of wrongdoing for purposes of determining retributive desert and retributive punishment. We do not divide our proportionality principle up into consequentialist desert schedules and deontological desert schedules. Rather, we have one mode of punishment (typically deprivation of liberty) and we mete out that one mode of punishment proportionately to one, univocal desert. By my lights, the mother who breaches her obligation to save her own child deserves more punishment, did more wrong, than another who breaches her obligation to save two children that were strangers to her. And again, even if you disagree with me here, that would equally well show that you too place the two deserts on a common scale and compare them. Comparable deserts, comparable degrees of wrongdoing, comparable breaches of obligation, comparable degrees of stringency in the obligations breached.

*22.2.7 The Degree of Stringency in One's Overall, End-of-the-Day Obligation
Is a Netting of the Stringency of the Winning Prima Facie Obligation
over the Stringency of the Losing Prima Facie Obligation*

One of the intuitions on which Alexander preys is the large moral difference (in degree of wrongdoing and thus of blameworthiness) that some small difference (in differential stringency between two conflicting obligations) can make.³⁶ Arneson rightly rejoins that slight differences in the stringency of competing obligations in fact make only slight differences in degrees of wrongdoing and blameworthiness for breach.³⁷ I here register my agreement with Arneson.

In the rescue situation posited earlier, even if I am right that a mother should save her own in preference to saving two stranger children, the mother who gets it wrong doesn't get it very wrong. More accurately put, the stringency of her obligation to save her own child gets reduced by the stringency of the obligation she flouts, viz., the obligation to save the two stranger children. All-out obligation doesn't "forget" one-half of that of which it is made,³⁸ namely, the weaker obligation that loses out.

³⁵ Not a purely hypothetical or academic question for me, incidentally, albeit one faced by me in slightly less draconian circumstances.

³⁶ Alexander, "Deontology at the Threshold."

³⁷ Arneson, "Deontology's Travails."

³⁸ This is reminiscent of the way in which aretaic ethics does not "forget" the losing obligation when the more stringent obligation is acted upon. Years ago Bernard Williams persuasively charted how a

It still counts for something that the mother who fails to save her own child did so to save two stranger children. She did less wrong – lots less wrong – than the mother who deliberately fails to save her child when the lives of no stranger children hang in the balance.

Matching degrees of wrongdoing to net differences in the stringency of conflicting obligations removes any charge of arbitrariness directed against threshold deontology because of its disproportionate treatment of close cases. Small differences in the net stringency of competing obligations make for small wrongs when the actor chooses against the more stringent obligation, and this is as it should be.

22.2.8 *There is No Lexical Priority of Deontological Obligations over Consequentialist Obligations When They Conflict; Since All Conflicts of Obligation Are Determined by the Relative Stringency of the Obligations in Conflict, Sometimes the Consequentialist Obligation Will Prevail*

There are three versions of the lexical priority claim that should be distinguished: (1) a strong version, according to which every instance of every deontological obligation wins out over (is more stringent than) every instance of every consequentialist obligation; (2) a moderate version, according to which there are some deontological obligations (the very stringent ones like that against torture), every instance of which wins out over (is more stringent than) every instance of every consequentialist obligation; and (3) a weak version, according to which some instance(s) of some deontological obligation(s) win out over (are more stringent than) every instance of every consequentialist obligation.

None of these three versions of priority is right. As to version (1), if not lying and not breaking a promise are taken to be the content of deontological obligations (as they often are), then it is implausible in the extreme to think that some consequentialist obligation (e.g., to save a stranger from being murdered by the murderer enquiring as to the stranger's whereabouts)³⁹ could not outweigh them on some occasion. Version (2) is more plausible; many think that obligations like that forbidding torture are “absolute,” that is, not subject to being overridden no matter what the consequences. Yet the torture debate reveals that this too is not true. Where discussants were saying what they believed was true – as opposed to saying what they thought would have the best consequences – most would admit that even torture

decent and virtuous person still feels regretful in such situations, even as he recognizes that he made the right choice of action. Bernard Williams, “Ethical Consistency,” *Proceedings of the Aristotelian Society Supplementary* 39 (1965): 103–38.

³⁹ Kant's familiar example in his essay, “On the Supposed Right to Lie from Altruistic Motives,” originally published in 1797.

could be justified by the avoidance of immediate and horrendous consequences.⁴⁰ And version (3) ultimately is no more plausible than version (2): Even torture done in horrific manners (“torture-heavy” as opposed to “torture-lite”) might be justified by our obligation to attain good enough consequences.

In any case, denial of all three versions of the priority of deontological obligations over consequentialist obligation amounts to assertion of the truth of threshold deontology. And the point here is not to reargue the intuitive plausibility of threshold deontology. We are here assuming that threshold deontology is intuitive; the ad hocery worry is that it is only that. Rather, the ambition of this article is to show how the threshold deontological conclusion flows naturally from familiar positions in deontological ethics. These positions are the ones I have argued for above: that consequentialist obligations are an integral part of deontic ethics, conflict of obligations is a fact of life for us as moral agents, obligations must be differentially stringent if their force in such conflicts is to have rational resolution, and such stringency is in any case required to account for our very intuitive sense that some wrongdoing is more wrong than others; that while stringency of consequentialist obligation has a simpler metric than does stringency of deontological obligation, we trade each off against the other in situations of conflict and in situations requiring judgments of comparative desert; also that the most stringent *prima facie* obligation determines what our overall obligation must be, and the wrongfulness of breach of that overall obligation takes into account not only the stringency of the *prima facie* obligation that one violated but also the stringency of the *prima facie* obligation one conformed to by so acting. These considerations do not “prove” threshold deontology to be true; but on the reasonable supposition that no obligation or kind of obligation always prevails in situations of conflict with other obligations – i.e., the supposition that no version of the lexical priority thesis is true – they make threshold deontology a reasonable conclusion from a perfectly familiar and plausible view of ethics.

Indeed, we can now see that threshold deontology is a natural part of any plausible deontology. Just as deontology’s distinctive “categorical force” amounts to no more than the fact that ordinarily deontological obligations are more stringent than are consequentialist obligations, so that when they conflict the deontological obligation prevails, so deontology’s “threshold feature” amounts to no more than the fact that extraordinarily consequentialist obligations can be more stringent than deontological obligations, so that when they conflict the consequentialist obligation prevails. My “three-layer cake” view of deontic ethics – layer one, an omnipresent

⁴⁰ I take this to be true of my long-term interlocutor on this topic, Jeremy Waldron. See Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House,” *Columbia Law Review* 105, no. 6 (2005): 1681–750.

background of consequentialist obligations, side-constrained by layer two, deontological obligations and permissions, itself overridden by layer three, the consequential trumping of deontology over some threshold⁴¹ – is only an epistemic, not an ontological, rendering.⁴² Ontologically, there is but one layer to this cake: We often face conflicting prima facie obligations, each possessing some measure of stringency; this stringency is univocal even when one of such obligations is consequentialist and the other is not; unsurprisingly, the most stringent prima facie obligation prevails in situations of conflict between two or more obligations, recognizing that most often deontological obligations are most stringent but also that sometimes that is not the case.

Threshold deontology, like most things in ethics, comes in different flavors. It remains to describe briefly the flavor of threshold deontology these considerations support. A main line of division that I have addressed before⁴³ is between those threshold deontologists who regard the threshold as a fixed amount of bad consequences and those who regard it as a “sliding scale,” one where the stringency of the prima facie deontological obligation violated determines the amount of bad consequences needed to justify violating it. I have before defended the sliding scale version of threshold deontology, and this is the version Alexander too finds more plausible, although he calls it the “ratio” version. Rather clearly, such a version is the one supported by my invocation of the just described eight familiar features of ethics. If threshold deontology is no more than the idea that the more stringent of two conflicting, prima facie obligations prevails (and the caveat that there is no lexical priority by kinds of obligations), then a quite stringent deontological obligation will require an even more stringent consequentialist obligation if the latter is to prevail; likewise, a less stringent deontological obligation will require less stringency in the competing consequentialist obligation for the latter to prevail.

22.3 CONCLUSION

Once one answers the big question of deontic ethics – whether one is a consequentialist or a deontologist – and answers that question in favor of deontology, it might seem like a minor, subsidiary question as to whether one should be an absolutist or a threshold deontologist. Yet this is not how the question of threshold deontology presents itself to me. Deontology without thresholds – whether my agent-centered kind or Alexander’s patient-centered kind – is too counterintuitive to

⁴¹ The three-layer cake metaphor is used to describe my view in Moore, *Causation and Responsibility*.

⁴² This is to construe the “prima facie-ness” of prima facie duties as epistemic and not ontological. For the difference, see Moore, “Responses and Appreciations.”

⁴³ Moore, *Placing Blame*, 722 n132.

be countenanced as a real possibility. If the choice comes down to consequentialism versus absolutist deontology, threshold deontology not being an option, then some form of consequentialism must be the correct ethics. So the stakes with threshold deontology are high, as high (because the same) as the stakes about deontology generally.

My aim in this paper has been modest and preliminary. It is not to argue decisively for there being thresholds within deontology, thresholds over which consequentialism again holds sway. It is rather to make the idea that there could be such thresholds seem natural and familiar. I seek thus to lower the burden that must be met to justify belief in threshold deontology – not to meet that burden by actually justifying threshold deontology itself.