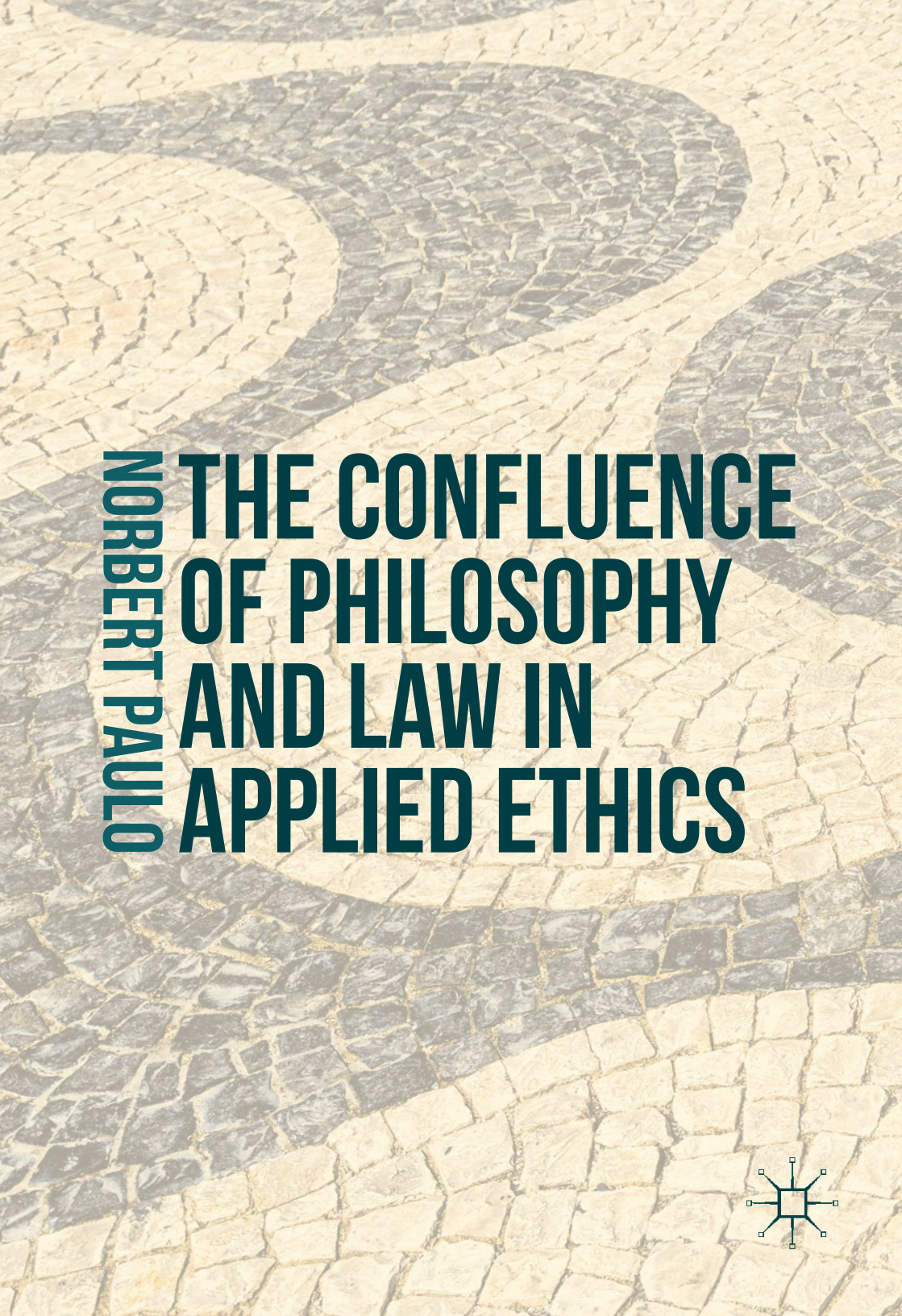
NORBERT PAULO
THE CONFLUENCE OF PHILOSOPHY AND LAW IN APPLIED ETHICS

The Confluence of Philosophy and Law in Applied Ethics

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Contents

Part I

Ethics and Law

Everyone faces moral problems and has to answer moral questions. Must one always be honest, or are there situations where lying is acceptable? Is it blameworthy to eat meat, to wear leather boots, to use cosmetics that have been tested on animals? Is it morally permissible to fly to Paris for a weekend vacation, given the devastating effects of mass air traffic? Are there moral limits to free markets? How about free markets for prostitution or for organs? Is it good to grow human heart valves in pigs?

And these are only general examples with relatively modest and indirect effects, if any, on individuals or their loved ones. Imagine you were the physician in 'Debbie's case' (Anonymous 1988); you are on a night shift in the hospital when someone calls you to see a patient whom you have never seen or heard of before. She is very young, but, as you see on her chart, she is in the terminal stages of ovarian cancer. She obviously suffers great pain. Seeing you, she pleads, 'Let's get this over'. Would you help her getting this over with by administering morphine in a dosage that hastens her death? How, imagining you are Debbie, desperately waiting for relief and angry to be treated as incompetent, do you decide your own fate?

One may invoke traditional moral principles to answer moral questions such as these. One may, for instance, turn to utilitarianism and ask which solution would amount to the greatest happiness for the greatest number. Alternatively, one may consult the categorical imperative and try

to find an action-guiding maxim of which one can also will that it should become a universal law. No matter which traditional moral principle you invoke, they are all way too abstract to determine a clear answer to these concrete questions. Fortunately, around the middle of the twentieth century, applied ethics emerged as a philosophical discipline. Applied ethics developed more specific principles for different fields, such as animal ethics, environmental ethics, business ethics, and bioethics. Bioethics, as the ethics of medicine and bio-technology, is widely seen as having been the first field of applied ethics. Nowadays, it is certainly the most developed; it is, furthermore, immensely important in the public realm. Just think about the bioethical commissions that parliaments, administrations, and health care institutions have established in order to develop clear guidelines for bioethical issues.

This book concentrates on bioethics even though the problem it addresses—and, I believe, the answer it gives—is more or less the same in all fields of applied ethics. This problem is the relation between abstract moral principles and concrete cases. For, even if one takes the four principles routinely invoked in bioethics—respect for autonomy, nonmaleficence, beneficence, and justice—these are still too abstract to determine what one should do in Debbie's or in other hard cases.

Reference

Anonymous. 1988. It's over, Debbie. *JAMA* 259: 272.

1

The Black Box Problem

It seems as if there is a black box between the principles and the particular case. What one can see in large parts of applied ethics is that the input (the moral principles one endorses and the moral problem one faces) and the output (a particular solution to the problem) are known. What one does not get to know, however, is how the latter followed from the former; there is a black box, the internal working (the method) of which remains unknown. The aim of the present book is to clear this black box; its central question is thus: *which are the methods that allow for the transparent and rational resolution of particular problems bearing on abstract and general moral principles?*

I approach this black box problem from a somewhat unusual angle, namely from the point of view of legal theory. The reason for this is simple: jurists do have the very same problem as applied ethicists. Both have to apply norms to particular problems or cases. But whereas applied ethics is a rather recent development, jurists have thought about what I call the black box problem for ages. Judges always had to decide particular cases on the basis of the law; and ever since, legal theorists have asked what judges actually do when they decide cases. Legal theorists have developed, criticized, and refined various methods to make abstract

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norms bear on cases. The basic idea is to inform the debate about methods in applied ethics by looking at the debate about methods in legal theory. There might be some lessons to be learned. Jurists have already made some mistakes and gone down some wrong paths; ethicists should not make the same mistakes again. I thus try to inform the debate on methods in ethics from the point of view of legal theory.

With this book, I wish to contribute to the understanding of what one can do with moral norms—and how one can do it. This contribution complements the usual work of normative ethicists, namely the elaboration and justification of certain abstract principles. I am not concerned with the principles themselves; I ask what one can do with them. Principles and methods go hand in hand. The methodological competence has been largely ignored in ethics, although one needs it whenever we want to make a particular moral judgment—and this has been one of the main motivations for doing ethics in the first place. This motivation became obvious over the past three or four decades with the emergence of ethics commissions in the public realm. There, so the idea goes, ethics experts use their expertise in order to develop guidelines or to advise the administration on how to design the law on contested issues, such as research involving patients or preimplantation genetic diagnosis (PGD). Methodological knowledge is a key requirement for someone being properly called an ethics expert. In fact, everyone needs some understanding of methods in order to lead a moral life.

Methods

I shall clarify my understanding of 'methods'. Within ethics there is some confusion about what methods are, and in particular about the relation between 'methods' and 'theory'. Just a few words on etymology: 'theory' originates from the Greek 'theōria', which means, roughly, observing, seeing, or regarding. In Greek, 'theorists' were people who, like tourists, saw foreign cities; later, 'theorist' became an official title that was awarded to ambassadors; they were reporters or commentators to confirm certain events. Thereafter, the meaning shifted to the now more common understanding of 'theory' as related to contemplation in the sense of reflection

and scrutiny. But this understanding of contemplation differs from the Latin 'contemplatio', which means—just like 'theōria'—observing or regarding rather than reflection or scrutiny (Louden 1992, 85 ff.).

'Method' originates from the Greek 'méthodos', which means, roughly, 'way towards an aim' or 'way of scrutiny'. Far from being decisive for one understanding of 'theory' and 'method' over another, I believe that the etymology at least supports my understanding of ethical theories as providing—as a result of observation and contemplation—the basis for ethical scrutiny and decision-making, and of methods in ethics as showing the way to go towards the resolution of a problem on the basis of a theory. Or, to invoke another picture, if one wants to play a Chopin nocturne, one will need a piano. But the piano will not play the nocturne by itself. One will also have to know how to play the piano. This knowing-how is the 'method' one needs in order to play the nocturne.

More precisely, by 'ethical theories' I mean moral systems such as Kantianism, utilitarianism, virtue theory, and casuistry. These are, *grosso modo*, functionally equivalent approaches to the phenomenon of morality, that is, different conceptions of what it is that makes actions (or motives, or character traits…) right or wrong, good or bad, better or worse. I do not assume that ethical theories are necessarily comprehensive in the sense that they cover *every* aspect of morality; 'ethical theories', in my understanding, include moral systems that are explicitly meant to cover only a certain area of human conduct. For instance, many theories in applied ethics are explicitly designed for a certain sphere, such as business, warfare, medicine, or journalism. This understanding of 'ethical theory' is in accord with the use of the term by C.D. Broad in his seminal *Five Types of Ethical Theory*, where he discusses the theories developed by Spinoza, Butler, Hume, Kant, and Sidgwick respectively, comparing, *inter alia*, their structure, and their metaphysical and epistemological assumptions (Broad 1944).

It is much harder to pin down the meaning of 'methods' in ethics. It is usually not distinguished from 'theories', neither in classical ethics nor in applied ethics. Henry Sidgwick begins his *The Methods of Ethics* with this clarification: '"Method of Ethics" is explained to mean any rational procedure by which we determine what individual human beings "ought"—or what is "right" for them—to do, or to seek to realize by voluntary action' (Sidgwick 1967, 1). These 'rational procedures' are, I suppose, the

various theories applied to particular cases using certain methods (in my understanding of the word). Such procedures—that is, a combination of theories and methods—is also what Tom Tomlinson, writing in medical ethics, has in mind when he takes 'method … to refer to an explicit set of procedures that structure our approach to a problem' (Tomlinson 2012, xiii). Also writing in medical ethics, Edmund Erde even holds that '*[m]ethod* simply identifies the premises and values preferences and sketches the logic … Deducing conclusions from the premises, values preferences and logic is *applying or employing* the method's domestic logic. It is simply method-application' (Erde 1995, 236 f., his italics). His understanding of 'method' seems to be what some regard as 'morality', namely a certain set of norms regulating human behavior, and is thus much more limited in scope than Sidgwick's and Tomlinson's views. Yet, I do not see any compelling reason why one should adopt this understanding where what I understand as 'method' is disparagingly called 'method-application' (and furthermore identified as deduction). I mention Erde here because he stands, *pars pro toto*, for both the wide-ranging neglect of the present book's topic and for the terminological confusion within its realm. Methods are not only application and not only deduction.

Instead, methods should be understood as primarily formal relations, such as specification, deduction, analogy, and balancing. Methods are usually not, as I will argue, functionally equivalent, which differentiates them from 'theories'. Rather, methods can be used within different ethical theories depending, for example, on their structure, their respective kinds of norms, virtues, or paradigms. This understanding does not yet differentiate methods from what I shall call 'theories of justification', such as wide reflective equilibrium. The methods I mean depend on ethical theories as well as on theories of justification in the sense that one needs methods to make a theory's content more concrete and to apply it; but the conjunction of methods and theory will not determine critical decisions. Both, then, depend on theories of justification to justify these decisions. I will elaborate on this later in this book. For my present purpose, it suffices to amend the example of the Chopin nocturne. One knows the nocturne (the 'theory') and how to play the piano (the 'method'); yet, whether or not the nocturne is a good piece worth playing depends on criteria (the 'theory of justification') external to both theory and method.

One further preliminary note is in order here. In normative theories, methods primarily have the function to *guide* decisions; I will mostly be concerned with the *ex post rationalization* of decisions that have already been made and that one later wishes to test for their rationality. I focus on the rationalization for several reasons: first and foremost, the understanding of methods as ex post rationalizations is much easier to grasp than the actual decision-making process, because the ex post analysis allows for an organization of afore unorganized thoughts and ways of reasoning. The ex post analysis also allows for an abstraction from time constraints. Decisions are often made under pressure of time, where it is very likely that methods such as analogy, deduction, specification, and balancing are merely understood as metaphors—that one has to look for similarities, for implications, make something more concrete, or weigh things up, respectively—without necessarily knowing what exactly they mean beyond this metaphorical level. Also, a mix-up between the formal and material parts is extremely likely to occur. Second, much of everyday decision-making and ethical reasoning is less organized than what I suggest in the following analysis. However, I believe that this analysis can inform our understanding of the metaphors, thereby enhancing our ability to use them as guides. In other words, there is a relation between the actual decision-making and the ex post rationalization; to focus on the latter is a first step to understanding and ultimately improving the former.[1]

Outline

This book has three parts.

The present first part is setting the stage for my examination of methods in law and ethics. I have introduced the topic and clarified some

[1] An argument for this claim would require a discussion of recent moral psychology. Many moral psychologists endorse the so-called dual-process theory of moral decision-making. This theory extends the post-Kahneman mainstream in psychology to morality. According to this dual-process theory, moral judgments are primarily influenced either by more or less automatic and emotional responses or by more or less controlled and conscious responses. My claim that there is a relation between the actual decision-making and the ex post rationalization of decisions assumes that the more or less automatic and emotional responses are not impenetrable, but that learning effects are possible (cf. Campbell and Kumar 2012).

basic terminology. The remainder of Part I clarifies my understanding of morality, ethics, applied ethics, and law. I thereby address the worry that my approach might be odd and misguided simply because law and ethics are entirely different practices. Chapter 2 rebuts this worry by showing that the parallels between ethics and law are, in fact, so manifold that it seems to be very promising to compare the two with regards to their methods, which is what I then do in Parts II and III.

Part II is a systematic outline of methods as used in legal theory, fitted into the framework of norm application and norm development. It explains deductive reasoning with statutes, as well as analogical reasoning with precedent cases, and emphasizes the various spots where legal reasoning allows for flexibility and creativity. It is argued that the methods' main purpose is to make these spots transparent and open for critique.

Part III then examines three representative kinds of contemporary ethical theories: Tom Beauchamp and Jim Childress' *principlism*, Albert Jonsen and Stephen Toulmin's *casuistry*, and two versions of consequentialism—Peter Singer's *preference utilitarianism* and Brad Hooker's *rule consequentialism*—with regards to their methods. I devote the most space to the discussion of principlism, which is by far the most influential theory, not only in bioethics but also in applied ethics in general.

The examination begins with a careful elaboration of principlism's basic ideas, of its main elements and structural features, and only then proceeds to the methods used within principlism to render its four main principles—respect for autonomy, nonmaleficence, beneficence, and justice—practical (Chap. 6). Principlism's main methods are specification and balancing. I draw on insights from Part II in order to recognize critical aspects of the two methods that have not yet been discussed in the literature. These insights also help to make suggestions on how to reconstruct and strengthen them. Furthermore, the framework of norm application and norm development in legal theory also motivates a framework for methods in principlism very similar to the one at work in legal theory.

When the discussion of principlism benefits mainly from comparisons to the methods used in Civil Law systems, the shorter discussion of casuistry gains insight mainly from the comparison to Common Law reasoning (Chap. 7). Comparisons to Common Law have often been

made in discussions of casuistry, but they never went beyond the purely metaphorical level. Taking this comparison seriously helps in clarifying the understanding of what casuistry's basic elements—maxims and paradigms—actually are and which role they have in resolving particular cases by analogy. It is argued that legal theory helps in structuring casuistry's reasoning process.

The discussions of principlism and casuistry are primarily constructive and show that almost all methodological aspects explained in Part II for legal theory appear again in the ethical theories. Law and ethics not only have largely similar functions, they also use largely similar methods to fulfill these functions—there is a confluence of philosophy and law in applied ethics.

The discussion of two kinds of consequentialist ethical theories (Chap. 8) is less constructive; it is rather critical of consequentialism as a good theory for applied ethics precisely because it almost completely lacks methods as discussed in this book. I argue that this is the reason why there are so few serious consequentialists working in applied ethics; the theory is good in theory, but not in practice.

Chapter 9 concludes Part III and the book by providing a statement of the framework for methods in applied ethics endorsed throughout the preceding chapters, thereby lifting the lid of the black box quite a bit. This framework is organized around deductive norm application and highlights the role of norm developments, as well as interpretations as key elements for rendering ethical theories practical. Since it derives from the confluence of law and ethics, I call it the *Morisprudence Model*. This model provides some basic methodological elements every normative theory has to entail; but it also leaves enough freedom to meet the needs of various kinds of normative theories.

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2

Ethics, Applied Ethics, and Law

Many people believe that law and ethics are entirely different practices. Law is a highly institutionalized system, strictly regulating human conduct and consisting of largely contingent rules that every individual has—under the threat of coercion—to follow. Ethics, in contrast, is primarily a personal matter, allowing for ad hoc reasoning and demanding existential decisions. On such a view, the task I set myself in this book seems to be odd and misguided from the start. This chapter aims at rebutting this worry by showing that the parallels between ethics and law are, in fact, so manifold that it actually is promising to compare the two with regards to their methods. There are obvious differences between law and ethics; but a fruitful comparison between two items does not presuppose identity, only similarity. As I shall argue, there are striking similarities between ethics and law, especially between applied ethics and law.

Terminology: Ethics and Morality

Many academic philosophers distinguish between 'ethics' and 'morality', such that morality is a certain system of rules, principles, values, or virtues,

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whereas ethics is moral philosophy, that is, the *theory of* morality. According to this view, ethics has to do with the examination, justification, or critique of particular moralities.[1] This understanding of morality is very wide, for it includes not only the traditional moralities based on Aristotelian virtues, on the Kantian categorical imperative, or versions of consequentialism, but also less elaborated forms of normative systems that regulate human conduct. Furthermore, this understanding is not limited to such moralities that regard good motifs or the good will as necessary elements of moral conduct. One can also make the same distinction between ethics and morality through the respective point of view; morality is seen from the internal point of view, ethics from the external point of view. A physician working within her professional code of conduct takes the internal point of view and is thus within the realm of morality. When she steps back and questions this code or compares it to alternative codes, she shifts to the external point of view and enters the sphere of ethics.

Interestingly, this distinction did not make its way into ordinary language, where ethics and morality are usually used interchangeably. If there is a difference at all, then it lies in the connotation. 'Morality' sometimes has a more traditional, oftentimes religious, conservative, or outdated, doctrinal ring to it; the connotation of 'ethics' is, in contrast, more neutral and modern. It is, thus, not surprising to see that the practical approaches to right or wrong human conduct in medicine, business, or environmental issues have been called applied *ethics* rather than applied morality.

Within applied ethics, the term 'morality' is only rarely used, not even to designate particular sets of norms developed for a particular sphere like medicine. Take, for instance, Tom Beauchamp and Jim Childress' seminal

[1] cf. (Pfordten 2010, 34 ff.), who traces this distinction between ethics and morality back to Plato and Aristotle and is surprisingly confident that it is nowadays 'beyond any doubt for philosophers.' Not only do I not follow this suggestion; many philosophers use alternative distinctions: For (Blackburn 1994), for instance, ethics designates the kind of practical reasoning that we find in virtue ethics of the Aristotelian kind, whereas morality designates other kinds of practical reasoning; (Habermas 1991, 108 f.) understands ethics as addressing questions of 'the good life' for an individual and morality as the norms that regulate societal coexistence; (Williams 1986) holds a very similar view, according to which morality is much narrower in scope than ethics; (Fox and Demarco 2000, 5) take morality to mean certain customary practices and ethics to refer to those rules or principles that people explicitly endorse.

book *Principles of Biomedical Ethics* (Beauchamp and Childress 2013). In this book, the two authors compare various approaches to ethics in general, and to bioethics in particular. Following the above distinction, this would count as ethics, for it is theorizing about certain systems of rules, principles, values, virtues, and the like from an external point of view. However, Beauchamp and Childress also develop their own approach to bioethics and suggest four principles to structure the field and to access particular cases. Given the above distinction, this would count as morality. Things get messy when Beauchamp and Childress settle these principles in a factually given common morality alongside justifying their use by deep theorizing. The whole book—standing here *pars pro toto* for applied ethics in general[2]—shows no clear distinction between the terms ethics and morality.

We can conclude that, neither in academic philosophy, nor in ordinary language, is there an agreed-upon distinction between ethics and morality. I will use these terms synonymously and refer to expressions like 'particular moral system', 'moral theory', or 'theorizing about ethics' where clarity demands so. There would not be any additional value in stipulating one or another clear-cut distinction for this book.

Ethics, Applied Ethics, Bioethics

'To view an act from a moral point of view … is to consider its effects upon persons, according to moral principles and rules' (Fox and Demarco 2000, 4). This statement, although formulated in a circular way, can be taken as representative for what most philosophers have in mind when talking about ethics (or morality). Important features of this view on ethics are the focus on actions and their consequences for other persons—rather than animals or the environment—and the reference to norms (rules and principles). Based on the Jewish-Christian tradition, this standard view largely

[2] An exception may be found in (Gert et al. 2006, 5 ff.), who explicitly make the distinction that morality is a particular system of rules and principles, and ethics the theory of morality. They nonetheless gave their book the title *Bioethics* and primarily use the term 'morality' in it. 'Ethics' is rarely mentioned within the book; instead they talk about 'moral theory' when referring to what they actually defined as ethics.

answers the question 'What shall I do?' by reference to norms, specifying and applying them to the particular problem at hand (cf. Borchers 2001, 61; Anscombe 1958). This standard view of ethics has at least one great rival, namely virtue ethics in the Aristotelian tradition, reanimated as the *New Virtue Ethics* in the 1970s and 1980s by Philippa Foot (2003), Alasdair MacIntyre (1981), and others. In virtue ethics, norms do not play any decisive role. Instead, its point of interest are virtues, that is, character traits that are regarded as making people good or leading to a 'good life'. The question of the good life aims at sorting out how individuals—given their particular social and cultural setting, their abilities and desires—can live as good lives as possible. The norm-based standard view of ethics, in contrast, aims at sorting out how individuals—given their different views on almost all matters of value—can best regulate their living together (cf. Wolf 1998, 42; Larmore 1987). This book will primarily be concerned with the norm-based standard view. I thereby exclude a very rich ethical tradition from my attention. There are three reasons for doing so, nevertheless. First, I do not see how virtue ethics can be justified (and how it can justify particular judgments) without—at least indirect—appeal to norms. How is one, for instance, to know what actually fulfills the virtue of justice without knowing which norms determine what is just? Second, ethics has so rich a tradition, and every tradition is itself so complex, that it is simply impossible not to cherry-pick a certain tradition and work on some particular theories therein. My focus on reasoning with norms is a consequence of this necessity to choose. Moreover, virtue ethics is obviously much more unlike law than the standard view is. It would thus be much harder to gain any insight into reasoning within virtue ethics from a comparison to legal reasoning.

There are some more characteristics—besides the focus on actions, consequences, and norms—that moral judgments are often associated with (cf. Birnbacher 2007, 8 ff.). They are usually deemed intersubjectively obligatory, categorical, and universalizable. One may doubt that these are characteristics of all moral judgments (rather than pre-commitments towards certain normative results), but they are nonetheless helpful to grasp the scope and content of ethics.

In ethics, there has been an almost exclusive focus on very abstract issues, such as the establishment and justification of the most abstract

ethical principles (Kant's categorical imperative, for example). Practical issues, such as the application of these principles to particular problems or cases, have for all too long been largely ignored (cf. Bayertz 1991; Harris 2001, 2 ff.). Cases have at best been used to test intuitions in dilemmatic situations or as illustrations of very abstract notions; and even the 'solutions' of these illustrative cases have mainly been stipulations, rather than their being taken seriously as problems themselves. It has seemed as if the application of the abstract principles would be obvious, or as if they would 'apply themselves'. Up to now, there is nothing like a proper methodology for ethics (cf. Beauchamp 2003; Dworkin 2006).

This neglect of practical questions in ethics further worsened through the concentration on theoretical problems in ethics as a result of the success of the empirical sciences at the beginning of the twentieth century, as represented in the 'logical positivism' movement (cf. Düwell and Steigleder 2003, 12; Potthast 2008, 263 ff.). Metaethics emerged as a distinct field, and for quite some time seemed to be the only part of ethics worth academic attention. This changed in the 1950s and 1960s, at least in the USA, for two main reasons. First, some philosophers raised doubts about the assumed clear-cut distinction between normative and descriptive ethics (Baier 1958; cf. Hare 1977). Second, scientific and technical developments enabled mankind to do things beyond the imagination of earlier generations. The emerging possibility of artificial respiration, for instance, posed the questions when and how it is good or right to prolong life and when to stop respiration. Similarly troubling questions emerged around the new possibilities of transplantation medicine, birth-control pills, and safer means of abortion. People met these issues mostly without clear intuitions about right and wrong, and it turned out that most traditional ethical theories were of little use in the search for clear answers.[3]

This is, in a nutshell, the background of the development of applied ethics. Applied ethics aims at being action-guiding in practical spheres

[3] cf. (Steinbock 2007, 2 ff.; Toulmin 1982; Düwell and Steigleder 2003, 15 ff.; Grimm 2010, 66). I am telling the story of the development of applied ethics as starting with medical ethics. Tom Beauchamp reminded me that it might even be possible to trace this development back to earlier discussions of race and gender issues. The problem with the latter two is, I suppose, that they have not been taken as seriously as medical ethics in academic philosophy, for they addressed problems that did not affect the—predominantly male and Caucasian—academics themselves.

where traditional ethical theories are not sufficiently guiding; it is divided into several areas, such as business ethics, environmental ethics, animal ethics, research ethics, ethics of journalism, legal ethics, and medical ethics. The latter can be seen as the starting point for the development of applied ethics as an academic discipline, at the latest since it has been institutionalized in the USA, starting with the *Institute for Society, Ethics, and the Life Sciences* (founded in 1969, today the *Hastings Center*) and the *Joseph and Rose Kennedy Center for the Study of Human Reproduction and Bioethics* (founded in 1971, today the *Kennedy Institute of Ethics*). It took some time until such institutes have also been established in continental Europe. To take Germany as an example, it was not before 1986 that the *Zentrum für medizinische Ethik* and the *Akademie für Ethik in der Medizin* were founded, followed by the *Interfakultätes Zentrum für Ethik in den Wissenschaften* in 1990.

So far, I have carelessly talked about bioethics or medical ethics. And, indeed, there is no settled terminology. If we start from the Greek 'bios', we can say that 'bioethics' refers to everything living, which would, besides the ethics of medicine and biotechnology, also include large parts of environmental and animal ethics. I will use the term bioethics more narrowly to refer to the ethics of medicine and biotechnology only. This narrower understanding follows the development within the field of bioethics and takes into account that bioethics, in the narrow sense, is relevantly different from environmental and animal ethics in that its subject matter is centrally the relations among humans. Bioethics as the ethics of medicine and biotechnology—sometimes called biomedical ethics—is, admittedly, still a huge and not clearly defined field. I shall paradigmatically be concerned with the direct relations between humans, such as the relation between physicians and patients.

Bioethics and the other fields of applied ethics require a degree of empirical knowledge that is oftentimes beyond a layperson's understanding of such matters. It does not make any sense, for instance, to judge the appropriateness of a certain medical treatment if one is not at all familiar with the available alternative forms of treatment and the respective prospects and dangers. Applied ethics thus oftentimes requires the collaboration between scientists and philosophers.

But what, then, is the role of philosophers in applied ethics? Some claim that philosophers ought to develop mid-level rules for certain practical fields, such as the patient-professional relationship, from more abstract moral principles and apply those mid-level rules to particular questions or cases within the respective field (Friesen and Berr 2004, 19). The problem is that there is no abstract moral principle that philosophers agree upon. As pointed out above, there are various rival traditions in moral philosophy; and even within these traditions there are various suggestions for the best or best-justified moral principle to determine right and wrong human conduct. Moreover, ethicist should not be 'engineers' (Caplan 1980). It is thus not surprising that we find in applied ethics, too, attempts to approach the relevant problems from all these traditions. There are consequentialist (Singer 2011), deontological (O'Neill 2002), virtue-theory (Pellegrino and Thomasma 1993), intuitionist (Vieth 2004), discourse-theoretical (Ott 2008), pragmatist (McGee 2003), and common-morality approaches (Gert et al. 2006), and many more. Particularly influential have been such approaches that do not draw on one particular tradition, but rather search for coherence between many of these traditions and widely shared considered judgments (Beauchamp and Childress 2013). There is also considerable disagreement whether applied ethics should work top-down, from abstract principles via mid-level principles deductively down to particular cases, as most consequentialists and deontologists do; bottom-up, working from particular cases up to the establishment of paradigms or principles, as, for instance, casuists do (Jonsen 1986); or if this opposition misses the point because the work is to bring all aspects, cases as well as abstract principles, to support each other in some kind of reflective equilibrium, as, for instance, principlists do. These issues of the proper foundation, if any, and the direction of the work of applied ethics are all too often mixed up with the methodological issues I am primarily concerned with in this book.

Applied ethics is, furthermore, relevant in various settings. There is the political sphere, where bioethical issues, to focus on these, are the subject matter of legislative proceedings or where ethics commissions are asked to advise the legislative bodies or the administration on bioethical issues. This is different from ethics committees within healthcare institutions,

which are consulted to discuss bioethical issues within the very institution. These issues will usually be far more concrete than the abstract issues discussed in the political sphere. Academic bioethics is not limited to any particular level of abstraction or any particular set of questions. What is distinctive for bioethics and other fields of applied ethics, in contrast to other aspects of academic ethics, is that it is far more often covered by the general media and thus more followed by the public.

Whereas the work of academic applied ethics is roughly to analyze certain concepts and test and justify various beliefs, oftentimes also making practical recommendations drawing on findings in various other disciplines (Beauchamp 1984), the task of 'ethics experts' in the public realm, for instance, serving as members of or consultants to commissions dealing with bioethical issues, is somewhat different. It is sometimes said that it is so different that ethicists are not even necessary for the debate of ethical issues in the public realm, because they are in no better position to judge what is right or wrong to do than anyone else; they might be experts in moral theory, it is said, but not in moral practice (Birnbacher 2002, 103). What is needed, some argue, are soft skills, such as independence, patience, resilience, empathy, and engagement (Ach and Runtenberg 2002, 19). This might be true, especially where conflicts are so deep that they even have the potential to endanger peace in society, as the debate about abortion did in some societies. But these soft skills are good assets for almost every job, for school teachers as well as for hotel managers; they are not distinctive for experts in ethics in the public realm. When ethicists serve as experts on public commissions, for instance, they are not only moderators or mediators for the other members that represent various religions, sciences, or professions.

As the answer to the question if there is something like ethics experts largely depends on which camp of applied ethics you belong to, and as there is considerable disagreement about which of these camps is the right one, it might be helpful to look for another form of expertise that makes ethics experts: Consider questions about certain economic policies, for instance, about which tax revenue is appropriate. The administration invites economists from different universities, institutes, or think tanks. All these economists come from different traditions and schools of economics and use different theoretical background assumptions; that

is, they will represent different widely (but not entirely) accepted and established views on the subject matter. These economists will, drawing on these traditions and assumptions, very likely recommend different tax revenues as appropriate. Still, there is no doubt that they are all experts. What one expects them to do is, thus, not to work on the same theoretical background assumptions; neither is it that they come to the same policy recommendations. Rather, I suppose, one expects them to stick to the empirical facts and to work from their theoretical background using these facts and using proper methods.

The same holds for ethics experts. What we expect them to do is thus: First, not to make something up but to recognize empirical facts and to stick to these. Second, to work on the basis of one approach to ethics that is widely (though not entirely) accepted and established. This can be one of the top-down approaches like deontology or consequentialism; but it can also be bottom-up casuistry or a coherence theory like principlism. We regard it as highly unlikely that there is still an entirely novel approach to ethics that still awaits discovery (cf. Parfit 2011). Third, we expect ethics experts to use proper methods, rendering their respective theory practical; this includes that they are non-partisan, that is, they must not act as an advocate. It does not question their status as ethics experts if they do not come to the same conclusion. What questions their status is only a defect in one of the three conditions.

This book can be read as an examination of what it means to be an ethics expert. It reconstructs and elaborates the methods used within two representative contemporary ethical theories. It shows that working with and within a certain normative theory, developing and applying it to particular cases, can be very demanding and is, indeed, a problem distinct from the question of which theory is superior.

Ethics and Law

Most people have a clearer understanding of the law than of ethics. For a very long time, law and ethics have literally been identical; at some point the law developed out of ethics (and, probably, religion). This is the main reason why it is sometimes much harder to differentiate between law and

ethics than it is to come across their similarities. Many prescriptions, like the prohibition of killing, are part of ethics and law (and religion). Not only are many norms identical in ethics and law, the common origin is still obvious from the shared terminology; law-talk and ethics-talk are dominated by rights, duties, claims, justice, utility, interests, punishment, and judges. They also still serve similar functions. In the political realm, law has the function to organize and legitimize state sovereignty; in the wider public realm it has to guarantee predictability and clear authoritative decision-making; for the individual citizen, the most important function seems to be the rule of law and, thereby, the guarantee of individual rights. A common view is that ethics almost only plays at the individual level, where it serves the same function as law. But what about the public and the political realm? Does not ethics there, too, serve just the same functions as law, probably to a lesser degree?

Imagine there were no legal system. Would people still want to enable predictability and decisions in contested matters? They surely would. And how would they proceed in designing rules and institutions that serve these functions? I suppose that they would elaborate individual moral considerations up to the public—and ultimately to the political—level, which is actually what theories of justice do in political philosophy. Another thought supports this view: What is the point of view from which one criticizes positive laws? Again, I suppose it is the moral point of view.

However, there seems to be a point of concreteness or of convergence of rival views where ethical considerations turn into political (and legal) considerations. To use the standard example: *that* we have to decide for a rule on which side of the road to drive is a matter of morality; but *what* this decision looks like is not. Such conventional rules do not belong to ethics, but to the law. Law has to regulate things that are not determined by morality, but morality points to the problems that require regulation.

Related to the law's conventionality is the fact that it differs from ethics insofar as it is intentionally made authoritatively by people for people. Jonathan Dancy pointedly remarked that morality is not invented like a 'set of traffic regulations … by a group of experts sitting in council to serve the purposes of social control' (Dancy 2004, 83). For most aspects

of morality, this is true. Most people's morality is not even explicit. It is, for example, perfectly fine to say that, as a result of legislation, starting August 1, statute X is not part of the law anymore. It sounds odd to say something like that about a moral norm Y.

However, there are also spheres of morality that function pretty much like Dancy's imagined group of experts. Consider a person who has read Jonathan Safran-Foer's bestseller *Eating Animals* and was shocked by the way sentient beings are treated and used for human consumption and by the devastating effects, both environmentally and in terms of global justice, of the excessive meat-consumption in industrial countries. She starts thinking about her own eating habits and encounters forms of deliberate diets, such as vegetarianism and veganism. She might seek more detailed information about the ways animals are treated for human consumption; eventually, she might enter the debate over animal rights. Furthermore, she might research human nutrition needs, how these can be met, how an alternative diet affects her health, and which consequences dramatically changing eating habits would have on a global level. Her conclusion will be empirically informed. Her research mirrors Dancy's group of experts. Finally, at some point, she will make a decision whether or not to change her diet. This can be seen as the repealing of a previously held moral conviction.

The similarity to Dancy's group of experts is even more obvious when we consider ethics in the public realm, as in ethics commissions. These literally are groups of experts, gathering empirical information on the subject matter, sorting out alternatives, and, with the help of ethics experts, working out norms regulating the subject matter (on the variety of such commissions see Vöneky 2010, 233 ff.).

People first encounter both ethics and law as something given within their society. In almost all societies, at all places and all times, there exist some ethical convictions and conceptions of what is good or bad that are widely shared and dominant within the respective society. To socialize within an environment is, to a significant degree, to learn these convictions and conceptions and to navigate within them (Benda-Beckmann 2009, 19). It is, of course, possible to develop a critical attitude towards these dominant views. It is often argued that ethics and law differ in how they allow for such critical attitudes. Moral convictions, it is said,

lose their status as moral convictions when they are not personally held anymore; this is different in law, for, no matter how inappropriate or unjust one finds it, it remains valid and binding. According to some legal theories, the law remains valid and binding until it is formally repealed or not followed anymore (for instance, Hart 1997). Consider the death penalty, which, in many jurisdictions, including the UK and several states in Germany, remained a formally enacted law for much longer than it has been followed by the courts. The courts simply did not impose it anymore as a penalty, with the result that, at some point, the death penalty lost its validity as law although it has not been formally repealed. Do ethical norms, too, lose their validity when they have not been followed for some time? To start with, this would only make sense when situations that fall under the respective norm actually occurred; if someone still did not apply the norm and followed its conclusion, there is some reason to believe that the norm has lost its validity, although there has never been an explicit change in the morality. This is thus roughly the same in law and in ethics.

The differentiation between the internal validity of morality and the external validity of law has a long tradition in philosophy. Just consider Kant's famous distinction between morality and legality, where the latter is the mere fulfilling of duties (no matter what the agent thinks about them) and the former also requires a volitional element (namely that the agent actually wills the duty). Legality thus does not require one's will to support the action; legality is a necessary element of morality. It is not surprising that Kant understands law as dealing with legality only, thereby limiting law to the regulation of an individual's external freedom to act (cf. Kersting 2004), and excluding many aspects that have traditionally been treated as crucial for law as well as ethics—for example, consequences such as happiness in Bentham's sense as the focal point of ethics and law.

We can thus conclude that the view that law and ethics differ fundamentally with regards to their respective origins and functions, their 'making', and their 'givenness' and validity often rests on simplistic misconceptions. This does not mean to deny the obvious differences between law and ethics; I here stressed their often-overlooked similarities.

Conclusion

In this first part, I have introduced the topic of this book and clarified how I use some basic notions, such as morality, ethics, applied ethics, theory, and method. I have also briefly addressed the worry that my approach might be misguided, by showing that there are many parallels between ethics and law when they are freed from simplistic and monolithic understandings. With this rather intuitive introduction, I hope to have motivated the idea that it might be promising to compare law and ethics with regards to their methods, which is what I do in what follows.

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Part II

Methods in Legal Theory

The appropriateness of a method for a normative system depends on its functions and on its structure. In democratic legal systems of checks and balances, under the rule of law, powers are divided between legislature, administration, and judiciary, which means that administration and judiciary are generally bound to the norms enacted by the legislature. Legal methods are designed to make these boundaries work. Although ethical theories do not work in such a division of powers, there is a similarity when ethicists suggest certain normative principles that they want others to work with. Contrary to law, one is free to alter one's own ethical principles. However, if one does so, one does not work within the suggested system anymore. The point is this: if one wants to work within this system, one should know how to do it. One needs to understand the structure and function of the respective theory, which, in turn, determine the proper methods to use.

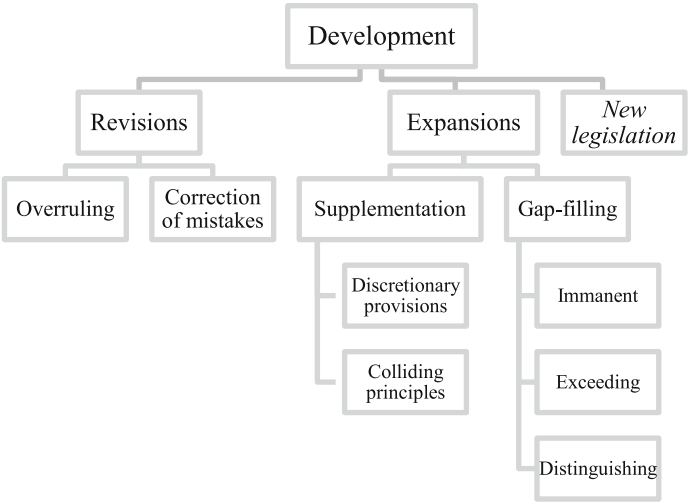
Two warnings and a note on terminology are in order here: first, this part of the book is not a comprehensive outline of legal methods (for such outlines see MacCormick 1978; Alexy 1989; Larenz and Canaris 2008). It is instead focused on the task of informing the debate on methods in ethics. I therefore concentrate on such elements and discussions that will be fruitful for the anticipated comparison; I nonetheless hope that it is representative for legal methodology. Second, with one exception, my aim is not to contribute original ideas to the debate on methods in legal

theory. The exception is that I place reasoning with precedents within the system of law application and law development, which will prove useful but still is untypical in Anglo-American jurisprudence (cf. Klatt 2008, 1–14). As for terminology: I understand philosophy of law as comprising both legal ethics and legal theory. Whereas legal ethics concerns the normative quality of positive law, whether or not it is just or unjust, for example, legal theory analyzes and scrutinizes concepts and problems common to many (or all) areas of law, such as concepts of norms, methods, psychological constraints on legal reasoning, and sociological patterns. I sometimes simply speak of 'methods in law', 'legal methods', 'legal methodology' or the like. What I mean are the methods that *should* be used in law, that is, the methods as developed in legal practice and refined in legal theory. This does obviously not imply that these methods are, as a matter of fact, always used properly in everyday judicial practice.

As in most areas of academic inquiry, many issues in legal methodology are contested. I touch on some, but not all, debates. My single most important aim is to provide useful distinctions between different things one can do with norms. For this purpose, I reconstruct a methodological framework for legal theory and use it as a foil for ethics. My assumption is that it is not necessary to start from scratch and that certain norms are readily available. One can either apply or further develop these norms. *Application* works with given norms and leaves them unmodified. I suggest deduction as the method for application, which does not mean that judges simply have to 'discover' the implications of a given norm without using any judgment or creativity. Norms are in need of interpretation. Sadly enough, the 'discovery model', picturing judges as working like a simple computer program, has 'become part of the history of ideas' (Klatt 2008, 10). Regularly, deduction also requires the development of a norm in order to be applicable in the first place. The *development* of a set of norms is also always dependent on interpretations, but in the sense that to realize the very need for development depends on having interpreted a norm; some reasoning based on this interpretation must have led to the conclusion that a development is necessary. Contrary to applications, developments modify the normative system by revising a norm or by adding new norms (expansion). The aim of further developing the law is to *allow for deductive applications* where the existing norms do not. These

developments are made paradigmatically by judges. Only when the normative system cannot be developed in the various ways I outline below is new legislation needed. It is in this sense that judges are lawmakers but not legislators—they are developing the law within certain boundaries, but they are not free to start afresh and legislate something completely new.

After introducing different kinds of norms, I arrange my discussion of legal methods around this distinction between application and development. The discussion of application will be focused on deduction and analogical reasoning. Things are a bit more complex for development. The following figure illustrates the different modes of norm development; and it gives you a first idea of how I will proceed in the respective chapters. In Part III, it will become apparent that the different kinds of norms, as well as the various forms of application and development explained in the setting of legal theory, are equally pertinent in contemporary ethical theory.



What I suggest here comes largely from the analytical tradition in legal theory, which, in a nutshell, employs insights from analytic philosophy for law (cf. Rödig 1986). I will only in passing refer to rival approaches such as hermeneutic and deconstructivistic legal theory. The hermeneutic legal theory draws, of course, on the work of Hans-Georg

Gadamer, especially on his immensely influential *Wahrheit und Methode*, originally published in 1960 (Gadamer 2013). Following Gadamer, the proponents of hermeneutics in legal theory (cf. Esser 1972; Kriele 1976) claim that the hermeneutic circle is the structural characteristic of every process of understanding. Every interpretation and application of a legal norm depends on pre-judgments with regard to the problem at hand, or so they argue. Moreover, the relation between norms and their meaning is not only, nor even primarily, semantic; rather, every judge who interprets or applies a norm thereby creates the norm in the first place (through the hermeneutic circle). Such an approach cannot make any sense of a distinction between application and development of norms. The hermeneutic tradition in legal theory dramatically deemphasizes the role of norms and focuses instead on issues like pre-judgment, historicity, and volitional or, more general, subjective elements in reasoning (cf. Koch 2003, 188 ff.). All of these issues might be interesting—but they do not contribute much to my interest in comparing approaches to working with norms, precisely because they downplay the role of norms.

The most forceful deconstructivistic approach to legal theory is, since the 1960s, the post-positivistic *Strukturierende Rechtslehre* [Structuring Legal Theory] (cf. Müller and Christensen 2013; Busse 2010). This approach, too, downplays the role of norms. The idea is that the text of the norm is nothing but a guideline with no claim to normativity. A proper norm is not the beginning but the end of an application. What legal practitioners do is develop the 'normative program' from the norm text and set it into the respective 'normative sphere', that is, the actual facts surrounding the 'program'. Only the combination of 'program' and 'sphere' constitutes a proper norm. Here, too, what the legislature enacts does not constitute norms, for norms are only constituted through applications (cf. Alexy 2002, 38 ff.; Klatt 2008, 73 ff.). The deconstructivistic legal theory is not useful for my project for the same reasons that speak against hermeneutics. Both touch on interesting issues, but both also downplay the role of norms. This amounts to problems when asked to explain why legislation in democratic systems actually matters. According to their concepts, the norms the legislature enacts do not play a significant role. Both also depart significantly from our ordinary understanding of norms.

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3

Norms

Consider Article 16(2)(1) of the German Basic Law: 'No German may be extradited to a foreign country.' This statement is called the *normative statement*; it expresses the *norm* that it is forbidden to extradite Germans to foreign countries. According to this conception, the norm is the meaning of the normative statement (Sieckmann 1994). In this relation, 'norm' is the basic notion, because the same norm can be expressed in different normative statements (Wright 1963, 93 ff.). Indeed, norms need not even be expressed in words—traffic lights and road signs also express norms. The differentiation between 'norm' and 'normative statement' might not be terribly important in normal cases, but it can bring clarity in hard cases. I will distinguish between statements and norms where clarity demands to do so; otherwise I will simply speak about norms.

Von Wright went to some pain to explore the different meanings of 'norm'. It can be understood as 'law', but there are laws of the state, laws of nature, and laws of logic. Consider the first pair. Laws of the state are prescriptive, whereas laws of nature are descriptive. The latter describe things as they are, the former prescribe something as it should be. If

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there is a discrepancy between the actual course of nature and the laws of nature, then it is the laws that need revision. By contrast, if people do not obey the laws of the state, the reaction is typically not to revise the laws but to force the people to obey the laws. The laws of logic, such as the *law of contradiction* ('No proposition is both true and false'), is special. The descriptive/prescriptive dichotomy does not easily apply to these laws; they clearly do not simply describe how people think (they often violate laws of logic) and they do not prescribe how we ought to think in the way the laws of the state do. Von Wright suggests an understanding of these laws as constituting a practice—just as the rules of soccer determine when a player is offside, so the laws of logic determine when someone infers correctly. Von Wright calls such constitutive norms '*rules*' and considers them as one main type of norms.

Another main type is *prescriptions*, understood as 'commands or permissions, given by someone in a position of authority to someone in a position of subject' (Wright 1963, 7). Examples are the laws of states and permissions that parents give to their children. Customs lie somewhere in between; they have some characteristics of rules and some of prescriptions.

The third main type of norms is '*directives*' or 'technical norms', as used in means-end reasoning. They take the form of this example: 'If you want to make the hut habitable, you ought to heat it' (Wright 1963, 10). The relationship between means and ends is, in some of these norms, necessary; von Wright calls the latter 'anankrastic statements'.

But how about moral norms? Von Wright rejects both the idea that they are only customary and the idea that they are prescriptions. The latter rejection follows from his definition of prescriptions as having an author (unlike moral norms). He also rejects the idea—one that he finds in utilitarianism—that they are directives or that they are norms *sui generis* (what he finds in deontology). 'The peculiarity of moral norms,' he concludes,

> is not that they form an autonomous group of their own; it is rather that they have complicated logical affinities to the other main types of norm and to the value-notions of good and evil. To understand the nature of

> moral norms is therefore not to discover some unique feature in them; it is to survey their complex relationships to a number of other things.[1]

I agree with this understanding of moral norms. There is no straightforward characterization, which is why one has to look carefully at particular moral norms. Many common moral norms will indeed be prescriptions in von Wright's sense. The relevant authorities are, then, the ethicists who developed the respective ethical theories. Large parts of this book are concerned with norms in the sense of prescriptions. In the following sections, I explore some general characteristics of norms and introduce the distinction between rules and principles.

Abstract and General Norms

I suggest to understand norms that are prescriptions as general imperatives that can be formulated in the form 'In situations of X and Y, everyone ought to do Z', in contrast to individual imperatives of the form 'Do now Z' (cf. Wolf 1984, 9 ff.). Applying norms means to stick to the characteristics X and Y (and to these only) and, if they are present, to conclude Z. Not to consider X or Y or to consider further characteristics simply means not to apply the norm properly. As Kenneth Winston has put it, '[to] apply a law justly is simply to proceed by rule; it is a matter of taking the same general rule and applying it to all the cases it covers—without prejudice, interest, or caprice' (Winston 1974, 5). Proper norm application is basically proceeding by rule; this is also what is often called 'justice formelle' (Perelman 1963). Chaïm Perelman analyzed different conceptions of justice and found that they had only one element in common: the idea of formal justice (cf. Kelsen 1960; Paulo 2012). Formal justice presupposes, according to Perelman, a rule (or norm) of justice. An act can only be just relative to a given rule. The act is just when it is the correct conclusion of a deductive argument that proceeded from the rule as a premise—irrespective of the quality of the rule itself. This might

[1] Wright (1963), 13. He further discusses 'ideal rules', which are not concerned with right actions but, like virtues, with the goodness of things or persons.

sound like a minor and trivial point. But it is not—John Rawls was right to point out that it is an important element of justice and that it should have its place in constitutions (Rawls 2005). Neither is it trivial; it is the point where the methodological problems, which are the focus of this book, only begin.

Norms in the form 'In situations of X and Y, everyone ought to do Z' are abstract and general. A norm is, roughly, *abstract* when it applies to different situations or actions (all situations of X and Y). For example, the prohibition of killing prohibits all kinds of killing, be it with a gun, a knife, or poison, be it at day or at night, here or in my neighbor's house, whether in military battle or self-defense. A norm, roughly, is *general* when its addressees are described with universal attributes: killing is prohibited for everyone, for me and for you. Taken together, the abstractness and the generality of the prohibition of killing prohibits killing in all circumstances and for everyone.

To get a clearer understanding, consider a norm that is not abstract and general, but concrete and individual. This is what I referred to above as individual imperatives of the form 'Now do Z'. A norm is individual when it addresses a person (or a group of persons) individually, for example by name. This happens in court rulings or when one gets a building permit for a house. The ruling and the permit prescribe something only for the individual person (or persons) explicitly named. Individual norms can be both abstract and concrete. A court ruling in the form of a criminal conviction is likely to be very concrete; one wants this particular murderer imprisoned and not some random guy.

I said that a norm is general when its addressees are described with universal attributes such as 'over the age of seven', 'having a medical degree', or 'being the president'. These attributes are not fulfilled by everyone. But at any point in time it is—theoretically, at least—determinable who is over the age of seven or who is the president. These attributes thus address certain people, but still are general when the addressed group of people described through these universal attributes is not conclusively determinable at the point of time of the enactment (or creation) of the norm. Under German law, everyone under the age of seven is legally incompetent. This provision was enacted long before I was even born, but it still covered me as a kid. The dividing line between general norms

and individual norms is thus whether or not, *at the time of the enactment*, the addressed group of people is conclusively determinable (Koch and Rüßmann 1982, 81 f.). The norm is general when, at this point in time, the addressed group is not thus determinable; it is individual when it is determinable.

Things are not so clear with regards to the *abstractness* or *concreteness* of norms. My above characterization was imprecise. I said that abstract norms apply to different situations or actions. Most actions—like killing in the above example—cannot be described as precisely as individuals can be addressed. But it is possible to specify actions by indicating, for instance, time and place. If it is prohibited that individual X kills individual Y on Main Street at noon, this prohibition is more concrete than the abstract prohibition of killing; but it still leaves open a lot, for example the weapon you use (if any) or the exact place on Main Street. Abstractness and concreteness are a matter of degree.[2]

Principles and Rules

A particularly useful distinction between different kinds of norms is the one between rules and principles. In ordinary language, principles are often taken to be rather abstract norms (like principles of justice), whereas rules are taken to be more concrete norms (like religious dietary provisions). This is not the distinction I mean. What I mean is the distinction initially developed in legal theory by Ronald Dworkin and later refined by Robert Alexy. Alexy's understanding of legal principles as optimization requirements even became the cornerstone for a whole 'school'—the 'principles theory'(cf. Klatt 2012, 2013).

Dworkin on Principles

In the 1960s and 1970s, Ronald Dworkin developed an understanding of legal principles in order to launch an attack on H.L.A. Hart's extremely

[2] In the section on norm development by supplementation, I will discuss yet another norm structure, namely, discretionary provisions of the form 'If A does X, a fine *can* be imposed.'

influential version of legal positivism. In a nutshell, the debate between legal positivists and natural law theorists is centered around the question whether or not the concept of 'law' is neutral in content, that is, whether law can be defined without reference to its moral quality. Natural law theorists claim that grossly immoral law is not law; positivists claim that immoral law is law, it is only bad law (cf. Hart 1958; Hoerster 1989). What Dworkin attacks with his distinction between rules and principles is this:

> I want to make a general attack on positivism, and I shall use H.L.A. Hart's version as a target, when a particular target is needed. My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules (Dworkin 1977, 22; see also Shapiro 2007; Watkins-Bienz 2004).

With 'policy', Dworkin means 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'; 'principle', in contrast, means 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality' (Dworkin 1977, 22). An example for a policy is the aim to reduce the number of car accidents; the standard that nobody may profit by her own wrong is an example for a principle. Oftentimes it will be possible to reformulate a principle as a policy.

The interesting distinction, however, is not between these two, but between standards (policies and principles) and rules. Dworkin later altered the terminology and did not talk about standards anymore, but only about principles (as including what he introduced as policies). In what follows, I stick to the latter understanding of principles.

According to Dworkin, rules function in an 'all-or-nothing fashion'; that is, '[if] the facts a rule stipulates are given, then either the rule is

valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision' (Dworkin 1977, 24). As should be clear, this is what I, above, referred to as the proper application of a norm. To apply the norm (or rule) 'In situations of X and Y, everyone ought to do Z' properly means to stick to the characteristics X and Y (and to these only) and, if they are present, to conclude Z.

Principles, in contrast, do not determine conclusively what ought to be done, even when the facts a principle stipulates are given; they merely provide reasons for one decision or another without necessitating any. Principles can always be outweighed by other principles without being thereby invalidated:

> If a man has or is about to receive something, as a direct result of something illegal he did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction—a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another (Dworkin 1977, 26).

When rules have an 'all-or-nothing fashion', principles have a 'dimension of weight or importance' that is particularly important in conflict situations. When two principles conflict, then the more weighty principle prevails without invalidating the other; it is always possible that the weights between the principles are distributed differently in other circumstances. In contrast, when two rules conflict, at least one must be (rendered) invalid. Otherwise, the legal system would contain contradictory prescriptions. There are different possibilities to decide which rule shall be invalidated; one example is '*lex posterior derogate legi priori*'. More importantly, such meta-rules are not to be found within the conflicting rules. Furthermore, principles, in contrast to rules, cannot be formulated

in a comprehensive manner in the sense that the formulation includes all exceptions (where other principles prevail). Such 'counter-instances … are not, even in theory, subject to enumeration' (Dworkin 1977, 25 ff.). Dworkin admits that it can be hard to make the distinction between rules and principles in some cases, because rules often contain indeterminate, ambiguous, or vague wording:

> Words like 'reasonable', 'negligent', 'unjust', and 'significant' … [make] the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the *kind* of other principles and policies on which the rule depends (Dworkin 1977, 28, his italics).

Remember that Dworkin developed the distinction between rules and principles in order to attack Hart's legal positivism. Here is his main argument:

> This fact [that, besides rules, legal systems also contain principles which work differently] faces the positivist with the following difficult choice. He might try to show that judges, when they appeal to principles of this sort, are not appealing to legal standards, but only exercising their discretion. Or he might try to show that, contrary to my doubts, some commonly-recognized test always does identify the principles judges count as law, and distinguishes them from the principles they do not. I argued that neither strategy could succeed (Dworkin 1977, 46).

Dworkin's point is that principles, unlike rules, cannot be detected as part of a legal system with something like a rule of recognition. Principles are oftentimes not written down or employed explicitly as arguments in courts. There is no way to conceive law without referring to extra-legal standards such as morality. I set the further debate between Hart and Dworkin aside here (but see Shapiro 2007). It does not get us further with regards to an understanding of different kinds of norms. I will instead focus on Alexy's advancement of Dworkin's distinction. Like

Dworkin, Alexy developed a non-positivistic philosophy of law from the distinction between rules and principles.

Principles as Optimization Requirements

Leaving aside the subtle differences between Dworkin and Alexy (cf. Alexy 2003; Heinold 2011), I will focus on Alexy's understanding of the differentiation between rules and principles. In Alexy's view,

> [p]rinciples are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees … By contrast, *rules* are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says … [T]he distinction between rules and principles is a qualitative one and not one of degree (Alexy 2002, 47 f., his italics, references omitted).

Optimization is here defined as 'realizing to the greatest extent possible'. This has two implications. Where factually possible, a principle requires, first, complete realization unless a competing principle is affected. Second, if two or more principles compete, the task is to determine to which extent each principle prevails; each principle must be realized 'to the greatest extent possible'. For Alexy, the 'possible' is where balancing enters the scene.[3] Below, in the section on development by supplementation, I will make use of Alexy's understanding of principles as optimization requirements and explain how balancing works in his account.

Philosophers will realize that principles as optimization requirements, with their 'dimension of weight', are the kind of norms called *prima facie*

[3] Alexy (2002), 66 holds the strong belief that 'there is a connection between the theory of principles and the principle of proportionality. This connection is as close as it could be. The nature of principles implies the principle of proportionality and vice versa. [This] means that the principle of proportionality … follows from the nature of principles.' Note that the 'principle of proportionality' is no principle in the sense of optimization requirements; rather, the three sub-principles are rules or legal maxims.

norms in ethics.[4] The idea is that prima facie norms are binding, other things being equal; each prima facie norm can be outweighed in a particular situation by other relevant norms or considerations. The different weights cannot be assigned in advance. Rather, they can only be determined in particular cases, considering the particular context.

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[4] The *locus classicus* in ethics is Ross (1988). The notion of prima facie norms will be important in Part III. For the different prima facie character of rules and principles see Alexy (2002), 57 ff.

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Norm Application

Now that we have a clearer understanding of norms, and of rules and principles in particular, we are in a better position to elaborate on various instances of norm application and norm development mentioned in the introduction to Part II.

I distinguished between *application* and *development*, such that the former works with given norms and leaves them unmodified, whereas the latter always modifies the normative system by revising a norm or by adding new norms (expansion) under certain constraints. In this section, I introduce deduction as the method for application. Deduction does not have a good reputation among jurists and ethicists. I argue that this is largely due to the misunderstanding that judges simply have to 'discover' the implications of a given norm without using any creativity. Although sticking to the traditional understanding of deduction as a form of inferring a consequence from certain premises, I go to pains to explain what a good and transparent deduction presupposes. The most important ingredient to a deduction from a given norm is the interpretation of this very norm. There are various theories of what it means to interpret a norm, all of which are likely to yield different conclusions. After discussing the main rivals in American jurisprudence, 'textualism' and 'living

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constitution' approaches, I suggest taking a moderate position in between these views and working with certain rules of legal interpretation.

Only then will I turn from the statute-based tradition in the continental Civil Law systems to Case Law systems that work with precedent cases, applying them with analogical reasoning. I explain the elements of precedent cases and how to best understand what is actually binding in them before outlining Scott Brewer's understanding of analogical reasoning, which fits well with my understanding of norm application. How neatly it fits becomes apparent in the then following chapter on norm development where I show how overruling and distinguishing—two crucial elements of reasoning in Case Law systems—complement the structure of various forms of expansions and revisions usually employed in continental jurisdictions.

Deductive Structure

Deduction's bad reputation among jurists and ethicists is largely due to the misunderstanding that, when using deduction, one simply has to 'discover' the implications of a given norm without using any creativity. The idea seems to be that every deduction is as simple as this syllogism:

P 1 All men are mortal.
P 2 Socrates is a man.
C: Therefore: Socrates is mortal.

The structure underlying such a deduction is, indeed, simple—the truth of the premises guarantees the truth of the conclusion. However, it is oftentimes not so easy to infer a conclusion deductively, simply because a premise like P 2 in the example is usually not readily available. Deductive reasoning with norms requires at least the following: (1) a universal and conditioned norm (i.e., a norm that is logically universal or all-quantified, but stated in an 'if … then' clause); (2) a case description; and (3) a semantic interpretation of (1) to bridge the gap between (1) and (2) (cf. Alexy 1989; Koch and Rüßmann 1982). The relation between (1), (2), (3), and the conclusion is a normal deductive inference, which means

that to accept the truth of the premises logically forces one to accept the truth of the conclusion. This simple deductive model is meant to reach transparency—because it forces one to disclose all three premises which are thereby open for critique—and stability (for it formally binds norm and conclusion together). In the Socrates example, the case description (2) and the interpretation of the 'norm' (3) were simply given in P 2. In cases where we need to deliberate about what to do, (2) and (3) are not given but oftentimes highly controversial. This is what some authors do not realize when blaming something as 'legalistic'.

The three formal steps are, in Alexy's terminology, the 'internal justification'. The crucial justification of the premises is the 'external justification'. Employing the same concept, Neil MacCormick speaks about 'first-order' and 'second-order justification', whereas Koch and Rüßmann use the terms 'Hauptschema' and 'Nebenschema' (Alexy 1989; MacCormick 1978, 101; Koch and Rüßmann 1982, 48 ff.). I shall deviate from all these terminologies and call Alexy's internal justification the *formal justification* and his external justification the *material justification*. I find this terminology more appropriate, because Alexy's and MacCormick's terminologies easily give way to misunderstandings. It is by no means clear why the one side and not the other is internal or external, or first or second order, respectively. It is also unclear which is the main and which the side schema. My suggestion makes plain what the difference between the two sides is. The one is formal, in that it states a formal inference; the other is material, in that it gives material reasons in order to justify the content on the formal side. The other suggestions, furthermore, imply a higher rank or importance for what I call the formal justification. Although I also focus on this element, I do not see such a higher rank or importance and, therefore, prefer to avoid such implications. Both the formal and the material justification are elements of the justification of a particular decision. The material justifications justify the premises of the formal justifications; the material justifications can use different kinds of arguments, as well as different kinds of normative background theories. Again, the formal justification consists of (1) a universal and conditioned norm, (2) a case description, and (3) a semantic interpretation of (1) to bridge the gap between (1) and (2). The premises of this formal justification, especially the semantic interpretation (2), then depend on the

material justification. Only taken together will the formal and the material justification make for a justification of a particular decision.

Consider a criminal offence, a battery with the result that the victim loses a kidney.[1] The question is whether this amounts to grievous bodily harm under sec. 226 of the German Criminal Code, which sanctions such an offence with a maximum sentence of 10 years. Somewhat simplified, sec. 226 reads,

P 1 If the injury results in the victim losing an important body part [wichtiges Glied des Körpers] the penalty shall be imprisonment from one to ten years.

Simply adding the case description does not yet solve the case:

P 2 Battery K resulted in the victim losing a kidney.

It is impossible to infer a conclusion, because the case (P 2) is not described with the same wording as the norm (P 1). What is needed is another premise such as this:

P 3 Kidneys are important body parts.

However, such a premise is not obviously true. One needs a justification for P 3. Here are two interpretations of 'important body part' suggested in the literature:

P 3' Important is a body part that forms a self-contained unit with special function within the entire organism.
P 3" Important is a body part that is connected with the remaining body through a joint [Gelenk].

These justificatory premises are also in need of justification. But they are of a different kind than P 3. In contrast to the latter, P 3' and P 3"

[1] The example is taken from Koch and Rüßmann (1982, 14 ff.). For their logical reconstruction of this example see Koch and Rüßmann (1982, 48 ff.)—I will not outline this formal setting here, because it is not very fruitful for the debate in ethics.

do not allow one to infer a conclusion together with P 1 and P2. Such an inference requires an empirical premise like this:

P 4' Kidneys are body parts that form a self-contained unit with special function within the entire organism.
P 4" Kidneys are not body parts that are connected with the remaining body through a joint.

I assume that these two empirical premises are not contested. But one should note that, in many hard cases, it is exactly this empirical step that is immensely controversial and difficult to settle. Assuming that P 3' is accepted instead of P 3", one can, together with P 1, P 2, and P 4', infer this conclusion:

C The penalty shall be imprisonment from one to ten years.

Above, I suggested, to understand norms as general imperatives of the form 'In situations of X and Y, everyone ought to do Z', P 1 is such a norm. I also said that such norms are usually abstract and general, that they apply to different situations or actions (abstract) and that their addressees are described with universal attributes (general). These universal attributes are oftentimes not part of a single norm within a legal statute. The legislature can instead limit the scope of application for the whole statute, as the German parliament did in sec. 1 to 10 of the Criminal Code. The scope of application is, inter alia, restricted to crimes committed *by adults* and *within Germany*. Within these restrictions, the norms apply to all addressees. Establishing such general restrictions for a whole statute is a merely pragmatic decision. The alternative option is to include these restrictions into every single norm. The other side of such pragmatic decisions is that, when the applicant wants to 'find' the proper norm to deduce from, she has to construct this norm from a norm like sec. 226 and the relevant restrictions regulated elsewhere (that the crime was committed in Germany, by an adult, not in self-defense and so forth).

Premises such as P 3' and P 3" in the example are oftentimes crucial in norm application. From time to time, however, the law itself provides such premises. This is the case when it contains statutory definitions

[Legaldefinitionen]. The German Criminal Code defines, for example, in sec. 32(2) that '[s]elf-defense means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another'.

Both the general limitation of the scope of application and authoritative definitions can also occur in ethics. Examples for the latter are the various forms of utilitarianism that define a certain understanding of utility. That the former rarely occurs in ethics is mainly due, I believe, to the usually high level of abstraction of ethical theories—in abstract theorizing, there is simply no need to be pragmatic in formulating sets of norms.

P 3' and P 3" are semantic interpretations of the norm P 1. Or, to use the intension/extension terminology, they are the intension of 'important body part'. The *extension* of a term is roughly understood as the designation of things the term applies or extends to. In this sense, 'important body part' possibly extends to kidneys. The *intension* of the term, on the other hand, is roughly understood as its definition, as the naming of all necessary conditions. This is what P 3' and P 3" are meant to do. One could say that intension is meaning in the ordinary sense. Consider another example: The intension of 'ship' is something like 'a vehicle for transport on water'. The extension is sailing ships, passenger ships, fishing ships, and so on. To tell that the spaceship Enterprise is not in the open extension of 'ship', one either needs to know the exact extension of 'ship' or to apply the intension to determine the extension. The Enterprise clearly is no vehicle for transportation on water. Thus, the intension I gave for 'ship' narrowed the possible extension. The usual way of interpreting terms or sentences is to use the intension to part the actual from the only possible extension.

It should be noted that interpretations such as P 3' and P 3" are always needed when there is a gap between the norm and the case, in the sense that the wording in the norm is not exactly the same as in the case description. The semantic interpretation then bridges the gap between norm and case. It also makes the argument more transparent and criticism possible. Having the exact same wording in the norm and in the case description will only happen very rarely. And if it does, it should be a cause for particular caution. Imagine a criminal trial where the judge asks a witness what she recalls from the situation in question and she answers, 'The accused attacked the victim and the victim lost an important body part'. This would be obscure rather than helpful (cf. Koch and Rüßmann 1982, 26).

Interpretation

Now that I have argued for the importance of semantic interpretations in deductive inferences, I shall explain how semantic interpretation is done. I begin with a look at the main rivals concerning constitutional interpretation in US-American jurisprudence, 'textualism' and 'living constitution' approaches.

Consider the recent case *Fisher v. University of Texas*.[2] Abigail Fisher, a white student denied admission to the University of Texas, claimed that the university's consideration of race, besides many other factors, in assessing applicants violated her right to equal treatment. The equal protection clause—as part of the Fourteenth Amendment of 1868 to the US Constitution—was originally designed to assist newly freed slaves and to generally improve the position of African-Americans and other disadvantaged groups through race-conscious measures. But the clause does not mention slaves, African-Americans, or any particular characteristic along these lines. It promises 'to any person … equal protection of the laws'. But why should we bother with what the legislators almost 150 years ago deemed to be right when we are concerned with today's issues? John Bingham, the principal Framer of the clause, would not have dreamt of a white student falling under this clause. Does the historical intention to protect a certain group of people play any role for our adjudication today? Or is Chief Justice John Roberts right when, in his opinion for another equal protection case,[3] he wrote that 'The way to stop discrimination on the basis of race is to stop discriminating on the basis of race'? (I quote from Dworkin 2012). Some jurists argue that it, indeed, does not make much sense to follow the command of the long-dead Framers who did not know anything about society in the twenty-first century, but to rely instead on our own judgment and the developed deliberative practices.

In everyday life, people usually do not feel bound by what was deemed right in the past. If they follow past decisions, this is mostly because they still regard them as being right. If they consider them wrong now, ideally they admit so and decide in the reverse. It is along these lines that 'living

[2] 570 U.S. 11-345 (2013). On the issues at stake in this case, see Dworkin (2012).

[3] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

constitution' approaches (Strauss 2010) in US-American jurisprudence view the constitution as a growing and evolving document as the conditions, needs, and societal values change, because the Framers of the constitution intended a general document for a growing nation in a changing world. A more extreme version of the 'living constitution' camp holds that there is no reason whatsoever to stick to what was deemed right generations ago concerning issues that are in dispute today; one should rather treat legal texts as pieces of friendly advice, not as strictly binding commands (Seidman 2013).

The rival approach is 'textualism', as most prominently defended by Justice Antonin Scalia (1998). Textualism highlights that the law is primarily made to build somewhat stable expectations for individuals, families, businesses, even for other states. Expectations cannot be met when every decision depends on what is deemed right at the moment by the person that happens to have the authority to make a particular decision. Most jurists argue that constitutions (and other legal texts) and the therein-expressed values and guarantees should be followed. The question is only how closely they should be followed. In a nutshell, textualism is the view that one ought to interpret legal texts in the way that best represents what the drafters of the very text actually said; this is what the sovereign endorsed as law. In Scalia's words, '[i]t is the *law* that governs, not the intent of the lawgiver … [The ideal is] a government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us' (Scalia 1998, 17, his emphasis). Textualists claim that 'judges should adhere to a historically fixed understanding of what principles the Constitution contains *and* how the Framing generation would have applied those principles to specific situations' (Liu et al. 2010, 40, their italics). They would thus hold that Abigail Fisher does not fall under the equal protection clause, because the Fourteenth Amendment's equal protection clause was meant to help freed slaves and to improve the position of African-Americans, certainly not that of white, middle-class Texas girls.

Yet, textualism is also deeply flawed. An obvious problem for textualism is that the Framers did not have any thoughts on many modern controversies: the Framers could not, for instance, have pictured implications of the Fourth Amendment for modern surveillance technology, which do not involve physical trespass into a protected space, thereby going beyond

the realm of unlawful intrusions the Framers had in mind (cf. Liu et al. 2010, 43).

Even more importantly, textualism cannot *explain* the actual development of constitutional law. Just consider the highly acclaimed and, probably, most famous decision of the Supreme Court, *Brown v. Board of Education*.[4] The case was about racial segregation in public schools. The legal question was if the Fourteenth Amendment of 1868 outlaws this segregation. The relevant section in the Amendment reads 'No State shall … deny to any person within its jurisdiction the equal protection of the laws'. The court made some effort to clarify what the Congress and the states ratifying the Amendment in 1868 thought, whether they understood it to abolish segregation in public schools, but found the result inconclusive because public education rarely existed at that time. The court went on to interpret the Amendment, taking into account the massive change in the social context of public education since 1868, highlighting the contemporary significance of public education for individuals and the democratic society altogether. Crucial was, then, which consequences segregation would have for black school children. They found these consequences, in Chief Justice Warren's words, to be 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'. This line of reasoning is irreconcilable with textualism's focus on the Framers' understanding of the Amendment. In the following decades, *Brown* became the precedent for a wide range of issues concerning racial equality beyond public schools. It was in this context that the new debate emerged around the above-mentioned case of Abigail Fisher, the white student denied admission to the University of Texas, whether the Fourteenth Amendment and the *Brown* authority require neutral, color-blind admissions or, instead, support affirmative action; the former reading would support Fisher's claim, the latter reading would not.

A proper understanding of semantic interpretation in legal theory must *explain* the actual development of constitutional doctrine, as opposed to textualism and living constitution approaches. It must, further, take seriously the binding power of the enacted law while also allowing for sufficient flexibility in order to keep the law alive and make it a good

[4] 347 U.S. 483 (1954).

guide for modern times. In what follows, I motivate such an understanding by, first, going through some general points concerning interpretation and authority and, second, by discussing traditional rules of legal interpretation. The middle ground between textualism and living constitution that I thereby lay bare is the predominant approach in continental Europe, and closely related to an emerging school in US-American jurisprudence labeled 'constitutional fidelity' (Liu et al. 2010).

Joseph Raz provides some general characteristics of interpretation that are not specific for law, but also meant to hold, for example, for theology and for literature:

> (1) Interpretation is of an original. There is always something that is interpreted. … (2) An interpretation states, or shows (eg in performing interpretations) the meaning of the original. (3) Interpretations are subject to assessment as right or wrong (correct or incorrect), or as good or bad … by their success in stating, showing, or bringing out the meaning of the original. … (4) Interpretation is an intentional act. One does not interpret unless one intends to interpret. What my friend said to me last night can be an interpretation of a dream I had last week. But he did not interpret my dream. I may have done so if I took his words to provide an interpretation of the dream (Raz 2010, 268).[5]

More specific for law—and, as we shall see, in a slightly different form also for ethics—is the conglomerate of authority and intention in interpretation. Recall that von Wright regards an authoritative relation as a constitutive element of all norms that are prescriptions when he says

[5] Raz is here not concerned with 'meaning' as discussed in the philosophy of language. The question what a legal norm means is different from the general problem what meaning is in linguistic acts in general. Legal norms are made and understood in a certain setting. This setting is usually a state with a particular legal system. The body that created the norm is usually attributed authority. This alters the general question whether use-theories or formal-theories of meaning are the appropriate approach, whether realism or anti-realism is the correct view, whether it is the speaker's audience-directed intention that determines meaning and so forth (cf. Avramides 1997). This is, of course, not to say that there is no relation between these deep problems of meaning and the discussion of semantic interpretation in legal theory (just see Bung 2004; Klatt 2008). But the differences with respect to the deep problems do usually not affect the level I am interested in here; the deep problems usually only impinge borderline problems such as how strict and effective the limit of the wording can actually be. Setting out the relations between semantic interpretation and the deep problems of meaning would require another book.

that they are 'commands or permissions, given by someone in a position of authority to someone in a position of subject' (Wright 1963, 7). Semantic interpretation in legal theory is closely related to authority in this sense. In Raz's words:

> To give a person or an institution law-making powers is to entrust them with the power to make law by acts intended to make law. It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make. Assume the contrary. Assume that the law made through legislation bears no relation to the law the legislator intended to make. For this assumption to be at all imaginable the legislator must be unaware of what law will be made by his actions. … [T]o assume that the law made by legislation is not the one intended by the legislator, we must assume that he cannot predict what law he is making when the legislature passes any piece of legislation (Raz 2010, 274).

Authority is thus the reason why the law must be interpreted in accordance with the legislator's intention. But Raz also highlights that this focus on intention does not mean that the wording of the law is irrelevant. On the contrary, '[i]n the cycle of convention and intention, convention comes first. Not in the sense that we follow conventions rather than intention, but in the sense that the content of any intention is that which it has when interpreted by reference to the conventions of interpreting such expressive acts at the time;' and '[w]hat the legislator said is what his words mean, given the circumstances of the promulgation of the legislation, and the conventions of interpretation prevailing at the time' (Raz 2010, 286, 288, footnotes omitted). It is such a combination of linguistic convention and author's intention that the following rules aim at for practical purposes of judicial adjudication, thereby covering the middle ground between textualism and 'living constitution'.

Rules of Interpretation

The rules I am referring to here are a traditional set of rules of interpretation that are meant to guide legal interpretation. In this form, they go back at least to Friedrich Carl von Savigny's classic *System des heutigen*

römischen Rechts of 1840; they are often referred to with the a Latin term as the 'canones' of interpretation. These rules have roughly to do with (1) the linguistic usage of a term; with (2) the position of a norm or single term in the legal system; with (3) the legislator's intention; and with (4) the objective teleology of a legal norm. There is no fixed formulation of these rules and their ordering is disputed.[6]

Following Koch and Rüßmann (1982), 166 ff., I suggest to understand these rules such that the individual rules actually complement each other. The *first rule* states the aim of semantic interpretation, namely to determine the relevant semantic content of a norm through linguistic conventions.

The *second rule* refers to the context of a norm within the legal system. It touches on two points. One point is that it specifies how the relevant semantic content of a norm is to be determined, namely, if the first rule reveals more than one possible norm content, the context of the norm within the legal system shall be used to determine which content fits best within this system. This already implies the other point, namely, that one shall choose the possible content that is consistent with other existing norms so that the system is free from contradictions. This second rule thus states not so much another aim of semantic interpretation. It, rather, specifies how the first rule's aim is to be achieved.

The *third rule* requires interpreting a norm in such a way that respects the legislator's intention in making it. The point of this rule is to determine the semantic content of the norm, such that the legislator's aims in making it can be achieved. This includes, inter alia, taking into account the circumstances (social or economic, for instance) that prevailed at the time and asking which conflicting interests the legislator tried to balance in designing the norm.

The *fourth rule* requires interpreting a norm such that its purpose can be achieved. The purpose is, here, not what the legislator intended to do, but what the norm itself aims at, that is, it refers to objective instead of subjective teleology. This can, for instance, be the positive consequences

[6] Just see the formulations in Alexy (1989), 234 ff. and Koch and Rüßmann (1982), 166. Everyone who wants a more extensive list of rules of interpretation should read Scalia and Garner's somewhat unsystematic discussion of no less than 70 such rules (Scalia and Garner 2012).

of a norm that have never been intended. Aharon Barak pretty much grounds the role of judges in democracies on objective teleology ('objective purpose' in his terminology (Barak 2006, 137 ff.)). He generally views the judge as a partner of the legislator: 'The authors establish the text; the judge determines its meaning. … The judge must ensure the continuity of the constitution. He must strike the balance between the will of the authors of the constitution and the fundamental values of those living under it' (Barak 2006, 135). Barak thereby extents the judge's role to a significant degree and overstates his points. He underestimates the role and the ability of the legislature to enact new laws or change existing laws, for example, in this passage: 'If a judge relies too much on legislative intent, the statute ceases to fulfill its objective. As a result, the judge becomes merely a historian and an archaeologist and cannot fulfill his role as a judge … The judge becomes sterile and frozen, creating stagnation instead of progress' (Barak 2006, 138). All this potentially yields two misunderstandings: First, that judges mysteriously 'know' the objective purpose or teleology of a statute. What they do is interpret the statute in light of their knowledge and beliefs within the modern society. Calling that an 'objective purpose' is somewhat euphemistic. Second, that the main role of a judge in statutory and constitutional interpretation is a more or less freelancing search for the 'right answer' from an objective point of view. It should be clear that objective teleology faces serious problems.

It turns out that the rules are best understood as two diverging aims of legal interpretation (linguistic convention vs. legislator's intention) that are specified by the second rule (to consider the norm's systematic context). The fourth rule (objective teleology) is particularly problematic. One should not understand it as a rule of norm interpretation, but as a limited competence of the norm applicant to herself determine what is most reasonable to do.[7] What counts as a rule of interpretation and how these rules are ordered depends on the function of legal interpretation. The point of norm interpretation is not so much to find the 'true' meaning of a norm, but to find an understanding that respects both the norm

[7] Koch and Rüßmann even suggest calling this rule 'consideration of consequences' [*Folgenberücksichtigung*] instead of objective teleology (Koch and Rüßmann 1982, 233).

formulation and the legislator's authority. This is what the rule of law ultimately amounts to. Just as Raz highlighted the legitimatory role of the legislator's authority (and intention) while also sticking to the relevance of linguistic conventions (Raz 2010, 286 ff.), so, too, are these the two poles in the rules. What else can it mean to be bound by what the legislature has enacted than respecting what they *said* or what they *intended*? Between these two options, what the legislature actually said is of primary importance, simply because this is the best means to guarantee stable expectations and predictability in complex societies. Most jurisdictions even stick to an explicit rule to this effect in certain areas of law—primarily in criminal law—in upholding the old principle '*nulla poena sine lege scripta*'. Furthermore, the whole process of legislation, with its different steps of formalization and ratification, implicitly fosters this primacy of what the legislature actually said in the law over what they intended to say.

The ordering of the rules is, first, to establish what the legislator said. When this leads to a clear and unambiguous understanding of the norm, this is it. This understanding cannot then be 'corrected' through other considerations. When what the legislator said is unclear or ambiguous—even after considering the context of the norm within the legal system—one has to ask what she intended to say in making the respective norm. Only if this step also does not yield a clear result does the applicant have the competence to determine her own ends or to determine for herself what is most reasonable to do within the scope of the norm's wording. The norm's wording thus guides and constrains the whole process of legal interpretation.

Some Intricacies

Some intricacies concerning the legislator's intention are worth mentioning here. I do not aim at providing comprehensive answers to these problems here; instead I content myself with hinting at how they might be dealt with.

The first intricacy is a simple question: whose intention is one asking for? Modern liberal democracies are highly institutionalized—and so is the process of legislation. New laws are usually initiated in government departments, developed and drafted by highly specialized experts. A thus

formulated law then makes its way to parliament where it is usually discussed in the relevant parliamentary committees. The committee members might hold additional expert hearings where they lack the relevant knowledge. After discussing the law in these committees the members will, if the law is important enough, inform the other members of their parliamentary party about the basic problems of the law and suggest how to vote on the issue. The other members will usually—given general plausibility of the proposal—trust the experts and follow their suggestion as to how to vote on the law. If the law is adopted with the votes of the thus informed members of the leading party, whose intention is meant when one asks for the legislative intention? Is one asking for a collective intention of the parliament or, rather, for the individual agents' intentions? Individual intentions are likely to be very diverse and extremely hard to determine in the first place. One can also, as lawyers do, refer to official public utterances on the respective law, be it in explanatory memoranda, officially issued justifications, or press releases explaining the purpose of a new law. These explanations and justifications are often very helpful in determining what the parliament as a collective intended to say in a law. They can also be helpful indirectly, for example, when they explain why and how certain expressions were revised or explicitly chosen, or why other expressions were intentionally avoided.

There are also some intricacies with establishing 'what the legislator said' (cf. Klatt 2008). How does this actually work? What is the relevant linguistic convention for legal interpretation? Is it ordinary language or technical—jurists'—language? Is it the convention at the time the law was enacted or, rather, the contemporary linguistic convention? It might be considered a matter of empirical research to determine the linguistic convention. It is usually not feasible to conduct empirical linguistic research before settling on a norm's meaning. In most cases, it will suffice to consult the relevant literature or dictionaries to grasp the relevant convention. When this is inconclusive, one can refer to personal assumptions about what the relevant convention is—but one has to do so explicitly so that legal discourse or the legislator can correct these assumptions (for example, by introducing authoritative legal definitions).

Since the point of the rule of law and of legal norm interpretation in general is to find an understanding that respects both the norm

formulation and the legislator's authority, the relevant linguistic convention is the one that was dominant at the time when the law was enacted, rather than the contemporary convention.

Other problems for semantic interpretation are indeterminacies in the form of ambiguity and vagueness. A term is ambiguous if linguistic convention has it that the term has different meanings in different contexts. For instance, 'bank' can refer to a commercial bank, as well as to the side of a river. In law, the term 'seizure' [*Wegnahme*] has different meanings in sec. 289 of the German Criminal Code and in sec. 17(2) of the German Unfair Competition Act [*Gesetz gegen den unlauteren Wettbewerb*] (Klatt 2008, 47). In most cases, the respective context will reveal the relevant meaning.

Vagueness is a far more serious problem than I can give the attention it deserves (but see Endicott 2000; Gruschke 2014; Poscher 2012; Broome 1997). In contrast to ambiguity, vagueness cannot be resolved through context. Vague expressions have borderline cases 'in which', to use Grice's definition, 'one just does not know whether to apply the expression or withhold it, and one's not knowing is not due to ignorance of the facts' (Grice 1989, 177). That is, there are individuals to whom the expression undoubtedly applies (positive candidates), individuals to whom the expression does undoubtedly not apply (negative candidates), and individuals for whom it is notoriously unclear whether or not the expression applies (neutral candidates or borderline cases). Expressions can be ambiguous and vague simultaneously. For example, without specified context, 'child' is ambiguous. It can mean, inter alia, 'offspring' and 'immature offspring'. The latter understanding has borderline cases where the relevant degree of maturity is unclear. There are several kinds of vagueness (Poscher 2012, 131 ff.), and the most important for law is probably classificatory vagueness. This is vagueness about the properties an object needs to possess in order to belong to a certain category, as in the above-mentioned question whether a kidney belongs to the category 'important body part', that is, the question whether kidneys are in the extension of 'important body part'. In interpreting expressions, one usually uses the intension to part the actual from the only possible extension; the intension is the properties an object needs to possess in order to belong to the extension of the expression. Consider the question

whether a glass brick element of a façade is properly called 'window'. Is the possibility of opening and closing part of the intension of 'window', or is it sufficient to be a translucent opening in the wall of a building? The glass brick element in a façade is a borderline case of 'window'; it is a neutral candidate of which it is just unclear whether it is in the extension of 'window', and this is 'not due to ignorance of the facts'.

When faced with a vague category in a norm, the applicant's task is to *stipulate* a fitting intention, that is, to stipulate a semantic interpretation of the category that resolves the question whether an object does possess the properties it needs in order to belong to this category. Doing this, the applicant turns the neutral candidate into a positive or negative candidate for the case at hand. This interpretation is not determined by the law as it stands. However, it is still no instance of norm development, as discussed in the next chapter, because it does not revise or extend the normative system.

Reasoning with Precedents

Analogical reasoning and the closely related use of precedents are often described as being 'one of the most frequently used techniques of legal argument' (Brewer 1996, 925), 'the most familiar form of legal reasoning' (Sunstein 1993, 741), or as 'two central forms of reasoning found in many legal systems, especially "Common Law" systems such as those in England and the United States' (Lamond 2014, 1). The latter emphasis on Common Law systems is important, because in Civil Law systems the use of analogy and precedent serves different functions and is less central to legal reasoning.

Both analogy and precedent can be understood as the use of a prior decision to decide another case when both cases are relevantly similar. They are different roughly in the following sense: precedents are legally binding in a way analogies are not. One can draw an analogy between two cases but still decide to solve the new case in a way that does not mirror the other case's solution. With precedents, this deviation is only possible when certain conditions are fulfilled. The main difference seems to be one of degree, not of kind. The burden to justify a deviation from a prior decision is higher and way more formalized in precedents than

in other analogies. In everyday life, people usually do not feel bound by their previous decisions. If they follow them, this is mostly because they still regard them as being right. If they happen to judge them differently now, they decide the reverse—special circumstances being absent. Legal precedents are often considered a special kind of analogies, in the sense that people rightly expect courts not to change their judgments without compelling reasons; the law provides criteria as to when courts can overrule past decisions and thus gives a special weight to previous decisions absent in people's everyday use of analogies.

In order to gain some more clarity, I will depart somewhat from this prima facie understanding of analogy and precedent by distinguishing the two in the following way: *I take analogy to be the way of reasoning that uses examples or cases, indifferent to their normative source, in order to infer a conclusion from certain premises. In contrast, I understand precedent as being a certain normative source, namely a certain case that is regarded as having a special normatively binding status. Precedents are often used by analogy; analogies are not dependent on precedents.*[8]

Precedents

As Twining and Miers point out, 'future decision-makers have some kind of obligation to come to the same conclusion should a similar case arise' and explain why this is important:

> others who observe or rely upon the decisions of the particular body may expect that similar cases in the future will be similarly decided and thus may base their conduct upon such expectations; … the decision-making process is not constituted simply by the *ad hoc* resolution of particular cases, but involves the rational development of general policies or principles through these cases; and … the individual decisions themselves have status as expressions of policy or principle. … These four notions, of

[8] Note that, here and in what follows, I do not explain the use of precedents in one particular legal system with important details such as which court exactly has the power to overrule. For a useful outline of the use of precedents in several legal systems see MacCormick and Summers (1997). Rather, I am interested in the theory behind the use of precedents as shared in all Case Law systems.

> obligation, expectation of future behavior, interstitial growth of policy and principle, and the authority of decisions, form the basis of the common law's treatment of precedent (Twining and Miers 1999, 312, their italics).

These four notions are important for every institutionalized legal system following the rule of law. The line between Civil Law systems and Case Law systems can nevertheless be drawn using the notion of precedent. In Civil Law systems, the law is mainly established through a process of legislation by a body different from the jurisdiction. In Case Law systems, the law is mainly established through decisions of the jurisdiction. Courts establish precedents that are binding for the future and thus have *practical authority*. That courts are bound by past decisions is called the *doctrine of precedent* or *stare decisis*.[9] In Civil Law systems, the decisions of high courts are also very important, but primarily as having *theoretical authority*[10]—theoretical authority in the sense that these decisions are oftentimes a focal point of discussion for courts in future cases similar to the earlier case decided by the high court. The difference is that courts in Civil Law systems, in deciding a new case, are generally not bound by past decisions. One can thus say that courts in Case Law systems make and apply the law, whereas courts in Civil Law systems apply the law and only very rarely make law.

In most legal systems, the practical authority of a decision expands to courts that are lower in hierarchy than the one that made the judgment (and to the ruling court itself). Lower courts are strictly bound, in the sense that they do not have the power to overrule a decision. If the same court later regards its own decision as being erroneous, it is generally bound but does have the power to overrule. The courts higher in hierarchy are not bound; but they still have to cite these prior decisions and explain why they reach a different judgment (cf. Gascón 2012; Twining and Miers 1999, 315 f.).

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[9] This statement is only provisional. In the section on overruling and distinguishing, I will refine this understanding.

[10] The terminology is taken from Lamond (2014). One important exception is the German Federal Constitutional Court, whose decisions are strictly binding for all lower courts and for all state authorities; some decisions even have the force of statutes [*Gesetzeskraft*].

There are two main problems concerning precedents: First, what exactly has the binding force? Is the precedent a norm, an argument, a balance of reasons? Second, how is the precedent binding?

What Is Binding?

I shall now explain what it is that has this kind of force and authority in precedents. Precedents are particular cases decided by a court. In Common Law systems, a decision usually consists of the following elements: (a) the case description; (b) the legal question at stake; (c) the reasoning about this question; (d) the ruling on the legal question; and (e) the result for the particular case, which follows from the ruling (cf. Lamond 2014).

Were the precedent binding only for identical cases, (e) would be the binding element. But since precedents are binding not only for identical, but also for similar cases, it must be something else. The most common—and convincing—view is that precedents are actually a kind of norm.[11] The idea is that, in deciding a particular dispute, the court first establishes a rule to deal with that *kind* of dispute and then applies this rule to decide the case at hand. On this view, what is binding is not the decision in the particular case, but the general rule that the court established. This rule is (d) in the above scheme and also called the *ratio decidendi*. Of course, these precedent-rules usually do not provide their own meaning, but are in need of interpretation, just as statutes are. Applying the ratio decidendi, however, is oftentimes more difficult than the application of statutes for two interrelated reasons. First, considerable agreement about how to interpret only exists for statutes but not for ratios. Second, when court decisions are not well structured, argued, or written, it can be quite a challenge to figure out what exactly the ratio of the case is. It can be any of the following options:

1. The rule(s) of law explicitly stated by the judge as the basis for the decision, that is, the explicit answer to the question(s) of law in the case. 2. The

[11] I abstain from spelling out alternative views here. Lamond (2014) and Marshall (1997) provide helpful overviews. Horty (2011) uses default logics to develop a very interesting understanding of precedents that combines different answers to the 'what is binding' question.

> reason(s) explicitly given by the judge for the decision, that is, the explicit justification for the answer(s) given to the question(s) in the case. 3. The rule(s) of law implicit in the reasoning of the judge in justifying the decision, that is, the implicit answer(s) to the question(s) of law in the case. 4. The reason(s) implicitly given by the judge for the decision, that is, the implicit justification for the answer(s) given to the question(s) in the case. 5. The rule(s) of law for which the case is made to stand or cited as authority by a subsequent interpreter, that is, the imputed answer(s) to the question(s) of law in the case (Twining and Miers 1999, 334; see also Chiassoni 2012).

Despite the problem to figure out what exactly the ratio of a case is, Joseph Raz rightly highlights one possible shortcut in reasoning with precedents: when interpretation shows that a new case has the features that are not significantly different from those of a prior case, the solution of the new case does not require the use of analogical reasoning, for one can directly apply the ratio of the prior case. Analogy only comes into play where one does not have a rule (ratio) that is applicable without ambiguity, but where the prior and the new case share only some relevant features. Consider a precedent case P has six relevant features a, b, c, d, e, and g. The case was decided with the rule (ratio) 'If A, B, C, then X'. The court subsumed P's features under the rule and concluded X as the result for the case P. When a future court is faced with a new case N with only three relevant features a, b, and c, this case can be solved with the rule from the earlier case P. This application makes no use of analogical reasoning; instead it is a matter of applying a rule as discussed above.[12]

Strict Binding Force?

One important feature of the use of precedents in comparison to statutes is that later courts are not strictly bound to apply existing norms, since there are the possibilities of overruling and distinguishing. As Raz puts it,

[12] I am using Raz's somewhat untypical notation here, because it also appears in a later discussion where I quote from Raz (2009), where he uses precisely this notation.

> the main conceptual difference [between judicial law-making and legislation] is in the constant possibility of distinguishing judge-made law. This means that judge-made law has a different status from legislated law. Strictly speaking judge-made law is binding and valid, just as much as enacted law. But judge-made law is unique in the ample powers the courts have to change it by overruling and distinguishing. The importance of the point is not merely the existence of more numerous repeal powers, but rather in the occasion for their exercise … In this respect it can be metaphorically said that judge-made law is less 'binding' than enacted law (Raz 2009, 195).

Besides the need to interpret the precedent's ratio, overruling and distinguishing are severe limitations for the binding power of precedents. I explain the notions of overruling and distinguishing in the section on norm development, because that is what they result in. Overruling is a means of norm revision; distinguishing expands the normative system by filling a gap, or so I will argue. Taking this into account, the doctrine of precedent or stare decisis is a disjunctive obligation of courts to either follow or distinguish a precedent.

Analogical Reasoning

Understanding analogical reasoning is of crucial importance to reasoning with precedents, for precedents are often used by analogy. Yet, 'despite its importance to all disciplines and its special prominence in legal reasoning', Scott Brewer concludes that 'it remains the least well understood and explicated form of reasoning' (Brewer 1996, 926). The intuitive understanding of analogical reasoning is that it informs our judgment of one thing using what is known about another thing when the two things share some features. Imagine Cass has a German shepherd dog that is gentle with children. Whenever Cass sees another German shepherd dog, he assumes that this dog is also gentle with children. This example (taken from Sunstein 1993, 743) makes use of known similarities and assumes that things that share some features are also likely to share other features. But, of course, knowing only one dog's gentleness is not even a sufficient

basis for reasoning in everyday life. The problem of detecting the analogy's rational force is still not solved by inferring from two, 10, or 50 dogs' known gentleness, for it can neither be the pure existence of similarities between the things, nor the number of similarities, that provides the normative force. As Brewer puts it, 'everything is similar to everything else in an infinite number of ways, and everything is also dissimilar to everything else in an infinite number of ways'.

> Consider any two items, x and y, where neither x nor y is a moose. However dissimilar they may be, they are "alike" in that both are not identical to one moose. But they are also alike in that they are both not identical to two moose, to three moose, and so on, ad infinitum (Brewer 1996, 932).

The following section outlines Brewer's understanding of analogical reasoning as one particularly attractive possibility to conceive of analogies in legal reasoning and as a basis for an application on casuistry in bioethics in Part III. I use Brewer's understanding because it is very clear, captures what most scholars seem to have in mind when merely referring to analogical reasoning without explicating its structure, avoids extreme confidence as well as extreme distrust in the reliability of analogies, and reconstructs analogical reasoning with notions much better understood than analogy itself.[13]

Brewer's Theory of Analogical Reasoning

Brewer's main idea is that reasoning by analogy is a sequence of three distinct reasoning processes. The first of these processes is abduction in a situation of doubt about the extension of a predicate or text, or when no canonical guidance exists. Confronted with several examples,

[13] There are, of course, also other interesting accounts of analogy, such as Holyoak and Thagard (1995), Spielthenner (2014) or Rigoni (2014). Others reject all attempts to find something like a structure in analogical reasoning, and, instead, highlight its intuitive plausibility and practical usefulness in everyday life and in legal reasoning. A book-length version of this view is Weinreb (2005). Although I draw on Alexy's work repeatedly in this book, I decided not to incorporate his understanding of analogical reasoning as developed in Alexy (2005, 2010), because I do not find it convincing. But see the discussion in Bustamente (2012).

the reasoner tries to organize these examples by a rule. Brewer calls this the 'analogy-warranting rule' or 'AWR'. The process used to discover this AWR is abduction. The second process is a confirmation or disconfirmation of the AWR, which involves the testing of the AWR. The third step is to apply the AWR to the particular example that originally triggered the reasoning process. The AWR plays a central role in this understanding of analogy. It is supposed to do much of the work that is necessary to attribute an analogical argument's rational force in being the sufficient warrant to believe that some features or characteristics of one thing allow to infer that another thing has the same features or characteristics. Recall the above example of a German shepherd dog that is gentle with children. Cass's reasoning that every other German shepherd dog is also gentle with children lacked such a warrant. What the AWR does is to state the logical relation between the known characteristics of compared items and the only inferred characteristics, step 4 in the following schema of analogical arguments:

Where x, y, z are individuals and F, G, H, are predicates of individuals:

Step 1: z has characteristics F, G …
Step 2: x, y, … have characteristics F, G …
Step 3: x, y, … also have characteristic H.
Step 4: The presence in an individual of characteristics F, G, … provides sufficient warrant for inferring that H is also present in that individual.
Step 5: Therefore, there is sufficient warrant to conclude that H is present in z (Brewer 1996, 966).

It should be noted that this schema says nothing about the *justification* of the AWR. It resembles for analogy what I referred to as the formal justification in deductions above. Deduction's material justification finds its parallel in the AWRa, which I explain in turn. If the AWR has a deductive structure, steps 4 and 5 in the overall analogical argument must satisfy the '*entailment requirement*, namely, that the AWR can serve as a premise (step 4 above) that, taken together with the "target premise" (step 1 above), deductively entails the conclusion (step 5 above) (Brewer 1996, 971, emphasis his).

Arguments by disanalogy have a very similar structure. Imagine a student who tries to convince the proctor that, if the use of pens is allowed on exams, word processors also should be allowed, for both assist students in communicating their ideas to their professors. He might, for instance, provide the rationale that the use of word processors increases justice for students with poor handwriting. The proctor then might seek to distinguish the pen and the word processor by pointing to characteristics they do not share, for instance that cheating is harder to detect when students use word processors:

Target (y) = use of word processor on exam.
Source (x) = use of pens on exam.
Shared characteristic:

F assists student in communicating ideas to professor.

Unshared characteristic:

G does not provide a method for hard-to-detect cheating.

Inferred characteristic:

H is permitted to be used on the exam.

Argument:

(1) x and y both have F;
(2) x also has G;
(3) y does not have G (y has not-G);
(4) x also has H;
(5) Disanalogy-warranting [rule] (DWR): any F is H unless it also has not-G; [i.e., all things that are both F and G are H.] …
(6) Therefore, the presence of F and H in x does not provide a sufficient basis for inferring the presence of H in y (Brewer 1996, 1007 f., reference and italics omitted).[14]

[14] Note that Brewer calls the DWR in step 5 of the argument disanalogy-warranting *rationale*. I hold this to be a typo, for he provides the abbreviation DWR and not DWRa (in analogy with

I do not have the space to discuss all aspects of or possible objections to Brewer's theory of analogical (and disanalogical) reasoning. However, one possible objection deserves particular attention, namely, that it does not capture what is distinctive about analogies.[15] Analogy is often taken to be reasoning 'from particular to particular', as opposed to deduction (from general to particular) and induction (from particular to general). One could suspect that, in the above examples, the sources (that is, the particulars) are ultimately irrelevant for the conclusion, because the conclusion largely depends on the AWR and not on the source. Brewer answers this objection by highlighting that, although analogical reasoning is rule-based, it is not reducible to rules. Rather,

> argument by analogy consists not just of a narrow argumentative process of inferring the truth or probable truth of some propositions from the truth or probable truth of others. It involves also the abductive step of *discovering* the rules to be applied, of making sense of *patterns* of characteristics, and of putting characteristics into rule-like patterns (Brewer 1996, 978, his emphasis).

The Sequence of Processes

I shall now explain these three distinct processes in some more detail. The *first process* is an abduction in a context of doubt about the extension of a predicate or text (such as a certain statute or precedent), or when no canonical guidance exists (as in a novel situation). The idea of *abduction*, or inference to the best explanation, is rooted in the philosophy of science. Charles Sanders Peirce introduced the term to explain the process of scientific discovery, that is, how scientists pick one or a few

AWR and AWRa). Further, step 5 must be the disanalogy-warranting *rule*, which is supported by the rationale that points to the seriousness of cheating, administrability, and so forth.

[15] See, for example, the criticism by Brozek (2008) and Spielthenner (2014). It should be noted, though, that Brozek himself does not take seriously the tension between the binding force of precedents on the one hand and the need for flexibility (that is, the possibilities of overruling and distinguishing) on the other hand. Brozek simply presupposes that precedents establish statute-like rules and—contrary to Brewer—that reasoning by analogy is only necessary once the interpretative work is done.

explanations of a heretofore not understood natural phenomenon from a potentially indefinite number of possible explanations of the phenomenon. Typically, an abductive inference itself has three steps. The first step is to notice an *explanandum*, something that calls for explanation because it is not yet understood. Take as an explanandum, for example, the smell of smoke in a car. The second step, then, is to find an *explanans*, that is, an explanatory hypothesis for the explanandum. One possible explanans for the smoke in the car is a short circuit in the car's stereo system. The explanans is a conditional proposition: if the explanans were the case, then the explanandum would be explicable. The short circuit in the car's stereo system can explain the smoke in the car. The third step is for the reasoner to settle on the explanans as the tentatively correct explanation of the phenomenon. The result is, thus, not necessarily true, but sufficiently likely to be the correct explanation of the explanandum in order to be tested. In Brewer's model, the explanans is the AWR.

The *second process* is to determine whether the AWR does effect an acceptable sorting. This requires the reasoner to measure the AWR against a separate set of explanatory and justificatory propositions, which Brewer, as mentioned before, calls 'analogy-warranting rationale' or 'AWRa'. The AWRas explain and justify the AWRs. But just as the attempt to justify rules of deductive inference deductively runs into an infinite regress, so AWRas do not necessarily need to satisfy the same requirements as the AWRs (cf. Brewer 1996, 1022). Also, one should not expect too much from the AWRas. As noted above, in analogical reasoning, the AWRs resemble the formal justification familiar from deductive reasoning, that is, the retrospective formal structure of the justification of a certain judgment, its formal cogency. The AWRas, in contrast, resemble the material justification, that is, the justification of the rules or the interpretation of the norms, respectively. They are open for various kinds of reasoning and they might be vague. Oftentimes the AWRas will be very abstract policies, principles, or deeply held convictions, which explains why

> in many … hard cases, the AWRas will underdetermine various AWRs that nevertheless may plausibly be explained and justified by reference to them, so that different reasoners will sometimes discern and endorse different

> AWRs even when they endorse the same AWRa. … [I]t is possible, indeed quite common, for different reasoners to discern and endorse different AWRs because they endorse (or at least rely upon) different ARWas (Brewer 1996, 1022).

The reasoner has to look in two directions: 'up' to the AWRas, testing the AWR for a strong degree of coherence with the AWRas, and 'down' to test whether the AWR effects a good sorting of the relevant particulars. Drawing on Rawls and Goodman, Brewer calls this reasoning device 'reflective adjustment' (Brewer 1996, 963). I take this approach to sorting out the best AWR using AWRas to be close to Raz's ideas to determine the relevant similarities between cases. Raz insists that there exists no clear guidance for how to determine this relevance; instead it depends on

> the rationale of the rule in [the initial case]—the reasons for having it, the purpose it serves. It is this which explains the role and importance of the conditions laid down in it. By its very nature the justification of a rule is more abstract and more general than the rule it justifies. Therefore just as it justifies this rule it could justify another … [T]he general technique of analogical arguments [is the] reliance on partial similarities to extend a rule … or to create another rule leading to the same result … when such a change in the law is justified by the same purpose or value which justifies the original rule on which the analogy is based … [T]he test of relevance for similarities is the underlying justification of the rule which forms the basis of the analogy. Argument by analogy is essentially an argument to the effect that if a certain reason is good enough to justify one rule then it is equally good to justify another which similarly follows from it (Raz 2009, 203 f.).

Just as I avoided the difficulties of material justification above because my focus is on the formal cogency of the respective kinds of reasoning, so, too, will I with analogy leave the matter there, all too aware of the fact that I am leaving aside many substantial issues.

The *third process* is to apply the AWR to the particular example or examples (exemplary propositions) that originally triggered the exemplary

reasoning process. This step is not very hard anymore. Although here we face the application of a legal rule, the difference in applications of the form I explored in detail in the foregoing sections is that steps 1 to 4 in the formal structure of the analogical argument already focused on the particular case at hand. This means that the AWR will already mention the crucial elements of the case, so that there is no massive problem anymore to bridge the gap between the AWR and the case description via interpretations of the AWR. The whole point of the process of analogical reasoning can be seen as building up this bridge.

Conclusion

This chapter introduced deduction as the method for norm application, explaining what a good and transparent deduction presupposes. The most important ingredient to a deduction from a given norm is the interpretation of this very norm. There are various theories of what it means to interpret a norm, all of which are likely to yield different conclusions. Having discussed the main rivals in American jurisprudence, the 'textualism' and 'living constitution' approaches, I suggested taking a moderate position in between these views and working with the traditional rules of legal interpretation in order to do justice to both the norm formulation—following linguistic convention—and the legislator's authority—thereby respecting what the legislator said or intended.

Turning from the statute-based Civil Law tradition to Case Law systems, I explained the functioning of precedent cases as applied through deductive or analogical reasoning. I suggested using Scott Brewer's understanding of analogical reasoning, which fits well with my understanding of norm application in general. How neatly it fits becomes apparent in the following chapter on norm development. There I show how overruling and distinguishing—two crucial elements of reasoning in Case Law systems—complement the structure of various forms of expansions and revisions usually employed in continental jurisdictions.

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5

Norm Development

At the outset to Part II, I said that my single most important aim is to provide useful distinctions between different things one can do with norms, and that I would reconstruct a methodological framework for legal theory that I will later use to inform the debate on methods in ethics. This framework is designed around the basic distinction between norm application and norm development, where *application* works with given norms and leaves them unmodified. Contrary to applications, *developments* modify the normative system by revising a norm or by adding new norms (expansion). Now that I have argued for deduction as the chief method for norm application in Civil Law systems as well as in Case Law systems, it is time to get a clearer picture of norm development.

There are three instances of norm development: expansions, revisions, and new legislation. I shall call expansions such developments that add norms to the system without thereby striking another norm out. Revisions are, in contrast, developments that replace old norms by

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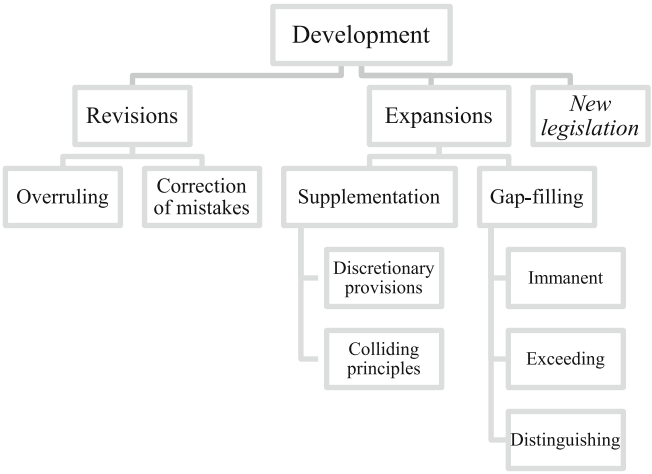
new norms.[1] I will focus on these two instances of developments. The third—new legislation—also modifies the given normative system. But new legislation is different, in that it does not have the same boundaries as expansion and revision have. New legislation can start afresh and regulate something almost entirely free from constraints. Expansions and revisions are, in contrast, always highly dependent on and constrained by the already existing normative system.

The development of a set of norms is also always dependent on interpretations, in the sense that to realize the very need for development depends on having interpreted a norm; some reasoning based on this interpretation must have led to the conclusion that a development is necessary. The aim of further developing the normative system is to *allow for deductive applications* to yield definite results in particular cases where the existing norms do not. Developments are, thus, not ends in themselves. They are made for the purpose of application. An early example of norm development is the so-called 'denial of justice' clause, recognized at least since its formulation in art. Article 4 of the French *Code Civil* of 1804: 'A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice.' Despite the many facets (and some limitations) of 'denial of justice'—especially in international law (cf. Paulsson 2005)—its core is that judges have the duty to decide *any case*. That is to say that they might have to decide cases that are not yet covered by the existing legal system. The relevance of 'denial of justice' is especially pertinent when the law has a gap.

Recall the figure of different forms of norm developments. I explain each of these in turn, starting with expansions.

[1] Note that I do not talk about the (rare) situation in which norms are eliminated from the system without being replaced.



Expansions

Norm developments through expansions add norms to the system. There are two main types of expansions: supplementation and gap-filling. Supplementation is important in dealing with discretionary provisions and in the resolution of conflicts between principles. Gap-filling is pertinent in two situations: when the law does not cover the particular case (law-immanent development), and when the law does not represent what the legislature wanted to enact (law-exceeding development). I shall argue that distinguishing should be understood as a further instance of gap-filling.

Supplementation

One instance of development in the sense of expansions is *supplementation*. This is a form of development that depends on the type of the initial norms. It is required when these norms call on the applicant to turn them into norms that can be used as a universal norm in a deductive applica-

tion. This is different from the applicant's task when faced with vague terms in statutes—the task is then to stipulate a fitting semantic interpretation of the norm. In cases of norm development by expansion, in contrast to the interpretation of vague norms, the applicant has to *build* or *invent* the norm in the first place.

The most common form of supplementation is the use of *discretionary provisions*. Above, I called imperatives of the form 'In situations of X and Y, everyone ought to do Z' the normal structure of norms. Compare this to norms of the form 'If A does x, a fine *can* be imposed'. Such provisions leave the consequence open; the applicant has discretion. She can impose a fine, but she does not need to. However, the provision should not be understood as a mere permission in the sense of 'If A does x, it is not forbidden to impose a fine'. Rather, the applicant is bound to the purpose the legislator has had in creating such a discretionary provision instead of regulating the matter all the way down. The purposes might be explicitly stated in other norms or in the explanatory memoranda of the law. Discretionary provisions are often used when very complex areas—such as environmental issues—need regulation. The legislator, then, only states general purposes and some general means to reach them, leaving it to the applicants to develop appropriate means in particular cases to achieve the purposes (cf. Luhmann 1966, 35 ff.). Where the purposes are not explicitly stated, the applicant has to determine through interpretation (as discussed in the previous chapter) what the legislator might have meant. The task then is to determine the legislator's intention. If this attempt fails, the applicant can engage in reconstructing an objective telos of the discretionary provision in question. It should be noted, however, that there is a difference in the reconstruction of an objective telos as discussed above for norms of the form 'In situations of X and Y, everyone ought to do Z'. Only regarding the latter norms is the search for a telos restricted by the semantic interpretation of the norm's wording. The supplementation of a discretionary provision is, in contrast, not restricted by the norm's wording—simply because the very idea of such norms is to extend the norm beyond its wording by supplementing it (cf. Koch and Rüßmann 1982, 237).

What the legislator does in creating a discretionary provision is to authorize the applicant to supplement the norm in particular cases

according to the purposes. The initial norm was intentionally left incomplete; the legislator deliberately created a norm that would need supplementation. Such norms call on the applicant to supplement the norm by adding further criteria for the use of the permission (for example, criteria for when a fine shall be imposed), thus creating a new norm, which stands alongside the initial norm.

The criteria yielding the 'ought' about the imposition of the fine in the particular case are thereby made explicit. The discretionary provision thus calls on the applicant to develop a proper prescription of the form 'If A does x, a fine *ought to be* imposed' that can be reformulated in the form 'In situations of X and Y, everyone ought to do Z'. This new norm will be one specification of the more abstract discretionary provision. As such, it becomes part of the normative system and binds at least the same applicant (for instance, the administration) to the effect that one cannot depart from this specification without further argumentation.

Conflict of Principles: Proportionality Test

Another instance of supplementation besides discretion is the *conflict of principles* that are understood as a certain form of prima facie norms, namely as optimization requirements (as introduced above). When such principles conflict, one prevails without rendering the other unlawful. In this instance, the supplementation is the development of criteria for when the one principle prevails over the other (cf. Alexy 2002, Chap. 3; Koch and Rüßmann 1982, 244 f.). Which principle prevails is determined through the *proportionality test*. Both discretionary provisions and principles are types of norms in which the conclusion is not fully determined by the fulfillment of the antecedent; but they are also structurally different: principles only yield a clear conclusion when no other principle is affected. The conclusion from a discretionary provision needs, in addition to the fulfillment of the antecedent, the development of a specified norm that has, as a conclusion, a clear obligation. Furthermore, discretionary provisions do not have prima facie character; they have no dimension of weight.

Proportionality—oftentimes synonymously used with 'balancing'[2] and 'appropriateness' (cf. Günther 2008)—is a metaphor that is widely used in both law and ethics. Like most metaphors, it is ambiguous in meaning. In the following I explain the legal notion of proportionality in some detail, which, in Part III, will prove to be fruitful to understanding balancing approaches in ethics.

Generally, proportionality is a method to limit rights, especially to limit constitutional rights or principles. The proportionality test was, in its nascent form, developed in German public law—as the *Verhältnismäßigkeitsgrundsatz*—in the nineteenth century, and refined after the Second World War. From there, it migrated to other national jurisdictions in Western Europe, to the law of the European Union, to the jurisdictions in the UK, South Africa, Eastern European jurisdictions, Asia, South America, and into international human rights law (for these migrations see Barak 2012, 178 ff.). There is some debate over whether proportionality is currently used in US law (cf. Barak 2012, 206 ff.). In 1987, Alexander Aleinikoff diagnosed the 'age of balancing' (Aleinikoff 1987, 943). Matthias Klatt and Moritz Meister state the importance of proportionality in the first sentences of their book-length treatment of the proportionality test thusly:

> As constitutional law is being globalized, the quest for a common grammar or 'generic constitutional law' becomes more pressing. That proportionality may be one element of such common grammar is both widely accepted and highly contested. In various jurisdictions worldwide, and across a broad range of areas of the law, there is a firm consensus that the proportionality test plays an indispensible role in constitutional rights reasoning. It is often assigned the central task of reconciling conflicting rights, interests, and values. Proportionality is said to enjoy 'central importance … in modern public law' and seen as 'by far the most important criterion for the analysis of fundamental rights'. It is characterized as 'a universal criterion of constitutionalism' (Klatt and Meister 2012, 1, footnotes omitted).

So what is it that enjoys so much attention? To start with, proportionality is a test to determine whether an interference with a right—which

[2] I will start off using them synonymously, too, but suggest a clear distinction later.

holds prima facie and has the form of an optimization requirement—is justified. There are several slightly different formulations of the proportionality test. But this rough formulation of proportionality in four steps should be more or less uncontroversial:[3] (1) The interference with the right must pursue a legitimate end. (2) The means used to achieve this end must be suitable at least to some degree; that is, there must be a rational connection between means and ends. (3) The means must further be necessary, in the sense that they are the least intrusive but equally effective means to achieve the end. Finally, (4) the means must be proportionate in the narrow sense ('balancing').

This test with its four prongs clearly demands more than the everyday use of 'balancing' suggests.

Before I explain the four prongs of the proportionality test in more detail, I shall provide a clearer picture of the situation in which proportionality comes into play in legal reasoning. Talk of conflicting norms presupposes two things: first, that there are at least two norms applying to the same case, and, second, that these norms yield results that are in conflict. A conflict does not necessarily occur when two norms do not yield the *exact same* result. If law-1 requires imprisonment for burglary and law-2 compensation in money or kind, these two norms are not in conflict, for they do not exclude the full realization of one another.

This presupposition of norms that yield conflicting results has another implication, namely, that one needs to know which norms do apply—this obviously brings us back to the problem of meaning and interpretation discussed above. Norms do not apply themselves. They contain abstract and general wording that requires interpretation to figure out whether or not the case at hand is within the scope of a certain norm. This might be relatively easy in some cases, but it is certainly hard in

[3] There is a vast literature on proportionality in law. What I offer here is not more than a first glance. For far more detailed and very recent accounts of proportionality see Klatt and Meister (2012) and Barak (2012). Klatt and Meister defend Robert Alexy's very influential approach against critics and focus almost only on the balancing requirement. Barak, in contrast, offers a very broad perspective on proportionality, its historical development, and its use in jurisdictions worldwide.

I will, in this part, mainly draw on Alexy's account of proportionality—especially Alexy (2002)—because, first, it is the most influential account in legal theory and practice; second, it is the best elaborate account I know; and, third, it fits with the rest of my description of legal methods (some of which also draw on Alexy).

others. It is, for instance, hard to say whether or not threatening the kidnapper of a boy with torture in order to get to know the boy's hiding place falls within the scope of the protection of human dignity (for the kidnapper).[4] Depending on how generous one is in interpreting the term 'human dignity', the broader or narrower is the scope of the norm that protects human dignity.

If two norms conflict—as, in the kidnapping case, the protection of the kidnapper's dignity (if one believes that the mere threat of torture is in the scope of human dignity) and the boy's right to life—one is faced with the task to resolve the conflict. That norms are in conflict does not necessarily mean that they are *violated*, for they can still be legitimately limited. They are *infringed* when the result is not in full compliance with the norms' commands, but this might very well be legitimate. Thus, infringement and violation are not the same. Violations are unjustified infringements. Imagine someone attacking you with a knife and seriously threatening to kill you. If you now pull the trigger and shoot the attacker, you are infringing her right to life without violating it, because you acted in self-defense.

Elaborated legal systems usually explicitly regulate how certain norms can be limited. On the constitutional level, most formulations of rights are accompanied by explicit limitation clauses. The legitimate use of self-defense is one example. Consider Article 2(2) of the German Basic Law: 'Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.' Such a law that can limit the constitutional right is to be found in the German Criminal Code and its regulation of self-defense.

The limitation clauses limit the constitutional right only indirectly, in that they *constrain the possibilities to legitimately limit the right.* This strange construction makes sense because all constitutional rights can be limited through other constitutional provisions. To include explicit limitation clauses narrows the possibilities to limit the constitutional right; it thus sets limits to the possible limitations. The sub-constitutional law

[4] Cf. the case of *Gäfgen vs. Germany* (22978/05; 1 June 2010) of the European Court of Human Rights (and the preceding trials in Germany cited in the ECHR ruling).

that limits the constitutional right must itself conform to all formal and substantial requirements that the very legal system imposes.[5] The whole legislative procedure must have been accurate and the law must not violate any fundamental rights. The limitation clauses are meant to rule out such situations as unjustified infringements of a certain right where it is not the case that the right authorities acted on the basis of legitimate laws that fall within the limitation clause of that right. The proportionality test is only applied when this hurdle is cleared.

Why this is relevant becomes clear when considering Timothy Endicott's 'pathology' of the proportionality test:

> One distinctive danger of judicial protection of human rights is extending proportionality reasoning to 'balance' things that should not be balanced. This danger is built into the enthusiasm of theorists for proportionality as a general technique… Given the vivid profile of proportionality and its vogue as a judicial technique … the risk is that judges will try to balance society's interests against private interests, when the interests on one side or the other do not belong in the balance. The dramatically worse possibility—Pathology Number One—is that decision makers, including courts, might try to 'balance' public interests against private interests, when public interests do not belong in the so-called scales (Endicott 2012, 20 f.).

Knowing the situation when proportionality actually comes into play in legal reasoning, one can say that Endicott's fear is not a pathology of the proportionality test. The test only applies after other hurdles have been cleared. The test is not meant to lump random considerations together. Instead, before it comes to the proportionality test, a certain measure will already have been proven to be generally a proper limitation of the right at stake. The proportionality test is, then, used to bring in all considerations that are relevant in the particular case and to provide a certain structure to resolve the norm conflict.

[5] For further kinds of limitation clauses see Barak (2012), 83 ff. I am setting aside the debate whether or not there are any absolute rights, that is, rights that cannot be legitimately limited and have no exceptions. See, from legal theory, (Alexy 2002, 178 ff.), and, from ethics, (Shafer-Landau 1995) and (Thomson 1992).

The Four Steps

Proportionality consists of four requirements: (1) a legitimate end; (2) suitable means to achieve this end (rational connection); (3) that these means are the least intrusive to achieve the end (necessity); and (4) that the means are proportionate in the narrow sense (balancing). This section explores the content of the four requirements.

The *first step* is that the interference with the right must pursue a legitimate end. What is not meant is that the person who actually made a certain decision—for example a judge, a police officer, or some civil servant—had the proper end on her mind. Rather, the question is whether the decision is objectively justifiable. As Barak put it, '[t]he element of [legitimate end] reflects a value-laden component. It reflects the notion that not every purpose can justify a limitation on a … right' (Barak 2012, 245). Consider the example of the prohibition of a demonstration. The reason given by the judge is that it might attract counterdemonstrations, which could lead to violence (the example is taken from Möller 2012, 712). Most systems protect an individual's physical integrity, liberty, property, and autonomy. In such a system, the protection of the physical integrity of those who might be harmed by the counterdemonstrations' violence would be a legitimate goal, although the initial demonstration does not pose the threat.

What could be a legitimate end ultimately depends on the normative system one is working in. Thus, different goals can be legitimate in different legal or moral systems. Socialist states, for instance, could focus on communitarian interests, rather than on individualist considerations. This makes already plain that the first step of the proportionality test does not do a lot of work. This step also does not limit the legitimate ends to ends that are (roughly) equally important within the normative system. Such considerations of relevance only come into play later in the proportionality test. However, different jurisdictions might impose different limitations on which considerations can be legitimate ends to limit constitutional rights.

The *second step* is to ensure that the means used to achieve the legitimate end must be suitable, at least to some degree; that is, there must be a rational connection between means and ends. This prong of the pro-

portionality test, as well as the next (necessity), is based upon empirical inquiry; they are relative to what is factually possible. In contrast, the first and the fourth prong—legitimate end and balancing—are relative to the normatively possible (cf. Klatt and Meister 2012, 10). In other words, if the interference with a certain right does not even contribute to some degree to the achievement of the legitimate end, then there is not even a conflict. And if there is no conflict, both the right and the other protected right or interest can be fulfilled. However, if the interference does contribute to the achievement of the end to some degree, then the suitability test is passed. The question is not whether there are other means that are more suitable or more effective. This makes plain that this step, too, does not do much work; it merely requires asking oneself if there really is, from an empirical point of view, a rational connection between the two rights or interests. As Dieter Grimm pointedly concluded, suitability's only 'function is to eliminate the small number of runaway cases' (D. Grimm 2007, 389).

The *third step*—necessity—requires that the means are truly necessary, in the sense that they are the least intrusive but equally effective means to achieve the legitimate end. In Julian Rivers' words:

> The test of suitability can … be subsumed under the test of necessity. Any state action which is necessary, in the sense of being the least intrusive means of achieving some end must, by definition, be capable of achieving the end in the first place. It has to be suitable. Nevertheless, the test of suitability serves a practical function as an initial filter. Any state action which is not even capable of achieving a given end is unlawful, regardless of the existence of other alternative means (Rivers 2002, xxxii).

The necessity requirement looks very agreeable in, roughly, calling for the choice of the means to promote the legitimate end that interferes least intensively with a conflicting right or interest. Of course, this formulation needs some qualifications to be put into practice. Also, one should note that the necessity requirement demands quite some creativity in application. It demands thinking carefully about other possibilities to promote the end. In fact, this step is the one where, in many cases, empirical knowledge is indispensable.

When I said above that suitability and necessity are relative to what is factually possible, that was, of course, not meant to neglect the normative domain, which necessity also incorporates. To say what counts as an interference with a right or interest and how intense such interference is, is a mixed normative and empirical judgment (cf. Möller 2012, 716 ff.).

There are some questions concerning the formulation of the necessity requirement. I spoke of the least intrusive *but equally effective* means to achieve the legitimate end, whereas Rivers focused on the least intrusive means only. Take the example of a policy to dismiss homosexual soldiers in order to avoid tensions between heterosexual and homosexual soldiers[6]; assume that such tensions would lead to a decline in fighting power. A possible alternative is the introduction of a code-of-conduct policy. If such a policy would work equally well to avoid tensions, then the dismissal of homosexual soldiers would not pass the necessity test, for the code-of-conduct policy would be less intrusive. But the problem will often, as in this example, be that the less intrusive policy or action will have some kind of disadvantage. The code-of-conduct policy will very likely not achieve the end (to avoid tensions) as effectively as the dismissal of homosexual soldiers would, simply because there would still be homosexual and heterosexual soldiers in the army. The dismissal policy would not pass the necessity test if one follows Rivers' formulation. Following my formulation, the policy would pass the necessity step. And, indeed, most formulations of the necessity test include the requirement that the less intrusive alternative equally advances the legitimate end. Some even directly relate the necessity test in this formulation to the notion of Pareto-optimality (cf. Barak 2012, 317 ff.; Möller 2012, 711; Alexy 2002, 105; Schlink 1976, 181 ff.).

Consider, again, the demonstration case, where one demonstration is prohibited because a counterdemonstration could lead to violence. It would be a less intrusive alternative to the ban of the initial demonstration to provide a large enough police force to protect the demonstrators and others from violence. As in the army case, one problem is that a complete ban is more likely to prevent violence. Thus, the ban might pass

[6] This example is also taken from Möller (2012). It refers to the case *Smith and Grady v. United Kingdom*, (2000) 29 EHRR 493.

the necessity test because the alternative does not equally advance the end (to prevent violence).

There is a further problem with the effectiveness condition within necessity, namely that the less restrictive policy or action possibly requires additional resources. Police forces are expensive and they might be needed at other occasions at the same time. Also, having police forces all over the place might, for instance, negatively affect the turnover in the nearby shops. Once we take such considerations to be part of the requirement that a means is only necessary if it is the least intrusive *and equally effective* to achieve a certain end, then the necessity test is not very restrictive. This inclusion of effects and costs other than these captured in the right or principle under discussion considerably widens the understanding of the effectiveness requirement, because it requires much more than advancing the legitimate aim just as well. Not having an effectiveness requirement in the wide sense would yield counterintuitive results. If the necessity test would always require going with the least intrusive means that achieves the end just as well—no matter the cost—this would yield absurd consequences. In the demonstration case, for example, one would have to use all available police forces, plus the army plus helicopter surveillance, plus putting all attendants and other people nearby in padded protective suits, and so on. Since one could almost always come up with absurd alternative measures that would be less intrusive while achieving the end just as well, one should keep the effectiveness requirement in the wide sense, that is, as including the respective costs and effects for others. This results in a generous understanding of the necessity requirement that will not rule out many means under consideration.

The necessity test's strength is, then, merely epistemic: it forces one to be creative and think hard about alternative means to achieve the end. It also prepares one for the next and final step in the proportionality test (balancing), in that it forces one to examine the respective costs and benefits of the available alternatives. But it only rules out such means that are more intrusive than alternative means, where the alternative means are also equally effective (in the wide sense) in achieving the legitimate end.

Fourth and finally, the means must be proportionate in the narrow sense. This is the balancing stage of the proportionality test. Having introduced the necessity test with a wide understanding of the effectiveness

requirement, it is important to see how necessity and balancing relate to one another. They are different tests. Even the least intrusive means to achieve a certain end may, on the balancing stage, turn out to be too high a price to pay in light of other legally recognized rights or interests.

It has been said that balancing is irrational and 'impressionistic'(cf. Tsakyrakis 2009, 482; Webber 2012, 89). Against this accusation, I here outline Robert Alexy's very influential suggestion for how to rationalize balancing. Just as Alexy's deductive model of norm application (introduced above), this suggestion here is meant to be a rational *reconstruction* of the balancing process. The claim is not that it reflects how the balancing actually proceeds. The aim behind the reconstruction is primarily to boost transparency.

Recall Alexy's understanding of principles as optimization criteria introduced above. Drawing on Ronald Dworkin's work, Alexy developed a differentiation between rules and principles according to which

> [p]rinciples are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees … By contrast, *rules* are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says … [T]he distinction between rules and principles is a qualitative one and not one of degree (Alexy 2002, 47 f., his italics, references omitted).

These two kinds of norms differ in conflict situations. In his understanding of principles as optimization requirements, Alexy defines optimization as 'realizing to the greatest extent possible'. This has two implications. First, a principle requires complete realization unless a competing principle is affected. Second, if two or more principles compete, the task is to determine to which extent each principle prevails; each principle must be realized 'to the greatest extent possible'. For Alexy, the 'possible' is where balancing enters the scene. To determine what is possible, one has to balance the two competing principles.

Let me begin with Alexy's 'first law of balancing': 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.' (Alexy 2002, 102) He explains that

> [t]he Law of Balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of or detriment to the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former (Alexy 2003, 436 f.).

So, what enters balancing are (1) the abstract weights of the two principles, (2) the intensities of interference with the principles, and (3) the reliability of the empirical assumptions concerning what the act in question means for the non-realization of the one principle and the realization of the other principle in the particular case. The weights in (1) are abstract, in the sense that they are independent of the particular case. Often these abstract weights will be equal. But some are not. The protection of human dignity or the right to life are, for instance, abstractly weightier than the right to assembly or the right to property. The intensities in (2) are relative to the particular case and thus always concrete as opposed to the abstract variables in (1). The empirical reliability (3) is related to Alexy's 'second law of balancing': 'The more heavily an interference with a constitutional right weighs, the greater must be the certainty of its underlying premises.' (Alexy 2003, 446)

An example will do no harm. Consider the so-called *Cannabis* judgment of the German Federal Constitutional Court.[7] The question was whether the legislature is allowed to prohibit cannabis products. Such a prohibition interferes with liberty rights of all the people who wish to buy and use cannabis products; the prohibition aims at combating the dangers associated with the drug, thus protecting public health. If the prohibition were not suitable or not necessary, it would be unconstitutional. In this case, the German Constitutional Court explicitly said that the legislature's empirical premises were somewhat uncertain. It considered it adequate that the empirical assumptions of the legislature were maintainable.

[7] This example is to be found in Alexy (2003), where he uses it to explain his arithmetical 'weight formula', which I will not be going into.

Here is how Alexy deals with this case: assume (1) the abstract weights of the colliding principles (liberty and public health) are equal. There is (2) an interference with the constitutionally protected liberty caused by the prohibition of cannabis products, and also some loss on the side of public health if cannabis products were not prohibited. The intensity of these interferences with the liberty right or public health, respectively, might be hard to determine. But one can say that the prohibition does not affect the liberty in such a severe way as, say, an imprisonment would. Similarly, the legality of cannabis products might affect public health, but the danger is by far not as severe as, say, legalizing cocaine. To measure the intensity of interference and degrees of importance Alexy introduces a *triadic model*:

> To be sure, the three steps or grades are not necessary for balancing. Balancing is possible once one has two steps, and the number of steps is open to the top. What follows also applies, with some modifications, if one reduces the number of steps to two or increases it to more than three … The triadic scale has, compared with its alternatives, the advantage that it fits especially well into the practice of legal argumentation. In addition to this, it can be extended in a highly intuitive way. The three stages can, as the examples show, be characterized by the terms "light," "moderate" and "serious." Representation is made easier if these stages are identified by the letters "*l*," "*m*" and "*s*" respectively. "*l*" stands here not just for the common term "light" but also for other expressions such as "minor" or "weak," and "*s*" includes "high" and "strong" as well as "serious" (Alexy 2003, 440, his italics).

If, in the particular case, one ascribes l, m, or s to the intensity of interference with the liberty right depends on the review standard in the case, which might focus on the very person in the case (who might use cannabis every day) or on a generalized person (who might not use cannabis at all or only very rarely). For the epistemic reliability (3), Alexy also uses a triadic model, the three classes being 'reliable (*r*), maintainable or plausible (*p*), and not evidently false (*e*)' (Alexy 2003, 447). These stages are taken from the rulings of the German Federal Constitutional Court, which distinguishes 'three different degrees of intensity of judicial review: an "intensive review of content" [e], a "plausibility review" [p] and an "evidential review" [r] … This brings a triadic epistemic model into play

which has a high degree of formal similarity to the substantive triadic model set out above, and which can be built into the Weight Formula without any great difficulty.' (Alexy 2003, 446 f., reference omitted) In the *Cannabis* case the interference with the liberty right is certain or reliable (r). The Court itself said that the reliability of the empirical assumption is 'maintainable' (p), that the prohibition of cannabis products was necessary in order to avoid dangers to public health.

This model might not resolve every hard case. However, it does offer a structure to talk about the balancing process, and to balance more rationally. It names three distinct components of balancing and suggests a triadic model to determine the respective weights. These are the abstract weights of the principles, the intensities of interference with the principles, and the reliability of the empirical assumptions.

Critique

Alexy's model is a suggestion to retrospectively rationalize balancing. It offers a rational reconstruction of the balancing process. The aim behind this reconstruction is to improve transparency. The ties to the deductive model of norm application are very strong. The whole proportionality test resembles the familiar differentiation between the formal and material justification, highlighting that what the test provides is only the formal argumentative structure (formal justification) that needs external reasoning to fill in the substantial considerations (material justification). Alexy's model is, thus, clearly not concerned with the truth or correctness of the premises, that is, which weights certain considerations have or how reliable a certain assumption is. All this is outsourced to the material justification. However, there are two main lines of critique against the proportionality test in the understanding outlined here.

One line of criticism is that proportionality is not morally neutral, but committed to a logic of *maximization and consequentialism* (cf. Tsakyrakis 2009; Urbina 2012). This critique deserves much more attention than it currently gets from proponents of proportionality. Klatt and Meister, for example, simply repeat the difference between formal and material justification and argue that proportionality must be morally neutral.

Balancing, they claim, 'is as neutral as possible as far as its formal structure is concerned … But this formal structure must be filled with moral arguments and considerations of weight and value that vary according to different perspective.' (Klatt and Meister 2012, 56, 64 f.) The use of the notion of proportionality depends on normative standards from outside that notion. This might be true, but it is a misunderstanding of the critique. The point is that the very structure of proportionality, that is, the formal justification itself, commits to consequentialism, because it makes use of a maximization logic on the balancing stage, which has the underlying view that in 'conflicts we should decide in favor of the alternative that realizes the most the engaged interests, values, or principles. The proportionality test can be seen as a doctrinal tool aimed precisely at establishing this.' (Urbina 2012, 50 f.) The critique is not that proportionality is not morally neutral, but that proponents of proportionality fail to explain why maximization is the ultimately relevant criterion to solve conflicts. Some—such as Möller 2012—even argue that, with such a maximization rationale, rights are ultimately 'up for grabs'.

In response to this line of criticism, I wish to highlight two points. The first point is that it is not necessarily a problem that proportionality is not as morally neutral as the deductive inference. I do not find it troubling to see proportionality as a mixture of rival moral traditions, namely of deontology and consequentialism. The very idea of using rights, attributing a certain power to them, and developing sophisticated tools to determine which limitations of rights are justified is deeply rooted in deontology (and so are the first steps of the proportionality test). The necessity and balancing prongs of proportionality come in as a second stage, as a form of readjustment where the pure deontological reasoning fails to provide clear guidance (mainly in situations where extreme injustices are already ruled out). This is obviously not a sufficient explication, but I hope that the broad picture is clear: proportionality can be seen—roughly like rule consequentialist accounts of morality—as a way to combine elements from deontology and consequentialism. But it is clearly not *only* consequentialist.

The second, related, point is that the claim that proportionality has only to do with consequences is not particularly clear. Proportionality deals with the optimal realization of principles, with the promotion of

values, the fulfillment of rights, and so forth. Although these and other issues can be understood as consequences, one should remember that proportionality not only consists of balancing, but has four prongs that already capture some non-consequentialist considerations. Furthermore, it is quite hard to capture all these considerations within a single notion of consequences; this is closely related to a problem that I take up in turn, namely, what the covering value in balancing legal principles is.

Even if one buys the maximization logic of balancing, some argue that it is impossible to balance the relevant rights, interests, and principles. This is the second line of criticism. This *incommensurability claim* can, roughly, be understood as holding that two items cannot be measured by a single scale of units or values. But that two items are not measurable by such a scale does not entail that these items are incomparable; there are at least two ways to compare or rank items, ordinally and cardinally. Two items can be comparable although they cannot be ranked cardinally. In this understanding, incomparability is the more significant notion than incommensurability, for every two items that are commensurable are also comparable; but two items that are comparable are not necessarily commensurable. Following Ruth Chang, I believe that much of the criticism raised against cost-benefit analysis, utilitarianism, and maximization under the heading of incommensurability, in fact, addresses issues of incomparability. Chang ultimately concludes that 'there is almost certainly no easy argument *for* incomparability' (Chang 1997, 3, emphasis mine).

Generally, 'two items are incomparable with respect to a covering value if, for every positive value relation relativized to that covering value, it is not true that it holds between them' (Chang 1997, 6). That between two items is a positive value relation is to say something affirmative about the relation between two items, for instance, that one is 'better than' or 'as cruel as' the other. In contrast, to say that one item is 'not better than' or 'neither crueler than nor kinder than' the other does not state something affirmative. The former are positive comparisons, the latter are negative comparisons. A covering value is the consideration with respect to which an evaluative comparison can be made. All comparisons necessarily presuppose such a covering value. No item is simply better or worse than another; it can only be better or worse with respect to some

value like kindness or clarity. It is easy to confound two distinct claims, first, 'that there is no covering value with respect to which the … merits of the items can be compared' and, second, 'that there is such a covering value but the … merits are incomparable with respect to it' (Chang 1997, 7). Only the latter is a claim of incomparability, for the former lacks the relativity to a covering value. Distinct from comparability and incomparability is noncomparability—understood as a formal failure of comparison, in that at least one of the two relevant items falls outside the domain of application of the associated covering value predicate. If the relevant covering value is 'aural beauty', the items 'fried eggs' and 'the number nine' are not in the domain of the covering value. The two items are, thus, noncomparable with respect to 'aural beauty' (the example is taken from Chang 1997, 27 ff.).

A common argument for incomparability proceeds from the diversity of values. Consider a comparison between Mozart and Michelangelo with respect to creativity. The incomparabilist would hold that the contributory values of creativity borne by Mozart are so different from those borne by Michelangelo that comparison is impossible. Chang objects to this type of argument with the nominal-notable distinction: a bearer is notable with respect to a certain value if it is a very fine instance of that value (such as Mozart and Michelangelo with respect to creativity); a bearer is nominal if it is a very poor instance of that value (such as Talentlessi, a bad painter, is a poor bearer of creativity). Notable bearers of a certain value are, by definition, better than nominal bearers with respect to this value. Chang argues,

> If Mozart and Michelangelo are incomparable in virtue of the diverse contributory values of creativity they bear, then so too are Mozart and Talentlessi. But we know that Mozart is better than Talentlessi with respect to creativity. If Mozart and Michelangelo are incomparable with respect to creativity, it cannot be for the reason that they bear diverse contributory values. For any two items putatively incomparable in virtue of the diversity of contributory values they respectively bear, it is plausible to suppose that there are notable and nominal bearers of the same values that are *ipso facto* comparable. Therefore, it cannot be the diversity of the values borne *per se* that accounts for bearer incomparability … In any case, there is good reason to think that Mozart and Michelangelo are comparable with respect to

> creativity, given that Mozart and Talentlessi are. [Consider] Talentlessi+, just a bit better than Talentlessi with respect to creativity and bearing exactly the same contributory values, but a bit more notably. This small improvement in creativity surely cannot trigger incomparability; if something is comparable with Talentlessi, it is also comparable with Talentlessi+. Thus we can construct a 'continuum' of painters including Talentlessi and Michelangelo, each bearing the same contributory values of creativity but with increasing notability. No difference in creativity between any contiguous painters can plausibly be grounds for incomparability; if Mozart is comparable with one item on the continuum, he is comparable with all items on the continuum. Therefore, given that Mozart is comparable with Talentlessi, he is comparable with Michelangelo (Chang 1997, 15 f.).

Another argument for incommensurability is that multiple rankings of items are legitimate and that none is privileged (cf. Broome 1997). Consider two candidates competing for a faculty position in philosophy. As a member of the search committee, you have to compare their philosophical talent. Contributory values include originality, insightfulness, clarity, and so forth. Depending on how we sharpen our understanding of philosophical talent, the combination of the contributory values will be different and will yield different comparisons between the candidates. Each of these sharpenings is legitimate. But if this is true, then there is no one correct comparison between the candidates and the two must be incomparable.

This kind of argument is best understood as an argument from vagueness of covering values. Philosophical talent is a vague concept; there are multiple ways it can be sharpened. But there is no straightforward relation between vague values and incomparability as the argument suggests. Quite the opposite, multiple legitimate comparisons *are* multiple comparisons; the very fact that there are many legitimate ways to compare items shows that they are not incomparable.

It is hard to say how one actually compares or commensurates different values, rights, or principles. The proportionality test is meant to help in reconstructing a reasoning process; it is not primarily meant to guide such an actual process. Furthermore, the very possibility to *somehow* compare and commensurate values or principles is so deeply embedded in our moral and judicial practice, and necessary to make meaningful decisions,

that the neglect of this possibility would have very severe results. The burden of proof seems to be on the incomparabilist. As long as there are no striking arguments *for* incomparability, we should assume that it is at least *somehow* possible to compare.

Following Chang, I said that comparisons are only possible with respect to a covering value. But even if one accepts that comparison is possible somehow, proponents of proportionality still have to point out what the covering value in balancing two legal principles actually is. According to Barak, this covering value is the 'marginal social importance in fulfilling the public purpose and the marginal social importance in preventing the harm to the constitutional right' (Barak 2012, 484). According to Alexy, the

> question is not the direct comparability of some entities, but the comparability of their importance for the constitution, which of course indirectly leads to their comparability. The concept of importance for the constitution contains [inter alia] a common point of view: the point of view of the constitution. It is, naturally, possible to have a dispute about what is valid from this point of view. Indeed, this occurs regularly. It is, however, always a dispute about what is correct on the basis of the constitution. Incommensurability, indeed, comes into being immediately, once the common point of view is given up (Alexy 2003, 42).

But this does not obviously solve the problem. Endicott objects that '[i]dentifying a single criterion does not eliminate incommensurability, if the application of the criterion depends on considerations that are themselves incommensurable' (Endicott 2012, 8). And, indeed, constitutions are very diverse. They include a huge range of rights, interests, and public goods. Maybe Urbina is right in saying that '[i]f rights or the values at stake in human rights conflicts are incommensurable, these sources will express those values, which will still be incommensurable' (Urbina 2012, 56).

Summing up this section on the legal notion of proportionality, I shall emphasize again that the result of the balancing process is the establishment of a rule that, in such and such circumstances, the one principle prevails over the other or, as Alexy puts it, '[t]he circumstances under which one principle takes precedence over another constitute the conditions of

a rule which has the same legal consequences as the principle taking precedence' (Alexy 2002, 54). This, the development of criteria for when the one principle prevails over the other, is the supplementation of the legal system. Just as with discretionary provisions, the rule established through the proportionality test (and balancing) is then to be used as a premise in a deductive argument, that is, for the formal justification.

Gap-Filling

Another instance of development by adding new norms (expansion) is gap-filling. Here, too, the new norm stands alongside the initial norm without modifying it. Roughly two situations allow for gap-filling: first, when the interpretation of the given norms reveals that the law does not cover the particular case (law-immanent development) and, second, when it reveals that the law does not represent what the legislature wanted to enact (law-exceeding development).

To speak of a gap in the law presupposes a certain area of human conduct that is sufficiently covered by the law, as is criminal conduct by the criminal law. This is meant to exclude conduct that is not to be covered by the law, such as large parts of private family life or table manners. Whether or not the law has a gap depends on the law itself, on the legislature's ends and intentions in creating that law, on its plans. A gap is, therefore, an incompleteness contrary to the legislature's plans (cf. Larenz and Canaris 2008, 192; Canaris 1983). The same holds for ethics. One can only speak of gap within an ethical theory when a certain conduct is to be covered by that theory, but is not so far. Thus, there is no gap when something was intentionally not, or not in another way, regulated.

Law-immanent development is a development within the given system. It aims at adding norms that fit the case at hand that is so far unintentionally not regulated. The primary method to bridge that kind of gap is the use of analogy to relevantly similar problems that are already regulated within the normative system (Larenz and Canaris 2008, 202 ff.). To guarantee stability, this new norm should fit the legislative intention to the extent that it is known. In contrast, the development is *law-exceeding* when it is '*extra legem*', but '*intra ius*', that is, beyond the scope of the

given law of the time, but within the general ideas, concepts, and principles of the very legal system. The need for such a development can, for instance, occur when new technologies (with their possibilities and dangers) come up that were simply unknown to the legislature at the time the law was made (cf. Larenz and Canaris 2008, 232 ff.). Barak offers a rather non-technical example:

> Consider a will naming Richard and Linda as the heirs, where Richard and Linda are the testator's son and daughter. After the making of the will, but before the death of the testator, a third child, Luke, is born. The facts show that the testator wanted Luke to inherit also, but he failed to modify the will. Does the will permit Luke to inherit? Interpreting the will cannot make Luke an heir. The interpretation is not "capable" of "cramming" Luke within the limits of "Richard and Linda." We need a non-interpretive doctrine, like the doctrine about filling in a gap in a will, which can, according to the will, add Luke as an additional heir (Barak 2005, 61).

Including Luke into the will is not law-immanent, because the will actually regulates the case. It regulates it in a way that the testator did not intend. Law-exceeding gap-filling is needed. But how can this kind of gap-filling legitimately be called a *development* of the very normative system (or the will) and not the *invention* of unrelated norms? Depending on the system one works with, different ways are possible. In very well developed systems, analogies might be drawn. Otherwise one might have to engage in a looser form of reasoning to reveal the more abstract principles, ideas, or concepts underlying the given norms. Having revealed them, one can try to derive norms that fit the case at hand. No matter which way one takes to find a new norm, to legitimately speak of a development of the very normative system (or will), this norm also needs to fit the underlying intention of the legislator (or testator). Notice that this has to be an (abstract) underlying intention, not the (more precise) actual intention. In Barak's example, the underlying intention of the testator was to name all his children as heirs. His actual intention was to name as heirs the two children he had at the time he issued the will. In order to identify the more abstract underlying intention of the testator, one might have, for instance, to look at the relation between the testator and his youngest child. Further, one might have to engage in a line of reasoning similar to that outlined below for other revisions.

Distinguishing

Very similar to law-exceeding gap-filling in Civil Law systems is the possibility in Case Law systems to distinguish the case at hand from a precedent case—or, more precisely, its ratio (that is, a certain legal rule)—that would be applicable to the new case. In the section on analogy and precedent above, I already touched on the possibility to distinguish and quoted Raz as saying, 'the main conceptual difference [between judicial law-making and legislation] is in the constant possibility of distinguishing judge-made law' (Raz 2009, 195).

Distinguishing the case at hand from the precedent is basically showing that some facts of the cases that are not part of the precedent's ratio differ in a relevant way. Distinguishing is, thus, the creation of a new norm by narrowing the precedent's ratio. The effect of distinguishing is that a court does not have to follow a precedent, although this precedent would apply to the case at hand. There are constraints on this kind of narrowing; in Lamond's words:

> (1) in formulating the *ratio* of the later case, the factors in the *ratio* of the earlier case … must be retained, and (2) the ruling in the later case must be such that it would still support the *result* reached in the precedent case. In short, the ruling in the second case must not be inconsistent with the result in the precedent case, but the court is otherwise free to make a ruling narrower than that in the precedent. Hence the more accurate statements of the doctrine of precedent are to the effect that a later court must *either* follow *or* distinguish a binding precedent—a disjunctive obligation (Lamond 2014, 8, his italics).

It is worth highlighting again the latter refinement, namely, that the doctrine of precedent is a disjunctive obligation to either follow or distinguish a precedent, which is probably the main reason for the flexibility of Common Law, because—in contrast to overruling, for which only very few (high) courts have the power—every court has the power to distinguish. Raz tries to capture the idea of distinguishing with conditions substantially similar to Lamond's:

> (1) The modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application. (2)

> The modified rule must be such as to justify the order made in the precedent (Raz 2009, 186).

The first condition brings in the narrowing aspect, similar to Lamond's first constraint:

> This is a direct consequence of the very function of distinguishing, i.e., modifying a rule to avoid its application to a case to which it does apply as it stands. This, in a precedent based system, can only be done by restricting the application of the rule through adding to its conditions of application so that the modified rule no longer applies to the instant case. Furthermore, in distinguishing the court cannot replace the previous rule with any rule it may like even if it is narrower in application. The new rule must be based on the old one and contain all the conditions which the old one contains together with the new restricting condition. A, B, C then X is transformed into A, B, C, E then X. The previous conditions are preserved and become the foundation of the new rule (Raz 2009, 186).

Raz's second condition makes more explicit what Lamond tried to get at in saying that the 'ruling in the later case must be such that it would still support the *result* reached in the precedent [i.e., it] must not be inconsistent with the result in the precedent case'. To avoid this inconsistency it is required

> that the modified rule would be a possible alternative basis for the original decision. In our example the original decision was P: a, b, c, d, e, g/A, B, C → X. Given that the new case is one of a 1, b 1, c 1, d 1, ē 1, f 1 the court will comply with the first condition of distinguishing equally by adopting A, B, C, not-D then X as by adopting A, B, C, E then X. Both are restrictive modifications of the rule in P. But only the second of these satisfies the second condition (Raz 2009, 186 f.).

This is the case because the second rule can be applied to the precedent case and would yield the same result (X) as the initial precedent rule. The point of distinguishing in this example would be not to reach X as a result for the new case; the rule 'If A, B, C, E, then X' would not yield

the result X when applied to the new case (with the features a 1, b 1, c 1, d 1, ē 1, f 1), because non-e is a feature of this new case; the case cannot be subsumed under the rule. The inclusion of 'E' into the new rule can then be seen as an exception from the precedent rule in the sense that the precedent rule does apply—except in cases that do not have the feature 'e'. Consider the prohibition of killing as the precedent rule; if one now comes across a case of killing in self-defense and regards this new feature—for one reason or another—as relevant, one can include this into the rule: 'Killing is prohibited, except in cases of self-defense' or 'Killing is prohibited if not committed in self-defense' (such exception-models of distinguishing are proposed by Holton 2010; Holton 2011; Scalia 1998).

I regard Lamond's and Raz's structural accounts of distinguishing as very plausible; they explain the strong link between the initial precedent and the later case without including material requirements that answer the question of which differing features between cases count as relevant enough to allow for distinguishing. Raz's and Lamond's accounts of distinguishing are so elegant precisely because they keep them on the structural level and do not include material conditions. This does, of course, not mean that material considerations are not important. Rather, they are important on another level. Just as the differentiation between the formal and the material justification, the constraining conditions are merely formal; but applicants are dependent on the quality of the material justifications in order to decide between different narrower rules that pass the formal conditions. Just as the four steps of the proportionality test do not answer the question of how weighty one principle is in relation to another, so the constraining conditions in distinguishing do not, themselves, answer the question of which differences are relevant enough.

To sum up, the doctrine of precedent or stare decisis is a disjunctive obligation of courts to either follow or distinguish a precedent. As we have seen, distinguishing is a form of narrowing a norm that is constrained by two conditions. Distinguishing leads to a new norm, leaving the precedent's ratio as the initial norm intact, thereby filling a gap in the normative system.

Revisions

Sometimes there is the need to develop a normative system, not only by adding norms, but also by revising them, that is, that the new norm replaces the initial norm. This, too, is familiar in legal theory—in Case Law systems, as well as in systems that follow the rule-based tradition predominant in continental Europe. The best example for norm revision is a court's overruling of a precedent; another is the correction of mistakes.

It is this part of norm development that has—according to most scholars—not been allowed in Islamic law since around A.D. 900 because, in the words of Joseph Schacht,

> the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of ijtihad', as it was called (Schacht 1964, 70 f.).

As Hallaq (1984) and Vikør (2006) have shown, Islamic jurists found their ways around this 'closing of the door' and, nonetheless, kept the law flexible enough to deal with changing circumstances and new demands; they realized that a 'closed' system would be fatal.

Overruling

One important feature of the use of precedents in comparison to statutes is that later courts are not strictly bound to apply existing norms, since there are the possibilities of overruling and distinguishing. Besides the need to interpret the precedent's ratio, overruling and distinguishing are severe limitations for the binding power of precedents. So, what is overruling? It is a way to develop the legal system by revising norms, that is, the new norm replaces the initial norm. Such a revision is a very

serious step and needs careful consideration, because it potentially affects the stability of the legal system even more than its development in the form of adding something, leaving the initial norm intact. People might rely on the norm one considers modifying. Revisions—like all developments—are dependent on interpretations; one has to realize the need for the modification in the first place. A review of the existing law must, first, lead to the conclusion that the particular case at hand falls under an existing precedent. Otherwise, the court would be free to state a fresh rule, thereby developing the law by adding a norm. Second, some line of reasoning must lead to the belief that the existing precedent, if applied, does not offer a good solution to the case at hand. Third, further reasoning must lead to another norm that fits the case better. Fourth, there must be good reasons to believe that the new norm also fits future cases better than the old norm. Barak suggests the following criteria to determine whether or not to overrule the precedent and thereby introduce the new norm:

> First, one must take into account the level of reliance on the old precedent … Second, one must take note of the "age" of the precedent from which deviation is being considered … Third, one must check whether it is possible to bring about the change in the previous law by way other than judicial change of precedent (Barak 2006, 162 f.).[8]

Especially the reliance on the existing norms and the age of the norms are important. As a rule of thumb: the older the norm, the easier it is to deviate from it (cf. Raz 2010, 296). For the reliance criterion, think again about Barak's inheritance example: one has to take into account if one of the two older children already made plans with their anticipated portion of the inheritance (for instance, buying a home). Another relevant aspect could then be how reasonable their assumption that the will stands was (two extremes being that the testator always talked about modifying the will but never did—as the case description implies—or that he explicitly said he would never change the will for the third child, because he never accepted it).

[8] Barak (2006: 162 f.).

An alternative way to 'bring about the change in the previous law by way other than judicial change of precedent' might be to distinguish the case at hand from the precedent by showing that some facts of the cases that are not part of the precedent's ratio differ in a relevant way.

Correction of Mistakes

Depending on the theory of interpretation one endorses, the need to revise a norm might also occur when a norm or precedent clearly states something the legislator or court did not want to enact, that is, when the legislator or court made a mistake. I suppose that this can be done using the process just outlined. Knowing that the legislator or court actually wanted to state something else might lower the burden for overruling the existing norm. However, one still has to consider the consequences, since the overruling might affect stability and violate reasonable reliance.

I shall note that it is hard to draw a sharp line between the correction of mistakes as revision and law-exceeding gap-filling just outlined as a form of expansion. I suggest that the difference lies in the point in time the 'mistake' occurred. It is a revision if the divergence between intention and actual norm occurs at the time the norm is made or enacted; if the divergence only occurs later (for instance, because of new unforeseen technological innovations or, as in Barak's inheritance example, because a new child is born), it is law-exceeding gap-filling. The difference is that the former norm was never 'correct', whereas the latter was 'correct' but only later became 'unfit'.

New Legislation

The art of good legislation—often discussed under the heading of 'governance' (cf. Brown and Marsden 2013)—is, in some respects, very similar to the instances of norm development just outlined, especially because new legislation will, most of the time, aim at further developing the basic ideals and values of the very system. But new legislation is not strictly bound to the existing system, it can be revolutionarily new. Legislators

can start afresh and change the norms on certain issues and even on whole fields of human conduct dramatically. This is not possible with norm development.

Although new legislation is a form of development—and arguably the most important one—I will not elaborate on it, because new legislation in states and comparable changes and developments on ethical theories usually function very differently. A deeper understanding of new legislation in law is, thus, not very helpful for my aim to inform methods in ethics.

Conclusion

In this chapter, I have laid-out a system of modes of norm development, distinguishing between development through expansions and through revisions. Two modes of norm development have been discussed in more detail—the proportionality test and distinguishing—because they are the most interesting for the following discussion of methods in contemporary ethical theories.

Part II is an outline of a framework of legal methods designed around deductive norm application as the central method in both Civil Law and in Common Law systems. This framework distinguishes between norm application and norm development; some types of norms outlined in Chap. 3 cannot be applied directly, but need development in order to be applicable. Both norm application and norm development require interpretation.

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Part III

Methods in Contemporary Ethical Theories

The point of a systematic outline of methodological elements in Part II has been to have, for the debates on methods in ethics, a pool of methods available that have proven useful in law. This outline had to be systematic—designed around deductive reasoning and the distinction between norm application and norm development—in order to understand that the methods are not a mere mishmash of reasoning tools, but that they are intertwined (and how).

The following three chapters examine three kinds of contemporary ethical theories: Tom Beauchamp and Jim Childress' *principlism*, Albert Jonsen and Stephen Toulmin's *casuistry*, and two versions of consequentialism—Peter Singer's *preference utilitarianism* and Brad Hooker's *rule consequentialism*. These three kinds of theories represent three different approaches to applied ethics. Consequentialism is a paradigmatic instance of top-down reasoning, starting from a very abstract moral principle and working down to particular problems. Casuistry, with its focus on moral experience and analogical reasoning with paradigm cases, represents the opposite way of ethical reasoning. It is a bottom-up approach, starting from particular cases and working up to more abstract moral rules, avoiding, as far as possible, talk of universal principles. Principlism combines elements from both the top-down and the bottom-up approaches and endorses a set of four mid-level principles, the application of which always has to be sensitive to the circumstances in particular situations.

Although principlism is the only of these theories that is bound to the field of bioethics, I discuss all theories in relation to this particular field for reasons of presentation, because it is easier to follow and to compare the three when the content matter is the same. I could as well have discussed each theory type within another realm of applied ethics, within business ethics or research ethics, for example. The methodological aspects I am interested in would have been the same. Another advantage of sticking to bioethics is that all ethicists discussed in the following chapters have actually written on the issue. I can, thus, take them at their word regarding the working of their ethical theory.

I begin with a careful elaboration of principlism's basic ideas, its main elements, structural features, and, most importantly, its methods (Chap. 6). Principlism's main methods are specification and balancing. I draw on insights from Part II in order to discuss critical aspects of the two methods. The framework of norm application and norm development in legal theory also motivates a framework for methods in principlism.

When the discussion of principlism benefits mainly from comparisons to the methods used in Civil Law systems, the shorter discussion of casuistry (Chap. 7) gains insight mainly from the comparison to Common Law reasoning. The understanding of Common Law reasoning developed above helps to clarify the conception and functioning of casuistry's main elements.

The discussions of principlism and casuistry are primarily constructive and show that almost all methodological aspects explained in Part II for legal theory appear again in the ethical theories. The discussion of two kinds of consequentialist ethical theories (Chap. 8) is less constructive; it is rather critical of consequentialism as a good theory for applied ethics, because it lacks methodological awareness.

Chapter 9 concludes Part III and the book by providing a statement of the framework for methods in applied ethics—the *Morisprudence Model*—endorsed throughout the preceding chapters.

6

Principlism

Principlism, the bioethical theory Tom Beauchamp and James Childress developed in their seminal book *Principles of Biomedical Ethics*, has been one of the first serious attempts to systematize bioethics, which, at the time of the book's first edition in 1979, still was a disparate field of research. The book has now appeared in its seventh edition, is used for courses on bioethics worldwide, and has been praised as 'the *locus classicus* of the regnant bioethical paradigm' (Arras 2001, 73).

Principlism's most characteristic features are the four principles: *respect for autonomy*, *nonmaleficence*, *beneficence*, and *justice*. These principles are meant to be more abstract than direct action guiding rules and more concrete than fundamental principles like the Kantian categorical imperative or the principle of utility. The basic idea is that it is useful to have some systematization of the field of bioethics—thus opposing anti-theorists, particularists, and some casuists—in order to have accessible action-guides, and that the fundamental disagreements between, say, Kantians and utilitarians are of little practical relevance. Instead, the enterprise is to look for a way to converge traditional approaches to ethics into one coherent theory. Of major importance for this convergence is the grounding of the four principles in what Beauchamp and Childress call

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the *common morality*, which is a set of shared moral beliefs independent of time and culture. The four principles are meant to cover the whole field of bioethics. And indeed, it is hard to come up with a fifth principle that has roughly the same degree of abstractness and still covers areas in bioethics not yet covered by the other four.[1] Moral problems are mainly conceived as conflicts between at least two principles, all of which only have prima facie character. The conflicts are solved via the methods of balancing and specification. Which resolution is justified is, in principlism, ultimately a matter of coherence.

In 1979, not only the book's first edition was published, but also the well-known *Belmont Report* of the *National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research*.[2] Incidentally, Tom Beauchamp worked for the commission and drafted the bulk of the *Belmont Report*. Although both principlism and the *Report* are similar in that they center on a group of highly abstract principles and that they are grounded on a *common morality*, they differ in other respects. For instance, the *Report* has only three principles: respect for persons (instead of autonomy in principlism), justice, and beneficence; in contrast to principlism, it does not differentiate between beneficence and nonmaleficence. The book and the report were written simultaneously and influenced one another, but none preceded the other (Beauchamp 2010, 6 ff.). It is a quite common mistake to read and interpret Beauchamp and Childress' book as a sequel of the report (see for example Heinrichs 2006, 61 ff.).

In this chapter, I develop my understanding of principlism. I first focus on its basic structure and only briefly outline the actual normative content before examining in detail the methods used in principlism. Despite all the criticism I raise, the effort I make is meant to help clarify and further develop principlism, not primarily to show its flaws. Beauchamp and Childress say that,

> [t]aken as a whole or in its parts, a theory should be as clear as possible. Although, as Aristotle suggested, we can expect only as much clarity and

[1] I owe this thought to Martin Hoffmann, see Hoffmann 2009, 599 f..

[2] The report was initially issued in 1978; the book went to press in 1977.

> precision of language as is appropriate for the subject matter, more obscurity and vagueness exists in the literature of ethical theory and biomedical ethics than is warranted by the subject matter. (Beauchamp and Childress 2013, 352)

This is also true for principlism. I do my best to move principlism a bit closer to the degree of clarity and precision that bioethics allows for. This also applies to their cautioning 'against expecting too much from ethical theories in the way of systematic tidiness and action guidance … [N]o available ethical theory will eliminate the importance of specification, balancing, and reaching for reflective equilibrium as aids in practical reasoning' (Beauchamp and Childress 2013, 423). My aim is to explore these boundaries—primarily by comparing the methods used in principlism to the methods from legal theory introduced above. As every ethical theory will need specification and balancing, I focus my discussion on these methods.

The Structure of Principlism

The term 'principlism' was initially coined by Danner Clouser and Bernard Gert, who critically referred to Beauchamp and Childress' focus on the four principles (Clouser and Gert 1990). Nowadays, 'principlism' is recognized as a neutral label for Beauchamp and Childress' theory. Some authors, however, have a much broader understanding of the term. David DeGrazia, for instance, takes principlism 'to denote any ethical theory that (1) emphasizes principles, (2) features more than one basic principle, and (3) leaves at least some of its principles unranked relative to each other' (DeGrazia 2003, n. 1; see also Childress 2007, 22). Such a broad understanding includes a whole family of normative theories. In what follows, I concentrate on Beauchamp and Childress' version of principlism. It will turn out that it is hard enough to come to grips with this particular account.

Although the label 'principlism' and the book's title—*Principles of Biomedical Ethics*—both highlight the importance of principles, the full theory has more elements—specific rules, rights, virtues, and ideals—and

explains how these elements relate to one another, which methods are to be used to solve hard cases, and how to resolve conflicts between norms. I shall introduce and discuss one element at a time.

Clusters of Principles and the Common Morality

The criticism that led to the label 'principlism' was directed against the emphasis of the four principles. The fear was that, to people without any in-depth training in philosophy—like physicians—they might appear *directly* applicable on particular cases, which was, of course, never Beauchamp and Childress' intention or claim. At least in part to avoid this potential misunderstanding, they now tend to speak about 'clusters of principles', which is meant to highlight that it is not only a certain principle to apply, but a whole ethical account consisting of complex clusters of considerations, virtues, rules, rights, and the like.

The four principles or clusters of principles are deemed to be part of the so-called *common morality*, which is a universal morality that is not relative to culture or historical period, in contrast to the many particular moralities, which consist of rather concrete norms that are not universal, such as religious, legal, or moral norms in Judaism. The concept of a common morality owes much to Alan Donagan (1977), whose natural-law and Kant-inspired ethics was very influential in American philosophy in the late 1970s. The idea is that

> [a]ll persons living a moral life grasp the core dimensions of morality. They know not to lie, not to steal others' property, to keep promises, to respect the rights of others, not to kill or cause harm to innocent persons, and the like. All persons committed to morality do not doubt the relevance and importance of these rules. … However, debates do occur about their precise meaning, scope, weight, and strength … [the common morality] is not merely *a* morality, in contrast to other moralities … [but] applicable to all persons in all places, and we rightly judge all human conduct by its standards'. (Beauchamp and Childress 2013, 3)

This idea of a common morality has been criticized harshly. The *first* and most obvious line of criticism is that the claim of an universal morality

that is not relative to culture or historical period is profoundly counterintuitive given the changes of moral practices over time—just think about discrimination on grounds of race or gender—and given the differences in moral practices in different cultures or even within one culture. The point is that the claim needs empirical support from a cross-cultural field observation, which will be hard to conduct (Turner 2003; but see Beauchamp 2003; Herissone-Kelly 2011; Christen et al. 2014). A *second* line of criticism is that it remains unclear *who exactly* shares the common morality. Since the book's fourth edition, this has changed from a somewhat limited account ('the members of a society') to more question-begging accounts ('all morally serious persons' or 'all persons committed to morality') (cf. Hoffmann 2009, 607 ff.). In fact, the two authors could not yet agree on a more precise account of the common morality; Beauchamp himself defines the common morality as 'the set of norms shared by all persons committed to the objectives of morality', namely 'promoting human flourishing by counteracting conditions that cause the quality of people's lives to worsen' (Beauchamp 2003, 260). A *third* line of criticism highlights that Beauchamp and Childress' relatively vague account of the common morality is in danger of being 'overly accommodating', in the sense that it leads people to agree on morality too easily. The fear is of a glossing over of actually existing moral diversities and relativisms and that the common morality might, thus, lose its edge (cf. DeGrazia 2003).

Here is another line of criticism against the idea of a common morality that has not yet been raised. My claim is that *there is no common morality*, but only particular moralities that are more or less shared. Arguing against the criticism that empirical anthropological and historical evidence speaks against the common morality, Beauchamp and Childress point out that these 'studies succeed in showing cultural differences in the *interpretation* and *specification* of moral norms, but they do not show that cultures accept, ignore, abandon, or reject the standards of the common morality' (Beauchamp and Childress 2013, 416, emphasis theirs). And they are very confident and appreciate the 'nuances that surround the design of empirical research that would test specific hypotheses about the common morality … [such as all] persons committed to morality and to impartial moral judgment in their moral assessments accept at

least the norms that we have proposed as central to the common morality' (Beauchamp and Childress 2013, 416) and elaborate a bit on how to choose the persons to be included in the study, as well as how to avoid circularity (when looking for persons who are committed to morality and defining morality as the common morality). What remains open is how the study should be designed in order to get confirmation for the norms of the common morality and not merely their varying interpretations and specifications, that is, of the different particular moralities, which occur at different places, in different societies, groups, and times (examples are religious moralities, like Protestant ethics, and professional moralities, like codes of medical associations). The idea is basically that all the norms encountered directly in daily life are norms of a particular morality. But if this is so, how can one *look through* the particular moralities and *see* the underlying common morality? Or, to put it the other way around, how can one say whether or not a norm is actually shared when one does not know some of the norm's specific content? Do two people in different cultural traditions share the principle of respect for autonomy if both have vastly different understandings of autonomy? Does one share with others the respect for human dignity if one does not share their particular understanding of it? Consider, for instance, Michael Quante, who takes human dignity to include, to the very least, non-instrumentalization, absoluteness, and inalienability (cf. Quante 2010). In contrast, I do not think that it is absolute and inalienable. Do we, then, share human dignity or, rather, the notion of non-instrumentalization only? I believe that we only share non-instrumentalization, because it is only possible to know (and test) if a norm is shared when one knows what the norm is. There is no *knowing that* without *knowing what*.

Beauchamp does not have these doubts. As he pointed out in personal conversation, he believes that one can legitimately claim something like a *core content* of a norm without knowing its scope of application; what he has in mind are *ideas* or *broad concepts* (like promise keeping) that people share, not so much a certain norm that could be formulated explicitly. Unfortunately, this does not solve the problem. Every time one tries to pin down what one means with obligations from a promise (for example, if there is a difference between promising something to my ape or to my mother; or between killing my mother and killing an ape), one necessarily

enters the sphere of the particular morality, because one starts specifying (or interpreting)—the concepts of killing or promising are empty without knowing at least some instances of the norm ('killing my neighbor for no reason is wrong'); indeed it is hardly understandable *what the norm is* when one does not know at least one intended application. This is not to say that one always needs a full understanding of norms, that is, knowing all implications or possible instances of the norm (as specification demands); for an understanding of 'do not kill', one does not need to know whether it only applies to humans (or also to animals); but for any kind of understanding, one needs to know some of its scope (for example, that it *at least* applies to humans). But if every attempt to pin down the (core) meaning of a norm of the common morality necessarily enters a particular morality and no core meaning can be assigned without doing that, then there is no meaning in these norms. There is nothing to share in a common morality. There is, thus, no common morality, but only particular moralities that are more or less shared.

Principles and Rules

Principlism's four clusters of principles are to be understood as 'general guidelines for the formulation of the more specific rules' (Beauchamp and Childress 2013, 13). In contrast to the terminology introduced for legal theory, in principlism, principles and rules differ in their degree of abstractness. All norms in principlism—principles, rules, rights and so forth—are *prima facie* binding only, that is, following W.D. Ross,

> they are binding other things being equal, but each can be outweighed in a particular context by another principle or rule. However, the principles' different weights cannot be assigned in advance; they can only be determined in particular contexts in addressing cases or policies. (Childress 2007, 22)

Note that this is not only the weak claim that principlism entails *mostly* prima facie norms. Indeed, the claim is very strong: *all norms in principlism are prima facie norms*. This view shapes the structure and the

application of principlism significantly, because, at least according to Beauchamp and Childress, prima facie norms can only be 'applied' using balancing and specification, but not deduction. This understanding of all moral norms as prima facie binding further implies a conflict-oriented view on moral problems; that is, moral problems are regarded as conflicts between prima facie norms; moral analysis is the search of such conflicts.

Ideals, Virtues, and Rights

Principlism not only consists of principles and more concrete rules; it also includes ideals, virtues, and rights. It is important to understand which functions these three elements have within principlism.

The common morality entails the notion of *moral ideals* as goals or aspirations that exceed obligations—they are warranted, but not strictly required. Following an ideal is praiseworthy, but a failure to do so cannot be blamed. No sharp line can be drawn between obligations and supererogatory ideals. Rather, it is a continuum from strict obligations to weak obligations, to ideals beyond the obligatory, to saintly and heroic ideals (Beauchamp and Childress 2013, 46 f.). Beauchamp and Childress make no distinction between moral ideals and supererogation and define the latter thusly:

> First, supererogatory acts are optional; they are neither required nor forbidden by common-morality standards. Second, supererogatory acts exceed what the common morality demands, but at least some moral ideals are shared by all who accept the common morality. Third, supererogatory acts are intentionally undertaken to promote the welfare of others. Fourth, supererogatory acts are morally good and praiseworthy in themselves, not merely undertaken from good intentions. (Beauchamp and Childress 2013, 45)

Some demands that are obligatory in particular moralities (for example, in professional codes) are only ideals in the common morality, because the universal common morality cannot impose obligations only on persons in certain roles (such as nurses or doctors). Doctors and nurses have special obligations towards their patients that other people do not have. The notion of moral ideals is further linked to virtues.

It was not before the fifth edition that Beauchamp and Childress—taking up the reemergence of *virtue ethics*—devoted considerable attention to the place of character traits in principlism. They now hold that these cover aspects of the moral realm that are not covered by principles, rules, and rights:

> Even specified principles and rules do not convey what occurs when parents lovingly play with and nurture their children or when physicians and nurses exhibit compassion, patience, and responsiveness in their encounters with patients and families. Our feelings and concerns for others lead us to actions that cannot be reduced to merely following rules, and morality would be a cold and uninspiring practice without appropriate sympathy, emotional responsiveness, excellence of character, and heartfelt ideals that reach beyond principles and rules. (Beauchamp and Childress 2013, 30)

For them, a '*virtue* is a dispositional trait of character that is socially valuable and reliably present in a person, and a *moral virtue* is a dispositional trait of character that is morally valuable and reliably present' (Beauchamp and Childress 2013, 31, their italics). Borrowing from David Hume and Rosalind Hursthouse, in principlism, virtues are conceived of as action guides that impose obligations, and as corresponding, though imperfectly, to rules and principles. There are also some virtues (for instance, 'exceptional compassionateness') that are corresponding to ideals and do not impose obligations. In bioethics, 'caring' is widely regarded as the central virtue, because it

> emphasizes traits valued in intimate personal relationships such as sympathy, compassion, fidelity, and love. *Caring*, in particular, refers to care for, emotional commitment to, and willingness to act on behalf of persons with whom one has a significant relationship. *Caring for* is expressed in actions of 'caregiving,' 'taking care of,' and 'due care'. (Beauchamp and Childress 2013, 35, their italics)

Despite the vagueness of the concept of care—which they recognize—opening principlism to such concepts allows Beauchamp and Childress to discuss emerging developments such as the 'ethics of care' that originated

in feminist approaches to ethics without directly having to reformulate the whole concept in terms of principles and rules.

These attempts to integrate other approaches were important and instrumental for principlism's success. The inclusion of different types of norms into principlism is just another step in the overall project of converging different approaches to ethical theory in a fruitful way. Precisely what principlism does regarding the foundation(s) of morality—not following one of the traditional schools in normative ethics, but instead endorsing a common morality as a set of shared moral beliefs independent of time and culture—happens with the types of norms, too. It is the attempt to provide a terminological framework for an understanding of ethical debates. Although Beauchamp and Childress primarily talk about principles and more specific rules, they leave the door open for other approaches. This proceeding has the advantage that it keeps principlism in discussion with alternative approaches. The basic belief behind this approach is that most of the alternative approaches capture some important aspect of morality and that one should aim at converging them instead of understanding them as being mutually exclusive. 'Differences among types of theory should not be exaggerated' since, as Beauchamp and Childress put it, 'theories are not warring armies locked in combat… Convergence on general principles is common in moral theory … In practical judgment and public policies, we usually need no more agreement than an agreement on specific action-guides—not … on their theoretical foundations' (Beauchamp and Childress 2013, 383 f.).

In the book, every section on the four main ethical traditions ends with a 'constructive evaluation' for principlism; these evaluations provide some hints at how the convergence works. Virtue ethics is primarily reduced to 'contexts in which trust, intimacy, and dependence are present. [It is] … well-suited to help us navigate circumstances of caregiving and the delivery of information in health care' (Beauchamp and Childress 2013, 383). Rights theories enter principlism merely for their powerful language: 'A major reason for giving prominence to rights in moral and political theory is that in contexts of moral practice … they have the highest respect' (Beauchamp and Childress 2013, 375). The grounding influence of Kantian and utilitarian theories are even more abstract. Kantian ethics is regarded as being important for mainly three

reasons. First, for the principle of universalizability and impartiality; second, for the refutation of evaluating actions by their consequences only; and third, the categorical imperative's implications for the principle of respect for autonomy. Utilitarianism is praised for its role in formulating public policies, because it, too, provides an impartial assessment of interests. Also, it grounds the principles of beneficence and nonmaleficence (Beauchamp and Childress 2013, 361 ff.).

Beauchamp and Childress introduce *rights* theories as alternatives to utilitarianism, Kantianism, and virtue ethics, and especially use rights talk in areas that have initially been shaped by court rulings, for example, the 'professional-patient relationship' with the rights to privacy and to confidentiality. I shall briefly outline and criticize Beauchamp and Childress' understanding of rights and offer an alternative understanding that is compatible with principlism and highlights a distinctive structural feature of rights—namely that rights can only be limited with reference to the rights or interests *of others*. This is the special bite of rights and implies that principlism has to abolish hard paternalism (cf. Paulo 2015; Buchanan 1984).

As pointed out earlier, within the realm of obligation-imposing norms, the differentiation between principles, rules, rights, and virtues does not do much work in principlism, because all are supposed to be more or less translatable into each other. Principles and rules are only different in their abstractness. Rights are understood as correlative with obligations (which themselves follow from rules and principles) and can potentially be on all levels of abstractness. 'A right gives his holder', according to Beauchamp and Childress,

> a justified claim *to* something (an entitlement) and a justified claim *against* another party. Claiming is a mode of action that appeals to moral norms that permit persons to demand, affirm, or insist upon what is due to them. 'Rights,' then, may be defined as justified claims to something that individuals or groups can legitimately assert against other individuals or groups. A right thereby positions one to determine by one's choices what others morally must or must not do'. (Beauchamp and Childress 2013, 368, their italics)

Although this sounds as if rights were absolute and as if the right holder could ultimately determine what is morally right to do, one should recall

that principlism does not contain *any* absolute norms. It also does not contain *any* absolute rights. The resolution of conflicts between rights works just as every other resolution of norm conflicts in principlism:

> [A] *prima facie* right … must prevail unless it conflicts with an equal or stronger right (or conflicts with some other morally compelling alternative). Obligations and rights always constrain us unless a competing moral obligation or right can be shown to be overriding in a particular circumstance. (Beauchamp and Childress 2013, 15)

For Beauchamp and Childress, rights and obligations are correlative in the sense that rights talk is always translatable to obligations talk. To say 'X has a right to do or have Y' is translatable to 'some party has an obligation either not to interfere if X does Y or to provide X with Y' (Beauchamp and Childress 2013, 371; see also Kramer 1998). The question is, then, if rights are fully correlative with obligations, do they serve any distinct function within principlism? Obviously, the use of rights talk does some work in linking principlism to the debate on rights-based moral theories, as well as to the debates in law and in politics. But is there any genuine gain from the inclusion of rights? Beauchamp and Childress highlight merely practical and political considerations for the use of rights talk:

> No part of our moral vocabulary has done more in recent years to protect the legitimate interests of citizens in political states than the language of rights … We value rights because, when enforced, they provide protections against unscrupulous behavior … A major reason for giving prominence to rights in moral and political theory is that in … practice … they have the highest respect and better shield individuals against unjust or unwarranted communal intrusion and control than any other kind of moral category … By contrast, to maintain that someone has an obligation to protect another's interest may leave the beneficiary in a passive position, dependent on the other's goodwill in fulfilling the obligation. (Beauchamp and Childress 2013, 375)

This suggests that there is something special to rights that does not really fit with the correlativity thesis. But what exactly is it that makes rights talk stronger and more efficient than obligations talk? What is the bite

of rights? Although Jeremy Waldron is right in saying that '[n]ot only do philosophers differ about what rights we have, they differ also on what is being said when we are told that someone has a right to something' (Waldron 1989, 503), the most obvious way to make sense of the bite of rights talk in comparison to other normative languages is captured in the traditional *will (or choice) theory* of rights. According to this theory, the right holder is, to borrow H.L.A. Hart's words, 'a small scale sovereign' (Hart 1982, 183). For will theorists, rights have the function to protect and foster individual autonomy. An essential feature of having a right is to have the power to enforce and to waive enforcement of the right, that is, to have control over another's duty. This is what Hart aims to capture with the sovereignty metaphor. Within the will theory, there is no room for inalienable rights understood as rights the right holder cannot waive. But there might be room for absolute rights understood as rights that can never be limited (cf. Finnis 2011, 223 ff.). This way of conceiving rights makes perfect sense regarding their juxtaposition to consequentialist moral theories, which notoriously have problems to save important individual concerns—or, indeed, individuals—from being weighed-off against other peoples' interests or preferences. This is also why Ronald Dworkin invoked the metaphor of 'rights as trumps' over other considerations (cf. Dworkin 1984; Pettit 1987). The same idea stands behind Jürgen Habermas' metaphor of rights as a 'firewall' (Habermas 1996, 254) and Frances Kamm's insistence on 'inviolability' (Kamm 1998, 1:272).

The main rival to the will theory is the *interest (or benefit) theory*. According to the interest theory, the function of having a right is to further the right holder's interests, to make the right holder better off. The interest does not need to be an actual interest of a particular right holder. Instead, interest is to be understood as an interest people generally have as human beings (such as not being killed or tortured). This is the reason why interest theorists have no problem to make sense of inalienable rights. I should note here, though, that inalienable rights are usually thought of as being only very few and concerning very central aspects of human life—such as dignity, basic liberty, and life itself. The right to bodily integrity, as in the side rails case, would normally not count as inalienable.

The take-home lesson here is that the understanding of rights within principlism is, as it stands, neither compatible with the will nor with the interest theory of rights. The point of the will theory is that some choices of individuals are protected. This does not necessarily mean that they can never be overridden or weighed up against competing interests. But strong versions of the will theory hold for a very limited number of instances, such as not being sacrificed for a greater good, that a right can never be overridden. This is clearly incompatible with principlism's emphasis on the prima facie character of all norms. I shall notice, though, that such an account of absolute rights can only apply to very narrowly constructed rights for, otherwise, different rights would easily conflict (without any chance of resolution when two absolute rights conflict). Such strong versions do not reflect how we usually conceive rights (cf. Waldron 1989). But principlism is also incompatible with weaker versions of the will theory. These weaker versions do not include absolute rights but nevertheless highlight the need to protect the right holder's choices in two ways. First, by reserving very high abstract weights for rights in the balancing process—thereby making it very hard to overturn them (cf. Alexy 2002). Principlism has no room for such abstract attributions of weight that do not vary from case to case. Second, by limiting the kind of interests that can be invoked to limit the right (on the first step of the proportionality test), requiring that not all interests may be taken into account and summed up against the right, but only such interests that are sufficiently important relative to the right. Principlism is also unable to allow for such a limitation. The upshot is that principlism is not compatible with any version of the will theory.

Similarly, principlism cannot subscribe to the interest theory, because it is committed to balancing all relevant considerations *in particular cases*. There is no room for an abstract ordering of values or rights. Degrees of importance (the weight) of particular considerations can, according to principlism, only be determined in particular situations and for particular agents. There is thus no way to assign higher relevance for certain rights for all persons as interest theorists do, especially with their notion of inalienable rights. Last but not least is the interest theory oftentimes—though not necessarily—bound to natural law with its strong emphasis on absolute norms, which are in stark contrast to principlism's prima facie norms.

The principlist understanding of rights is, as it stands, neither compatible with the will nor with the interest theory of rights. Elsewhere, I argue that the special bite of rights can be developed from similarities between the different theories of rights (Paulo 2015). Off the shaky ground of inalienability and absoluteness, they all agree that rights can be limited. Furthermore, they all agree on the structure of the limitation of rights, particularly that rights can only be limited with respect to rights or interests of others—rights cannot be limited with reference to rights or interests of the right-holder herself. What does all this mean for principlism? There are two options.

The first option is that principlism includes my structural claim that rights can only be limited with reference to the rights or interests of others. This would not do away with the result that its notion of rights is incompatible with all theories of rights. But my claim about the bite of rights is compatible with principlism. Beauchamp and Childress could adopt it. With this adoption, at least the notion of rights would serve a distinct function in principlism, which is clearly what Beauchamp and Childress wanted it to do. This is probably not much, but it is better than nothing. This very modest proposal would not alter the overall architecture of principlism. Every right could still be weighed up against all competing rights, virtues, principles, rules, or ideals—*except for competing rights or interests of the very right-holder*. Rights would still not be absolute; they would remain prima facie binding only. No right would have a fixed weight in each and every case. The weight would still be determinable differently from case to case. Beauchamp and Childress would only have to refine their correlativity thesis (between rights and principles-based obligations), because not all obligations do have the special bite that singles out rights.

The second option is to eliminate the notion of rights from principlism altogether and to work only with principles, rules, virtues, and ideals. As it stands, rights do not serve any distinct function in principlism.

I believe that principlism-immanent reasons favor the first option: the second option would not really fit the convergence approach of principlism. It would merely mark-off principlism from contemporary theorizing about rights, which is a bad idea given the immense importance of rights, especially of human rights, in contemporary bioethical issues.

I can only hope that someone makes the effort to develop a notion of rights within principlism that makes sense of the special bite that is attributed to rights and that is also compatible with contemporary theories of rights.

Principlism's Normative Content

So far, I was concerned with principlism's structure—with the kinds of norms it includes, with their prima facie character, their relation to one another, and so forth. The following sections briefly outline principlism's normative content, which is primarily to be found in the four clusters of principles and in remarks on 'relationship' and 'moral status'. This outline is not meant to be exhaustive; it is meant to give an idea of how Beauchamp and Childress conceive principlism's normative content. Everyone who seeks guidance from principlism has to grasp this content—otherwise she would simply not work within Beauchamp and Childress' theory.

Respect for Autonomy

In the first edition of their book, Beauchamp and Childress focused their discussion of the autonomy principle almost entirely on Immanuel Kant and John Stuart Mill:

> To respect autonomous agents is to recognize with due appreciation their own considered value judgments and outlooks even when it is believed that their judgments are mistaken. To respect them in this way is to acknowledge their right to their own views and the permissibility of their actions based on such beliefs … This conclusion follows from Mill's views on individualism and social liberty, but it also has an important basis in Kant's thought … The moral notion of respecting the autonomy of other persons can, for our purposes, be formulated as a *principle of autonomy* that should guide our judgments about how to treat self-determining moral agents. It follows from the views advanced by Mill that insofar as an autonomous agent's actions do not infringe the autonomous actions of others, that per-

> son should be free to perform whatever action he wishes—even if it involves serious risk for the agent and even if others consider it to be foolish … The second aspect follows from Kant's position: in evaluating the self-regarding actions of others we ought to respect them as persons with the same right to their judgments as we have to our own [respect for persons]. (Beauchamp and Childress 1979, 58 f., their italics)

Surprisingly, the respective section in the seventh edition does not even mention Kant or Mill anymore, although the understanding of autonomy has not changed significantly. How intensely they take up the contemporary philosophical debate and criticisms of principlism may be illustrated by pure numbers: not only did the conceptual analysis of autonomy grow from six pages in 1979 to almost 20 pages in 2013; in the first edition, the autonomy chapter had 37 footnotes; in the latest edition, the (now much longer) chapter requires 96 footnotes. Beauchamp and Childress now hold that respect for autonomy means

> to acknowledge [the agents'] right to hold views, to make choices, and to take actions based on their values and beliefs. Such respect involves respectful *actions*, not merely a respectful *attitude*. … Respect, so understood, involves acknowledging the value and decision-making rights of autonomous persons and enabling them to act autonomously. (Beauchamp and Childress 2013, 106 f., their italics)

The principle contains positive (for example, disclosing information) and negative (for example, no controlling constraints) obligations, which support more specific rules such as '1. Tell the truth. 2. Respect the privacy of others. 3. Protect confidential information. 4. Obtain consent for interventions with patients' (Beauchamp and Childress 2013, 107). These obligations have correlative rights to choose (on the side of the patient), but they entail no duty to choose. Thus, the principle is about what patients *do want*, not about what they *should want*.

In their understanding of autonomy, Beauchamp and Childress focus on the *autonomous choices* of persons, not so much on *autonomous persons* per se. They reject approaches that understand—as, for instance, Gerald Dworkin's (1988)—autonomy as a higher level capacity to reflect upon lower level desires combined with the capacity to change the latter in

light of the former, because these are very demanding and outrule from autonomy many choices we ordinarily judge as autonomous, such as cheating on one's spouse despite the general aspiration to be a honest person. Instead, Beauchamp and Childress conceive 'autonomous action in terms of normal choosers who act (1) intentionally, (2) with understanding, and (3) without controlling influences that determine their action' (Beauchamp and Childress 2013, 104).

'Intentionality' is meant to outrule accidental acts; the agent should have some kind of plan, although this does not mean that she cannot be unhappy having to perform that act. 'Understanding' means a substantial degree of factual understanding and freedom from constraint, taking into account that almost every act is in some way or another constrained and that agents oftentimes do not have full understanding of the situation, of all alternatives, possible outcomes, etc. Contrary to intentionality, understanding and noncontrol are matters of degree. 'Noncontrol' is meant to outrule control by external sources (like coercion or manipulation) or internal states that impede self-directedness (like mental illness).

Since understanding and noncontrol are matters of degree, all acts are only autonomous by degrees. And since the whole approach is focused on actions, the relevant focus for autonomous actions is on specific objectives of decision-making. Different objectives—deciding whether or not to wear a cast, whether or not to have a caesarean, or whether or not to withhold treatment when terminally ill—require different degrees of understanding and different degrees of (non)control in order to judge if a person's decision is substantially autonomous. Thus, it is possible for a person to make an autonomous choice regarding the color of her sweater, but not about a serious medical treatment.

The understanding condition is very close to the concept of competence, which is usually taken to be the ability to perform a task and has in medical ethics a gate-keeping function, especially regarding the importance of patients' informed consent. Just like autonomy, competence does not come in an all-or-nothing fashion. Rather, it can vary with time, context and the special task. As Beauchamp and Childress put it: 'The criteria for someone's competence to stand trial, to raise dachshunds, to answer a physician's questions, and to lecture to medical students are radically different' (Beauchamp and Childress 2013, 115).

'Informed consent' is probably the single most important notion in the autonomy cluster. It has three main elements: first, a threshold element (that the patient is competent and decides voluntarily); second, the information element (disclosure of information, the recommendation of a plan, and the patient's understanding of both); and third, the consent element (the patient's decision in favor of a plan and the authorization of it) (cf. Beauchamp and Childress 2013, 124; the model goes back to Faden and Beauchamp 1986).

Nonmaleficence

The main idea behind the principle of nonmaleficence is easy to grasp: We shall not harm others. In principlism, it is important to distinguish between nonmaleficence and beneficence; not many ethical theories make this distinction. 'Obligations of nonmaleficence are usually more stringent than obligations of beneficence, and nonmaleficence may override beneficence, even if the best utilitarian outcome would be obtained by acting beneficently' (Beauchamp and Childress 2013, 151). But one should note the 'usually' in that remark, since nonmaleficence—just like every other norm in principlism—only has prima facie character. Beneficence requires taking some action by *helping*, whereas nonmaleficence only requires *intentional avoidance* of actions that cause harm.

'Harm' is, in principlism, distinct from 'wrong'. Wronging involves the violation of rights; harm does not. Diseases or natural disasters might harm people but do not wrong them. Harm is understood as 'thwarting, defeating, or setting back some party's interests … [Harmful actions are prima facie wrong.] The reason for their prima facie wrongness is that they set back the interests of the persons affected' (Beauchamp and Childress 2013, 153).

More specific rules that stem from nonmaleficence include: '1. Do not kill. 2. Do not cause pain or suffering. 3. Do not incapacitate. 4. Do not cause offense. 5. Do not deprive others of the goods of life' (Beauchamp and Childress 2013, 154). These rules are introduced without any justification. Instead, Beauchamp and Childress cite the work of one of their fiercest rivals, Bernard Gert. This is surprising because, according

to Gert, there is no differentiation between nonmaleficence and beneficence and, moreover, he holds that there is a unifying principle for all morality—nonmaleficence.

The more applied parts of the nonmaleficence chapter discuss various issues such as problems of nontreatment. One conceptual problem concerning nontreatment are the distinctions between omission and commission, withholding and withdrawing treatment, sustenance technologies and medical treatments, killing and letting die, and the rule of double effect, all of which Beauchamp and Childress ultimately reject as rules about the forgoing of life-sustaining treatment. Instead they offer a threefold distinction between obligations to treat, obligations not to treat, and situations where it is optional whether to treat a patient—this distinction relies heavily on quality-of-life considerations (Beauchamp and Childress 2013, 168 ff.).

Other sections under the heading of nonmaleficence cover, *inter alia*, the protection of incompetent patients (and their proxies).

Beneficence, Impartiality, and Moral Status

I already pointed out that one difference between principlism and Bernard Gert's rival theory is the differentiation between nonmaleficence and beneficence. Whereas, for Gert, beneficence is only an ideal, in principlism, beneficence imposes duties. Beauchamp and Childress argue that

> rules of nonmaleficence (1) are negative prohibitions of action, (2) must be followed impartially, and (3) provide moral reasons for legal prohibitions of certain forms of conduct. By contrast, rules of beneficence (1) present positive requirements of action, (2) need not always be followed impartially, and (3) generally do not provide reasons for legal punishment when agents fail to abide by them. (Beauchamp and Childress 2013, 204)

Beneficence is, thus, understood very broadly as including action intended to benefit other persons. However, it should not be confused with the classic utilitarian principle. One obvious difference is that beneficence can be overridden by other principles, such as autonomy or nonmaleficence, and is thus not the fundamental principle. Principlism has

no theory of the good or a clear notion of utility. Towards the end of the beneficence chapter, Beauchamp and Childress discuss some methods of how to balance costs, risks, and benefits in health policies—methods such as cost effectiveness, cost-benefit analysis, risk assessment—where the understandings of costs, risks, and benefits are described relative to some notion of benefit. For example,

> *Costs* include the resources required to bring about a benefit, as well as the negative effects of pursuing and realizing that benefit … The term *benefit* sometimes refers to cost avoidance and risk reduction, but more commonly in bioethics it refers to something of positive value, such as life or improvement in health. (Beauchamp and Childress 2013, 230, their italics)

Having a clearer understanding of such positive values would be immensely helpful to get a better understanding of beneficence. Unfortunately, Beauchamp and Childress leave at a merely intuitive understanding of *what* is to be promoted.

Under the heading of beneficence, Beauchamp and Childress also engage with Peter Singer and others on the question *towards whom* moral agents actually have their obligations; the question is basically whether or not rules of beneficence must always be followed impartially. Singer believes that moral agents indeed have to be beneficent in an impartial way.[3] Beauchamp and Childress argue for partiality for reasons of practicality: 'The more widely we generalize obligations of beneficence, the less likely we will be to meet our primary responsibilities' (Beauchamp and Childress 2013, 205). Parents, for instance, are right in caring primarily for their own children. The idea is certainly not that we do not have to care at all about persons that we do not have a close relationship to. Rather, the obligations towards our loved ones are deemed stronger than those to strangers. I return to the notion of impartiality in the section on balancing.

A closely related issue is the scope of moral norms, in the sense of answering the question of moral status. The development of ethics can be seen as granting more and more groups—ethnos groups, women,

[3] Most pointedly in Singer (1972). See also the discussion in Chap. 8.

children, future generations, animals—higher or full moral status. In bioethics, questions of moral status are particularly pressing in issues such as abortion, surrogate decision-making, research with animals, and so forth. Since the sixth edition, Beauchamp and Childress discuss the problem of moral status in a full-fledged chapter. The chapter follows the same pattern they use throughout the book in examining prominent theories of moral standing—theories based on human properties, on cognitive properties, on moral agency, on sentience, and on relationships—and ultimately converge them. They regard each one as 'attractive, yet deeply problematic if taken as the only acceptable theory. Each theory presents a plausible perspective on moral status that merits attention, but no theory by itself is adequate … [but] all five theories contribute to our understanding of moral status' (Beauchamp and Childress 2013, 65). What they finally propose is a multi-level account of moral status, in which status is a matter of degree.

Justice

The fourth cluster of principles is justice. This cluster is particularly important for public health, for problems of allocation and rationing in national and global perspective. Problems of public health seem to be structurally different from most issues covered by the other three principles. The latter focus on more-or-less direct effects of one person's acts or omissions on another person. Public health issues, in contrast, usually play on a policy level with far less direct attributions of responsibilities. For this reason, I will only say very little about justice and public health here and elsewhere in this book.

Beauchamp and Childress discuss different theories of justice—some traditional, utilitarian, libertarian, egalitarian, and communitarian theories and, for the first time in the seventh edition, some more recent theories, Amartya Sen and Martha Nussbaum's capabilities approach and Madison Powers and Ruth Faden's well-being theory—and then examine particular problems using these theories 'as resources, with special attention to egalitarian thinking' (Beauchamp and Childress 2013, 262). Thus, they do not even try to converge all these theories of justice.

The principle of justice is certainly the most abstract of the four. Here the term 'cluster of principles' is certainly more to the point than the mere term 'principle'.

Relationship

From the first edition on, the book included a chapter on moral problems of the relationship between patients and the health care professionals (like physicians and nurses). There are close ties between the four principles and the problems of relationship and, indeed, '[s]ome of the moral rules and principles we … consider [in the relationship chapter] can be derived from the principles … But in addition some moral principles and rules that will be discussed here may hinge on the terms of the relationship itself rather than on external principles' (Beauchamp and Childress 1979, 201). The rules that govern professional-patient relationships are veracity, privacy, confidentiality, and fidelity. The main issues concerning *veracity* in bioethics are disclosure of bad information (like a cancer diagnosis) to the patient where veracity often conflicts with beneficence. *Privacy* is understood as 'a state or condition of limited access … to the person' (Beauchamp and Childress 2013, 312) and is distinguished in five forms: informational, physical, decisional, proprietary, and relational privacy. *Confidentiality* is very close to privacy. The basic difference is that confidentiality, other than privacy, can only be infringed within a relationship. Once we grant others access to information about ourselves, we surrender privacy, but we usually want this information to be treated confidentially and not disclosed to third parties. An actual case example that Beauchamp and Childress discuss is about a man who is tested positively for HIV infection. The family physician, who arranged for the test, agreed not to tell the man's wife about her husband's infection and the danger it poses for her. Depending on many other circumstances—for example, if the patient intends to tell his wife himself or not—an infringement of the rule of confidentiality might be justified. The last of the four rules in professional-patient relationships is *fidelity*. 'Obligations of fidelity arise whenever a … health care professional establishes a significant fiduciary relationship with a patient. To establish the relationship is

to give … [a] promise to faithfully carry out or abstain from carrying out an activity (Beauchamp and Childress 2013, 324). Problems with fidelity occur in manifold situations, for example, when a third party comes into play as when the patient is a small child and the physician has to deal with the parents (as the child's surrogates). Situations occur where the physician might not want to follow the parent's decisions (a famous example is the rejection of blood transfusions from Jehovah's Witnesses), but rather act in the child's best interest. Another example is of physicians who provide medical examinations of applicants for positions in a certain company or of applicants for an insurance policy. The physician then prima facie owes fidelity, not to the patient, but to the hiring company or the insurance company.

Theory of Justification

How to justify certain moral beliefs is a key issue for every moral theory. Principlism is no exception. Whether and how significantly the idea of justification has changed since the book's first edition is much debated (cf. Gert et al. 2006, 101; Rauprich 2013; Schöne-Seifert 2006; Hoffmann 2009, 605 ff.). Beauchamp and Childress now call their theory of justification an 'integrated model using reflective equilibrium' (Beauchamp and Childress 2013, 404). The Rawlsian idea and ideal of a reflective equilibrium aims at a coherent set of moral beliefs, principles, theoretical convictions, and so on.

Beginning with the considered judgments—moral judgments at all levels of abstraction which one is very confident about—whenever these considered judgments conflict with an implication of a normative theory, either the theory needs modification or the considered judgments need readjustment. But what if the starting point—the considered judgments—is already morally outrageous? One might well develop a perfectly coherent system, but only a system that is morally unacceptable. To escape this problem of unsatisfactory moral beliefs as starting points for reflective equilibrium Beauchamp and Childress take the norms of the common morality to be the best-considered judgments to start with. 'The thesis is that reflective equilibrium needs the common morality to

supply *initial norms* (foundations), and appropriate development of the common morality requires reflective equilibrium (a method of coherence)' (Beauchamp and Childress 2008, 385, their italics). Accepting 'reflective equilibrium as a basic methodology and to join this model with the common morality approach to considered judgments … [and using coherence] as a basic constraint on the specification and balancing of the norms that guide action'[4] is meant to place justification in principlism somewhere outside the usual categorization of foundationalism versus coherentism (Beauchamp and Childress 2008, 385). This shift from a more or less pure coherence theory towards this mixed approach only took shape from the sixth edition.

However, principlism does not offer an explicit account of what exactly coherence means and how to achieve reflective equilibrium. Beauchamp and Childress endorse Norman Daniels' idea of wide reflective equilibrium (cf. Daniels 1996). The most precise statement of how (wide) reflective equilibrium is to be achieved is thus: 'Equilibrium occurs after one evaluates the strengths and weaknesses of all plausible moral judgments, principles, and relevant background theories, incorporating as wide a variety of kinds and levels of legitimate beliefs as possible' (Beauchamp and Childress 2008, 383). Notice that this statement is both ambiguous and very demanding. Ambiguous is the talk of 'strength and weaknesses' (in what respect?), 'plausible moral judgments' (what is the standard for plausibility?), 'relevant background theories' (how does one know which theories are relevant?), 'legitimate beliefs' (what is the standard for legitimacy here?), and the variety of beliefs 'as wide … as possible' (possible for whom and under which set of circumstances?). The statement is demanding because it requires the evaluation of 'all' judgments, principles, and theories, only at the end ambiguously limiting the evaluation to a variety 'as wide … as possible'.

Since I am primarily concerned with methods as the formal side of justification, I can leave the problem of justification aside here (but see Arras 2007; Hahn 2000; Hoffmann 2008; van der Burg and van Willigenburg 2012).

[4] Beauchamp and Childress (2009: 385).

Let me, instead, briefly come back to the question whether or not the idea of justification has changed significantly over the course of the now seven editions of *Principles of Biomedical Ethics*. Despite their use of the term 'coherence' since the first edition, Beauchamp and Childress did not use the Rawlsian reflective equilibrium, but relied on Joel Feinberg's understanding of dialectic, which they introduced in a section on criteria for ethical theories:

> First, an ethical theory should be internally consistent and coherent … [I]t is questionable that … [an inconsistent] theory could really count as a theory, because it would not yield similar results when used by different people or even by the same persons in different but relevantly similar circumstances. Second, a theory should be complete and comprehensive … Third, simplicity is a virtue of theories. (Beauchamp and Childress 1979, 13)

Only the fourth step accounts for the dialectical method:

> Fourth, a theory must be complex enough to account for the whole range of moral experience, including our ordinary judgments … [Ethical theories] build on, systematize, and criticize our ordinary notions. Our moral experience and moral theories are also dialectically related. We develop theories to illuminate experience and to determine what we ought to do, but we also use experience to test, corroborate, and criticize theories … As Joel Feinberg suggests, our procedure is similar to the dialectical reasoning which occurs in courts of law: 'If a principle commits one to an antecedently unacceptable judgment, then one has to modify or supplement the principle in a way that does the least damage to the harmony of one's particular and general opinions taken as a group. On the other hand, when a solid well-entrenched principle entails a change in a particular judgment, the overriding claims of consistency may require that the judgment be adjusted.' The relations between the different tiers of justification follow a similar dialectical pattern. (Beauchamp and Childress 1979, 13 f.; the Feinberg citation is from Feinberg 1973, 34)

It is interesting to see how Feinberg actually continued, although Beauchamp and Childress did not refer to this section:

> This sort of dialectic is similar to the reasonings that are prevalent in law courts. When similar cases are decided in opposite ways, it is incumbent on

> the court to distinguish them in some respect that will reconcile the separate decisions with each other and with the common rule applied to each. Every effort is made to render current decisions consistent with past ones unless the precedents seem so disruptive of the overall internal harmony of the law that they must, reluctantly, be revised or abandoned. In social and political philosophy every person is on his own, and the counterparts to 'past decisions' are the most confident judgments one makes in ordinary normative discourse. The philosophical task is to extract from these 'given' judgments the principles that render them consistent, adjusting and modifying where necessary in order to convert the whole body of opinions into an intelligible, coherent system. (Feinberg 1973, 34 f.)

I do not see a relevant difference between the picture Feinberg draws and the Rawlsian reflective equilibrium. The next sections show that it would have been fruitful to rely not only on Feinberg's dialectic, but also on his parallel to legal reasoning in applying and developing normative systems.

Methods

We are now in a position to turn to principlism's methods. Drawing on judicial reasoning, Feinberg mentions distinguishing, adjusting, and modifying. We shall see that these and other moves are important in principlism, and that legal theory helps to get a clearer picture of these and other methods. The distinction between formal methods and a theory of justification takes up the differentiation between the formal and the material justification used in legal theory. I understand the methods used in principlism primarily as formal structures to present or test norms or solutions for particular cases, that is, as formal justifications to rationalize decisions. Principlism is generally aware of the need to employ not only one, but several methods. As Childress puts it:

> Instead of viewing application, balancing, and specification as three mutually exclusive models, it is better, I believe, to recognize that all three are important in parts of morality and for different situations or aspects of situations, as well as often intertwined and overlapping. (Childress 2007, 29)

This awareness is important. Since large parts of what I have to say point into this direction, I want to make sure that I do not only bring sand to the beach: my analysis will bring far more clarity about the different methods and their use, how they are 'intertwined and overlapping', and when we need which method—it is a common misunderstanding in the ethics literature not to distinguish between different methods sufficiently.

Childress takes application to mean *deductive application* of norms to cases. Further, he claims that, in some cases, decisions are made without appeal to norms and that norms sometimes need modification. The two latter claims lead to his conclusion that deductive application 'does not cover all or even the most significant connections between principles and particular judgments about cases' (Childress 2007, 25). Even if the claim (that we make decisions without appealing to norms) were true in the majority of cases, this would not have any implications for my discussion of methods as means to rationalize decisions. In discussing specification, I take up Childress' claim about modifying norms—I will argue that modifications do not discount deduction; modifications are, rather, a necessary tool to develop normative theories to allow for deduction. This discussion further clarifies the relation between deduction and specification. Childress reserves a place for deductive application within principlism while still relying on specification. This is somewhat surprising because, as I will explain, the latter was explicitly designed to replace deduction (and balancing). Childress' remarks are potentially misleading. The following is how he envisions the relation between (deductive) application, specification, and balancing:

> The application framework can function effectively only where we can assume that (a) the principle's scope and range of applicability can be firmly established, (b) the principle's weight or strength can be established a priori, and (c) the principle will never come into conflict with other equally significant principles. In concrete cases, conflicts between moral principles […] generate moral perplexities that lead to adjustments in (a) or (b). In such situations we often proceed by specifying or balancing the principles in conflict. Specifying is a way to try to reduce or eliminate the conflict; balancing principles is an effort to try to resolve the conflict through determining which principle outweighs the other in the circumstances. (Childress 2007, 25)

This seems to give a framework for which method to use for which kind of problem. I will now examine these methods in detail. I start with specification and its relation to deductive application and forms of norm development. This discussion will lead over to an examination of balancing.

Specification

After Henry Richardson's initial 1990 paper, the notion of specification attracted quite some interest in the bioethics literature. David DeGrazia coined the term 'specified principlism' to combine principlism and specification and regards specification as 'the most significant contribution to our understanding of bioethical theory in some time' (DeGrazia 1992, 524). Beginning with the fourth edition, Beauchamp and Childress make use of specification for principlism, but only as one method next to others. As Beauchamp puts it,

> Specifying norms is achieved by narrowing their scope, not by interpreting the meaning of terms in the general norms (such as 'autonomy'). The scope is narrowed … by 'spelling out where, when, why, how, by what means, to whom, or by whom the action is to be done or avoided.' A definition of 'respect for autonomy' (as, say, 'allowing competent persons to exercise their liberty rights') clarifies the meaning of a moral notion, but it does not narrow the scope of the norm or render it more specific and practical. The definition is therefore not a specification. (Beauchamp 2011, 301 ff.)

Richardson uses a concept of coherence and the idea of wide reflective equilibrium to describe the choice between different specifications of norms, which obviously made it easier for Beauchamp and Childress to incorporate specification into principlism. Richardson explicitly aimed at developing

> a schema of what it would be to bring norms to bear on a case so as to indicate clearly what ought to be done. The deductive application of rules to cases and the intuitive weighing of considerations [balancing] are the two cognitive operations usually thought central to this task. I seek to add specification as a third, even more important operation. (Richardson 1990, 280)

But he dismisses not only balancing and deduction as means to ensure a stable attachment to a certain moral theory; although specification owes much to Dewey's ethical pragmatism and Rawls' reflective equilibrium in terms of revision of norms, Richardson criticizes their lacking contribution to stability, too (cf. Richardson 1990, 291 f.; Richardson 1994; Richardson 2000). Stability is, here, understood as the connection between the abstract norms of an ethical theory and its more concrete norms (and the particular case resolutions). It is meant to provide criteria as to how we can reach stability in ethical theories.

The Importance of Revisions and Expansions

Richardson argues that 'the complexity of the moral phenomena always outruns our ability to capture them in general norms', which is why we should take moral norms to be non-absolute, that is, they do not hold in each and every case but are open for exceptions and revisions where the circumstances demand so (Richardson 1990, 295). He further argues, and this is surprising, that stability in ethical theories *requires* initial norms that are not absolute. Let me call this his *necessity claim*. According to this claim, norms need to be non-absolute, because only non-absolute norms allow for either kind of development: first, that the specified norm replaces the initial norm, what Richardson calls a *true revision* of the set of norms. Second, that the specified norm stands alongside the initial norm, what he calls an *expansion* of the set of norms (cf. Richardson 1990, 292).

> For … stability in the course of revision to be possible, *it must be the case that the norms being specified are not 'absolute' in logical form* … Instead of being, in this sense, prefaced by an 'always,' they must be seen as implicitly beginning with a 'generally speaking' … If the initial norm were strictly universal, then … [an expansion] would be otiose, since it would already be implied in the initial norm, and could be omitted as an unnecessary step in a deductive argument to a practical conclusion … If the more specified norm replaces the one it specifies, however, the result would be an implied exception that would be logically incompatible with the initial norm's universal command, making it difficult to see any stability. Accordingly, to conceive of a kind of stability over the course of a path of specification that

> does useful work, one must suppose that the norms being specified are not absolute. (Richardson 1990, 292 f., italics mine)

The argument is that *true revisions* are only possible with non-absolute norms, since, for absolute norms, the 'result would be an implied exception that would be logically incompatible with the initial norm's universal command'. Development in the sense of *expansion* is possible with absolute norms; but it would be unnecessary ('otiose'), just like a specification of absolute norms is possible but 'superfluous' (Richardson 1990, n. 38). Thus, specification also works—however otiose—with absolute norms, but only in a limited sense that excludes *true revisions*. In order to allow for either kind of development, one needs non-absolute norms, or so he claims.

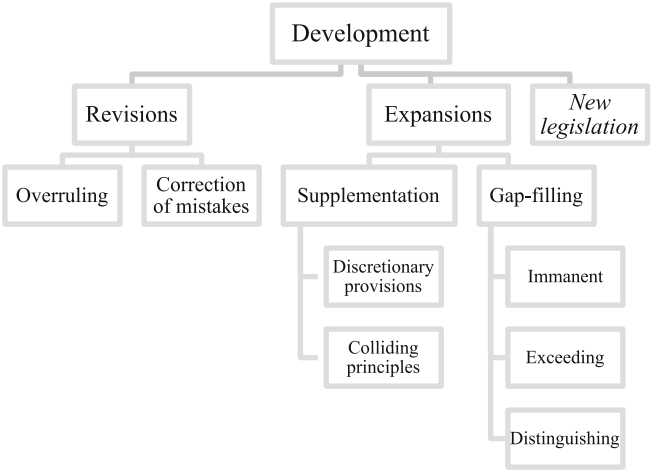
This seems to be the only difference between absolute and non-absolute norms. Since Richardson puts so much emphasis on the distinction between norms of these two logical forms, he must have an important point in mind with that distinction. The only point I see is the importance of *true revisions*. But how do these revisions fit within the specification relation in contrast to deduction? There is no straightforward relation between revisions and either specification or deduction. Specification leads to more concrete norms. But it does not, by itself, provide reasons to abandon the initial norm in favor of the specified norm. It might turn out that the specified norm should replace the initial norm, but this judgment would depend on another form of reasoning than specification. A similar point holds for deduction: Richardson is right that 'an implied exception … would be logically incompatible with the initial norm's universal command'. Yet, this only means that deduction—just like specification—does not help in revising the norm in application. It does not mean that there are no ways to modify a set of absolute norms. Fortunately, though, the necessity claim is wrong and is no limitation for specification.

In Chap. 5, I already explained how norm revisions work in legal theory. A look back at this chapter uncovers the wrong picture behind the necessity claim. I outlined two instances of developments of normative systems by revising norms, the overruling of a precedent case and the correction of legislative mistakes. Overruling is pertinent when interpretation shows

that the problem at hand falls under an existing precedent, which, if applied, would not be a good solution for the problem. However, since people might rely on the norm one is about to alter, revisions need careful consideration. Just imagine ethical guidelines issued by a medical association or a medical practice followed by a certain hospital. Both can lead people to reasonably rely on these guidelines or the practice and, for instance, design their advanced directives in accordance with them. A minimum requirement is that a new norm fits the problem at hand *and future cases that are in its scope* better than the existing norm.

The point against Richardson's necessity claim is that the two instances of development by norm revision are, indeed, possible with absolute, as well as with non-absolute, norms. The reasoning behind such revisions is neither deduction nor specification; no formal method generates reasons for revisions. Rather, revisions—like other forms of development—are from time to time necessary to allow for deductive applications (or specifications). Richardson's necessity claim is thus wrong.

But the necessity claim nicely connects specification with my discussion of norm development in Chap. 5. Recall the graphic I used there in order to illustrate the different modes of norm development:



We have seen that the notion of norm revision is relevant in specification, as well as in legal theory. But Richardson also mentioned the other

form of norm development already familiar from legal theory; namely, *expansion*, in the sense that the specified norm stands alongside the initial norm. He does not elaborate on this kind of norm development, though. In Chap. 5, I distinguished two instances of development by expansion, *supplementation* and *gap-filling*. Supplementation is a form of development that depends on the type of the initial norms, for it calls on the applicant to turn them into a norm in order to be applicable. The most common form of supplementation is the use of discretionary provisions like 'If A does x, a fine *can* be imposed'. Such a permission to impose a fine calls on the applicant to supplement the norm by adding further criteria for the use of the permission (that is, for when a fine shall be imposed), thus creating a new norm, which stands alongside the initial norm. The other example for supplementation was the conflict of principles—understood as a certain form of prima facie norms, namely as optimization requirements. When such principles conflict, one principle prevails without rendering the other unlawful. The supplementation is, then, the development of criteria for when the one principle prevails over the other. I elaborate on such conflicts between principles in the following section on balancing. This also clarifies how specification and balancing interact in principlism. That Richardson did not elaborate on norm development by expansion and on balancing conflicting principles arguably led to the misconception that specification would ultimately replace balancing as a method.

The second instance of development by expansion is *gap-filling*. Here, too, the new norm stands alongside the initial norm without modifying it. Roughly two situations allow for gap-filling: first, when the interpretation of the given norms reveals that the law does not cover the particular case (law-immanent development) and, second, when it reveals that the law does not represent what the legislature wanted to enact (law-exceeding development). To speak of a gap in the law presupposes a certain area of human conduct that is sufficiently covered by the law, as is criminal conduct by the criminal law. The same holds for ethics. One can only speak of gap within an ethical theory when a certain conduct is to be covered by that theory, but is not so far. Thus, there is no gap when something was intentionally not or not in another way regulated.

The two types of development by adding norms—supplementation and gap-filling—differ in two main respects: first, supplementation expands the normative system by adding more specific norms; gap-filling expands the system by adding norms that can, but do not need to be, more specific. Second, supplementation is intended by the creator of the normative system; gap-filling is not.

That these distinctions between different modes of norm development are necessary in law suggests that they are also important in the even broader and more convoluted field of ethics.

Talking about norm development, is there also a parallel between specification and norm application? Recall that application works with given norms and leaves them unmodified, whereas developments modify the normative system by revising a norm or by adding new norms, thereby expanding the system. The aim of further developing the normative system is to *allow for applications* to determine particular case resolutions where the existing norms do not. The distinction between application and development is not sufficiently clear in specification. In fact, the application of a norm to a particular case is not even a distinct problem for Richardson once the norms are specified:

> The central assertion of the model of specification is that specifying our norms is the most important aspect of resolving concrete ethical problems, so that once our norms are adequately specified for a given context, it will be sufficiently obvious what ought to be done. That is, without further deliberative work, simple inspection of the specified norms will often indicate which option should be chosen. (Richardson 1990, 294)

In a footnote to this, he refers to Aristotle as holding that, in applying thus specified norms, it is '"perception" that must supply the "premise" that a currently possible action satisfies the norm' (Richardson 1990, n. 33). It is certainly true that norms are usually easier to apply the more specific they are. However, this does not render the distinction between application and development irrelevant. Richardson believes that specification potentially does play all roles—the resolution of particular cases (at least together with 'inspection' or 'perception') and the development of the normative system through revisions and expansions—although,

as he noted in personal conversation, not necessarily the only possible, let alone the best, method for every role. Regarding the *necessity claim*, I already argued that there is no straightforward relation between development and specification. Specification does lead to more concrete norms, but it does not provide reasons for abandoning the initial norm in favor of the specified norm or to leave the initial norm intact. It does not itself generate reasons for doing this or that; it depends on reasons from outside the formal structure of specification.

Richardson's Definition

This brings us to the definition of specification:

Norm *p* is a specification of norm *q* (or: *p* specifies *q*) if and only if

(a) norms *p* and *q* are of the same normative type [end, permission, requirement, or prohibition];
(b) every possible instance of the absolute counterpart of *p* would count as an instance of the absolute counterpart of *q* (in other words, any act that satisfies p's absolute counterpart also satisfies q's absolute counterpart);
(c) *p* specifies *q* by substantive means … by adding clauses indicating what, where, when, why, how, by what means, by whom, or to whom the action is to be, is not to be, or may be done or the action is to be described, or the end is to be pursued or conceived; and
(d) none of these added clauses in *p* is irrelevant for *q* (Richardson 1990, 295 f., footnote omitted).

In Richardson's explanation of these criteria, conditions (b) and (c) seem to be of special importance: (b) is supposed to mean that every instance of p must be an instance of q, but becomes a bit difficult because we mainly deal with non-absolute norms. Condition (b) requires that the extension of the specified norm is fully within the extension of the initial norm. Condition (c) is the glossing condition and ensures that p is, in fact, more precise than q—because content was added—and not only a subset of q (like an implication

of q in a logical sense); (c) thus implies that the norm gets specified through an addition of the intension of the initial norm. Condition (d) is supposed to exclude glossing by adding conjunctions (just as (b) is meant to exclude disjunctions). Condition (a) does not seem to be substantially important (it merely addresses formal complications for the definition). Specification can be summarized as *extensional narrowing* (b) plus *glossing the determinables* (c) (cf. Richardson 1994, 72 f.; Richardson 2000, 289).

Specification is explicitly defined as a *relation between two norms*. It offers some formal criteria to determine whether one norm counts as a specification of another. Neither does it offer criteria for the justification of any norm, nor enable it to choose between different (specified) norms that satisfy the formal criteria. Richardson only hints at a discursive justification standard, that 'in effect carries the Rawlsian idea of "wide reflective equilibrium" down to the level of concrete cases' (Richardson 1990, 300). I will not go into that standard here, because there is no necessary connection between specification and this very standard; one could as well use specification combined with another standard—such as utilitarianism, Kantianism, or majority vote—for justifying the choice of one possible specification over another. Note also that the wide reflective equilibrium already takes judgments in particular cases into account. It is unclear why there is still a need to carry this idea 'down to the level of concrete cases'.

All of this resembles the two forms of justification introduced in Chap. 5, the formal and the material justification, where the formal justification states the structure of a formal inference, and where the material justification provides the substantial reasons in order to justify the content on the formal side. Taken together, the formal and the material justification make for a full justification of a particular decision. Methods such as deduction, analogy, balancing, and specification have their role as part of the formal justification. Full justifications depend on material justifications that are not provided by the methods themselves. Material justifications can make use of various kinds of arguments and of different kinds of normative background theories (such as utilitarianism, Kantianism, or reflective equilibrium). As explained above, my focus is on formal justification.

We have seen that specification is part of the formal justification and that it is meant to allow for developments by norm revision and by expansion. Furthermore, I pointed out that Richardson does not regard the application of a norm to a particular case a distinct problem, because, once the norms are adequately specified, it will be obvious what ought to be done.

However, this understanding of specification has two problems: it is too restrictive and too simplistic. First, it is overly restrictive because it does not allow for any move that does not alter the normative system. This is due to specification's setup as a pure instrument of norm development. It is purely defined as a means to determine if one norm counts as a specification of another norm. In order to solve a particular case, one will have to specify to a very high degree of concreteness until it is clear what ought to be done. The problem, then, is that all these specified norms are developments of the normative system by either revising or expanding the system, that is, all these specified norms modify the normative system. There is no way to use specification without thereby altering the normative system. This is restrictive for future applications of the system; it will undoubtedly yield excessive regulation. The second problem with this view is that it is simplistic, in the sense that it neglects the relevance of interpretation for both norm development and norm application. This will become apparent in the following example. The main point is that Richardson's assumed unimportance of application simply cannot explain when it is obvious what ought to be done and when exactly 'simple inspection' indicate which option should be chosen. In Chap. 5, I argued that every norm application depends on a semantic interpretation to bridge the gap between the norm and the case description. One of the main reasons to use deduction as the main method of norm application is that it forces one to make these interpretations transparent. One defect of Richardson's view is to leave this interpretative step in the dark.

Interpretation

An example will help to clarify the points being made. The following case goes back to one of Richardson's illustrations of specification:

> A … newborn was diagnosed to have trisomy 18 syndrome … The prognosis of infants with this disease is poor; approximately 50% of them die within 2 months, only 10% survive 1 year or longer …, The disease causes severe mental retardation and developmental disorders. In this case, the infant had oesophageal atresia … such that oral nutrition is not possible. In addition, the infant was suspected of having a ventricular septal defect of the heart. The atresia could be corrected by surgery. The heart defect probably could also be corrected surgically when the infant is older, provided that she survives to that age. However, the parents requested to withhold all available life support measures for their child, including nutrition, hydration and surgical correction of the atresia. Should their wish be respected? (Rauprich 2011, 593)

This is Oliver Rauprich's suggestion of the use of specification in this case:

> The first step in using the method of specification for the analysis of the case is … to determine morally relevant facts of the case and some general moral norms to which they connect … I suggest … three morally relevant facts: (1) limited life expectancy and (2) reduced expected quality of life of the infant due to developmental disorders and mental retardation; (3) the parents' request to decline treatment. These aspects may connect … to the best-interest principle and the principle of respecting parental decision-making authority. (Rauprich 2011, 593)

Leaving aside doubts about how Rauprich accesses the case and how the two mentioned principles relate to one another, let us continue with Rauprich's resolution:

> How … the morally relevant facts connect to the general norms … must be shown by specification … To start with the best-interest principle, a reasonable specification may be:
>
> 1a: Respect the principle of beneficence by treating incompetent patients with no discernible preferences according to their best interest.
>
> 1b: …by treating incompetent patients in a way that provides them with the best balance of expected benefits over burdens.
>
> 1c: …by providing aggressive treatment to severely ill newborns only when they have long-term life expectancy and the capacity to develop self-consciousness.

> 1d: …by not providing surgery, nutrition and hydration for newborns with trisomy 18 syndrome and oesophageal atresia.
>
> According to this line of specification, it is not in the best interest of the infant to have aggressive treatment because it would cause pain and other harm without providing a significant chance for long-term survival and development of selfconsciousness.
>
> [The second specification of the principle of respecting parental decision-making authority] is in accordance with the specification of the best-interest principle above as well as with usual practice … For a complete discussion of the case, certainly more than these two specifications would be needed. However, they may suffice to indicate how specified principlism is able to reach reasonable solutions to concrete cases … I do not claim … that the method is able to provide ultimate solutions. (Rauprich 2011, 593 f.)

In this quote, Rauprich offers norms with a narrowed scope and some glossing. However, one gets no information about where these specifications come from and why they are more coherent (and thus justified) than other possible specifications. In what follows, I show how demanding the use of specification actually is and in which sense it depends on interpretations.

Specification can be summarized as *extensional narrowing* (b) plus *glossing the determinables* (c). It does not come as a surprise, then, that especially these two conditions (b) and (c) are very demanding. To apply (b) in cases of doubt [5], one must know *all* instances of the specified norm and, in the end, *all* instances of the initial norm, too. Or, to put it another way, (b) requires knowing all possible instances of both norms (extension). That will, in most hard cases, also require the knowledge of the intension

[5] This limitation is due to an objection that Richardson, in personal conversation, raised against my understanding of specification, namely that there are cases where it suffices to have an ordinary understanding of the English language. Consider this example: when the initial norm is 'Each working mother ought to take one of her children to work on Take Your Child To Work Day', one does not need to know all instances of this norm to know that 'Each working mother ought to take one of her children to work on Take Your Child To Work Day, giving preference to a daughter' is a specification of the initial norm; it suffices to know that 'daughter' is within the scope of 'children'. This is true, but only for obvious cases for which one does not need specification in order to guarantee stability. One does need means like specification *in cases of doubt*—and almost all problems in ethics are of the latter kind. Being a competent speaker of English does not tell you whether 'best interest' boils down to 'not providing surgery, nutrition and hydration for newborns with trisomy 18 syndrome' in Rauprich's case.

of both norms. Condition (c) requires that the specified norm is more precise than the initial norm. I suppose it is, in many cases, hard to tell the difference between a special case of the initial norm and a glossing (in the sense of adding content). The glossing condition, too, demands quite some knowledge about the extension of the initial norm.

Specification always depends on interpretations of the norms at hand. Recall that an interpretation is roughly the choice of one possible extension; when interpreting a norm that has been made by someone—such as the ethical norms developed and explicated by Beauchamp and Childress—one has to take into account the linguistic conventions as well as the author's intentions (cf. Raz 2010).

Consider, again, Rauprich's specification of the best-interest principle. I am unable to tell whether this specification fulfills Richardson's criteria for specification. For being in a relation of specification, both norms have to be of the same normative type. Neither of Rauprich's initial principles tell whether they are prohibitions, requirements, or some other normative type. This is a problem regarding Richardson's condition (a). To overcome this problem, one simply needs to give a full formulation of both the initial and the specified norm (or at least a formulation of the normative type). Rauprich only named the principle without providing its content. What the principle actually says depends on the respective ethical theory one works with; specification starts from a *given* norm. So, how does one know what is an instance of the 'best interest principle'? Condition (b), in this case of doubt, requires knowing all possible instances (extension) of both norms, probably by interpretative support of the norms' intensions. The glossing condition (c) requires that the specified norm is more precise than the initial norm, which will be hard to tell in many cases. At least this condition, too, demands quite some knowledge about the extension of the initial norm. What this shows is that, to test whether one norm is a specification of another norm, one needs to know at least four things: the precise wording of the initial norm, the precise wording of the other (specified) norm, an interpretation of the initial norm (its extension and in most cases its intension), and an interpretation of the specified norm.

As specification depends on interpretations, it needs to be supplemented with a *theory of interpretation*, that is, with a theory that points out

how to interpret ethical norms [6], in order to make it practical. Regarding the practical use of specification, the formal relation between the two norms alone does not get us very far. To point out the need of a theory of interpretation is not so much a critique of specification as defined by Richardson. Rather, every formal relation between two norms (like deduction, balancing, and analogy) has this need. Different opinions about which theory of interpretation to use will very likely yield different outcomes. A theory of interpretation is even necessary to tell whether one specifies or uses some other form of 'interpretation'. Richardson differentiated between four kinds of 'interpretation' in his understanding of modifying norms [7]: specification (extensional narrowing plus glossing), extensional narrowing (without glossing), glossing (without narrowing), and sharpening.

> An example of *narrowing* that does not gloss is the move to 'do not torture' from 'do not harm.' The former is indeed extensionally narrower, but since 'torture' is a well-understood notion on its own, there is no need to generate this more specific norm by adding clauses to the initial norm prohibiting harming. An example of *glossing* that does not narrow would be any gloss that purports to replace an initial formulation by definition rather than supplementing it. For instance, 'do not have sex in the office' could be glossed as 'do not have sex in the office, by which we mean: do not engage in any act involving contact (of a certain kind) with the genitals of another.' This formulation adds words but purports, at least, not to narrow: it is simply spelling out what 'having sex' already meant. (Richardson 2000, 289 f.)

[6] Note that the interpretation of a norm is different from the justification of which specification to pick. The interpretation takes part in the process of testing possible norms for their compliance with the specification criteria. A justification is then needed to choose between the norms that passed the test.

[7] Note that Richardson (2000), 288 f.) has an unusual understanding of 'interpretation' as modifying the content of a norm by adding content. He distinguishes 'interpretation' from derivation, where the latter merely links a norm 'to a conclusion by causal (or conceptual) facts … These links supplement the initial norm without changing it.' For Richardson, the divergence between 'interpretation' and derivation is also related to the logical form of the initial norm (absolute for derivation, non-absolute for 'interpretation'). Derivation is meant to be the form of reasoning used for, inter alia, deduction, whereas 'interpretation', in this sense, is the generic term that includes specification. I use 'interpretation' in quotation marks whenever I use it in Richardson's sense.

Glossing in this quote sounds pretty much like the problem to find the meaning of the initial norm, spelling out at least one possible extension. It is what (Beauchamp 2011, 301) in the introductory quote calls 'interpreting meaning'. Yet, in the example, Richardson suggests that the extension as well as the intension of 'do not have sex in the office' are more or less obvious, which they are not. How about 'do not have sex in the office, by which we mean: do not masturbate in front of colleagues in the office'? Is this in the extension of the initial norm? The answer depends on the interpretation of 'having sex', on whether or not it includes masturbation. My point is that glossing without narrowing is very rare. In fact, it only occurs with well-defined terms such as 'circle', 'bachelor', or 'unicorn'. *Narrowing without glossing* seems to be the choice of one or more possible extensions ('do not torture') of the initial norm ('do not harm'). I suppose this is what in ordinary language—and also in philosophy—is usually called interpretation.

Sharpening, in Richardson's sense, has to do with vague terms and norms. A vague norm cannot be specified, because vagueness makes it impossible to tell whether or not the specified norm is extensionally narrower than the initial norm, or so he argues. Vagueness is usually defined through borderline cases. To take Richardson's example, it is impossible to tell if 'do not drink more than twelve beers at a single sitting' is extensionally narrower than 'do not drink inordinately', for it might well be 'inordinate' to drink ten beers. Richardson admits that moral norms often contain vague terms. What he does not point out, though, is that this might be a major limitation for specification as a method in ethics, because one can never tell whether a norm is a specification of another norm if the initial norm contains a vague expression.

Fortunately, the discussion in Chap. 5 helps. There, I discussed vagueness as one intricacy for deductive norm application. Vagueness, in contrast to ambiguity, cannot be resolved through context. Vague expression has borderline cases 'in which one just does not know whether to apply the expression or withhold it, and one's not knowing is not due to ignorance of the facts' (Grice 1989, 177). That is, there are positive candidates to which the expression applies, negative candidates to which the expression does not apply, and neutral candidates where it is unclear whether or not the expression applies. 'Do not drink more than twelve beers at a sin-

gle sitting' is a neutral candidate of 'do not drink inordinately'. For law, as well as for ethics, the most important kind of vagueness is probably classificatory vagueness. This is vagueness about the properties an object needs to possess in order to belong to a certain category. Consider, again, the question whether a glass brick element of a façade is properly called 'window'. Is the possibility of opening and closing part of the intension of 'window' or is it sufficient to be a translucent opening in the wall of a building? The glass brick element of a façade is a borderline case of 'window'; it is a neutral candidate of which we just do not know whether it is in the extension of 'window' and our 'not knowing is not due to ignorance of the facts'. When faced with a vague explication in a norm, the applicant's task is to *stipulate* a fitting intention, that is, to stipulate a semantic interpretation of the category that resolves the question whether an object does possess the properties it needs in order to belong to this category. Doing this, the applicant turns the neutral candidate into a positive or negative candidate for the case at hand. This stipulation is not determined by the norm as it stands. However, this does not mean that one cannot rationally justify a decision in a transparent way.

Abandoning Specification

Some of specification's distinctive features turned out to be built on misconceptions or were designed in opposition to other modes of reasoning without also compensating for their functions. For instance, focusing purely on norm development and neglecting the relevance of norm application leaves one of the most important functions of methods in the dark. Designing specification in opposition to balancing without elaborating on what balancing actually is and how it works merely wastes the potential that lies in the collaboration between different methods. Also, banishing deduction because ethical norms are understood as non-absolute also turns out to be mistaken. But the most severe problem is the complete absence of interpretation within specification. The discussion revealed that interpretations are crucial to tell whether specification is applicable at all, to differentiate it from other forms of 'interpretation', and to make practical use of specification in hard cases.

For principlism—and for other normative theories—I suggest abandoning specification as a method altogether. Instead, one should have a closer look at the methods in legal theory introduced in Chap. 5, where I argued for a deductive structure of norm application that has a clear place for interpretation and that is compatible with different kinds of norms, with absolute as well as with non-absolute norms.

I do not believe that this does away with all problems in making decisions or in justifying them retrospectively. Yet, what it does is important enough: it provides a framework for norm application and norm development and for how the two interact; furthermore, the deductive structure performs every function (and some more) that Richardson designed specification for.

Balancing

Every principles-based normative theory has the problem that these principles will conflict in one case or another. To resolve such conflicts, one could either order the principles hierarchically (or lexically) or introduce an organizing super-principle, an ultimate value, or the like. Beauchamp and Childress cannot take either of these paths, because, as we have seen, they work with prima facie norms. This has strong implications for the methods used in principlism, which

> views moral principles as prima facie or presumptively binding, rather than as absolutely binding or lexically ordered. It thus balances various principles when they come into conflict in particular cases, if the process of specifying the principles does not eliminate the conflict. (Childress 2007, 28)

Balancing is a mode of resolving norm conflicts. It seems as if the various prima facie norms in principlism run into conflicts continually—indeed, moral problems are often understood as conflicts between principles—and that conflict resolutions cannot draw on principlism anymore. The normative system itself does not provide the resolution of these conflicts—otherwise one would not have to fall back on balancing. When the normative system itself does not resolve these conflicts, one has to draw on other sources, such as intuition, wisdom, and judgment.

Yet, how is one to determine the principles' weights in particular cases if they are not determined in advance by the normative theory? Principlism has no decisively organizing super-principle; rather, in relying on balancing, it calls for judgment. As we shall see in turn, it is still not purely intuitive; it can be more rational than some critics assume.

An important feature of balancing that differentiates it—according to Beauchamp and Childress—from specification is balancing's sensibility for particular situations and persons, whereas specification, in contrast, works on an abstract level and 'requires that a moral agent extend moral norms by both narrowing their scope and generalizing to relevantly similar circumstances' (Beauchamp and Childress 2008, 20). Beauchamp and Childress further link their notion of balancing to the balancer's virtues:

> Capacities such as compassion, attentiveness, discernment, caring, and kindness are integral to the way wise moral agents balance diverse, sometimes competing, moral considerations. These capacities tutor us in 'what to notice, how to care, what to be sensitive to, how to get beyond one's own biases and narrowness of vision,' and the like. (Beauchamp and Childress 2008, 22)

As these remarks already indicate, Beauchamp and Childress rarely uncover their reasoning behind the attachment of weights to principles. In discussing examples they almost always simply state a particular solution as the outcome of balancing (cf. Tomlinson 2012, 53 f.). I shall explain how the reasoning behind balancing can be made more rational and transparent.

The Constraining Conditions and Proportionality

There are some hints in principlism, though, at how balancing can be constrained. Arguing against Richardson's claim that—in contrast to his method of specification—balancing is too loose a method to guarantee stability (cf. Richardson 2000), Beauchamp and Childress argue 'balancing is [not] a matter of on-the-fly, unreflective intuition without reasons' (Beauchamp and Childress 2008, 22). They even offer conditions that

infringements of prima facie norms must meet in order to be justified, thereby constraining discretion and intuitionism in balancing:

1. Good reasons can be offered to act on the overriding norm rather than on the infringed norm.
2. The moral objective justifying the infringement has a realistic prospect of achievement.
3. No morally preferable alternative actions are available.
4. The lowest level of infringement, commensurate with achieving the primary goal of the action, has been selected.
5. Any negative effects of the infringement have been minimized.
6. All affected parties have been treated impartially (Beauchamp and Childress 2013, 23).

These conditions are certainly helpful. However, Beauchamp and Childress explain neither how they developed them, nor how they are to be used. Since balancing together with these conditions is strikingly similar to the notion of proportionality introduced in Chap. 5, I employ proportionality in order to get a better grasp of the conditions and of balancing within principlism. Recall that proportionality in legal theory has four requirements to limit a right or a principle, namely, (1) a legitimate end, (2) suitable means to achieve this end (suitability), (3) that these means are the least intrusive to achieve the end (necessity), and (4) that the means are proportionate in the narrow sense (balancing).

Among Beauchamp and Childress' six conditions is no obvious candidate for a legitimate-end requirement, because such a requirement would be redundant in principlism. In principlism, moral problems are conceived as conflicts between principles; only conflicts between principles that are part of principlism's normative set are considered moral problems. And only such conflicts between two or more principles require balancing to resolve the conflict. The legitimate end requirement is thus presupposed by the very structure of principlism.

Condition (2) is similar to the suitability requirement of proportionality, which is meant to ensure that the means used to achieve the legitimate end must be suitable at least to some degree; that is, there must be a rational connection between means and ends. This prong of the

proportionality test (as well as the necessity requirement) is based upon empirical inquiry. Two points deserve clarification here: first, the constraining condition (2) does not demand any connection between the realistic prospect of achieving the objective and the means used, although Beauchamp and Childress meant to ensure exactly this connection. It would be strange to vaguely demand realistic prospects of achieving an objective through any means whatsoever when the actually chosen means do not have such a prospect, that is, if there is no rational connection between chosen means and ends. Second, it is unclear which degree of probability is sufficiently 'realistic'. It is probably meant to be higher than the basic requirement from the legal notion (where every degree—however minor—suffices). 'Realistic prospect of achievement' sounds like somewhere in between this basic requirement and a chance of 50 %.

Conditions (4) and (5) resemble the necessity requirement. These two constraining conditions demand that the action with the 'lowest level of infringement' has been chosen that is also 'commensurate with achieving the primary goal of the action'. This already implies that the 'negative effects of the infringement have been minimized'. The point in distinguishing between the two might be to take into account effects on third parties. Above, I said that most formulations of the legal necessity test require that there must not be a less intrusive alternative that equally effectively advances the legitimate end. This is what I take to be what Beauchamp and Childress want to capture with their condition (4). I argued for a wide understanding of the effectiveness requirement as including effects and costs other than those captured in the right or principle under discussion, which requires more than advancing the legitimate aim just as well. If the necessity test would always require going with the least intrusive means that achieves the end just as well—no matter the cost—this would yield absurd consequences. One could move the world just to achieve this particular end without considering other effects. The same holds, I believe, for ethics. One should not demand the 'lowest level of infringement' that is also 'commensurate with achieving the primary goal of the action'. One should, rather, demand that *there must not be an alternative action with a lower level of infringement that is commensurate with achieving the action's end while not having (considerably) higher costs other than those captured in the principle under discussion*.

This only rules out means that are more intrusive than alternative means, where the alternative means are also equally effective (in the wide sense) in achieving the legitimate end.

I have shown that Beauchamp and Childress' constraining conditions (2), (4), and (5) resemble the two prongs of suitability and necessity of the proportionality test, and how these criteria can be refined. Further, the legitimate-end requirement is presupposed by how principlism conceives moral conflicts. But how about Beauchamp and Childress' conditions (1) and (6)?

Condition (1) is very vague ('good reasons can be offered') and seems to be only a reference to the weighing metaphor; it is not helpful.

Condition (6) demands impartiality, which is a basic requirement of ethics and, depending on the normative system, either part of the generality of every moral norm (as explained in Chap. 3, above) or captured in a special norm, like the rule of equality. The relation to balancing is rather loose. Tom Tomlinson called condition (6) a 'gratuitous addition' (Tomlinson 2012, 55), which is not quite accurate. The attentive reader will remember that Beauchamp and Childress, under the heading of beneficence, argued against strict impartiality regarding the question towards whom moral agents have obligations, whether one ought to care for strangers as one should for our most loved ones. Still, there is no straightforward relation between balancing and impartiality. In my understanding, principlism generally requires impartiality in balancing conflicting principles, except for special cases in the realm of beneficence. Principlists, however, should clarify the place and the role of impartiality in principlism.

This is a strange result. We began by examining Beauchamp and Childress' six conditions that must be met to 'justify infringing one prima facie norm in order to adhere to another' (Beauchamp and Childress 2013, 22). But although these conditions apply to balancing, there has been no talk of balancing yet. Tomlinson rightly concludes that the six conditions are not really criteria for balancing, but for 'comparing courses of action with respect to selecting the one that entails the least infringement of all the norms at stake, *without regard to which norm is the weightier*', and that

> [w]hen all the criteria are satisfied, they establish that there is an irreducible conflict between norms that *only then* will require a judgment about which

> norm should be overriding. At that point, however, the criteria are of no further use in warranting the balancing judgment that must follow … Until these conditions are met, no balancing judgment is called for; but the conditions don't justify the balancing judgment that follows. (Tomlinson 2012, 56, his italics)

This conclusion supports my claim that balancing and the six criteria resemble the proportionality test, since this is exactly the function of proportionality's first three steps. Following the proportionality test step by step, one rules out certain ends or means without engaging in balancing—at least until one reaches the fourth step. It is only on step four that one knows that there is a conflict that calls for balancing.

In the legal proportionality test, as in principlist balancing, the first three steps do not help with the actual balancing process. These steps do not constrain balancing; instead, they are providing a procedure that limits the number of cases that truly need balancing, which is a considerable advancement of the much debated rationality of conflict resolutions within principlism.

If the six constraining conditions resemble the first three steps of the proportionality test, what, then, is the equivalent of the fourth step of the test—the actual balancing—in principlism? There is heavy use of metaphors; on one page alone, Beauchamp and Childress mention 'weighing', 'outweighing', 'overriding', 'equal or stronger obligation', 'W.D. Ross's "greatest balance"', and 'all things considered' (Beauchamp and Childress 2013, 15, grammatically adjusted). Unfortunately, Beauchamp and Childress do not offer much more guidance. They say that capacities such as 'compassion, attentiveness, discernment, caring, and kindness are integral to the way wise moral agents balance diverse, sometimes competing, moral considerations', and that these capacities tutor us in 'what to notice, how to care, what to be sensitive to, how to get beyond one's own biases and narrowness of vision' and the like (Beauchamp and Childress 2008, 22). All this might be true; but I do not find it extremely helpful. Beauchamp and Childress only give very few hints at how they picture the balancing process.

One such hint appears in an example Beauchamp and Childress discuss. There they say that, in every particular case, one has to consider

the levels of whatever is under consideration—in the example, risks and burdens for a particular patient—which then must be balanced with the

> *likelihood of the success* of a procedure (in this specific case), the *uncertainties involved*, whether an adequately informed consent can be obtained, whether the family has a role to play, and the like. In this way, balancing allows for a due consideration of all norms bearing on a complex, very *particular circumstance*. (Beauchamp and Childress 2013, 21, my italics)

This highlights that balancing has at least two core elements: (1) weights can only be assigned within the particular case, taking into account the particular circumstances; and (2) considerations of certainty, the likelihood of success, uncertainties of side effects, and so on.

Recall Alexy's three basic elements of balancing in legal theory, (1) the abstract weights of the principles, (2) the intensities of interference with the principles, and (3) the reliability of the empirical assumptions. These seem to match the two elements just identified in principlism. Taking into account that, in principlism, the principles' abstract weights are always the same, one can use Alexy's model to reconstruct the balancing process.[8] Note, again, that this model is not meant to mirror the actual balancing process, but to retrospectively rationalize the process. This does not always provide clear guidance in adjudicating hard cases in bioethics. However, it does provide a structure to think and to talk about it, which is an advantage compared to much of contemporary applied ethics.

Critique and Alternatives

The parallel of principlist balancing to the legal proportionality test also suggests that the two share the same problems. Recall the two lines

[8] In fact, I do not think it is correct to say that the abstract weights are the same for every principle. This is what principlists would say, but only, I suppose, because they do not differentiate between abstract weights and intensities of interference in the particular case. What they want to say is only that there is no *definite* ranking between the principles, for instance that autonomy *always* trumps beneficence. But this would not follow if one assigned different abstract weights to different principles, for, following the model I am suggesting here, the priority rule depends in each and every case on the abstract weights, the intensity of interference, and the factual uncertainties.

of criticism against the proportionality test discussed in Chap. 5. One was that proportionality is not morally neutral but committed to a logic of maximization and consequentialism (cf. Urbina 2012). If one understands proportionality and balancing as a mixture of rival moral traditions—deontology and consequentialism—this perfectly fits principlism's core idea of a convergence between different ethical traditions. The two broadly consequentialist prongs of necessity and balancing are mere readjustments where pure deontological reasoning fails to provide clear guidance, that is, mainly in situations where extreme violations of principles are already ruled out. Proportionality and balancing are thus not adequately described as following a logic of maximization or consequentialism.

The second line of criticism was that it is impossible to balance the relevant rights, interests, or principles. This incommensurability claim can, roughly, be understood as holding that two items cannot be measured by a single scale of units or values; incommensurability is, here, understood such that '*two items are incomparable with respect to a covering value if, for every positive value relation relativized to that covering value, it is not true that it holds between them*' (Chang 1997, 6).

The discussion of incomparability boiled down to the acknowledgment that it is hard to say *how* different values, rights, or principles are actually compared. However, the burden of proof seems to be on the incomparabilist. As long as there are no striking arguments for incomparability, one should assume that it is at least *somehow* possible to compare.

Yet, even if one accepts that comparison is possible somehow, proponents of proportionality, and of balancing approaches more generally, still have to explain what the covering value in balancing two principles actually is. This is, thus, another task for Beauchamp and Childress in further developing principlism.

Given these two problems—and other possible objections I am not addressing here—one might be tempted to look for alternatives to balancing for the resolution of norm conflicts. Here are two such alternatives that have been discussed in the literature. One is the ranking of principles; the other is the introduction of a guiding principle. I shall briefly discuss these two alternatives and a separate suggestion to rely on

the common morality as an organizing meta-principle to reconcile conflicts in particular cases.

Bob Veatch, Beauchamp's long-time colleague at Georgetown University, suggests a way to resolve norm conflicts by drawing on the Rawlsian idea of a lexical ranking between principles, that is, one principle is prioritized and must be completely satisfied before another principle can be taken into consideration—just like in a lexicon all words starting with 'a' come before words starting with 'b' (cf. Veatch 1981; Veatch 1995).

Veatch proposes a 'mixed strategy' with three steps. The first step is to balance the primarily consequence-maximizing principles (nonmaleficence and beneficence). The next step is to balance the nonconsequentialist principles (justice and respect for persons—the latter entailing autonomy, veracity, fidelity, and avoidance of killing). In these two steps, there is no lexical ranking among the consequence-maximizing or non-consequentialist principles, respectively. The critical third step, then, is to 'lexically rank the aggregate effect of the nonconsequentialist principles over the consequence-maximizing ones' (Veatch 1995, 211). He thus endorses a lexical priority of non-consequentialist principles over consequentialist principles. This ranking renders, for example, hard paternalism unjustifiable, because the autonomous decision of a patient cannot be weighed against considerations of beneficence. Similarly, considerations of beneficence or nonmaleficence 'by themselves can never justify breaking a promise, telling a lie, violating autonomy, killing another, or distributing goods unjustly. Each of these must be satisfied first' (Veatch 1995, 212).

This mixed strategy to resolve norm conflicts knows only two situations in which the consequence-maximizing principles can be taken into consideration, namely when the non-consequentialist principles are fully satisfied, and in tie-break situations when the non-consequentialist principles yield conflicting results. A non-consequentialist principle can, thus, never be overridden by a consequentialist principle alone; but the latter can serve as an intensifier to a non-consequentialist principle so that their combined force overrides the principle.

This mixed strategy takes up the deep intuition that consequences are important, but should not override all other considerations, which is at

the heart of the long-lasting debates between rule consequentialists and deontologists. Unfortunately, Veatch relies almost exclusively on this intuition and does not provide sufficient reason for taking exactly this position in the debate. His argument is as follows: 'I know of no case in modern Western ethics where utility alone justifies violating a non-consequentialist principle' (Veatch 1995, 13). Consequentialists of any stripe would disagree. For the very reason that Veatch's approach ranks non-consequentialist above consequentialist principles, Beauchamp and Childress reject this mixed strategy. They do not see any conclusive reason for doing so in each and every case and do not want to rule out the possibility that, even if in rare cases only, considerations of beneficence, for instance, can outweigh considerations of autonomy. Veatch's is thus no alternative to resolve norm conflicts within principlism. Another critique against Veatch's model is that it remains unclear *how* to balance among the non-consequentialist or consequence-maximizing principles, respectively.

This last point was, inter alia, articulated by Bert Heinrichs, who developed a Kantian reconstruction of principlism, arguing that his model provides a rational basis for the resolution of norm conflicts (cf. Heinrichs 2006). In discussing Beauchamp and Childress' six constraining conditions for balancing, he mistakenly takes them to guide the actual process of balancing itself. As explained above, the conditions should instead be understood as criteria for 'comparing courses of action with respect to selecting the one that entails the least infringement of all the norms at stake, *without regard to which norm is the weightier*', to use Tomlinson's words, and that, until the conditions are met, 'no balancing judgment is called for; but the conditions don't justify the balancing judgment that follows' (Tomlinson 2012, 56). I argued that the constraining conditions do not constrain balancing, but provide a procedure that limits the number of cases that actually need balancing. Heinrichs thus looks at the wrong place for a rational foundation of the balancing process itself.

However, developing his own Kantian reconstruction of principlism, he generally endorses Beauchamp and Childress' four principles; yet, he regards them as merely material principles facing a higher-order formal principle—the categorical imperative. What is particularly Kantian in this reconstruction is not only the differentiation between formal and

material principles, but also the anthropological backing and interpretation of the four principles. The main point in adopting the Kantian approach is that the question of hierarchy is automatically solved. The four 'anthropologically enriched' material principles are understood as derivations from the formal principle, that is, the categorical imperative expressing the principle of human dignity. They are instances where human dignity is typically affected; and they are only relevant insofar as human dignity is potentially affected (Heinrichs 2006, 92 f.). Human dignity is, in Heinrichs' model, the focal point for moral reasoning. In passing, he admits that one might be left with some problems of interpretation and specification; but he is quite optimistic that the notion of human dignity is clear enough to solve most problems once 'higher-tier judgment' [*höherstufige Urteilskraft*], is used (characterized by 'sensibility', 'flexibility', and 'creativity') (Heinrichs 2006, 99). He further claims that medical ethics will use a complex casuistry with a flexible system of flexible points of comparison and that, in such a casuistic system, the formal principle of human dignity can justify universal moral demands independent of time and cultural boundaries and reasonably guide practical reasoning (cf. Heinrichs 2006, 102 f.).

Unfortunately, he does not explain how this is supposed to happen. In fact, Heinrichs replicates the mistake of many critiques of principlism in exclusively focusing on the four principles as if the book had nothing more to offer in its more than 400 pages. There is much more content than the four headings. His anthropological backing does not seem to bring any additional gain.

Furthermore, Heinrichs' Kantian reconstruction breaks with many of Beauchamp and Childress' theoretical convictions. Principlism is meant to converge insights from different ethical traditions and cannot subscribe to a purely Kantian ethics (or any other ethical theory); principlism is committed to prima facie norms, whereas the formal principle, as well as the material principles, in Heinrichs' model are absolute. His model can, thus, not be used within principlism.

Despite that, and more surprisingly, Heinrichs' model does not even solve the problems he criticized in Veatch and in principlism, namely, the respective indeterminacies in resolving norm conflicts. Sure, Heinrichs has a super-principle. But this principle is extremely vague. And the ref-

erence to casuistry and to our 'higher-tier judgment', with sensibility, flexibility, and creativity, sounds not much more promising than what principlism has to offer.

To sum up, the two alternative models to resolve norm conflicts do not work within principlism. They are incompatible with principlism's basic theoretical convictions. Veatch's model is still much closer to Beauchamp and Childress' principlism and more likely to solve conflicts than Heinrichs' vague Kantian model.

It is now time to briefly examine the suggestion of adding to the rationality of balancing and specification judgments by relying on the common morality as a kind of organizing meta-principle:

> Common morality … applies to concrete situations, in which, for example, one knows not to lie, not to steal property, to keep promises, to respect the rights of others, not to kill or cause harm to innocent persons, and the like. This is important because common morality can, then, function as a guiding principle in situations where diverse principles and rules may conflict. Of course, we do not hold the view that common morality is able to provide a unique correct answer, but it can be seen as a constraining framework that, first, separates ethical from unethical answers, and secondly, indicates which ethical answer seems more appropriate with regard to the ideal of common morality without saying that this is the only correct available answer. (Gordon et al. 2011, 299, footnote omitted)

Although this sounds promising, the authors fail to offer convincing reasons for their claim. They build on the different ways in which Beauchamp and Childress, over the years, conceived the common morality—discussed above—and simply pick one without justification:

> We believe that the first approach [that the common morality is the set of moral beliefs that is shared by all morally serious persons] … is the best one to use in applying common morality to particular cases … Furthermore, [besides reflective equilibrium] the powerful methods of specification and balancing provide further 'weighting considerations' in order to solve the moral conflict, as we have thoroughly demonstrated by our detailed analysis of how to apply principlism in the present case of Maria. To put it in a nutshell, the appeal to common morality suggests the following main line

> of argumentation: Morally serious persons agree that the wishes of competent adult persons with regard to medical treatments should be respected unless they are not in their best interest. (Gordon et al. 2011, 299, footnote omitted)

What sounds like a brute summary here is everything the authors offer, in substance, in their paper. The idea is simply that the common morality, conceived as an appeal to morally serious persons, can guide reasoning in principlism. The applicant of principlism simply has to ask 'How would morally serious persons resolve the problem at stake?' It is clear, I guess, that this suggestion does not add to the rationality of specification or balancing judgments, because it is circular (cf. Herissone-Kelly 2011). A generous reading of this appeal to morally serious persons would be to see it as the nucleus of a theory of interpretation, because it calls on the very basis of principlism, just as Bernard Gert refers to nonmaleficence as the nucleus of his theory of interpretation.

Besides that—and despite my general doubts about the very existence of something like a common morality—I cannot see how the most abstract and vague idea in principlism (the common morality) should be guiding if all the more specific derivations from that idea within principlism are not.

I thus conclude that principlism cannot rely on the common morality as an organizing meta-principle.

Conclusion

This has been an extensive treatment of principlism, the most influential contemporary bioethical theory. One reason this treatment of principlism has been so extensive is that many of the issues treated here will, in other forms and contexts, appear again in the following chapters, where casuistic and consequentialist theories are discussed.

Another reason is that I had to cover a lot of ground. I introduced principlim's structure—the understanding of prima facie principles and rules, of ideals and virtues. I also critically discussed the notion of rights within principlism. I then outlined principlism's normative content,

before explaining its theory of justification—a model integrating the common morality and reflective equilibrium—and, finally, turning to principlism's methods. This groundwork was necessary, because principlism, as a theory, is more complicated than many assume. It is, therefore, also often misunderstood. I wanted to lay the foundations for a discussion of methods within principlsim that is truly meaningful for principlism, because it takes the theory's structure and its core ideas seriously. Which methods are to be used in a normative theory depends on the structure of the theory, for example on the kinds of norms it works with. I have, for instance, repeatedly stressed the implications of principlism's reliance on prima facie norms for methodological issues.

In this chapter, I argued for a certain understanding of how principlism should proceed. This can be captured in a *framework for methods in principlism*: I suggest organizing principlism's methods around deductive norm application. As explained in Chap. 5, a deduction requires at least the following: (1) a universal and conditioned norm, (2) a case description, and (3) a semantic interpretation of (1) to bridge the gap between (1) and (2). The relation between (1), (2), (3), and the conclusion is a normal deductive inference, which means that to accept the truth of the premises forces one logically to accept the truth of the conclusion. This simple deductive model is meant to reach transparency—because it forces one to disclose all three premises, which are thereby open for critique—and stability (for it formally binds norm and conclusion together). These three formal steps are the formal justification; it is another line of reasoning—the material justification—that justifies the premises of the formal justification. In contrast to specification, the deductive inference has a strong justificatory power for the conclusion. Moreover, only the deductive model can deal with universally qualified norms (normal application) as well as with expanded or revised norms.

The single most important thing to understand here is that deduction as a method in ethics does not require the norms in an ethical theory to be all-quantified (absolute). Deduction can be used in theories such as principlism, with its focus on prima facie norms that are not all-qualified (non-absolute). What is needed are means to render them absolute. The task is, thus, to make them deductively applicable in a rational and transparent way and only then to apply them deductively. In ethics, one is

often faced with norms that are not directly applicable but need supplementation. That is to say that one often needs to develop the normative system in order to make it applicable. Recall that *application* works with given norms and leaves them unmodified. The method for application I suggest here is deduction. Contrary to applications, *developments* modify the normative system by revising a norm or by adding new norms (supplementation and gap-filling), thereby expanding the system. The aim of further developing the system is to allow for deductive applications where the existing norms do not.

All the kinds of norm development discussed in Chap. 5 and above in the section on specification do have their place in principlism. I will not repeat the different kinds of norm development by revisions (overruling and correction of mistakes) and expansion (supplementation and gap-filling), but simply highlight the most important kind of norm development within principlism, namely the supplementation of norms through the proportionality test or balancing when two principles conflict.

Remember the situation before proportionality comes into play. Proportionality is the tool used to resolve conflicts between principles. Talk of conflicting principles presupposes two things: first, that there are at least two principles applying to the same case and, second, that these principles yield results that are in conflict. Note that a conflict does not necessarily occur when two norms that apply to the same case do not yield the *exact same* result. One further needs to know which norms actually apply, which points to the relevance of meaning and interpretation (as discussed above). Norms contain abstract and general wording that requires interpretation in order to figure out whether or not the case at hand is within their scope. This might be relatively easy in some cases; but it is certainly hard in others.

Once it is clear that two norms conflict, one is faced with the task to resolve the conflict. That norms are in conflict does not necessarily mean that they are *violated*, for they can still be legitimately limited. They are *infringed* when the result is not in full compliance with the norms' commands, but this might very well be legitimate. Violations are unjustified infringements. Just as, in law, all constitutional rights can be justifiably infringed through other constitutional provisions only, so can in principlism principles only be justifiably infringed through other principles

within principlism. Before it comes to the proportionality test, a certain measure will already have proven to be generally a proper limitation of the right at stake. The proportionality test is, then, used to bring in all considerations that are relevant from the point of view of principlism in the particular case and to provide a certain structure to resolve the norm conflict. Recall that proportionality has four requirements to limit a principle, namely, (1) a legitimate end, (2) suitable means to achieve this end, (3) that these means are the least intrusive to achieve the end (necessity), and (4) that the means are proportionate in the narrow sense (balancing).

Principlism is designed such that the only legitimate end to limit the enjoyment of a principle is the promotion of another conflicting principle within principlism. The suitability requirement of proportionality is meant to ensure that the means used to achieve the legitimate end must be suitable at least to some degree; that is, there must be a rational connection between means and ends. This prong of the proportionality test (as well as the necessity requirement) is based upon empirical inquiry. The necessity test requires that there must not be a less intrusive alternative that equally effectively advances the legitimate end. I argued for a wide understanding of the effectiveness requirement as demanding that there must not be an alternative action with a lower level of infringement that is commensurate with achieving the action's end while not having (considerably) higher costs other than those captured in the principle under discussion.

When following the proportionality test step by step, one rules out certain ends or means without balancing anything until one reaches the fourth step. Only then does one know that one actually has a conflict that calls for balancing. The first steps do not constrain balancing, but merely provide a procedure that limits the number of cases that truly need balancing.

The actual balancing is a potentially very complex process in principlism; but it has at least two core elements: (1) weights can only be assigned within the particular case, taking into account the particular circumstances; (2) considerations of certainty, the likelihood of success, uncertainties of side-effects, and so on. Recall Alexy's three basic elements of balancing in legal theory, (1) the abstract weights of the principles,

(2) the intensities of interference with the principles, and (3) the reliability of the empirical assumptions. These seem to match the two elements identified in principlism. Taking into account that, in principlism, abstract weights are always the same, I suggest that one can use Alexy's model to reconstruct the balancing process.

The result of the balancing process as the final step in the proportionality test in principlism is the development of criteria for when exactly one of the conflicting principles prevails over the other. These criteria then become part of principlism by supplementation. Not only can one use the norm that explicitly names these criteria as an all-quantified (absolute) norm in the deductive model of norm application. One can also use it for all future cases where the same criteria are fulfilled without repeating the whole procedure.

This framework designed around deduction helps to boost transparency; it also leaves considerable flexibility in developing the norms and in applying them. The debate in the literature is almost entirely focused on the questioned rationality of balancing.

Since this question can be addressed with the procedure outlined here, the more serious problem for rational decision-making in principlism is, I believe, the complete lack of a theory of interpretation. Interpretations are presupposed by all norm developments. They are further part of every deductive inference in ethical decision-making. Since the cases we argue about are usually hard cases, interpretation should be of the highest importance for everyone designing an ethical theory. I cannot develop a theory of interpretation for principlism here. This is another task for Beauchamp and Childress, or for anyone who wants to enhance principlism. To conclude with a quote from the beginning of this chapter:

> Taken as a whole or in its parts, a theory should be as clear as possible. Although, as Aristotle suggested, we can expect only as much clarity and precision of language as is appropriate for the subject matter, more obscurity and vagueness exists in the literature of ethical theory and biomedical ethics than is warranted by the subject matter. (Beauchamp and Childress 2013, 352)

I hope that my discussion of methods in principlism does help to clarify and further develop principlism.

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7

Casuistry

The so-called 'anti-theorists' in ethics are skeptical about the usefulness of deep ethical theorizing and of the usefulness of rules or principles in ethical deliberation. Instead, they work bottom-up and mostly rely on moral wisdom and on intuitions (cf. Simpson and Clarke 1989). In the realm of ethics, this anti-theory camp includes most versions of particularism, pragmatism, feminism, and narrative approaches (cf. Lance and Little 2006; Arras 2001). Things are not so clear with regards to virtue theory and casuistry (cf. Arras 2013; Nussbaum 2000; Louden 1992, 99 ff.). They are certainly more theoretical than, say, narrative approaches to ethics; but both share some of the skepticism against norm-centered ethics and foundationalism in practical spheres. As we shall see, casuistry can be understood as a proper theory, although it has not yet been sufficiently elaborated.

Casuistry is designed around reasoning with cases. This orientation on cases comes naturally for many health care professionals working in bioethics, because that is how they were trained in medical school; they learned medicine largely through the use of paradigm cases. And this is also how they practice as physicians; they think in concrete cases, not in abstract theories. It is, thus, not very surprising that casuistry has some

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appeal for health care professionals and seems appropriate for medical ethics (cf. Strong 1999; Cherry and Iltis 2007).

For reasons of simplicity, I limit my discussion on the most developed version of casuistry I know of, namely Albert Jonsen and Stephen Toulmin's casuistry, as laid down in their influential *The Abuse of Casuistry* (Jonsen and Toulmin 1992) and as developed and defended by Jonsen thereafter (thereby leaving aside similar approaches such as Douglas Walton's 'layered maieutic case study method' (Walton 2003)). Jonsen and Toulmin launched a massive attack on bioethical theories that work top-down (from principles to cases) and view rules, principles, or rights as important ingredients of morality. In an early paper, Toulmin even spoke of the 'tyranny of principles' in applied ethics (Toulmin 1981); principles obscure, so he argued, moral reasoning and continually run into conflicts. The proposed alternative approach is basically to rely on shared convictions about paradigm cases and to reason by analogy from these paradigms to reach solutions in novel cases.

Drawing on their personal experience serving on the *National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research* (from 1975 to 1978—Jonsen was a member of the commission, Toulmin a staff member and consultant in the early stages of the commission's work), they observed that 'Members of the commission were largely in agreement about their specific practical recommendations; they agreed what it was they agreed about; but the one thing they could not agree on was *why* they agreed about it' (Jonsen and Toulmin 1992, 18, their emphasis).

The point is that it seems easier to agree on solutions in specific cases, rather than on the theoretical backing for the particular decision. As noted above, Tom Beauchamp drafted the bulk of the *Belmont Report*, which was the result of the work of the *National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research*. Jonsen points out, however, that the similarity between the *Belmont Report* and principlism does not reflect the commission's actual deliberation process. Rather, the report was written long after its members had found common positions on the contested issues (Jonsen 1986, 71), which nicely supports the casuists' view that principles merely '*report* in summary fashion what we have already decided' (Arras 1991, 34). But the very fact that both teams,

Beauchamp and Childress, as well as Jonsen and Toulmin, generally applaud the work of the same commission, already points to the likelihood of a convergence between principlism and casuistry that some bioethicists believe in nowadays (cf. Beauchamp and Childress 2013, 397 ff.; Kuczewski 1998; Jonsen 1995). It is argued in this chapter that they do not converge; rather, after further elaboration, casuistry can live up as a true alternative to principlism. Both are functionally equivalent, roughly work within the same methodological framework, but serve their similar functions with different methods.

In the following sections, I provide a critical outline of Jonsen and Toulmin's version of casuistry. Casuistry has many problems, some of which have already been addressed in the bioethics literature. The bottom-line of the criticism is Tomlinson's harsh verdict:

> Given the frequency with which writers in medical ethics declare themselves casuists, there are still surprisingly few published attempts at any sustained, in-depth defense of the application of casuistical methods to specific problems in medical ethics … [The] appeal of casuistry is in many respects a superficial one that promises much more than it delivers. (Tomlinson 2012, 84)

Although some of Jonsen and Toulmin's claims have certainly been superficial and overly optimistic, I believe that one can strengthen casuistry, thereby making it a useful part of bioethics. As with principlism above, despite all the criticism I raise, the effort I make is meant to help to clarify and further develop casuistry, not primarily to show its flaws. I do so by drawing on points made earlier in this book, especially by drawing on Common Law reasoning and Scott Brewer's model of reasoning by analogy.

Many authors recognized the close relation between casuistry and the reasoning in Case Law systems (cf. Kamm 2013; Beauchamp and Childress 2013, 400). Some even call casuistry 'morisprudence' and 'common law morality' (Arras 1991, 33, 40; Jonsen and Toulmin 1992, 316). But, to my knowledge, so far there has been no attempt to elaborate this relation between casuistry and Common Law reasoning beyond the purely metaphorical level. This is what I shall do in this chapter, thereby

clarifying and strengthening casuistry. In order to do that properly—and not just suggesting a way of reasoning that misses the point of casuistry—I explore some of casuistry's background and basic ideas.

The Basics

Jonsen and Toulmin define casuistry as being

> the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinion about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action. (Jonsen and Toulmin 1992, 257)

This definition highlights casuistry's focus on paradigms and analogical reasoning in order to resolve questions about moral obligations in particular cases; it also mentions rules that do not hold in each and every case, but prima facie only and are variable. I shall try to get at these elements by exploring some of casuistry's background. Jonsen and Toulmin argue that the

> current vogue or habit of regarding "codes of rules" as capturing the heart of the matter is the outcome of certain powerful but not uniquely important developments in the social and intellectual history of the last three hundred years. If looked at in a longer historical perspective, rules of law and principles of ethics turn out in practice always to have been balanced against counterweights. The pursuit of Justice has always demanded both fairness and discernment. If we ignore this continuing duality and confine our discussion of fundamental moral and legal issues to the level of unchallengeable principles, that insistence all too easily generates … its own subtle kind of tyranny. (Jonsen and Toulmin 1992, 10)

They believe that the top-down approach to ethics (and law) that focuses on invariable rules or principles ('axioms') to deduce resolutions for particular real-life problems ('theorems') is a misconception, because

it understands ethics as a theoretical enterprise, as a kind of 'moral geometry', whereas the 'general principles are better understood, and known with greater certainty, than any of the specific conclusions they are used to explain' (Jonsen and Toulmin 1992, 23, 25). In contrast, casuists share Aristotle's view that ethics is not theoretical in this sense, but fundamentally practical, dealing

> with a multitude of particular concrete situations, which are themselves so variable that they resist all attempts to generalize about them in universal terms … [Ethics] is a field of experience that calls for a recognition of significant particulars and for informed prudence: … *phronesis* or 'practical wisdom'. (Jonsen and Toulmin 1992, 19)

In practical fields, our 'locus of certitude' is at the level of particular facts of experience; we 'have more certainty of their truth, than we ever do about the general principles that we may use to account for them' (Jonsen and Toulmin 1992, 26). They claim that moral knowledge is always particular and that general principles merely abstract from our particular intuitions about cases, not adding anything new. Using Aristotle's famous example, Jonsen and Toulmin explain that the belief *that* chicken is good to eat is not in doubt, even though we might be very uncertain of the reason *why* it is good to eat. The knowledge *that* something is the case depends on 'accumulated experience of particular situations; and this practical experience gives one a kind of wisdom—*phronesis*—different from the abstract grasp of any theoretical science—*episteme*' (Jonsen and Toulmin 1992, 26). In this sense, enterprises such as politics, law, ethics, and medicine are practical rather than theoretical. It should be noted, though, that the likening of medicine and ethics as being practical rather than theoretical is dubious. As Tomlinson (2012), 91 ff. rightly points out, it is one thing to make a medical diagnosis and another thing to decide what to do about it (the former is what Jonsen and Toulmin compare moral reasoning to; the latter is what moral reasoning should be compared to). Furthermore, is the theoretical background knowledge entailed in many medical diagnoses much more complex than what is needed, in terms of theoretical knowledge, for the insight that that chicken is good to eat.

Jonsen and Toulmin trace the development of casuistry from antiquity to its maturity during the century between 1556 (starting with the publication of Martin Azpilcueta's *Enchiridion*) and 1656 (ending with the publication of Blaise Pascal's *The Provincial Letters*), and call the moral reasoning of the time—in particular, the Jesuits' reasoning—'high casuistry' (Jonsen and Toulmin 1992, 137 ff.). High casuistry came to an end with Pascal's attack. Pascal's attack hit casuistry extremely hard and made it an object of disrepute until Jonsen and Toulmin set themselves the task to rehabilitate casuistry, developing a 'new casuistry' that draws on some features of high casuistry.

The Structure of Casuistry

The main features of high casuistry Jonsen and Toulmin incorporate into their own ('new') casuistry are (1) the reliance on paradigms and analogies, (2) the appeal to maxims, (3) the analysis of circumstances, (4) the degrees of probability, (5) the use of cumulative arguments, and (6) the presentation of a final resolution (Jonsen and Toulmin 1992, 250 ff.). It is not exactly clear how these (old) features relate to the categories they use for 'new' casuistry. Jonsen simply says that his three categories—*taxonomy*, *morphology*, and *kinetics*—'do not actually appear in the classical rhetoricians and casuists, but do conform, in a general way, to the major features of their work' (Jonsen 1991, 298). It seems pretty clear that the category 'morphology' refers to the appeal to maxims and the analysis of circumstances, and that 'taxonomy' relates to the reliance on paradigms and analogies. 'Kinetics' might refer to the use of cumulative arguments, probability, and the presentation of a final resolution (cf. Jonsen 1991, 298 ff.). Let me introduce one category at a time, using Jonsen's own example, the anonymously reported case of Debbie (Anonymous 1988). I closely follow Jonsen's illustration before raising doubts about the case resolution and its use of the features of casuistry. The discussion also shows the relevance of the prima facie character of rules and their variability. Here is Jonsen's case description:

> A resident in obstetrics is called late at night to see a young woman whom he does not know. On reviewing her chart he sees that she is in the terminal

> stages of ovarian cancer. Entering her room, he notes her emaciated state and obviously great pain. She pleads, 'let's get this over'. The resident administers a heavy dosage of morphine and Debbie dies within an hour of the respiratory depression induced by the morphine. (Jonsen 1991, 298)

Morphology

Jonsen starts his case resolution with the *morphology* as the first category. The morphology consists of the 'center of a case' and of the circumstances that 'stand around the center'. The center is 'constituted of certain maxims, brief rule-like sayings that give moral identity to the case … [Maxims] distill, in a pithy way, experience' (Jonsen 1991, 298). Maxims are different from the more abstract paradigms. As a first approximation, when a paradigm is the general prohibition of killing, a maxim might be a saying such as 'force may be repulsed by force'. When arguing about morality, ordinary people frequently invoke maxims such as 'don't kick a man when he is down', rather than more abstract paradigms (Jonsen and Toulmin 1992, 252 f.).

> When maxims, such as "Do no harm" or "Informed consent is obligatory," are invoked, they represent, as it were, cut-down versions of the major principles relevant to the topic, such as beneficence and autonomy cut down to fit the nature of the topic and the kinds of circumstances that pertain to it. (Jonsen 1995, 244)

Similar to the standard list of circumstances familiar from Richardson's glossing condition of specification, discussed above, in casuistry the circumstances are constituted by 'certain persons, places, times, actions and affairs … listed … in a standard way as "who, what, when, where, why, how and by what means"' (Jonsen 1991, 298; Jonsen and Toulmin 1992, 253 f.). In Debbie's case, the circumstances are pretty much everything to be found in the case description, which is not surprising, since the circumstances are 'the descriptive elements of the narrative, the story … [whereas the] maxims provide the "morals" of the story' (Jonsen 1991, 298). Likely maxims include '"competent persons have a right to determine their fate", "the physician should respect the wishes of the patient", "relieve pain", "thou shalt not kill"'; the task is, then, to determine which

maxims should 'rule the case and to what extent' (Jonsen 1991, 298). Both the selection of the very maxim and its extent are determined by the circumstances. Maxims are not important or weighty in themselves; rather, 'a maxim would accumulate weight from the circumstances that hung from it in a particular case. This interplay of circumstances and maxims constitute the structure of a case. Thus, we can speak of the morphology or the perception of form and structure' (Jonsen 1991, 299). Most cases also lead to qualifiers like, in Debbie's case, 'unless she is mentally incompetent at the time she uttered her wish to die'.

Taxonomy

The *taxonomy* is the 'lining up of cases in a certain order' (Jonsen 1991, 301). The starting point is usually a case that is, within the relevant type, a paradigmatic instance of rightness or wrongness. Such paradigms are, for instance, sexual abuse of children or gratuitous care of the impoverished sick. The relevant type in Debbie's case is, according to Jonsen, killing. The task is, thus, to draw a lineup of cases of killing, starting with the paradigm of unprovoked killing that entails the maxim 'thou shalt not kill'. From there, one has to move to less certain cases. Take cases of provoked killing like killing in self-defense against a direct attack or, less certain, killing in 'self'-defense against an attack on one's family, killing in self-'defense' to protect property, preemptive defense and so on. The idea is, thus, to start with the 'most manifest breaches of the general principle, taken in its most obvious meaning [and then to propose cases that move] away from the paradigm by introducing various combinations of circumstances and motives that [make] the offense in question less apparent' (Jonsen and Toulmin 1992, 252). Cases of physician assisted suicide have their place in the taxonomy of killing, 'ready for an analysis of the relevant similarities and differences that lead to a judgment of justifiable or unjustifiable killing. Debbie's case stands in a line that might begin with a case about a competent, lucid patient with terminal illness requesting his or her personal physician to administer a lethal drug' (Jonsen 1991, 302), although her case obviously differs from this paradigm (which might be an instance of justified killing) in that

the physician did not know Debbie or her specific condition and that Debbie's lucidity is doubtful. The question is whether there are circumstances in Debbie's case warranting an exception to the maxim in the basic paradigm of prohibited killing, circumstances such as a competent request, intractable pain, or terminal illness.

Kinetics

The 'understanding of the way in which one case imparts a kind of moral movement to other cases' is called *kinetics*, just 'as a billiard ball imparts motion to the stationary one it hits'; kinetics is where the circumstances get fitted to other 'important social institutions' or 'personal ideals', thus appropriating or 'weighing them up' (Jonsen 1991, 303 f.).

> The introduction of … 'quantities' into moral reasoning is crucial to casuistry [but] quantifiable circumstances are rather an embarrassment to moral theory: it is very difficult to deal with 'a little utility' or 'a certain amount of autonomy' … The import of these 'quantified circumstances of each case is that prudent judgment must discern the relevance of a maxim in the light of the matter under consideration. (Jonsen 1991, 304)

The relevant quantifications in Debbie's case are the extent of pain, the degree of lucidity, the probability of successful palliation, and the scope of resident's familiarity with Debbie and her case. The appropriate fit or weight comes 'from the wisdom of experience' (Jonsen 1991, 304). Resolving Debbie's case, and I can only quote this extensively in order to not be blamed with summarizing Jonsen's unfairly, he holds that

> the kinetics of this case might move in two different directions. The most likely one for the clinical ethicist to take would be to challenge the competency of the requester who is in great pain and depression, as well as to question the adequacy of the physician's knowledge and involvement in the case … A second approach that the casuist might take is to explore the implications of a physician accepting voluntary euthanasia requests even in appropriate circumstances … This approach is a form of the so-called 'slippery slope' response. *Debbie's case is resolved casuistically with ease*. The

> casuist need not move to more theoretical considerations about the principle of autonomy. Staying at the level of the case, the casuist can note that defects in the voluntary nature of the request and the adequacy of the physician's involvement are sufficiently serious that no exception to the dominance of the maxim against killing is justified. The resident was wrong to administer the morphine in a lethal dose. (Jonsen 1991, 305 f., my italics)

Critique

This case resolution has many flaws (cf. Tomlinson 2012, 99 ff.). I only comment on some points that are particularly interesting for my aim to understand casuistry's method.

Cases Do Not Speak for Themselves

The first category is the morphology of the case, consisting of the circumstances and the maxims that 'rule the case'. The circumstances are given in the case description. Case descriptions do not simply 'give' a faithful, neutral and objective observation of the facts. Instead, cases are usually described in a way that focuses on those facts that are deemed morally relevant against the background of the particular normative framework. It is, thus, already at this point—not only when maxims, paradigms, and analogies are employed—that casuists appear overly optimistic in believing their approach to be 'theory free'. The very questions of which problem to select for moral study and which circumstances to regard as relevant (and to include in a case description) are 'theory laden'. This holds for every normative theory; but it is particularly troubling for casuists, because they do not have fixed rules or principles that could provide the necessary criteria of relevance. As Arras puts it,

> In a manner somewhat reminiscent of pre-Kuhnian philosophers of science clinging to the possibility of 'theory free' factual observations, to a belief in a kind of epistemological 'immaculate perception,' these casuists appear to be claiming that the cases simply speak for themselves. (Arras 1991, 39)

What Rules the Case?

Also, how does one find the maxims? Recall that Jonsen suggested as likely maxims in Debbie's case, inter alia, '"competent persons have a right to determine their fate", "the physician should respect the wishes of the patient", "relieve pain", "thou shalt not kill"' (Jonsen 1991, 298). Sure, these—and several others—are responses one would hear when discussing the case with lay people on Main Street. But how is one supposed to pick a particular set of such maxims for further consideration and not an alternative set? And how are these maxims relevant at all? Casuists do not have much to say about this. The advice that the task is to determine which maxims should 'rule the case', and that both the selection of the very maxim and its extent are determined by the circumstances, is extremely unclear. When the selection of the maxims depends on the circumstances, and, as we have seen, casuistry lacks any criteria of relevance for the circumstances, then neither can the maxims tell what to consider relevant in the circumstances, nor can the circumstances determine the maxims that rule the case. Already at this point, casuists have to rely on pure intuition.

Importance of the Taxonomy

How about the second category, the taxonomy? Jonsen chose killing as the relevant type and paradigmatic instance of rightness or wrongness (as a starting point for the lining up of cases) and briefly said that the 'alternative proposal that the relevant taxonomy is care for the patient might be briefly entertained but would probably be dismissed by most commentators as question begging' (Jonsen 1991, 301). This ruling out of an alternative type is telling. Tomlinson rightly points out that 'Jonsen doesn't explain why placing the case in the taxonomy of care for the patient is any more question-begging than placing it in the taxonomy of killing, when the question seems precisely to be which of these competing moral imperatives should govern the case' (Tomlinson 2012, 100; cf. Beauchamp and Childress 2013, 402). Jonsen said that 'it might be suggested that the taxonomy is wrong; euthanasia should not be seen

as an act of killing but an act of mercy. This puts the case into another taxonomy and requires that some paradigm of mercy, say, saving threatened life, be the starting place of the reasoning by analogy' (Jonsen 1991, 302). This suggests that the taxonomy is actually not terribly important and that one would likely come to the same result no matter which taxonomy one picks. When Jonsen says that the 'taxonomy of cases is crucially important in casuistry [because it] puts the instant case into its moral context and reveals the weight of argument that might countervail a presumption of rightness or wrongness' (Jonsen 1991, 302), I take him to mean that there are oftentimes various moral contexts and taxonomies that fit the case, and that all of these can yield proper resolutions. If it were, contrary to my understanding, crucial to find the one fitting taxonomy, then casuists should have much more to say about how to do this.

The Role of Paradigms

In casuistry, similar type cases ('paradigms') serve as final objects of reference in moral arguments. These paradigm cases create initial presumptions that carry conclusive weight, absent exceptional circumstances. Just as the kind of prima facie norms in principlism, paradigms state what is presumably right or wrong. 'Reference to the paradigm alone settles the case and justifies the moral judgment in a direct and unproblematic way' if the paradigm's presumption is not rebutted in the particular case (Jonsen and Toulmin 1992, 307). That is, paradigms hold prima facie. When two or more paradigms apply in conflicting ways, they must be 'weighed' or 'mediated'. Talking primarily about the doctrine of double effect, Jonsen and Toulmin's advice on how to weigh or mediate is as follows:

> The heart of moral experience does not lie in a mastery of general rules and theoretical principles, however sound and well reasoned those principles may appear. It is located, rather, in the wisdom that comes from seeing how the ideas behind those rules work out in the course of people's lives: in particular, seeing more exactly what is involved in insisting on (or waiving) this or that rule in one or another set of circumstances. Only experience of this kind will give individual agents the practical priorities that they need in weighing moral considerations of different kinds and

> resolving conflicts between those different considerations. (Jonsen and Toulmin 1992, 314)

These similarities with principlism might have misled Tomlinson and others in likening the problem of choosing between alternative sets of paradigms in hard cases to the balancing of conflicting principles in principlism (cf. Tomlinson 2012, 94 ff.; Beauchamp and Childress 2013, 401). Casuists, as I understand them, would rather say that, just as a prima facie principle, a paradigm decides the case when it applies directly and is not rebutted. However, when there are reasons not to apply the paradigm directly, then the alternative paradigms do not play the same role as conflicting prima facie principles. The classification of a case as a type of killing rather than mercy or care does not yet resolve the case. It is a judgment of which paradigm best fits the case at hand; but this is not comparable to the weighing of conflicting principles. Balancing principles resolves the case, classifying a case into a particular paradigm does not. The comparison between balancing in principlism and classifying paradigms holds only in the cases where paradigms apply in conflicting ways and must be weighed or mediated. But this seems to be a rare problem only.

That the choice of the paradigm is not as crucial as it seemed to be makes one question even more important: how is one supposed to reason with the picked paradigm? Unfortunately, Jonsen and Toulmin do not offer much guidance that goes beyond what we have seen in Jonsen's case resolution (cf. Jonsen and Toulmin 1992, 308 ff.). One has to start from some clear paradigm case and then draw a line to less certain cases by changing the circumstances moving towards the case at hand. Jonsen starts from a case about a terminally ill patient who, being fully competent and lucid, requests a lethal drug from her personal physician. Leaving aside the lapse that Jonsen not even makes explicit whether this paradigm is a clear instance of justified killing (which is far from obvious), comparing Debbie's case with such a paradigm highlights the problematic aspects in Debbie's case. But are we any further since we started with the case description? As mentioned above, cases are usually described in a way that focuses on those facts that are deemed morally relevant. The differences between Jonsen's paradigm and Debbie's case resemble almost all features of Debbie's case that we know

from the case description. I articulated my doubts that casuists can provide criteria to say which features of the case are relevant, that is, which circumstances (and maxims) establish the morphology of the case. The taxonomy mirrors this problem, because casuistry offers no criteria for the relevance of differences between cases. Not only does one not know how weighty certain differences are; one does not even know which similarities or differences to consider in the first place. There has not been any progress since the very start with the case description.

Arbitrary Kinetics

In the third category—kinetics—the relevant features get quantified and weighed in order to resolve the case. Jonsen ultimately claimed that

> Debbie's case is resolved casuistically with ease. The casuist need not move to more theoretical considerations about the principle of autonomy. Staying at the level of the case, the casuist can note that defects in the voluntary nature of the request and the adequacy of the physician's involvement are sufficiently serious that no exception to the dominance of the maxim against killing is justified. The resident was wrong to administer the morphine in a lethal dose. (Jonsen 1991, 305 f.)

But why these defects are 'sufficiently serious' remains completely unclear. There is still no progress since the start with the case description, since then the problems of Debbie's case were known. There has not been any clear guidance how to resolve the case. At the end, one is told that the defects are 'sufficiently serious that no exception to the dominance of the maxim against killing is justified'—unfortunately without any reason why this is so. The resolution seems completely arbitrary.

Despite the frequent mentioning of the comparison of cases and of analogical reasoning, there is also no explanation how this is to be done. Pretty much everything Jonsen has to say is that 'ethical reasoning is primarily reasoning by analogy, seeking to identify cases similar to the one under scrutiny and to discern whether the changed circumstances justify a different judgment in the new case than they did in the former' (Jonsen 1995, 245).

Casuistry's Conventionality

Another feature that is often criticized in casuistry is its alleged conventionality or conservatism (cf. Arras 1991, 44 ff.). The claim is that casuistry assumes that everything morally relevant has already been incorporated into conventional paradigms and that casuistry has, thus, no means for progress or change. In Tomlinson's words, casuistry

> seems to provide no way by which the settled paradigms themselves might be challenged. For this reason, even though casuists apply their art within a specific time and place, making no presumptions about 'timeless' principles, casuistry is no more historically conscious than more 'theoretical' approaches. (Tomlinson 2012, 98 f.)

Jonsen and Toulmin, anticipating this critique, compare casuistry with Case Law:

> In both common law and common morality problems and arguments refer directly to particular concrete cases … In both fields, too, the method of finding analogies that enable us to compare problematic new cases and circumstances with earlier exemplary ones, involves the appeal to historical precursors or precedents that throw light on difficult new cases as they occur. This method can provide positive guidance only if the precedents are close enough for a positive decision. Otherwise the claims of charity or equity demand an openness to novelty and a readiness to rethink the relevance and appropriateness of older rules or principles. This does not mean questioning the *truth* of those principles: they will remain as firm and trustworthy as ever, as applied to the 'type cases' out of which they grow and to which they paradigmatically refer. (Jonsen and Toulmin 1992, 316, their emphasis)

But this only addresses one side of the critique. The other side, namely that casuistry has no means to change the paradigms themselves, is not taken seriously by Jonsen and Toulmin.

In the following section, it is argued that the methods outlined in Part II shed light on reasoning with cases and explain how casuistry can make progress and change paradigms. Since I focus on the formal aspects of

reasoning, casuists can adopt my suggestion and still stick to their conviction that moral reasoning is largely intuitive and requires 'phronesis' or practical wisdom; the latter will be primarily important in the material justification. Although its proponents sometimes speak as if casuistry is merely a part of rhetoric, rather than providing clear, action-guiding procedures (cf. Jonsen 1995), the structure I suggest is helpful in reconstructing and thereby rationalizing casuistic decision-making.

A Better Structure for Casuistry

In law, precedents are a certain normative source. Resulting from authoritative decision-making, they are cases that are regarded as having a special normatively binding status. The advantage of Case Law over ethical casuistry is thus that, in law, one knows where to look for the normative source; the cases thus decided are even collected in reports and case books. This is different in ethical casuistry, where there is no agreed-upon corpus of precedents one can rely on to resolve novel cases. This was different in 'high casuistry', when the Jesuits, for example, had relatively stable institutions that over the course of time developed a corpus of paradigm cases that were regarded as being authoritative. This authoritative status was not identical to the practical authority of precedents in Case Law systems (that is, courts are bound by past decisions); but it was more similar to this authority than to the merely theoretical authority of high court decisions in Civil Law systems (where these decisions are the focal point of discussion in future cases without binding). In modern pluralistic societies, we lack clear authorities in the realm of morality. There is no agreed-upon book comprising the authoritative decisions that count as paradigm cases for ethics in our secular societies (cf. Wildes 1993). Jonsen and Toulmin cannot make up for this disadvantage. On the contrary, they do not provide *any* normative content themselves.

This has been criticized (for instance by Beauchamp and Childress 2013, 403), although it does not come as a surprise given that casuistry is often taken to be a member of the anti-theory camp and views itself merely as a way of reasoning with different cases. The emphasis is thus not so much on the various paradigms, but on how to reason with *any* paradigm.

Jonsen and Toulmin even name some modern institutions that are professionally engaged with ethical issues—and issues in medical ethics in particular—and through their work provide normative sources and paradigm cases to be used casuistically. These institutions include the Roman Catholic Bishops, ethics commissions, academia in general and bioethics institutes (such as the *Hastings Center* and the *Kennedy Institute of Ethics*) in particular, federal and state agencies, and courts (Jonsen and Toulmin 1992, 337 ff.). This gives some guidance where to look for paradigm cases; but one will obviously find different—as well as evolving and changing—normative sources from these various institutions.

Since casuistry does not have any normative content itself, in order to discuss the problem of methodology, one has to formulate a hypothetical question: How does casuistry work when it has normative content? This could, for instance, be the case when health care professionals in a Catholic hospital aim at developing a policy for their hospital, spelling out what to do in critical end-of-life situations, how to deal with incompetent patients, and so on. These health care professionals could draw on two complementary sources, on past cases that actually occurred in this very hospital, and on Catholicism. So what would these professionals do when they were casuists? I assume that they regard their past cases and Catholicism as having a special normatively binding status. What would they do when reasoning with these paradigms? In order to get a clearer picture of that, it will be helpful to turn to the same two questions that guided the above discussion of precedents in Case Law systems: what is binding in paradigms/precedents? And how are they binding?

Rules: Maxims and Paradigms

Casuistry is unclear regarding its basic elements—'case', 'maxim', and 'paradigms'. As shown above, a *case* is understood as the combination of circumstances and maxims. I criticized that, when the selection of the maxims depends on the circumstances and when one lacks any criteria of relevance for the circumstances, then neither can the maxims tell what to consider relevant in the circumstances, nor can the circumstances determine the relevant maxims. *Maxims* are meant to be 'brief rule-like

sayings that give moral identity to the case … [and] distil, in a pithy way, experience' (Jonsen 1991, 298). Such a maxim would be 'don't kick a man when he is down' (Jonsen and Toulmin 1992, 252 f.). Maxims of this fashion are nothing but very rough rules. Casuists claim that *paradigms* are rules that are more abstract than maxims; they are paradigmatic instances of rightness or wrongness. Examples for paradigms are sexual abuse of children, gratuitous care of the impoverished sick, and the general prohibition of killing. Such paradigms create initial presumptions that carry conclusive weight, absent exceptional circumstances. Just like prima facie norms, paradigms state what is presumably right or wrong, but this presumption can be rebutted in particular cases.

That paradigms are more abstract than maxims is, at least, the basic idea. In fact, there is no difference between maxims like 'do no harm' and the general prohibition of killing as a paradigm. The latter is, indeed, arguably more concrete than the former. But recall the maxims Jonsen suggested for Debbie's case. Among these maxims was 'thou shalt not kill' (Jonsen 1991, 298), which is not different at all from the—supposedly more general—prohibition of killing. There is, thus, no strict difference between maxims and paradigms in casuistry. Both are rules that are articulated in cases, that is, they are articulated within a set of circumstances. These circumstances allow for refinements of the rules when the latter are poorly formulated, helping to explicate the conditions under which the rough rules were applied in the particular case.

We are now in a position to compare the elements of casuistry with precedent cases in Common Law systems as introduced in Chap. 4. There, I explained that a case resolution usually consists of the following elements: (a) the case description; (b) the legal question at stake; (c) the reasoning about this question; (d) the ruling on the legal question (the *ratio decidendi*); and (e) the result for the particular case, which follows from the ruling (Lamond 2014). The case description (a) is nothing but the careful statement of the circumstances of the particular case, naming the familiar 'who, what, when, where, why, how and by what means'. The legal question (b) mirrors the moral question, that is, what actually triggered the examination of the case. This question can have many forms and is likely to be less formalized in ethics than it is usually in very structured and highly institutionalized legal systems. Indeed, it will oftentimes

not even be made explicit in ethics. In Debbie's case, a question could be whether such cases are instances of prohibited killing or of morally legitimate care. The reasoning element (c) also occurs in law and in ethics. Note that this does not imply that the reasoning itself is also the same. Legal and ethical cases obviously also have results for particular cases (e). The question is whether these results are, not only in law, but also in ethics, derived from a rule, namely from the rule (d) that answers the question (b). The answer is yes. If cases such as Debbie's are instances of prohibited killing and not of care, than the resident acted morally wrong in administering the lethal dose of morphine. We have seen that, in casuistry, maxims and paradigms are rules that are articulated within a set of circumstances, that is, they are similar to the *ratio decidendi* in legal cases. In legal as in moral cases, these rules are general imperatives of the form 'In situations of X and Y, everyone ought to do Z'. The case resolution only refers to the characteristics (X and Y) that are part of the antecedent, but the case in which this rule was established has more characteristics that are featured in the case description. These further characteristics are, from time to time, helpful to understand the ruling; and they are essential for distinguishing novel cases from the precedent or paradigm cases. The normative source for future cases is thus not the particular case resolution, but the paradigm in form of a rule as articulated in the particular case with all its particular circumstances. It is, first and foremost, the paradigm rule that matters for future cases; the further circumstances of the paradigm case are only important in cases of doubt if or how the rule should apply to the new case.

Application of Paradigms

Just as legal precedents, moral paradigms will oftentimes be in need of interpretation. Furthermore, when interpretation shows that a new case has the features of a prior case, the solution of the new case does not require the use of analogical reasoning, for one can 'simply' apply the ratio of the prior case. Analogy only comes into play where one does not have a rule that applies without ambiguity, but where the prior and the new case share only some, but not all, relevant features. Thus, when the

prior case P has the features a, b, c, d, e, g and was decided with the rule A, B, C → X to the effect that X, a new case N-1 that has the features a-1, b-1, c-1 could be solved using the rule from P. This application makes no use of analogical reasoning (cf. Raz 2009). This is also what casuists have in mind when saying that a paradigm decides the case when it applies directly and is not rebutted (Jonsen and Toulmin 1992, 307).

Overruling and Distinguishing Paradigms

The second question for the understanding of reasoning with paradigms was this: how are the paradigms binding? The comparison to reasoning with legal precedents is again helpful to answer this question. That courts are bound by past decisions is called the *doctrine* of precedent or *stare decisis*. But, as explained in Chap. 4, there are severe limitations for the binding force of legal precedents. One is the need to interpret the *ratio decidendi*. More important are the possibilities of overruling and distinguishing. Overruling is a means of norm revision; distinguishing is a means to expand the normative system by filling a gap, or so I argued. Taking this into account, the doctrine of precedent or stare decisis is actually a disjunctive obligation of courts to either follow or distinguish a precedent. This disjunctive obligation is probably the main reason for the flexibility of the Common Law.

The separation between the application of a rule established in a precedent case and the two modes of norm development is to be found in Common Law, as well as in casuistry. Recall that I distinguished between *application* and *development*, such that the former works with given norms and leaves them unmodified, whereas the latter always modifies the normative system by revising a norm or by adding new norms (expansion) under certain constraints. Developments ultimately aim at providing norms for application.

The modes of reasoning familiar from Common Law also provide casuists with an answer to the critique that casuistry is overly conservative and conventional, for it assumes that everything morally relevant has already been incorporated into conventional paradigms and has no means for progress or change. Jonsen and Toulmin, anticipating this

critique and comparing casuistry with Case Law, said that 'the claims of charity or equity demand openness to novelty and a readiness to rethink the relevance and appropriateness of older rules or principles. This does not mean questioning the *truth* of those principles: they will remain as firm and trustworthy as ever, as applied to the "type cases" out of which they grow and to which they paradigmatically refer' (Jonsen and Toulmin 1992, 316, their emphasis)." What they vaguely point at can be described more precisely by invoking the notion of distinguishing.

I suggested to understand paradigm cases as consisting of a case description (circumstances), a moral question, the reasoning about this question, the ruling on the question (the precedent rule), and the result for the particular case, which follows from the ruling; I further pointed out that, when interpretation shows that a new case has the features of a prior case, the solution of the new case does not require the use of analogical reasoning, for one can apply the ratio of the prior case. But it can be rebutted when a novel case has further characteristics that seem to be relevantly different from the characteristics of the paradigm case, although these characteristics are not part of the paradigm rule. In Common Law, distinguishing allows for keeping faith with the precedent while still allowing for flexibility. It does so by allowing for the creation of a new norm by narrowing the paradigm rule under certain constraints. The effect of distinguishing is that one does not have to follow a paradigm rule, although it applies to the case at hand. Recall the constraints on this kind of narrowing in Common Law: '(1) The modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application. (2) The modified rule must be such as to justify the order made in the precedent' (Raz 2009, 186). The first constraint brings in the narrowing aspect. The idea is to add further conditions to the rule, such that it does not apply to the new case anymore. But since the new (narrower) rule must keep faith with the precedent, the former must be based on the latter. A precedent rule A, B, C → X can, for example, be narrowed to a new rule A, B, C, D → X. Furthermore, as Raz makes clear with his second constraint, the new rule must also be a possible alternative basis for the precedent case. Consider a precedent case with the features (circumstances) a, b, c, d, e, g that was decided by the precedent rule A, B, C → X, and a new case with the features a 1, b

1, c 1, d 1, ē 1, f 1. The rule A, B, C → X applies to both cases. If one wants to distinguish these two cases, one would comply with the first constraint of distinguishing with both narrower rules, A, B, C, not-D → X, and with A, B, C, E → X. But only the latter rule satisfies the second constraint on distinguishing (because the former rule would not apply to the precedent case anymore).

This is similar for paradigms in casuistry. One generally has to stick to the paradigm rule. But if the paradigm case and the new case are relevantly different, one can narrow the paradigm rule as long these two constraints are respected: (1) The new (modified) rule must be the rule laid down in the paradigm restricted by the addition of a further condition for its application; (2) the modified rule must be such as to justify the order made in the paradigm. When Jonsen and Toulmin highlighted that 'openness to novelty and a readiness to rethink the relevance and appropriateness of older rules or principles' is important, but that this 'does not mean questioning the *truth* of those principles: they will remain as firm and trustworthy as ever' (Jonsen and Toulmin 1992, 316), what they actually referred to is the effect of distinguishing. That the principles kept in the paradigm remain 'firm and trustworthy' has two aspects: first, as secured by the two constraints on distinguishing, the new (narrower) rule keeps faith with the paradigm, in that it must also justify the decision in the paradigm case, although it is narrower than the paradigm rule. Second, the paradigm rule remains part of the normative system. It can still be invoked as a normative source for future cases, because distinguishing is a means of developing the normative system by expansion.

Just as distinguishing is not a rare move in legal reasoning, but the daily business of lawyers and judges, it is a frequent task for casuists, too. In fact, when there is no paradigm rule readily applicable to the case at hand, casuists start the 'lining up of cases', thereby placing the case in a taxonomy. Starting with a clear paradigm case like unprovoked killing, casuists would move to less certain cases, such as killing in self-defense against a direct attack or killing in 'self'-defense against an attack on one's family, killing in 'self-defense' to protect property, preemptive defense, and so on. This lining up is precisely what I just described as developing the normative system by expansions, where the expansions are norms that

are the result of distinguishing novel cases from paradigm cases, thereby making the normative system more and more concrete.

From time to time, there might be the need not only to expand the normative system, but to revise it. This was the second point of the critique that casuistry is conventional and conservative, particularly because it has no means to change the paradigms themselves. This critique was not taken seriously by Jonsen and Toulmin. Common Law knows the notion of overruling, which is a way to develop the legal system by revising norms (the new norm replaces the initial norm). Such a revision is a very serious step and needs careful consideration, because it can affect the stability of the legal system severely. People might rely on the norm one considers to modify. In ethics, this might not be as important as it is in law, but even in ethics, as long as one wants to work within a certain ethical theory, one should be explicit about when and why one wishes to revise this very normative system. Remember the example of health care professionals developing a policy for their Catholic hospital; once established, people might rely on this policy. Patients may ask to be transferred to this hospital because they know how they will be treated—or not treated—in this hospital. Medical school graduates may want to work at the hospital because they strongly identify with this policy. All this does not mean that one can never change the policy; but it means that such changes require careful consideration.

These steps, derived from Common Law, are only a rough guide: a review of the existing paradigms must, first, lead to the conclusion that the particular case at hand falls under an existing paradigm rule. Second, some line of reasoning must lead to the belief that the existing paradigm rule, if applied, does not offer a good solution to the case at hand. Third, further reasoning must lead to another norm that fits the case better. Fourth, there must be good reasons to believe that the new norm also fits future cases better than the old norm.

To sum up, as long as one wants to work casuistically within a certain normative set, one generally has to be faithful to the existing precedents. Just as with legal precedents, so with moral paradigms; when interpretation shows that a new case has the features of a prior case, one has to apply the rule established in the prior case. But there are severe limitations for the binding force of paradigms. One is the need to interpret the para-

digm rule. More important, though, are the possibilities of overruling and distinguishing. Overruling is a means of norm revision that needs to be employed carefully; distinguishing is a means to expand the normative system by narrowing the precedent rule. These limitations on the binding power of paradigms make clear that casuistry is not necessarily overly conservative and conventional; it has methodological means for flexibility and change.

Analogical Reasoning

Casuists frequently refer to analogy as their way of reasoning with cases. Unfortunately, they do not explain what they do when reasoning analogically. The intuitive understanding of analogical reasoning is that it informs our judgment of one thing using what we know about another thing when the two things share some, but not all, features. In casuistry, then, the idea is that cases in which we are more certain about our moral response can help us informing our judgment of new cases (that share some features with the first case) to which our response is less certain.

In Chap. 4 above, I introduced one particularly clear understanding of analogical reasoning, namely, Scott Brewer's, in which analogical reasoning is reconstructed with notions understood much better than analogy itself. The main idea is that reasoning by analogy is a sequence of three distinct processes: first, an abduction in a situation of doubt. Confronted with several examples, the reasoner tries to organize these examples by a rule. Brewer calls this the 'analogy-warranting rule' or 'AWR'. Second, the testing of the AWR that leads to a confirmation or disconfirmation of the AWR. Third, the application of the AWR to the particular example that originally triggered the reasoning process. Since I already explained this understanding of analogical reasoning above, I here only repeat the basic idea illustrated in a resolution of Debbie's case.

In this case, the *first process* is an abduction in a context of doubt, or when no canonical guidance exists. Typically, an abduction has, itself, three steps. The first step is to notice an *explanandum*, something that calls for explanation because it is not yet understood. In Debbie's case, the explanandum could be the moral legitimacy of the resident's administering

the morphine in a lethal dose. The second step, then, is to find an *explanans* (an explanatory hypothesis for the explanandum). One possible explanans for the moral legitimacy of the resident's act is that it was an instance of the maxim 'physicians should respect the wishes of the patient'. The third step is for the reasoner to settle on the explanans as the tentatively correct explanation of the phenomenon. The result is, thus, not necessarily true, but 'sufficiently likely to be the correct explanation of [the explanandum] that it is worth trying to confirm it' (Brewer 1996, 949). Jonsen invoked alternative maxims that could serve as an explanans; for instance, 'competent persons have a right to determine their fate', or 'relieve pain'. It does not seem essential for the casuist which taxonomy to pick, for oftentimes various moral taxonomies can yield proper resolutions. Let us here, for the sake of argument, settle on the first explanans. In Brewer's model, the explanans is the AWR. Thus, in Debbie's case, the explanans (and AWR) would be: if Debbie's case was an instance of the maxim 'physicians should respect the wishes of the patient', then the resident's administering of the morphine in a lethal dose was morally legitimate.

The *second process* is to measure the AWR against a separate set of explanatory and justificatory propositions, which Brewer calls 'analogy-warranting rationales' or 'AWRa'. The AWRas explain and justify the AWRs. They are open for various kinds of reasoning and might be vague. Oftentimes, the AWRas will be very abstract policies, principles, or deeply held convictions. One has to look in two directions, 'up' to the AWRas, testing the AWR for a strong degree of coherence with the AWRas, and 'down' to test whether the AWR 'effects an acceptable sorting of chosen particulars—taking into account, for example, concerns about slippery slopes and overbreadth'; Brewer calls this reasoning device 'reflective adjustment' (Brewer 1996, 1023).

This step is central to analogical reasoning. Here, one has to see if the chosen explanans really is the best way to explain the explanandum. When exactly this is the case is beyond the scope of my work. However, what Brewer calls 'reflective adjustment' is, I suppose, what casuists call the 'lining up of cases', bringing various cases in an order from cases towards which we have clear and settled intuitions to cases where we do not have such clarity; moving from the former to the latter by altering the circumstances step by step, always asking how the change of this or that

feature, affects our moral response to the case. It seems as if the decisive job in casuistical reasoning is actually not done by a clearly structured analogy, but merely by some unclear form of reasoning that looks pretty much like the search for a reflective equilibrium (cf. Arras 1991, 48).

Just as the point of sticking to deduction of the mode of reconstructing norm applications was to make transparent the premises and interpretations used, so is the advantage of Brewer's suggestion to test the AWR against various AWRas that this is more transparent than what one has seen in Jonsen's case resolution, although Brewer's model, too, does not provide any *substantive* guidance on which AWR to use. So, in Debbie's case, it is this second process where one has to measure the AWR against the AWRas and see if the latter justify the former. I suggested the maxim 'physicians should respect the wishes of the patient' as a good candidate for an AWR. This was primarily because that is what was known from the case description. Debbie was a dying patient who suffered great pain and asked the physician to 'get this over with'. But does this AWR really fit in this case? Formally, it can serve as an explanans for the explanandum of the act's moral legitimacy. But substantially, Jonsen pointed out rightly, I believe, that one usually invokes this rule with confidence only in cases where the physician is familiar with the patient and her condition. Furthermore, the patient's wish is taken seriously because her autonomy is respected. One usually does not follow patient's requests blindly if one knows them to be temporarily out of mind. In Debbie's case, the resident did not know Debbie at all; also, Debbie's lucidity is at least doubtful. When Jonsen ultimately concludes that defects in the voluntary nature of the request and the adequacy of the physician's involvement are sufficiently serious that no exception to the maxim against killing is justified, he invokes a disanalogy with the rules that establish such exceptions of this form:

Target (y) = Debbie's case.

Source (x) = cases of use of "physicians should respect the wishes of the patient".

Shared characteristic:

F patient asks the physician to hasten death.

Unshared characteristic:

G physician is familiar with the patient and patient is lucid.

Inferred characteristic:

H is morally legitimate.

Argument:

(1) x and y both have F;
(2) x also has G;
(3) y does not have G (y has not-G);
(4) x also has H;
(5) Disanalogy-warranting rule (DWR): any F is H unless it also has not-G.
(6) Therefore, the presence of F and H in x does not provide a sufficient basis for inferring the presence of H in y.

The *third process*, the application of the AWR (or DWR) to the case that originally triggered the reasoning process, led in this case to a negative result; the rule is not applicable to Debbie's case. In cases of successful analogies, the application is not hard anymore and generally not different from norm application as discussed above. Beauchamp and Childress criticize that casuists 'sometimes write as if paradigm cases speak for themselves [whereas, in fact,] a recognized and morally relevant norm must connect the cases … The creation or discovery of these norms cannot be achieved merely by analogy' (Beauchamp and Childress 2013, 401). We are now in a better position to respond to this line of criticism raised above: whether or not Beauchamp and Childress' critique is correct depends on one's understanding of analogy. Following Brewer's model, they are right in pointing out that one needs a norm that connects the cases. This norm is the AWR. But the development of this norm is part of the sequence of processes that analogical reasoning consists in. The norm is, thus, achieved by analogy; but it is not achieved by analogy *only*, for it depends on support from rationales that are not themselves the result of analogical reasoning.

Since casuistry does not provide normative content, and thus no set of paradigms or maxims to start from, the rational force of the argument largely depends on the rationales one uses to support the chosen AWR. But the less structured the normative system one works in, the less certainty will there be as to which AWRs better fit and as to when one reached something like a reflective equilibrium. Because casuistry does not provide clear starting points, one way of working casuistically would be to try to rationalize the possible resolutions from the various possible starting points.

Conclusion

In this chapter, I elaborated on the relation between casuistry and Common Law reasoning that Jonsen and Toulmin—and many commentators—have left at the metaphorical level. Drawing on Common Law reasoning, I argued that casuistry does not have any normative content and focused on the hypothetical question how casuistry would work when we had normative content. I scrutinized casuistry's basic elements and concluded that maxims and precedents are rules articulated in a case. I argued that, as long as one wants to work casuistically within a certain normative set, one generally has to be faithful to the existing paradigms. When interpretation shows that a new case has the features of a prior case, one has to apply the rule established in the prior case. But there are also severe limitations for the binding force of paradigms or maxims. One is the need to interpret the respective rule. More important, though, are the possibilities of overruling and distinguishing. Overruling is a means of norm revision that needs to be employed carefully; distinguishing is a means to expand the normative system by narrowing the paradigm rule. These limitations on the binding power of paradigms make clear that casuistry is not necessarily overly conservative and conventional; it has methodological means for flexibility and change. This was the one line of criticism that casuists can now better respond to. The other line of criticism was that the structure of the actual analogical reasoning itself is extremely unclear. I suggested the use of Brewer's model of analogical reasoning to address this worry. I have shown that this model helps to structure the reasoning process

without hiding away the ample places where casuists still have to rely on moral wisdom and the like. Brewer's model has—just like the deductive structure for norm application—primarily the advantage of making the argument transparent and thereby enabling pointed criticism.

Moreover, I have shown that my suggestions for strengthening casuistry in many respects take up Jonsen and Toulmin's own ideas and conceptions, but reconstruct them in a much more structured and precise manner through the comparison with the methodology of Common Law reasoning. If further developed along these lines, casuistry can, I believe, appropriately be called 'morisprudence' or 'common law morality'.

Finally, the discussion also sheds light on the much-discussed question whether principlism and casuistry are, in fact, rivals, complements, or if they converge (cf. Arras 2013; Beauchamp 1994; Jonsen 1995; Kuczewski 1998).

Both principlism and casuistry are ultimately norm-driven theories, and both apply norms deductively to cases. However, they differ in two crucial respects: in their respective kinds of norms and in their modes of norm development. Principlism works with—more or less explicitly stated—norms (rules, principles, ideals, virtues, and rights). It balances them when they conflict, thereby developing more concrete rules that allow for deductive application in the particular case. Casuistry works with maxims and paradigm rules. The problem of choosing between alternative sets of paradigms in hard cases is similar to, but not identical with, the balancing of conflicting principles in principlism. In casuistry, a paradigm decides the case when it applies directly and is not rebutted. But when there are reasons not to apply the paradigm directly, then the alternative paradigms do not play the same role as conflicting prima facie principles. The classification of a case as one type rather than another is only a judgment of which paradigm best fits the case at hand; balancing principles resolves the case, classifying a case into a particular paradigm does not. This decision how to classify a case does not develop the normative system. This is, rather, done through overruling and distinguishing.

As it stands, principlism is much more developed than casuistry. Casuistry's most striking defect for particular case resolutions is that one is left in the dark as to where to look for the relevant maxims and

paradigms. But imagine casuists would develop a set of maxims and paradigms, which could, for instance, be done from bioethical case books; then casuistry could live up as a true alternative to principlism. Just as its sister in legal theory, casuistry could be a functionally equivalent alternative to principlism; both working within the same methodological framework, but serving their similar functions with different methods.

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8

Consequentialism

Consequentialism is often taken to be a rather practical ethical theory, one that can guide decision-making. Since the times of the classical utilitarians Jeremy Bentham and John Stuart Mill, consequentialists take pride in defending a theory that is practical in at least two ways—in the justification of their moral principle itself, and in the application of the principle (cf. Gähde 1993).[1] The idea is that consequentialism is not a mere metaphysical idea, worked out in the armchair, but an empirically well-founded moral theory (modeled after scientific theories). And like scientific theories, it is often taken to work top-down, from the abstract moral principle down to particular problems. To work the way down, one only needs to fill in the relevant facts. Take Richard Hare, who self-confidently remarked that 'it is not difficult, if one gets the hang of the general theory, to apply it in particular fields like business. Ethics is ethics whatever one's vocation' (Hare 1998, 58). If this is true, one wonders

[1] I shall note that the label consequentialism is a rather recent one that made its way into the philosophical vocabulary after Anscombe's well-known article 'Modern Moral Philosophy' (Anscombe 1958). Consequentialism is the generic term for those moral theories that judge the moral quality of an act by the consequences of this act alone. Utilitarianism is a kind of consequentialism that focuses on certain consequences, such as utility, the good, pleasure, preference-satisfaction, or well-being.

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why it is so hard to find serious attempts by dyed-in-the-wool consequentialists to systematically engage with applied ethics. The reason is, I suppose, that consequentialists are too optimistic when they believe that their theory more or less applies itself, only requiring factual knowledge to be supplied by social scientists.

This chapter discusses two well-known consequentialist theories, Peter Singer's and Brad Hooker's. Singer is known for his controversial views on practical problems such as abortion, euthanasia, poverty alleviation, and animal ethics. These views are based on his version of consequentialism (preference utilitarismism). Hooker is a prominent theorist of consequentialist ethics who does not work in applied ethics. I discuss him nonetheless, because his version of consequentialism (rule consequentialism) is interesting in itself and promising for applied ethics, since he illustrated its working with some practical problems. Despite the fact that Singer appears more practical and Hooker more theoretical, both regard the practicality of their respective theories as crucial. Singer holds that one 'thing that ethics is not is an ideal system that is all very noble in theory but no good in practice. The reverse of this is closer to the truth: an ethical judgment that is no good in practice must suffer from a theoretical defect as well, for the whole point of ethical judgments is to guide practice' (Singer 2011, 2). And Hooker regards as one criterion for the assessment of all moral theories that they 'should help us with moral questions about which we are not confident, or do not agree' (Hooker 2001, 4). Singer and Hooker thus set themselves the task to show that their respective consequentialisms are not only good in theory, but also in practice.

I will argue, however, that Singer's and Hooker's respective theories fail on this task. I show that their theories are indeterminate and lack guidance when the rules they endorse conflict. The chapter begins with a brief critical discussion of Singer's moral theory and its application to the practical problem of euthanasia. It is argued that this theory has severe structural shortcomings. I turn then to Hooker's more sophisticated moral theory, reconstruct its methods, that is, how he pictures the application of the theory to practical problems such as euthanasia, and critically discuss these methods and suggest improvements.

Compared to the two preceding chapters on principlism and casuistry, the discussion of consequentialist ethical theories in this chapter is less

constructive; it is rather critical of consequentialism as a good theory for applied ethics precisely because it almost completely lacks methodological awareness. I argue that this is the reason why there are so few serious consequentialists working in applied ethics; the theory is good in theory, but not in practice. Legal theory does not give much advice on how to resolve consequentialism's problems directly. But the preceding discussions of ethical theories, informed by legal theory, do provide the means to spot the weaknesses in consequentialism, and a good instinct for which alternatives are worthwhile. The view from legal theory thus helps indirectly.

Peter Singer's Preference Utilitarianism

Peter Singer is probably the most controversial contemporary practical ethicist. His arguments for animal rights, abortion, infanticide, and euthanasia have provoked heated debates, within academic philosophy as well as in the general public. The following brief discussion of his work does not engage in these substantial debates. Instead, it examines how Singer renders his abstract moral theory—preference utilitarianism—practical.

Preference utilitarianism is 'the version of utilitarianism that we reach by universalizing our own preferences … According to preference utilitarianism, an action contrary to the preference of any being is wrong, unless this preference is outweighed by contrary preferences' (Singer 2011, 80). Consider the wrongness of killing a person who prefers to continue living: 'That the victims are not around after the act to lament the fact that their preferences have been disregarded is irrelevant. The wrong is done when the preference is thwarted' (Singer 2011, 80). Singer's abstract moral principle boils down to the equal consideration of the interests of all affected by the act in question. It is fundamentally impartial.

The Practice of Singer's Theory

Singer's focus is on practical issues, not on deep theorizing. His writing is very engaging and peppered with illustrations, which makes it hard to

follow his line of reasoning. One might think that the solution to practical problems lies in the application of the preference-utilitarian principle, that is, the empirical and impartial determination of the balance between frustrated and fulfilled preferences. Yet, this is not how Singer proceeds.

Consider the example of euthanasia. Singer discusses various kinds of euthanasia (or aid in dying). Euthanasia is voluntary if the person herself wants to be killed or let die (and utters that wish); euthanasia is nonvoluntary if the person did neither express such a wish nor opposed euthanasia; it is involuntary if the person expressed her wish not to be killed or let die. Singer also discusses euthanasia concerning different groups of people, for example the euthanasia of infants and of disabled infants.

In his discussion of voluntary euthanasia, Singer draws on a more abstract discussion of the general wrong in killing. Concerning this general wrong, he arrives at four principles, two utilitarian and two nonconsequentialist principles. The first principle is the

> classical utilitarian claim that because self-aware beings are capable of fearing their own death, killing them has worse effects on others. [The second is the] preference utilitarian calculation that counts the thwarting of the victim's desire to go on living as an important reason against killing. [The third is a] theory of rights according to which to have a right one must have the ability to desire that to which one has a right, so that to have a right to life one must be able to desire one's own continued existence. [The fourth is the principle of respect] for the autonomous decisions of rational agents. (Singer 2011, 169 f.)

Given these four principles, voluntary euthanasia is not a hard problem for Singer. He simply applies these principles and concludes that none speaks against this form of euthanasia. Note that Singer does not directly apply his abstract preference-utilitarian principle, but the four principles, which are more concrete and generally subordinate to the abstract principle. Singer adopts Hare's idea of two levels of moral thinking, the intuitive and the critical level. The intuitive level is the one employed most of the time in everyday life. On this level, one draws on moral norms that have proven useful; these norms can be consequentialist as well as non-consequentialist rules and principles. It is this intuitive level

where autonomy and the right to life have their place. The critical level is only reached in exceptional circumstances, when one has the time, curiosity, and information necessary to think hard about moral questions. Critical thinking is supposed to determine the principles that guide intuitive thinking, and on this level, only preference utilitarian considerations are employed. This two-level account of moral thinking is a combination of act and rule consequentialism (Singer 2011, 78 f.).

Yet, in Singer (as in Hare, to a lesser degree) the exact working of this two-level account remains unclear. It notoriously leaves open the question when one can (or should) move from the intuitive level to the critical level, and how, exactly, critical thinking informs intuitive thinking. What is clear, though, is that the justification goes into one direction only, from critical thinking to intuitive thinking, not the other way around. Critical thinking is supposed to systematize and rank the principles on the intuitive level and to resolve conflicts between these principles. But how critical thinking does all this remains largely unexplained.

One would think that a philosopher, writing a book on practical ethics, is on the critical level of moral thinking. Yet, many of the arguments Singer endorses are arguments on the intuitive level. They are often mere ad hoc arguments, the status and relevance of which are unclear. For instance, having applied the four principles on the intuitive level to voluntary euthanasia and having concluded that euthanasia is morally permissible, Singer continues the discussion with arguments against voluntary euthanasia, such as possible misdiagnoses and palliative care options, which might raise doubts about the permissibility of euthanasia (both are resolved in a superficial way, see Singer (2011), 271 ff.). Is this still intuitive thinking or already critical? If it is intuitive thinking, why are such considerations not captured in the principles? Are there further problems, beyond the ones mentioned by Singer, worth considering, or is his discussion conclusive (he regularly presents his arguments and ultimate claims as if they were conclusive)? If it is already critical thinking, where was the step from one level to the next? And how does preference utilitarianism on the critical level systematize the intuitive thinking?

Further problems with Singer's view come up in his discussion of the euthanasia of infants. In the general discussion of the wrong in killing he claims that

> the fact that a being is a human being, in the sense of a member of the species Homo sapiens, is not relevant to the wrongness of killing it; instead, characteristics like rationality, autonomy and self-awareness make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings or any other self-aware beings. The principles that govern the wrongness of killing nonhuman animals that are sentient but not rational or self-aware must apply here too. As we saw, the most plausible arguments for attributing a right to life to a being apply only if there is some awareness of oneself as a being existing over time or as a continuing mental self. Nor can respect for autonomy apply where there is no capacity for autonomy. The remaining principles identified [in the general discussion] are utilitarian. Hence, the quality of life that the infant can be expected to have is important. (Singer 2011, 160)

The idea is clear: Singer has argued for some general moral principles concerning killing humans. These are then applied to the problem of euthanasia of infants. Since infants lack rationality, autonomy and self-awareness, they are not 'persons' (in Singer's understanding of the term) and have thus no right to life; neither is the principle of autonomy applicable. What is left, then, are the two consequentialist principles, the indirect 'classical utilitarian claim that because self-aware beings are capable of fearing their own death, killing them has worse effects on others', and the 'preference utilitarian calculation that counts the thwarting of the victim's desire to go on living as an important reason against killing' (Singer 2011, 169). Given these two principles, the solution depends on the particular circumstances. Killing infants is generally permissible if the balance of either indirect utilitarian considerations or preference satisfaction counts against letting the infant live. It remains unclear, though, if euthanasia of an infant is permissible in cases where the two utilitarian principles yield different answers.

I am not interested here in Singer's ultimate result; my interest is in his way of reasoning. Several points are noteworthy in this respect. The first is how Singer argues against the option not to consider infants *qua* infants, but to take into account their *potential* to become rational, autonomous and self-aware humans. He dismisses this potentiality idea with the analogy that 'the potential of a fetus to become a rational, self-

aware being cannot count against killing it at a stage when it lacks these characteristics – not, that is, unless we are also prepared to count the value of rational self-aware life as a reason against contraception and celibacy' (Singer 2011, 160). Such analogies make up a considerable part of Singer's reasoning. However, they are not warranted by preference utilitarianism; they also lack any argumentative structure. As shown in Chap. 4, the rational force of analogies is a difficult matter. I followed Scott Brewer's, who argues that the rationality of analogical reasoning lies in a sequence of three distinct reasoning processes, the key element of which is an abduction to a rule. In contrast, Singer simply points to other cases he deems inconsistent with the claim under consideration. However, this would require much more explanation, especially because contraception is far from being an obvious case from a moral point of view. Not only is the moral permissibility of contraception disputed (as I am writing this, Pro-Life activists are marching through Salzburg). Also there are differences between contraception, celibacy, and infanticide regarding potentiality (some of which might be morally relevant). Despite his claims to the contrary, what Singer does, in effect, is rely on unexplained intuitions (cf. Tomlinson 2012, 30 ff.).

Another point is that the two principles not applicable to infants—right to life and autonomy—were more or less randomly picked. Singer offers no reason why critical thinking would lead to these principles and not to any of the other principles discussed in the literature. Again, the working of critical thinking remains unclear.

To sum up, Singer's moral theory does not work the way he suggest it works. Also, as it stands, the theory does have some serious shortcomings. It has a very general structure only: its model of application is clearly deductive; what is to be applied deductively are normally principles on the intuitive level of moral thinking (not the preference utilitarian principle). If one works with Singer's theory, the main task is not the application of these principles on the intuitive level, but rather their domain-specific development.

As shown in previous chapters, moral norms need development in order to be applicable. This holds for every normative theory discussed in this book. The methods of norm development remain inexplicit in

Singer. Methods of norm development are formal structures allowing for norm revisions or expansions (on the intuitive level of moral thinking), for example through the proportionality test. Singer relies heavily on analogies as one such method. But the structure of these analogies remains unclear.

As the material principle (on the level of critical thinking) justifying the action-guiding principles (on the intuitive level), Singer endorses the preference utilitarian principle. As this standard of justification is itself consequentialist, this would suggest a balancing structure for decision-making in particular cases. However, the preference utilitarian principle only provides the justification for the principles on the intuitive level; it is not, at least not explicitly, meant to guide the interpretation of particular principles.

Singer's theory thus lacks both methods of norm development and a standard for the material justification concerning particular cases. Such a material justification would require a material standard that justifies the premises of the formal justifications. The preference utilitarian principle does not seem to be meant to be doing this job. In Singer's discussion of euthanasia, we have seen that his own applications are full of questionable intuitions; these intuitions seem to fill the gap caused by the lack of a standard for the material justification. Many moral theories depend on intuitions. But unlike many of the ethicists endorsing such theories, Singer explicitly opposes the reliance on intuitions (cf. Singer 2005). There is thus a remarkable discrepancy between aspiration and reality.

Beyond all this, there are also some instances where Singer allows for direct applications of the act consequentialist preference utilitarian principle (on the critical level). Yet, *when* this is the case and *how* this relates to the principles on the intuitive level is not explained. In short, the relation between critical and intuitive thinking remains unclear in many respects.

One might argue that my arguments are not relevant for Singer's work, given its nature as aiming at a general audience. However, even if he writes for a general audience, he should at least be clear and transparent in his reasoning. But the arguments presented in *Practical Ethics* do not work as he suggests they would, and this is crucial—part of the success of the book is that it seems to provide principled and well-argued positions on many controversial issues. The discussion has shown that the working

of the theory is unclear, and that Singer's arguments are often not well-argued. His conclusions might still be supported by other theories or by reasons not contained in the book; what is important is that the theory presented in the book is defective.

With this negative result, I shall now turn to Brad Hooker's more sophisticated version of consequentialism.

Brad Hooker's Rule Consequentialism

Since the mid-1990s, Brad Hooker has developed and defended an interesting version of consequentialism, namely, a rule consequentialist theory, according to which people should live by a moral code whose collective internalization would have the best consequences. More specifically, according to this rule consequentialism

> An act is wrong if and only if it is forbidden by the code of rules whose internalization by the overwhelming majority of everyone everywhere in each new generation has maximum expected value in terms of well-being (with some priority for the worst off). The calculation of a code's expected value includes all costs of getting the code internalized. If in terms of expected value two or more codes are better than the rest but equal to one another, the one closest to conventional morality determines what acts are wrong. (Hooker 2001, 32)

This formulation is very precise. Each of the key phrases is the result of a sophisticated argument against common criticism of rule consequentialism, such as the charge that it would either collapse into act consequentialism or be incoherent. Since I cannot in this brief discussion take up all of Hooker's points, I only highlight some core elements of the theory before turning to the theory structure and to Hooker's methods.

In the stated principle, Hooker relies on a code's *expected value*, rather than its actual value, because he takes this to be less epistemically demanding, and because only this emphasis on the *ex ante* view (as opposed to actual value's *ex post* view) can explain the relation between the wrongness of an act and its blameworthiness (cf. Hooker 2001, 72 ff., 113

ff.). The formulation of the principle does not require mere compliance with a code, but its acceptance or *internalization*. Internalization means that people are usually in compliance with the code, but that they also endorse it and expect others to endorse and follow it; they might even develop dispositions to pressure others to behave according to the moral code. When enough people internalize the moral code, a 'collective conscience' might evolve (Hooker 2001, 2).

As in all consequentialist theories, impartiality plays an important role in Hooker's theory. He distinguishes the traditional utilitarian understanding of impartiality as giving equal weight to the well-being of every individual from his own view, according to which the worst off deserve some priority (Hooker 2001, 25 ff.). Hooker is openly uncertain about this prioritarianism—aggregate well-being combined with some priority for the worst off—which is noteworthy, since this distinguishes his rule *consequentialism* from a rule *utilitarianism*; the latter theories judge moral rules by aggregate well-being only (leaving no room for further features such as just distribution) (Hooker 2001, 43 ff., 59, 65). He is also very open regarding the precision to be expected:

> a prioritarian rule-consequentialist should balance aggregate well-being against priority for the worst off. Big increases in aggregate well-being are more important than small increases in the well-being of the worst off. Big increases in the well-being of the worst off are more important than small increases in aggregate well-being. However, such generalizations leave many cases undecided. Indeed, there is a large grey area where increasing aggregate well-being does not seem clearly more important, nor clearly less important, than increasing the well-being of the worst off. (Hooker 2001, 59)

The Basic Theory Structure

Like Singer's moral theory, Hooker's has a two-level structure in which rule consequentialism 'can be broken down into (i) a principle about which rules are optimal, and (ii) a principle about which acts are permissible. The theory selects rules by whether their internalization could reasonably be expected to maximize the good. The theory does not, however,

evaluate acts this way. Rather, it evaluates acts by reference to the rules thus selected' (Hooker 2001, 102). This is the main idea of rule consequentialism. Particular acts are judged by rules; the rules are judged by reference to the consequentialist principle. The justification of the consequentialist principle itself depends on certain criteria (detailed in the following section); it is ultimately a matter of reflective equilibrium.

It would be a rather natural idea, it seems, to make use of the rule consequentialist maximization principle when deliberating about the application of the rules (or to resolve conflicts between rules). As we shall see, Hooker does not endorse this idea. The theory structure is, indeed, very basic and lacks some crucial refinements.

Impartiality, Reflective Equilibrium, and Pluralism

Unlike Singer, Hooker is very explicit about the way he justifies his moral theory. He offers five criteria to assess *every* moral theory:

(1) Moral theories must start from attractive general beliefs about morality.
(2) Moral theories must be internally consistent.
(3) Moral theories must cohere with (i.e., economically systematize, or, if no system is available, at least endorse) the moral convictions we have after careful reflection.
(4) Moral theories should identify a fundamental principle that both (a) explains why our more specific considered moral convictions are correct and (b) justifies them from an impartial point of view.
(5) Moral theories should help us deal with moral questions about which we are not confident, or do not agree (Hooker 2001, 4).

This list emphasizes some points already familiar from discussions in earlier chapters. Let us have a closer look at the impartiality condition 4b in Hooker's list. Hooker discusses various kinds of impartiality, namely, the impartial application of rules, the impartiality in scope, and the impartiality in the justification of moral convictions (Hooker 2001, 23 ff.). Especially the first two are only vaguely stated by Hooker. To get

a clearer idea, recall the terminology introduced above. At the beginning of this book I suggested to understand norms as general imperatives of the form 'In situations of X and Y, everyone ought to do Z', in contrast to individual imperatives of the form 'Do now Z'. Applying norms means to stick to the characteristics X and Y (and to these only) and, if they are present, to conclude Z. Not to consider X or Y or to consider further characteristics simply means not to apply the norm properly. This is part of the idea of formal justice and what Hooker calls impartial application of rules. Norms in the form 'In situations of X and Y, everyone ought to do Z' are abstract and general. A norm is abstract when it applies to different situations or actions (all situations of X and Y). For example, the prohibition of killing prohibits all kinds of killing, be it with a gun, a knife, or poison. A norm is general when its addressees are described with universal attributes: killing is prohibited for everyone. Universal attributes are attributes like 'over the age of seven' or 'having a medical degree'. Such attributes are not fulfilled by everyone. But, at any point in time it is—theoretically, at least—determinable who is over the age of seven or who has a medical degree. These attributes thus address certain people; but the norms are still general as long as the addressed group is not conclusively determinable at the point of time of the enactment (or creation) of the norm. This understanding of generality is, I suppose, what Hooker tries to get at with 'impartiality in scope'.

Concerning the justification of his theory, Hooker starts his reasoning from moral intuitions, which he calls 'beliefs that come with independent credibility' (Hooker 2001, 12), with a credibility, that is, that is not inferred from or backed by conscious testing against other beliefs we hold. These beliefs appear self-evident, but might turn out to be mistaken. 'In short, we search for a coherent set of moral beliefs and are willing to make many revisions so as to reach coherence. But we should start with moral beliefs that are attractive in their own right, that is, independently of how they mesh with our other moral beliefs' (Hooker 2001, 13).

Acknowledging the justificatory force of intuitions in a reflective equilibrium,[2] Hooker argues that some kind of common morality pro-

[2] On the question whether Hooker's use of reflective equilibrium is narrow or wide see Miller (2000) and Miller (2013), 425.

vides the moral beliefs about which most people confidently agree. Rules of this common morality are, for example, 'help the needy', 'do not steal', 'do not lie', 'keep promises', 'prevent disaster' and so on. These rules come with some qualifications. For instance, promises are only to be kept when they do not infringe moral rights of others, and when this obligation is not outweighed by other competing considerations. Obligations to help the needy obtain even if this involves limited self-sacrifice (Hooker 2001, 16 ff.).

There are many more such intuitions Hooker explicitly relies on. 'Any moral theory will be terribly counterintuitive if it requires you to make every decision on the basis of an equal concern for everyone. To be plausible, a moral theory must leave room for some considerable degree of bias (a) towards yourself and (b) towards your family, friends, benefactors, etc.' (Hooker 2001, 28). He offers no deep theoretical argument for this or similar claims, but merely expresses such claims as more or less obvious basic requirements for every moral theory. Furthermore, he claims that rule consequentialism's commitment to maximizing the good does not stand alone. It is, rather, accompanied by a commitment to impartially defensible behavior, that is, a 'desire to behave in ways that are impartially defensible' (Hooker 2001, 102).

This reliance on intuitions, reflective equilibrium, the common morality, and the openness for different theories of well-being as well as for different kinds of norms—besides his maximization principle, Hooker includes rights as well as personal virtues (cf. Hooker 2001, 33–37; Miller 2013)—provokes the question if this theory really is rule consequentialist or, rather, another version of pluralism, similar to Beauchamp and Childress' principlism (cf. Hooker 2001, 104 ff.; Hooker 1996; Stratton-Lake 1997). Hooker acknowledges far-reaching similarities, yet does not subscribe to pluralism. Regarding his condition (4) for moral theories, Hooker argues for a unified account of morality. If a unified account were possible, then this account would be desirable. Even if pluralism and the unified account would share the pluralistic principles, the unified account would have the advantage of being 'more informative and integrated', or so he argues (Hooker 2001, 21).

However, what exactly this advantage is remains somewhat unclear. Is it more than 'brute curiosity' that 'many of us would want to know what,

if anything, explains and ties together these moral principles, even if the knowledge would have no effect on our practice?' (Hooker 2001, 21). In his condition (5), Hooker expresses the hope that such a unified account would also be helpful in resolving unsettled moral questions. Whether or not his theory is helpful in this respect is the question examined in the remainder of this chapter.

Prima Facie Rules, Interpretation, and Conflicts

Hooker's is a *rule* consequentialism. Like pluralists, he understands moral rules as holding prima facie only. Besides that, he is not very precise regarding their nature and function. He briefly refers to H.L.A. Hart's remark about all rules' 'penumbra of uncertainty', to their possible vagueness, and to the need for 'sensitivity, imagination, interpretation, and judgment' in applying them (Hooker 2001, 88). As shown above, interpretation is one of the main tasks in the application of rules. Hooker is right in pointing to problems of uncertainty and vagueness. Yet, simply acknowledging the fact that interpretation might be problematic is hardly satisfying, especially because most moral rules we draw on in arguing about hard cases contain vague terms.

Hooker frequently refers approvingly to Bernard Gert's work. Gert was one of the few ethicists who explicitly discussed the interpretation of norms in his theory. He developed a well-known general moral theory (Gert 1998) and later, with his co-authors Danner Clouser and Charles Culver, turned this general theory into a theory of bioethics (Gert et al. 1997; Gert et al. 2006). Both theories are grounded in a common morality. Their main elements are the 10 moral rules,[3] moral ideals, and a two-step procedure to resolve conflicts. In Gert's theory, the purpose of morality is to reduce the amount of harm people suffer. The three authors have an interesting take on the interpretation of the moral rules. Behind the problem of interpretation, they argue, 'lies a line of reasoning

[3] On the rules as the distinctive feature of Gert's theory, see Wolf (2002). The 10 rules are: do not kill, do not cause pain, do not disable, do not deprive of freedom, do not deprive of pleasure, do not deceive, keep your promises, do not cheat, obey the law, and do your duty; see Gert (1998), 157 ff.

based on our moral theory. The theory explains why the interpretation of moral rules that should be chosen is the interpretation that produces a public system resulting in less harm than any alternative interpretations' (Gert et al. 1997, 58). Although linguistic conventions might be helpful in most cases, what is decisive for the interpretation of moral rules is the very purpose of morality—the rule *should apply* if this would lead to lesser harm suffered. Gert, Culver, and Clouser acknowledge that

> interpretations can change in different settings. The changes are not ad hoc and whimsical; they are appropriate and systematic, explained by the concept of morality as a public system … Depending on the nature of the group of persons who are interacting and the intensity and frequency of their interaction, an interpretation of a moral rule may be more or less inclusive of particular actions. (Gert et al. 1997, 58)

This is one way how moral theorists can draw on their very understanding of morality and on their most abstract moral principle in order to guide the process of interpretation, that is, how they can use their theory in the material justification. I am not saying that Hooker should adopt this idea of Gert.[4] But some guidance is needed. What is important is that he develops any idea of how to interpret moral rules; otherwise, his rule consequentialism cannot help with many practical problems, especially not with those 'about which we are not confident, or do not agree'.

This call for a clear idea of how norms are to be interpreted as part of Hooker's moral theory becomes even more urgent when we take into account that the moral rules will not be particularly precise. The more precise the moral rules are, the more complex and complicated they become. Such complicated moral rules would require high internalization costs, which is something Hooker's principle does not allow for. '[T]here remain limits on what we can learn. And even within the class of learnable codes, the costs of learning ones with more rules and more complex rules will be higher. So the ideal code will contain rules of limited number

[4] On the contrary, in the concluding chapter, I argue against Gert's idea as an understanding of interpretation in hard cases. Properly understood, an interpretation is always guided and constrained by the moral norm's wording, which Gert cannot account for. Among the rules for interpretation, I suggest, an idea similar to Gert's functions as a last resort only.

and limited complexity' (Hooker 2001, 97). Hooker argues that a more complex code would carry the danger of misapplication of the rules and undermine the dependability on 'habitual, automatic, and therefore easily predictable' situations. The broad picture he draws might fit much of everyday life. But what we really need moral codes for are 'moral questions about which we are not confident, or do not agree' (his criterion (5)). How are habitual, automatic, and easily predictable situations helpful with such moral questions? The danger of misapplication is certainly smaller the more complex and precise a moral code is. And, although sticking to more or less conventional rules has minimal internalization costs, one must not forget that such conventional rules oftentimes conflict, simply because they have a broad scope.

Rule consequentialism thus needs an idea of how to resolve such conflicts between rules. Unlike Singer with his two-level account of moral thinking, Hooker rejects act consequentialism as a fallback option (that is, to resolve *rule* conflicts by prescribing the *act* that produces the best consequences), because this would undermine expectation effects. People's expectation that others follow the moral rules would be frustrated, which would, in turn, undermine the rules themselves. He also rejects the idea of avoiding conflicts through exceptions built into the rules, because such rules would be too complex, thereby raising the internalization costs.

Although he often approvingly refers to Gert, Hooker does also not follow Gert's idea of how to avoid rule conflicts. According to Gert, when two moral rules conflict, at least one of them must be violated; but such violations are only justified when they pass a certain two-step justification procedure (cf. Strong 2006). The first step is to identify the type of rule violation using a list of questions (such as 'What harms would be avoided, prevented, and caused?', 'What are the relevant beliefs and desires of the people toward whom the rule is being violated?', and so on) to determine the relevant features of the case, that is, by way of abstraction (Gert 1998, 227 ff.). The second step of the justification procedure is to estimate the consequences of everyone knowing that the certain type of rule violation is allowed, as well as the consequences of everyone knowing that it is not allowed. If all fully informed, impartial, and rational persons would estimate that less harm would be suffered if this violation were publicly allowed than if it were not allowed, then all these persons would advocate

that this violation be publicly allowed. The violation is *strongly justified*. If these persons would estimate the opposite, the violation is *unjustified*. If some would estimate that less harm would be suffered if this violation were publicly allowed than if it were not allowed, and some that more harm would be suffered, the type of rule violation is *weakly justified*.

The idea Hooker favors lies at the level of moral motivation. 'When rules conflict', he says, 'so do the aversions that are attached to them. The stronger aversion determines what action is permissible, according to rule-consequentialism. When moral requirements conflict, one should do, as Brandt writes, "whatever course of action would leave morally well-trained people least dissatisfied"' (Hooker 2001, 90). This is related to the idea, mentioned above, that the moral code must be *internalized*, such that they are usually in compliance with the code, but also endorse it and expect others to endorse and follow it. When enough people internalize the moral code, a 'collective conscience' evolves. Hooker takes up Richard Brandt's idea of an ideal conscience and of morally well-trained persons. Where a conscience is a set of aversions against certain acts, one conscience can be better than another in virtue of the strength of the aversions against these acts. 'The ideal conscience, then, is ideal in just the way that the ideal code of rules is: it is that conscience whose internalization has maximum expected value' (Eggleston 2007, 333). A person is morally well-trained if she has this ideal conscience.

Yet, why does Hooker stress the degree of aversion (in the ideal conscience) and not the degree of the injury itself, that is, the intensity of the rule violation? Minor injuries simply are not as bad in terms of well-being as major injuries—how does it help to know that morally well-trained persons have a strong aversion against major injuries? Hooker might have epistemic reasons for relying on aversions. It might be easier to 'see' the degree of aversion towards an act than to 'see' the intensity of a rule violation. But such an epistemic reason would merely be a reason to *construct* a moral code in one way or another; it would give reasons to include certain rules (protecting important values, the violation of which provokes aversions) but not others. However, at the level of rule *application* or *conflict resolution*, this epistemic reason does not seem to be helpful.

It has been argued that Hooker's idea to rely on the aversions of the morally well-trained 'does not solve the indeterminacy problem *at all*'

(Eggleston 2007, 337, his emphasis), because in order for it to be helpful, the ideal conscience would have to be more determinate than the ideal code of rules. I agree with a slightly weaker form of this critique. For reasons to be stated in turn, I also believe that the reference to aversions does not help *in itself*. But I prefer a more charitable reading of Hooker's that reveals something similar to a balancing structure as familiar from pluralist moral theories such as principlism. Even if the aversions do not help, the balancing structure does *some* work to reconcile rule conflicts.

The degree of aversion and the intensity of a rule violation both seem to be a product of the value at stake (life, bodily integrity, privacy, and so on) and the intensity of interference with the value (a little scratch compared to the loss of a leg). People 'with a good rule-consequentialist training would have an enormously strong aversion to killing others … but a much weaker aversion to doing very small harms to others. Likewise, they would have a very strong aversion to telling huge lies under oath and breaking solemn promises about important matters, but a much weaker aversion to telling small lies or breaking little promises' (Hooker 2001, 131 f.). Hooker illustrates his idea with people well-trained in rule consequentialism in a situation in which the only way to prevent a loss in well-being is to break a promise.

> Would they break the promise? They would if the choice is between preventing a huge loss to someone and keeping a small promise. They would not if the choice is between preventing a small loss to someone and keeping a solemn promise about an important matter. This approach does not entail that the duties and aversions can be lexically ranked in any sense denied by ordinary moral conviction. Rule-consequentialism agrees that the stringency of a general duty and the corresponding aversion varies with the circumstances—in particular, with what is at stake. Since the general duties are pro tanto, not absolute, the correct resolution of a conflict between two duties in one set of circumstances can differ from the correct resolution in other circumstances. (Hooker 2001, 132)

And further, 'there seem to be some general conflict-resolving principles. One example is that the duty not to injure others is normally stronger than the duty to benefit others' (Hooker 2001, 133), an order that

can be reversed in untypical circumstances. The picture Hooker draws is strikingly similar to pluralist moral theories, which are usually committed to balancing conflicting moral norms or considerations.

Recall that Hooker claimed that his rule consequentialism is helpful in resolving unsettled moral questions (and that his unified theory does a better job in this respect than pluralism). We are now in a position to examine this claim. As in pluralism, the moral rules supported by his rule consequentialism are basically the rules of the common morality, and they also hold prima facie only. The rules must remain imprecise in order to minimize internalization costs, and Hooker provides no understanding of how to interpret the moral rules. In cases of conflicts between such rules—that is, in almost all hard moral problems—what ought to be done is determined by the balance of the values at stake. The only difference between pluralism and Hooker's rule consequentialism is the way this balance is to be determined. As shown above, pluralists can determine this balance in three steps: first, the abstract value at stake (life is more important than bodily integrity or privacy); second, the intensity of interference with the value (a little scratch compared to the loss of a leg); third, the balancing of these two considerations.

Hooker, in contrast, relies on the aversion of morally well-trained people in balancing the relevant considerations in norm conflicts. He thinks that this idea shows that rule consequentialism is sensitive to judgment and 'not crippled by conflicts between rules. It has a method for determining what is right in such situations', although it does not resolve every conflict in hard cases (Hooker 2001, 91). However, there seems not only to be room for hard cases, but too many cases will be hard cases for rule consequentialism.

A couple of problems are rather obvious. First, depending on how the idea to rely on the aversion of the morally well-trained is spelled out, it can be very conservative. Second, if an individual is faced with a moral question, how is she supposed to know what 'would leave morally well-trained people least dissatisfied'? This problem comes back to the point made earlier that Hooker might well have good epistemic reasons for relying on aversions instead of the intensity of a rule violation, because the former is easier to 'see' than the latter; but such an epistemology does not help at the level of rule application or resolution of conflicts between

rules. Individuals do not have access to the aversions of the morally well-trained (unless they are part of this club). Third, is this appeal to the aversions of the morally well-trained a call for the 'wise old men'? Or does it, rather, call for ethics experts in public committees?

In short, the idea is extremely unclear and provides no more guidance than balancing approaches in pluralist moral theories. Rule consequentialism is no better than pluralism on this count. It is probably even worse, because the reliance on the aversion of the morally well-trained blurs the contours of a good balancing procedure. However, even if one abandons the reliance on the aversions of the morally well-trained, what remains at least mirrors pluralist balancing. The aversions are to the particular circumstances and vary with the value at stake, the intensity of interference with the value, and with the balancing of these two considerations. One can thus say that the core of Hooker's approach to conflict resolution is this basic balancing procedure.

Hooker on Euthanasia

One of the practical questions Hooker uses to illustrate how his rule consequentialism deals with practical moral problems is thus: which forms of euthanasia, if any, are morally permissible? Hooker starts by defining euthanasia as 'either killing or passing up opportunities to save someone, out of concern for that person' (Hooker 2001, 178), and distinguishes the three kinds of euthanasia already familiar from Singer's discussion, namely voluntary, nonvoluntary, and involuntary euthanasia. Euthanasia is voluntary if the person herself wants to be killed or let die (and utters that wish); nonvoluntary if the person did neither express such a wish nor opposed euthanasia; and involuntary if the person expressed her wish not to be killed or let die. All these three kinds of euthanasia can be active or passive. They are active when the person is actively killed, and passive when the death results from the passing up of opportunities to preventing it.[5]

[5] The distinction between direct and indirect euthanasia is absent from Hooker's discussion, although it might seriously affect the expected well-being. The forms of euthanasia he has in mind are direct, that is, the patient's death is intended. Euthanasia would be indirect when death is only

The question he wishes to answer is if an ideal moral code would allow euthanasia, and if so, which kind of it. In Hooker's two-level moral theory, particular acts are judged by rules; the rules are judged by reference to the consequentialist principle. The question thus plays at the level of rules judged by the consequentialist principle. One would expect Hooker to start from the rule consequentialist principle—'an act is wrong if and only if it is forbidden by the code of rules whose internalization … has maximum expected value in terms of well-being'—and then to spell out which rules concerning euthanasia it would not forbid. These rules would be allowed by the ideal code.

But Hooker does none of this. Nothing in his argument is principled or related to his particular moral theory. Instead, he engages in an ad-hoc consideration of benefits and harms of euthanasia, which are then evaluated by some secret standard. The following is just one example of this ad-hoc reasoning: one benefit of euthanasia is, Hooker says, that it can 'prevent the unnecessary elongation of the suffering experienced by many terminally ill people and their families. What about painkilling drugs? I believe that, until medical technology develops further, there are some kinds of pain that cannot be controlled with drugs that leave the patient conscious and mentally coherent' (Hooker 2001, 180). He is clearly trying to balance some harms and benefits; every consequentialist does. But his approach is surprisingly loose, given the sophistication of his theory: would the well-being be maximized if the suffering person were allowed to die or be killed? Perhaps. When is the elongation of the suffering 'unnecessary' (and necessary or unnecessary for what)? And what has the potential drug to do with it? What would be conditions for a pain-killer to outweigh competing considerations? Is it normally better to be dead than being permanently mentally incoherent? What would be better for the well-being of friends and family? And most important, how is one to know the answer to such questions and to the even larger question, the internalization of which rules would have maximum expected value in terms of well-being?

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a (foreseen) side-effect. The primary intention is usually to relieve pain, for example by administering a drug of which one knows that it also shortens the patient's life span. Indirect euthanasia is, thus, the place for discussion of the doctrine of double effect.

Hooker answers none of these questions; he continues his ad-hoc reasoning with a discussion of problems of autonomy. Through his inclusive understanding of well-being, he can take on autonomy as an intrinsic value such that a voluntary request to be killed counts in favor of voluntary euthanasia. Yet, he argues, 'the moral norms in this area should be shaped in light of the truism that people suffering from terminal illness and intense pain are often not in a good state to make rational decisions' (Hooker 2001, 180). Autonomy comes in degrees. He thus deliberates a waiting period between the patient's wish and the administration of any lethal drugs.

Involuntary euthanasia is then ruled out, because it violates autonomy and because it would undermine people's trust in doctors and hospitals. They would always fear to be killed, because the doctors thought this would be good for the person, or so the argument goes. Does this still hold if someone would really be much better off dead but simply does not want to die? And how important is autonomy in relation to the competing considerations? Does it always trump the person's suffering? A cold-blooded maximizer of well-being might argue that she is simply not brave enough (and is not bravery a virtue Hooker's consequentialism would also endorse?).

Concerning nonvoluntary and voluntary euthanasia, Hooker deliberates about further problems, such as possible misdiagnoses. What if a patient is killed voluntarily because she was wrongly diagnosed with a terrible, terminal illness? Nobody knows the future, not even a doctor. There might be a new drug or treatment available soon, which would have cured the patient or at least relieved her pain. 'From a rule-consequentialist perspective, the points about mistaken diagnoses and future cures mandate restrictions on when euthanasia would be considered, but they do not preclude euthanasia' (Hooker 2001, 184). Which restrictions? Hooker does not tell; and he does not seem to worry too much about voluntary euthanasia in general. There is only one more point regarding partiality:

> The rule could be designed to ensure that the decision to perform euthanasia on a patient is made by people focusing on the wishes and best interests of the patient. Of course the patient may ask loved and trusted others, including heirs, what they think. But the rule could insist that doctors with

> nothing to gain certify that the patient really would be, by the time of the euthanasia, thereafter better off dead … Patients will need the rule to protect them against coercive pressures by family and other heirs. (Hooker 2001, 185)

Further, in discussing nonvoluntary euthanasia, Hooker deliberates whether a moral rule should require adults to formally indicate (for example through advanced directives) whether or not they would want euthanasia for themselves at a time when they still are in possession of their faculties. Again, we are left without any guidance from rule consequentialism on this question. And even if some of Hooker's proposals do sound reasonable—which I do not deny—what is specifically rule consequentialist about all this? In closing the discussion of euthanasia, Hooker admits that

> It is hardly an a priori question whether allowing euthanasia would erode communal inhibitions on killing the innocent against their will. [Many of these questions are ones] for social scientists … We ought to know by now that large social, economic, or legal changes often have unexpected results … Rule-consequentialists have to make a judgment based on what they think the probabilities are. (Hooker 2001, 186 f.)

This might all be true. However, one would have expected him to be more explicit about his rules and, specifically, about the rule consequentialist reasons for favoring these rules over others. Hooker closes the discussion, asking 'whether a new code allowing euthanasia under some conditions must have lower expected value than a moral code forbidding euthanasia' (Hooker 2001, 187). He immediately has a result: 'Human beings are susceptible to cognitive errors and impure motivation. These facts provide rule-consequentialist reasons for tight restrictions on the use of euthanasia, and for rigorous enforcement of those restrictions. With rigorously enforced restrictions; a rule allowing euthanasia, even active euthanasia, has (I believe) greater expected value than a complete ban' (Hooker 2001, 187). This conclusion is not supported by argument, and I do not even know how one could argue for or against it, simply because the alternatives are unclear. The variety of voluntary and nonvoluntary

forms of euthanasia is great and can be shifting. Different restrictions on euthanasia are possible (and have been discussed in the literature and in the general public); Hooker only touches on some of these. So, which rules are we actually to consider (and to compare) for inclusion in the ideal code? Are there rule consequentialist reasons to pick the restrictions Hooker happens to discuss? And are the thus restricted rules simple enough in order to be internalized? The upshot is that Hooker's reasoning is merely ad-hoc, with almost no reference to his abstract moral theory, and that he stipulates a result that has no clear relation to the reasoning before.

The important point to note is not that Hooker was too careless in his discussion of euthanasia. The point is, rather, that his theory is too indeterminate. Just reflect on the question how you yourself would have solved the euthanasia problem using Hooker's rule consequentialism. This is a hard task. And it is hard because the theory—however well it might be justified—lacks the crucial ability to methodically guide moral deliberation.

Conclusion

Both Singer's preference utilitarianism and Hooker's rule consequentialism seem to be defective as judged by their own criteria that moral theories are to be practically helpful. This does not necessarily mean that all consequentialist theories have the same defect. But given the fact that there are hardly any consequentialists also working as consequentialists in applied ethics, this suggests that consequentialism as a family of ethical theories does have limitations that make it hard to apply in a systematic manner.

Singer's theory has a very general structure only: principles on the intuitive level of moral thinking (that is, not the preference utilitarian principle) are to be applied deductively. The applicant's main task, however, is the domain-specific development of such principles. Yet how one is to develop these principles methodically remains inexplicit. The material principle (on the level of critical thinking) justifying the principles on the intuitive level Singer endorses is the preference utilitarian principle. As

this standard of justification is itself consequentialist, this would suggest a balancing structure for decision-making in particular cases. However, the preference utilitarian principle is not meant to guide the interpretation of particular principles. Singer's theory thus lacks both methods of norm development and a standard for the material justification concerning particular cases.

Hooker's rule consequentialism is also a two-level theory. Yet, only the material content of the most abstract level is clear (the rule consequentialist principle). Which more concrete rules it endorses remains unclear. Just as in Singer's theory, the abstract principle is simply too abstract to be helpful in establishing more concrete moral rules. And this is not only due to factual uncertainties that could be provided by social scientists. It takes much more philosophical work, conceptually and methodically, in order to further develop the two theories. Both theories lack something like a theory of interpretation.

Pluralist moral theories, such as principlism, might be less systematic in terms of the justification of their moral rules or principles, but their specification and application to problems like euthanasia is way more systematic than consequentialism's. They not only have more concrete norms; they are also aware of the need for various methods to develop and apply these norms. Almost the only thing that remotely resembles something like a method in Hooker's rule consequentialism is his idea of how to resolve rule conflicts. Since he cannot rely on the principled answer provided by the consequentialist maximization principle 'Which act would yield the best consequences?' (because then his rule consequentialism would collapse into a version of act consequentialism), he has to accept the premise of the problem of a rule conflict question—that there is a true conflict of duties, in which the ethical theory itself does not provide any further guidance. This is why Hooker resolves conflicts not through pointing to the most abstract principle available (as Hare and Singer would do), but by relying on the aversions of the morally well-trained. As shown above, this is not helpful, because it is never more determinate than the ideal code of rules. Hooker should develop his conflict resolution method closer to a balancing structure as developed above.

A serious problem in Hooker's theory is the tension between internalization costs and guidance regarding particular problems. One of his

criteria for ethical theories is that they are practically helpful in hard cases. His is also bound to having implications on the very concrete level due to his reliance on reflective equilibrium as the theory of justification for his consequentialism (cf. Hooker 1996). Yet, such concrete implications will almost always involve high internalization costs, which is why Hooker repeats time and time again that the action-guiding rules must not be very precise. I suspect that one cannot have both implications for concrete problems or cases and low internalization costs. One option would be to develop domain specific rules for fields such as medicine. This might open the door for more complex and precise rules (with higher internalization costs) that are only relevant for a certain group of people.

Unless this tension is eased, Hooker's consequentialism cannot function as a theory in applied ethics. Only then can one start doing the conceptual and methodical work necessary to make it a normative theory functioning on all levels of abstraction, on the very high and on the very low.

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9

The Morisprudence Model for Applied Ethics

I shall now provide a more abstract statement of the framework for methods in applied ethics endorsed throughout the preceding chapters before closing the book with arguments for this framework. Throughout this book, I have been concerned with the relation between abstract moral principles and concrete moral problems or cases. My aim has been to clear the black box between the input from ethical theories (the moral principles one endorses and the moral problem one faces) and the output (a particular solution to the problem). I hope to have shown that and how methods help to lift the lid of the black box.

The framework I suggest for methods in applied ethics is organized around deductive norm application and highlights the role of norm developments, as well as interpretations, as key elements for rendering ethical theories practical. Since it derives from the confluence of law and ethics, I call it the *Morisprudence Model*.[1]

[1] This label is, of course, taken from John Arras, who attributed it to casuistry (cf. Arras 1991, 33).

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Deductive Norm Application

A deduction requires at least (1) a universal and conditioned norm, (2) a case description, and (3) a semantic interpretation of (1) to bridge the gap between (1) and (2). The relation between (1), (2), (3), and the conclusion is a normal deductive inference. These three formal steps are the *formal justification*; the crucial justification of the premises is the *material justification*. The former is formal, in that it states a formal inference; the latter is material, in that it gives material reasons in order to justify the content on the formal side. Only taken together do the formal and the material justification make for a full justification of a particular decision. This simple deductive model is meant to reach transparency and stability.

This deductive model is, nonetheless, very flexible, because it almost always requires interpretations, because it acknowledges the relevance of norm developments, and because it makes plain the distinction between formal and material aspects of justification. The deductive model is thus a suitable tool to end the tug-of-war between the two main groups in applied ethics: the one group calling for very strict theorizing, for working systematically from some abstract principles or values, leaving as little discretion to the applicant as possible; the other group highlighting the constraining effects of too much theorizing, calling instead for wisdom and judgment, pointing to the constant development of our social practices and to our faculty to adapt to changing circumstances. The morisprudence model breaks up this opposition and highlights the possible extent of stability and of flexibility in working with normative theories. It shows how far applicants are bound by the norms of the respective theories and also where these norms call for interpretation and development by the applicant.

Interpretation

Interpretations are central in almost every deduction, every specification, every analogy, and in every proportionality test. They are necessary to determine the range of norms, to realize the need for norm

supplementations and for norm revisions. And yet, interpretations do not receive the attention they deserve in applied ethics.

The applied ethics literature is focused on analogies and the possibility to resolve norm conflicts, although an even more serious problem, for rational decision-making seems to be the complete lack of a theory of interpretation. Ethicists often speak as if interpretations are none of their business, as if the scope of norms and their meaning were sufficiently clear. I think this is only true for very few cases (for well-defined terms such as 'bachelor'), and certainly not for the cases we argue about. The latter are full of vague value-laden terms and emotive language. Interpretation should thus be of the highest importance for everyone designing an ethical theory. Note that I am not calling for quasi-authoritative definitions of a theory's key norms or something the like. What I am after is a principled approach as to how applicants are meant to access a certain theory when interpreting, applying, and developing it.

One of the few ethicists who explicitly mentioned the interpretation of norms in his theory was Bernard Gert. As mentioned in Chap. 8, he developed a general moral theory that was later, with his co-authors, turned into a theory of bioethics (cf. Gert 1998; Gert et al. 2006. The theory is grounded in a common morality and consists of 10 moral rules ('do not kill', 'do not cause pain', and so on), moral ideals, and a two-step procedure to resolve conflicts. It is claimed that

> There must be consistency throughout the moral system… Not only must there be consistency within the moral system, but there must also be consistency in applying the rules, ideals, and lines of reasoning to different persons… The emphasis on consistency and coherence is in direct opposition to the ad hoc approach characteristic of much of bioethics. (Gert et al. 2006, VII)

But then they overstep the mark in systematizing the moral theory such that the wording of the rules does not receive the attention it deserves. In Gert's theory, the main purpose of morality is to reduce the amount of harm that people suffer (Gert 1998, 13). The three authors argue that behind the problem of interpretation 'lies a line of reasoning based on our moral theory. The theory explains why the interpretation of moral

rules that should be chosen is the interpretation which produces a public system resulting in less harm than any alternative interpretations' (Gert et al. 1997, 58; see also Gert 1998, 174). Thus, although linguistic conventions might be helpful in most cases, it is the very purpose of morality which is decisive for the interpretation in hard cases when it is not clear whether a certain rule applies. The idea is that the rule applies when this leads to less harm being suffered. The authors acknowledge that

> interpretations can change in different settings. The changes are not ad hoc and whimsical; they are appropriate and systematic, explained by the concept of morality as a public system… Depending on the nature of the group of persons who are interacting and the intensity and frequency of their interaction, an interpretation of a moral rule may be more or less inclusive of particular actions. (Gert et al. 1997, 58)

What they have in mind sounds pretty much like 'objective teleology' discussed in Chap. 4; in Barak's words: 'The aim of interpretation in law is to realize the purpose of the law; the aim in interpreting a legal text … is to realize the purpose the text serves. Law is thus a tool designed to realize a social goal' (Barak 2006, 124). Such an interpretation-guiding purpose is also what is to be seen in Gordon, Rauprich, and Vollmann's suggestion (discussed in Chap. 6) to use the common morality as an organizing meta-principle in balancing conflicting principles.

Recall how this idea has been criticized in Chap. 4, where I discussed the traditional rules of legal interpretation, which aim at reconciling the binding force of the law—paying respect to what the legislature said and to what it intended—with the sometimes occurring problem of settling on an interpretation where the law is unclear. The ordering of the rules is this: first, establish *what the legislator said*—when this leads to a clear and unambiguous understanding of the norm, this is it. This understanding cannot be 'corrected' through other considerations. When what the legislator said is unclear or ambiguous—even after considering the context of the norm within the whole legal system—one has to ask *what she intended* to say in making the respective norm. Only if this step also does not yield a clear result has the applicant the competence to determine her own ends or to determine herself what is most reasonable to do within

the scope of the norm's wording (*objective teleology*). The norm's wording thus guides and constrains the whole process of interpretation.

This is just the same in ethics. As long as one works within one particular ethical theory and wants to interpret its norms, one has to figure out what the authors of this theory said and what they meant to say. Only if this leaves one with an unclear result, one is to ask for further purposes, as in the example of Gert, Culver, and Clouser, or of Gordon, Rauprich, and Vollmann; but these purposes, too, are constrained by the wording of the norm. There is no difference between law and ethics with respect to interpretation in this sense. In ethics, one might be free to set the intention of the authors aside and follow one's own understanding of their norm. But in ethics as in law, one is thereby leaving the realm of interpretation; one is then merely working with one's own understanding of the norm.

Similarly, in ethics, one is free to change the norms altogether. But if one does so without sticking to the modes of norm development discussed above, one simply does not work with the respective theory anymore. It is perfectly fine to do so. But it is a different thing to do. One should acknowledge and make plain when one makes this step out of working within a particular theory towards working with a new self-designed theory. What one shall notice is that these possibilities in ethics to go beyond what a particular author suggested to do, not do away with the problem of interpretation. Rather, to realize that one wishes to change a norm or to deviate from a particular understanding of a norm presupposes that one already has interpreted a norm in a certain way.

Although interpretation in ethics also has to respect the wording of the norms and what the authors intended, there is still a point in stating some kind of over-arching purpose, which can then be used in unclear cases of interpretation. But one should never confound this supporting role of such a purpose with interpretation as a whole.

One difference between interpretation in law and in ethics deserves mentioning, though. The relation between what the author of a particular ethical theory said and what she intended is different from the parallel relation in law. What the legislator said is of primary importance in law, inter alia, because the whole process of legislation and ratification fosters this primacy. This is different in ethics. When there are reliable means of

knowing what the ethicist wanted to say, but failed to express properly, this seems to prevail over the theory's wording. This is possible in ethics because the guarantee of stable expectations is usually not as important as it is in law. However, the more public and the closer to law-making ethical practice is (for example in bioethics commissions), the more important are such considerations in ethics, too.

Application and Development

Interpretation is important in norm application and norm development. I have shown its role in deduction as the central form of norm application. It should be used to apply norms directly; but it is also a key element in analogical arguments as depicted above. I followed Scott Brewer's understanding of analogical reasoning as a sequence of three distinct processes, in which an abduction leads to a rule that is then applied deductively.

I have also shown that one often needs to develop norms in order to make them applicable and that interpretation is needed to realize the need for such developments in the first place.

The reliance on development for application makes it possible to use deduction as a method in ethics even when—as with principlism—the ethical theory does not contain all-quantified (absolute) norms; one then needs means to render these norms absolute. One important step in clearing the black box between the abstract norms and the particular cases has been to distinguish between norm application and norm development, such that *application* works with given norms and leaves them unmodified, whereas *developments* modify the normative system by revising a norm or by adding new norms (expansion). The aim of further developing the system is to allow for deductive applications where the existing norms do not.

I have shown that deductive application (directly and in analogical reasoning) and the various kinds of norm development discussed in Chap. 5 also have their place in ethical theories. The understanding of different kinds of norm development helps to clarify the functioning of different kinds of norms within these theories.

The basic kinds of norm development are rather obvious: every functioning normative theory needs means to develop its norm-set via revision and via expansion. Concerning norm revision, it must be able to correct mistakes and to change norms when they have proven unfit for new situations. But the day-to-day job is norm development by expansion; attempts to make abstract norms more specific, to include exceptions, to fill gaps, and to reconcile norm conflicts are instances of norm development by expansion. I have used the proportionality test and distinguishing as the prime examples to illustrate how methods of norm development can inform such processes in ethical theories.

Why the Morisprudence Model?

Throughout the book, I have discussed methods that allow for transparent and rational resolutions of particular problems bearing on abstract and general moral principles. One might say that the framework defended in the book, then, has little bearing for such approaches to ethics that do not give principles (or norms in general) a central place in ethical deliberation. Proponents of narrative ethics, care ethics, and some forms of virtue ethics might not be terribly impressed by what I have to say. They might also not be happy with the place I attribute to their approaches: I believe that their role in ethical deliberation is not as rival approaches to ethical theories such as the ones discussed above; neither are they alternative methods to relate abstract principles to particular cases. Their place is, rather, in the material justification, that is, as resources for arguments that justify the premises in the formal justification. Note, however, that this does not mean that they are unimportant. Pretty much the opposite; the material justification is where hard cases are ultimately decided. The problem is that it is so hard to grasp and to rationalize what people do when relying on the various narratives or virtues. The theories and methods discussed in this book do not do this decisive job; they only show where this needs to be done. By placing the norm-skeptical approaches in the material justification and thus understanding them as backing up and supporting norm-based approaches to ethics, I suggest to use my

morisprudence model for all approaches to ethics. I do so for the following reasons:

This framework that inspired the model is successfully used in working legal systems. Both Civil Law and Common Law serve similar functions, and neither of them does so in a superior way. That they both fit neatly into the methodological framework suggests that this framework contains at least some necessary elements of all legal systems.

I hope to have shown that principlism can be strengthened using Civil Law methodology; that casuistry can be strengthened using Common Law methodology; and that consequentialist theories are defect because they lack a comparable methodology. Since the same methodological framework is at work in both legal traditions and in contemporary ethical theories, one can assume the morisprudence model contains the key methods for normative systems that share roughly similar functions as the law and the ethical theories discussed.

Furthermore, taking the model as the core and placing approaches that are not explicitly norm-based within the material justification can also take on and organize the conclusions of other commentators. Tomlinson, for instance, concludes his book with what he calls 'informed eclecticism', namely, that

> various methods play different *roles* within the course of reasoned deliberation. Although the initial structure of the problem may often be set by the moral principles in contention, the deliberation that follows may need to use any of the [theories of principlism, casuistry, narrative ethics, virtue ethics, and care ethics]. Which of them are used will depend on the paths taken in the give-and-take of argument over a problem, and the type of question raised by that argument. This calls for an imaginative flexibility in our understanding and use of these [theories] that's capable of seeing the opportunity to employ one [theory] or another at the right juncture. (Tomlinson 2012, 235, his emphasis; see also Arras 2007, 68 f.; Arras 2013)

This eclecticism is probably unavoidable, but not for the whole reasoning process. Rather, one can use ethical theories with the methods suggested and limit the eclecticism to the material justification of the premises of the formal justification. The advantage of this way of orga-

nizing deliberation is the boost in transparency. My suggestion does not necessarily yield better decisions; but the decisions will, at least, be more transparent and thus more open for critique—and transparency and criticism are likely to contribute to better decisions in future cases.

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