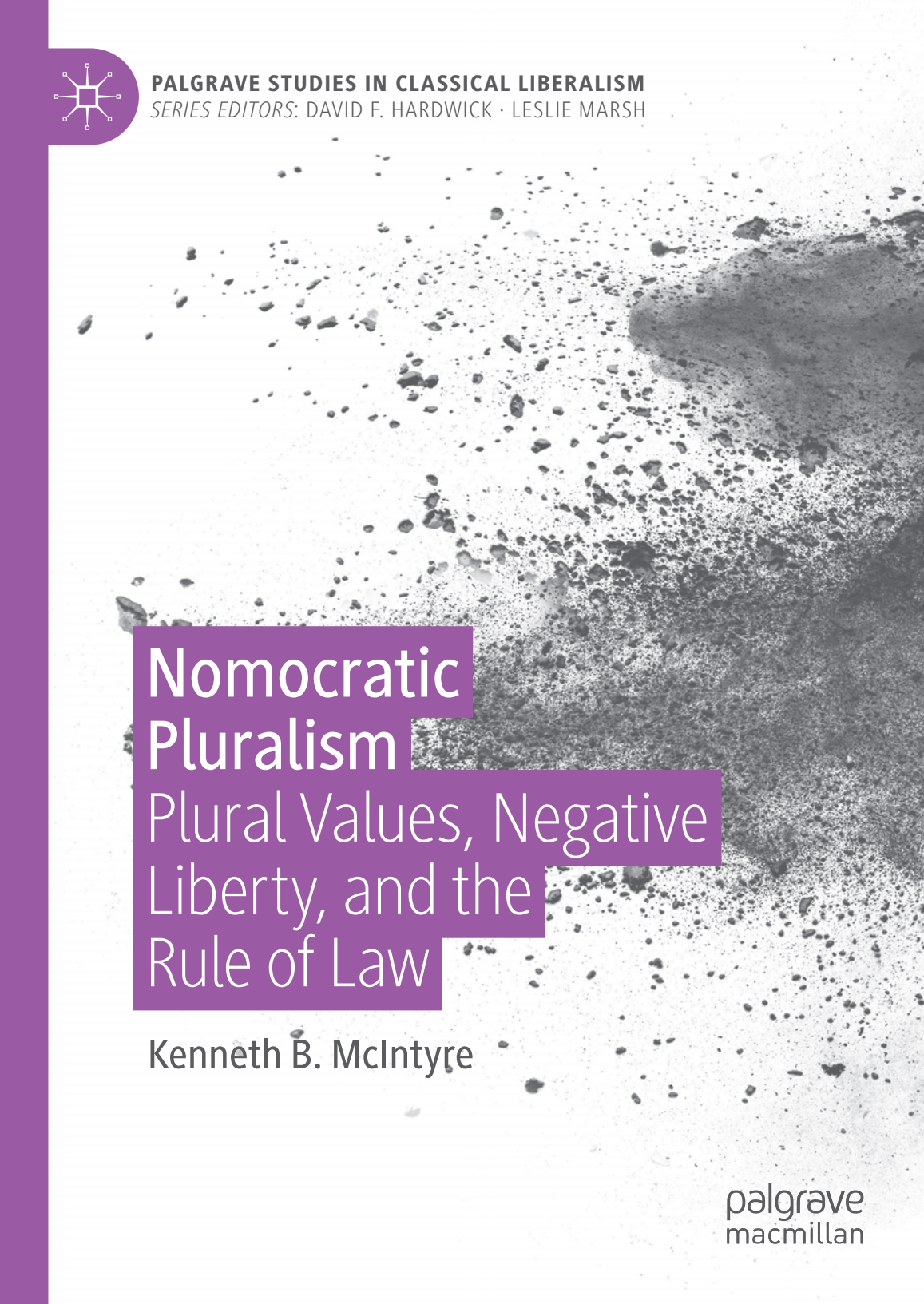

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Nomocratic Pluralism

Plural Values, Negative Liberty, and the Rule of Law

Kenneth B. McIntyre

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'If you can't annoy somebody, there's little point in writing.'
Kingsley Amis

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Praise For *Nomocratic Pluralism*

"Kenneth McIntyre's *Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law* is an excellent critique of many of the misconceptions spread by analytic philosophy about the nature of morality. It demonstrates, in exquisite detail, why so many analytic philosophers' work in this area cannot and does not reflect the realities of how people reach moral decisions while living peacefully with each other, nor do they provide any positive guidance for improving society or government. This book provides a coherent and realistic philosophical explanation of why nomocratic pluralism and negative liberty provide the only stable way of enabling peace and tolerance among different moral views in a plural society."

—Nicholas Capaldi, *Legendre-Soulé Chair in Business Ethics and Professor of Management, Loyola University New Orleans, USA*

"Kenneth B. McIntyre's *Nomocratic Pluralism* couldn't come at a more important time. As society fractures, journalism disintegrates into rank sensationalism and faux outrage, and public discourse degenerates into angry threats and shouting matches, the importance of nomocratic order and value pluralism is all the more apparent. We need to accommodate differences and diversity to avoid violence and coercion. McIntyre's astute reasoning is an important step in that direction."

—Allen Mendenhall, *Associate Dean, Thomas Goode Jones School of Law, Faulkner University, USA and Executive Director of the Blackstone & Burke Center for Law & Liberty*

"A very useful and original contribution to the study of morality from a philosophical/political theory perspective. McIntyre's work far outstrips recent scholarship and presents a coherent view of the field and cogent criticisms based on the realities of human interaction and in context with functional and functioning governmental habits. I very much enjoyed reading this book."

—Nadia E. Nedzel, *Reilly Family Professor of Law, Southern University Law Center, USA*

"McIntyre's incisive study of our current political climate rejects the moral monism that remains the dominant approach to cultural conflict and contributes to the poisonous discourse that characterizes the twenty-first century. Our politics offers the impression of pluralism, to the extent that diverse viewpoints exist, but these views tend to reject the legitimacy of their political rivals. In a move reminiscent of Aristotle's ethics, McIntyre attempts to carve out a path to real political pluralism and human flourishing through the development of practical reasoning and connoisseurship, which involves not only expertise but also sincere concern for solving cultural problems rather than promoting a single way of life."

—Jack Simmons, *Professor of Philosophy, Georgia Southern University, USA*

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CHAPTER 1

Introduction

Abstract This chapter offers a brief introduction and overview of the various arguments that will be made in the body of the work. It begins with a critique of moral monism, an elaboration of the character of value pluralism, and an examination of the implications of value pluralism for political life, suggesting that a self-conscious value pluralist approach to politics is one way of dealing with plural monisms. This chapter suggests that the acceptance of pluralism involves placing certain limitations on what is an acceptable form of government and what functions governments ought to be legitimately performing.

Keywords Nomocratic pluralism · Value pluralism · Negative liberty · The rule of law · Moral monism · Moral pluralism · Isaiah Berlin · Michael Oakeshott · Friedrich Hayek · David Wiggins · Aristotle · Incompatibility of values · Incommensurability of values · Deontology · Consequentialism · Utilitarianism · Moral philosophy

While Western liberal democracies have always been characterized by their political and moral pluralism, this pluralism has been primarily an empirical fact that many have seen as unfortunate. Despite the obvious existence of individuals and groups who hold a variety of moral, social, and political

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values or ideals in these societies, most theorists, and just as importantly, most political partisans and activists have rejected value pluralism, which is the claim that such values or ideals are multiple, various, incommensurable, and often incompatible with each other. Indeed, value pluralism, as a way of understanding the character of moral life, is still foreign to most participants in Western political life. Further, though the mass immigration of non- or anti-liberal non-Western peoples into Western countries has accentuated and amplified the empirical pluralism of Western states, it has done so by introducing new forms of religious and moral monism (i.e., the claim that "authentic" values and ideals are completely consistent, compatible, and commensurable, and that a single decision procedure can be discovered which will solve moral questions or problems) so that the problem that Western political communities now face is not the problem of self-conscious pluralism and its implications for political life but the problem of proliferating plural monisms and their implications for political life. In this book, I offer a brief critique of moral monism, an elaboration of the character of value pluralism, and an examination of the implications of value pluralism for political life, suggesting that a self-conscious value pluralist approach to politics is one way of dealing with plural monisms.[1] The book will be a contribution to the ongoing philosophical conversation about value pluralism and its relation to political life. Its uniqueness lies in its insistence that the acceptance of pluralism does involve placing certain limitations both on what is an acceptable form of government, and on what functions governments ought to be legitimately performing.

[1] P.F. Strawson provides a concise statement of the general sentiment from which this book arises. He writes that, "What will be the attitude of one who experiences sympathy for a variety of conflicting ideals of life? It seems that he will be most at home in a liberal society, in a society in which there are variant moral environments but in which no ideal endeavors to engross, and determine the character of, the common morality. He will not argue in favor of such a society that it gives the best chance for the truth about life to prevail, for he will not consistently believe that there is such a thing as the truth about life. Nor will he argue in its favor that it has the best chance of producing a harmonious kingdom of ends, for he will not think of ends as necessarily capable of being harmonized. He will simply welcome the ethical diversity which the society makes possible, and in proportion as he values that diversity he will note that he is the natural, though perhaps sympathetic, enemy of all those whose single intense vision of the ends of life drives them to try to make the requirements of the ideal coextensive with those of common social morality." P.F. Strawson, "Social Morality and Individual Ideal," *Freedom and Resentment and Other Essays* (London: Routledge, 2008) 49.

The practice of moral philosophy has been marked as much by attempts to solve moral problems as philosophical ones. These attempts have consisted of the promulgation of various decision procedures or hierarchies of value which offer an answer to the question, what should I or we do? Moral monism can be understood as the notion that some singular, unique, universal, and timeless standard can be found that would answer all moral questions. In recent years, a few moral philosophers have begun to question the viability of moral monism as a philosophical project.[2] These writers have claimed that the goals of moral monism are unreachable for a variety of reasons, including the following: moral/practical problems cannot be resolved by philosophical means; the scope of morality is limited, and moral considerations do not always trump other considerations; and even if the scope of morality is unlimited or if it is understood to trump other considerations, it is unlikely that any systematic decision procedure will cover any and every situation. Value pluralism, which is the term that has come to describe the position of these writers, is characterized by the claim that values (including moral ones) are both incompatible (i.e., there are multiple things that humans value and that are objectively valuable, and these things do not form a coherent whole but conflict with each other) and incommensurable (i.e., that values are not completely comparable according to a single metric, such as pleasure or preference satisfaction). If, as I shall maintain, value pluralism is an adequate way of understanding the nature of the practical lives of human beings, what implications does an acceptance of it carry for political institutions?

[2] See, among others, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Michael Stocker, *Plural and Conflicting Values* (Oxford: Clarendon Press, 1990); David L. Norton, *Personal Destinies: A Philosophy of Ethical Individualism* (Princeton: Princeton University Press, 1976); Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy, Updated Edition* (Cambridge: Cambridge University Press, 2001); Annette Baier, *Postures of the Mind: Essays on Mind and Morals* (Minneapolis, MN: The University of Minnesota Press, 1985); Edmund L. Pincoffs, *Quandaries and Virtues: Against Reductivism in Ethics* (Lawrence, KS: The University Press of Kansas, 1986); Stuart Hampshire, *Innocence and Experience* (Cambridge, MA: Harvard University Press, 1989); Isaiah Berlin, "Two Concepts of Liberty," *Liberty*, Henry Hardy, ed. (Oxford: Oxford University Press, 2002) 166–217; John Kekes, *The Morality of Pluralism* (Princeton: Princeton University Press, 1993); Charles Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987); and Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985).

There are several ways that value pluralists have approached politics, and I will examine a few of them before offering my own account of what I will call the nomocratic pluralist state. Some pluralists, like John Gray, claim that the acceptance of the validity of value pluralism offers little or no direction concerning specific political values or institutions. These modus vivendi pluralists reject the traditional connection of value pluralism with liberalism, in the most capacious sense of that term, and, thus, reject the primacy of liberty altogether, considering political life to be a way to manage empirical pluralism or plural monisms. A second approach, manifest in the work of Thomas Nagel, claims that equality ought to be the primary political value for pluralists, and such egalitarians conceive of the state as a managerial enterprise for achieving material equality. A third approach, exemplified in the work of Isaiah Berlin, argues that liberty, especially negative liberty, is one of the most important political values associated with value pluralism, but it is merely one value among others. This generic liberal pluralism can also be divided into, on the one hand welfare liberal pluralism, which can be seen in the work of Joseph Raz, and which emphasizes the achievement of a strong version of individual autonomy as the goal of the pluralist state, thus justifying significant redistributionist welfare policies. And, on the other hand, classical liberal pluralism, which can be seen in the work of thinkers like Gerald Gaus, which claims that self-conscious value pluralists would place a rebuttable priority on negative liberty, because such liberty allows individuals to fulfill their commitments and obligations, and pursue their own particular conceptions of a good human life.

I will argue that classical liberal pluralists are substantially correct, and that value pluralists would reasonably place a high priority on negative liberty. Further, I will claim that a species of liberal pluralism which I will call nomocratic pluralism offers the best institutional instantiation of the defense of negative liberty. The nomocratic pluralist state would reject positive liberty as a political value, and place a high, but not absolute, priority on negative liberty as a political value. Finally, the nomocratic state under the rule of law, with law understood as noninstrumental, impersonal, and general rules which condition but do not prescribe the choices of citizens with their own commitments, plans, and projects, posits a third concept of liberty. Liberty under the rule of law consists of the fact that the rule of law as understood here does not require individuals to take specific substantive actions, but only obligates them to act

according to a formal condition or conditions while making substantive decisions and/or taking substantive actions.[3]

I will conclude this first introductory chapter by offering an overview of the arguments in each subsequent chapter. In Chapter 2, I offer a critique of moral monism, suggesting that the aspirations of moral monism are unreachable for a variety of reasons. Most importantly, moral monists fail to offer an adequate single decision procedure which would resolve all moral conflicts, and, since the production of such a decision procedure is the purpose of monistic moral philosophies, the failure to produce a convincing version of one is fatal to the monistic project. In the first section of the chapter, I provide a brief outline of the typical characteristics of moral monism. These include the generation of a single decision procedure (SDP) which is supposed to provide a universal, rational, general, and impersonal solution to all moral problems or conflicts; a hierarchy of values which complements the SDP; a rejection of the distinction between theoretical and practical reason; and the claim that moral considerations always override any other considerations. In the remaining sections of Chapter 2, I examine the work of Alan Gewirth and R. M. Hare, representatives respectively of the two most prominent and influential contemporary versions of moral monism, deontology, and utilitarianism. While offering an exposition of Gewirth's and Hare's theories as examples of moral monism, I will also suggest why moral monism is an inadequate schema within which to understand the moral lives of human beings.

In Chapter 3, I consider the sources of moral complexity and conflict, and offer the first part of my account of value pluralism. Like other versions of value pluralism, mine includes a discussion of the nature and variety of human values and valuation, and also a series of claims about the relationship between or among values. I argue that values are plural, that there are nonmoral values as well as moral ones, that these values often conflict, and that they are often incommensurable. For example, there are different moral or value systems in the world and in world history (e.g., Homeric honor, the Victorian gentleman, Medieval chivalry, contemporary liberalism), and every one of them is necessarily incomplete

[3] As will be apparent to readers familiar with the following thinkers, my development of a theory of the nomocratic pluralist state owes much to the work of Gerald Gaus, Erick Mack, Loren Lomasky, Friedrich Hayek, Isaiah Berlin, John Kekes, Lon Fuller, and Michael Oakeshott.

in that none have realized, nor possibly can realize perfect human goodness, and each offers a set of values not reducible to any other; second, that within value systems, there is inevitable conflict between values (e.g., liberty v equality, love v independence, justice v mercy), and that such conflict occurs because these values are incompatible and incommensurable (i.e., they are not reducible to a single metric); and, third, that such conflicts are inevitable even within the moral life of individuals, who have to make choices among multiple forms of the good life. Thus, there is no one single hierarchical value or principle that rules them all, but a variety of valuable choices, both moral and nonmoral, and a variety of morally acceptable forms of life.

In Chapter 4, I examine the nature of practical reason, the centrality of personal or subjective commitments and purposes to choices about good human lives, and the minimum moral content of good human lives. The conclusion that human values are often incompatible and incommensurable suggests that a convincing account of value pluralism requires a different conception of practical reason than the conceptions offered by monistic moralities. Proponents of monistic conceptions of practical reason tend to model these conceptions of reason on the kind of reasoning associated with the natural sciences and mathematics. Such conceptions posit that reasoning is a unity, so practical reasoning, like all reasoning is abstract, universal, objective, and impersonal. This kind of scientistic rationalism conflates practical reason and theoretical/scientific reason, thus, misconstruing the moral and nonmoral values of human beings, since these values are not abstractions, but are instead complex and often particular to specific individuals. Nonetheless, if a comparison between values, possible actions, and purposes is impossible, that suggests that there can be no rational choice made concerning values, purposes, or actions. The version of practical reason presented in Chapter 4 involves a combination of the traditional distinction between reasoning about things subject to change and things not subject to change, a neo-Aristotelian conception of virtues and skills, and an emphasis on the particularistic or subjective character of valuation, both moral and nonmoral.

In Chapter 5, I begin my exploration of the implications of value pluralism for political theory and practice. I suggest that two of the most important are that, for those who accept value pluralism, the primary political value will be the kind of negative liberty that allows individuals to fulfill their commitments and pursue their projects, and the primary political virtue will be tolerance of the commitments and projects of

others. However, before elaborating these claims, I examine the way that other value pluralists have treated political questions, focusing on how they conceive of the place of liberty in a pluralist state. First, there are modus vivendi pluralists who reject the notion that the acceptance of pluralism suggests that negative liberty would be the primary priority of a pluralist community, and, indeed, are skeptical of the notion that the acceptance of pluralism necessarily entails any specific political regime or set of institutions. Second, there are egalitarian pluralists who reject the notion that negative liberty would be the most reasonable priority of a pluralist community, instead insisting that political, legal, and material equality is central to the adequate use of liberty and the promotion of pluralism, and, thus, ought to be the primary priority of a pluralist community. I examine these claims through the work of prominent exponents of each of them, with John Gray as the modus vivendi pluralist and Thomas Nagel as the egalitarian pluralist.

In Chapter 6, I discuss two varieties of liberal pluralism: welfare liberal pluralism and classical liberal pluralism. I argue that, between welfare liberal pluralism, with its focus on personal autonomy and positive liberty, and classical liberal pluralism, with its focus on negative liberty and toleration, self-conscious value pluralists would reasonably prefer the latter. Welfare liberal pluralists place too much emphasis on personal autonomy as a pre-political value, and thus also claim that individuals have positive liberty concerns, which necessarily involve paternalistic and coercive governmental measures which interfere with the commitments, plans, and projects of their fellow citizens. Value pluralists would reject the notion that any pre-political value overrides all others, and instead reasonably conclude that the protection and promotion of negative liberty ought to be considered as the rebuttable first priority of an authentically pluralist political community, and that positive liberty concerns with values like autonomy are best left to the individuals in the community themselves. The public morality of a political/legal community composed of self-conscious value pluralists would consider the protection of negative liberty as the first responsibility and the *differentia* of a pluralist government. Such a public morality consists of the rules that constitute what counts as peaceful coexistence, including general commitments to tolerance of, and forbearance and impartiality toward the private morality of others, which citizens owe to each other as citizens and which the government owes to its citizens as citizens. As a complement to negative liberty as the unique responsibility of a self-conscious pluralist government, the

first virtue and the *differentia* of the public morality of a pluralist community would be toleration of others, especially toleration of what others choose to do with their liberty.

In Chapter 7, I complete my treatment of the implications of value pluralism for political theory and practice. I offer a specification of liberal pluralism which deals with the institutionalization of the protection of negative liberty by law. I refer to this further specification of liberal pluralism as nomocratic pluralism. In a nomocratic pluralist state, the institutional manifestation of the protection of negative liberty is a regime governed by the rule of law. I develop the conception of the rule of law in connection with the specific type of political community that would be acceptable to self-conscious value pluralists. As suggested in Chapters 5 and 6, pluralists would reject any notion that the political community ought to be understood as a collective and cooperative arrangement in pursuit of a shared substantive purpose or set of purposes. Instead, the political community is best understood as a means of peaceful coexistence among people with their own lives to live. The role of the government is to maintain the articles of peaceful coexistence, which are noninstrumental rules which do not command specific performances but, instead, condition the self-chosen actions of individual citizens. I call this regime a nomocratic pluralist state under the rule of law. Thus, the type of law connected with this sort of regime is limited to laws which are noninstrumental and constitute the conditions in which individuals pursue their own purposes. The institutional instantiation of the rule of law provides an arena of peaceful (more or less) coexistence (more or less) for people who do not share a single substantive purpose and who do not necessarily (but may) share beliefs about or commitments to a single version of what makes for a good human life. This conception of the state is the most reasonable way to address both the empirical reality of pluralism or diversity, and it is also what self-conscious value pluralists would recognize as the character of a pluralist state. Finally, the nomocratic pluralist state preserves the negative liberty of its citizens, while also incorporating a further type of liberty, which is liberty under noninstrumental rules.

CHAPTER 2

The Critique of Moral Monism

Abstract This chapter elaborates an extensive critique of moral monism, suggesting that the aspirations of moral monism are unreachable for a variety of reasons. Most importantly, moral monists fail to offer an adequate single decision procedure (SDP) which would resolve all moral conflicts, and, since the production of such a decision procedure is the purpose of monistic moral philosophies, the failure to produce a convincing version of one is fatal to the monistic project. It provides a brief outline of the typical characteristics of moral monism. These include the generation of a SDP which is supposed to provide a universal, rational, general, and impersonal solution to all moral problems or conflicts; a hierarchy of values which complements the SDP; a rejection of the distinction between theoretical and practical reason; and the claim that moral considerations always override any other considerations. It also examines the work of Alan Gewirth and R.M. Hare, representatives respectively of the two most prominent and influential contemporary versions of moral monism, deontology, and utilitarianism.

Keywords Moral monism · Single Decision Procedure · Theoretical reason · Practical reason · Alan Gewirth · R.M. Hare · John Rawls · The Principle of Generic Consistency · Two-level utilitarianism · "Dirty hands" problem · Rule utilitarianism · Act utilitarianism · "Government house" utilitarianism

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In this chapter, I offer a critique of moral monism from the perspective of value or moral pluralism, suggesting that the aspirations of moral monism are unreachable for a variety of reasons. Most importantly, moral monists fail to offer an adequate single decision procedure (SDP) which would resolve all moral conflicts, and, since the production of such a decision procedure is the purpose of monistic moral philosophies, the failure to produce a convincing version of one is fatal to the monistic project.[1] In the first section of this chapter, I provide a brief outline of the typical characteristics of moral monism. These include the generation of a SDP which is supposed to provide a universal, rational, general, and impersonal solution to all moral problems or conflicts; a hierarchy of values which complements the SDP; a rejection of the distinction between theoretical and practical reason; and the claim that moral considerations always override any other considerations.[2]

The two most prominent and influential contemporary versions of moral monism are deontology and utilitarianism, and, in the second and third sections, I examine the work of Alan Gewirth and R.M. Hare. Gewirth offers an exemplary version of deontological moral theorizing, while Hare provides a distinctive utilitarian version of moral philosophy. I will not be concerned so much with the particularities of each thinker's work but with their respective moral theories as representative of the general character of moral monism.[3] However, it will sometimes be relevant to bring out the unique characteristics of Gewirth's or Hare's. Gewirth's moral philosophy is a cogent and comprehensible

[1] H.A. Prichard was one of the first contemporary moral philosophers to offer a critique of monism's commitment to the creation of a SDP. See H.A. Prichard, "Does Moral Philosophy Rest on a Mistake?" *Mind* 21 (1912) 21–37.

[2] In noting the centrality of a SDP for monistic moral theories, I am not claiming that the SDP has to be simple, but merely unified. For example, Rawls' conception of justice has three elements, but they are hierarchically related and are intended to lead to a single objective result. R.M. Hare's two-level utilitarianism is also complex, but intended to resolve all moral questions in an objective and impersonal way.

[3] Both Gewirth's and Hare's moral theories have been the subject of compendious commentary. For an overview of the literature dealing with Gewirth and with Hare, see Edward Regis, Jr., ed., *Gewirth's Ethical Rationalism: Critical Essays with a Reply by Alan Gewirth* (Chicago: The University of Chicago Press, 1984) and Douglas Seanor and N. Fotion, eds., *Hare and Critics: Essays on "Moral Thinking"* (Oxford: Clarendon Press, 1988).