

De Ethica

A Journal of Philosophical,
Theological, and Applied Ethics

Vol. 7, No. 4 (2023)

Special Issue: The Foundations of Equal Moral Standing

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DE ETHICA

A JOURNAL OF PHILOSOPHICAL, THEOLOGICAL, AND APPLIED ETHICS

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De Ethica was founded in 2013. It published its first issue in 2014 under the guidance of its first Editor-in-Chief, distinguished professor Brenda Almond.

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From the Editors

Should we consider and treat others and ourselves as equals? If so, when, where, and why? Basic moral equality connotes an intriguingly elusive moral concept. Philosophical and theological accounts about moral equality, human dignity, the general right to equal concern and respect, and opacity respect, exemplify attempts to explicate the meaning, function, and possible justification of similar moral concepts. They share seemingly paradoxical core properties, such as strong obligatoriness, and prescriptions of comparative equality of, some kind of non-equivalent social status, in virtue of which humans allegedly are vulnerable to humiliation and therefore need protection. Stones and computers do arguably not need the same protection.

Conceptions of basic equality pervades many contemporary normative and political arguments, in one way or another. Occasionally as an explicit normative starting point, at other times as an implicit principle, something taken for granted. Yet, it is a disputed concept. Should we understand it as a substantial politically relevant moral principle? Or, in terms of justification, as a relevant reason for substantial moral convictions? The latter path necessitates investigations about whether it should be interpreted as an axiomatic starting point, or as valid in virtue of its position in an allegedly coherent web of ideas. There are interesting debates about which kind of reason basic moral equality or human dignity can be. Do these notions of moral equality, like, e.g., Rainer Forst argues, offer procedural criteria, such as reciprocity and generality, for a morally informed idea about political justification? Or should they rather be understood substantively, as implying specific moral and political principles about social justice or human rights, for example. Both alternatives presuppose intriguing investigations into criteria for determining the comparative reasonableness of alternative accounts of basic equality. These are ongoing and by no means settled issues.

Furthermore, change is a fact. Ethical outlooks, as Rosalind Hursthouse names them, that serve as backgrounds for arguments of about practical rationality change too. In spite of the philosophical pervasiveness of ideas about humanity as sufficient for deserving equal respect, today ethnocentric ideas of national identity have become increasingly popular suppliers of ideational material for political visions. They inspire social policies that alter core institutions of liberal democracies, like the relations between the state and courts of law, culture or media. Furthermore, political skepticism towards granting asylum permeates the political climate of contemporary Europe. Political arguments in favor of equality of all humans before the law are increasingly rare in mainstream media debates, as well as not tacitly taken for granted as valid, as they used to be in, for example, Sweden. Ethical responses towards these trends are urgent for many reasons. Suffice it to say, ideas about human dignity and accounts about its justification must be relevant for the task. The meaning of relevance can be morally ambiguous though. Ideas can serve the purpose of legitimating current orders, but also offer tools for explications of political critique. Human dignity can be and has been interpreted as an abstract and empty “word of honor”. Still, viewing any other as a being of incomparable

worth appears to be interestingly incompatible with how states sometimes treat some human beings, and with many instances of how we humans tend to regard each other.

In summary, there is a combination of urgent normative, practical, and theoretical reasons for coming to terms with problems pertaining to ideas about basic equality. This issue of *De Ethica* seeks to address these intriguingly composite quandaries.

In his paper, Philip Strammer investigates the grounding of equal moral status, and proposes a phenomenological approach to the question. He argues that in order for talk of equal status to be meaningful, it must be thought of as grounded in the individual's responsiveness to the Other. To be responsive in this way is not just having one's attention directed in a certain direction, towards a certain person, but also being able to grasp the moral weight of that person's circumstances. If such an account is correct, then what grounds basic equality is not fundamentally the empirical properties of people, but the phenomenological properties of encountering another person.

One approach towards grounding basic equality takes metaphysical naturalism as its starting point. James Orr argues in his article that this line of reasoning does not succeed in giving an account of basic equality. His approach resembles Strammer's. However, Orr's position on the grounding of basic equality is different. He argues that a broadly theistic account of moral equality provides the way forward. If basic equality is about God's relationship to each human being than there allegedly is a ground for equality.

Kevin Jung's article can be read as continuing the Theistic line of thought. Jung investigates neo-Aristotelianism, Kantianism and Theism as alternative accounts of basic equality. By doing so, he not only provides us with a broad overview of possible positions, he also sets the stage for his positive argument. Jung argues that a theistic approach inspired by the work of Robert Adams provides the most plausible account of basic equality. The core idea is that we could think of goodness as a sort of resemblance to God. One advantage of this theory is, Jung claims, that it handles, e.g., the Wrong Kind of Reasons objection, often raised against the fitting attitude theory of value, well.

Lars Sandman guides us down from the heights of metaphysics to the practice of treating others as moral equals in health care. He argues that a traditional (thin) formal equality principle is useful for priority setting, both as a heuristic for achieving consistency, and for dealing with cases that are underdetermined by other factors. The article goes on to investigate more robust versions of formal equality and argues that a "thick" formal equality principle assists us with handling cases where problems of health care distribution is brought about by factors outside the health care system. However, as Sandman points out, such a principle will bring to the fore difficult questions of responsibility ascriptions and economic trade-offs.

The discussion of the theory and practice of basic equality will continue, in *De Ethica* and elsewhere.

Per Sundman (guest editor) and Lars Lindblom (executive editor)

Being Claimed in Immediate Response to an Other: Against a Foundationalist, and Towards a Relational, Understanding of Moral Status

Philip Strammer

In this essay, I propose a phenomenological alternative to the established candidates of what grounds moral status, namely the experience of being claimed in immediate response to an Other. Drawing from late-Wittgensteinian moral philosophy, I develop this alternative in critical juxtaposition to theories that aim to derive moral status from values grounded in independently accountable empirical properties. Against such theories, I expound how meaningful talk of moral status must instead be understood to be rooted in the individuals' morally charged immediate responsiveness to Others, a responsiveness that preconditions the very possibility of separating value and fact. If my analysis is sound, then the empirical property or set of properties that is commonly taken to qualify as a candidate for a ground of moral status in fact presupposes a phenomenological dimension of 'ethical encounter'. The recognition of this deeper phenomenological level would, while not disposing with the notion of moral status, transform its meaning and, thus, how much of the philosophical debate on moral status is conducted.

1. 'Being Claimed in Immediate Response' as a Philosophical Motive

Moral equality is undoubtedly a notion of great moral significance, and one that resonates deeply with us. It is a widespread belief that we all have the same moral worth. The equivalent of this belief is found in moral philosophy in the form of the widespread theoretical commitment that we, at least the "typical adult humans",¹ have *full equal moral status*.² In addition, recent decades have seen various attempts, both theoretical and socio-political, to make the case for the moral worth of those who are not traditionally considered part of this core group of moral equals but whom we still regard as morally significant. In moral philosophy, these upheavals were to a large extent reflected in the attempts to deliver a theoretical framework on the basis of which the expansion of the circle of beings considered as having moral worth should become possible in rational and justifiable ways. While there were (and still are) numerous disagreements over which entities – infants, the cognitively impaired, mammals, insects, plants, stones, cyborgs, entire ecosystems – should be accorded what kind of moral status – full,

¹ Benjamin Sachs, 'The Status of Moral Status', *Pacific Philosophical Quarterly* 92:1 (2011), pp. 87–104, at p. 88.

² For a comprehensive overview of the various accounts of full moral status (or FMS), cf. Agnieszka Jaworska and Julie Tannenbaum, *Stanford Encyclopaedia of Philosophy: Spring 2021 Edition*, edited by Edwin N. Zalta (online at <https://plato.stanford.edu/entries/grounds-moral-status/>, accessed 2021-12-23), Ch. 2.

partial, or none; located on a continuum or as an all-or-nothing matter³ – the paradigm for moral status is virtually always taken to be the presupposed moral equality between individual *persons*.⁴

In rejecting this approach, I instead want to show that the property(/-ies) upon which moral status is usually grounded presupposes a phenomenological dimension of “ethical encounter”.⁵ I think a good starting point for explaining what I mean by ethical encounter is what some philosophers at times refer to in terms of *being claimed in immediate response to an Other*.⁶ Although this is a core notion – if not *the* core notion – in a certain strand of late-Wittgensteinian moral philosophy,⁷ it is not treated as an axiom or principle, as this would be in conflict with its fundamentally experiential nature. It is better understood as a motive, a theme, or an intimation that by its very nature eludes definition, that is, it eschews being framed in definitive theoretical terms because it intimates the very experiential basis for any meaningful theorising. Accordingly, it is articulated and inflected in varying forms, depending on the context and the point in question. It is best described, I think, as a *pointing* or *appealing*, namely, to the readers’ own respective experience in the attempt to awaken *their* sense of what *they* take to be of the deepest moral significance. So the abstract description – *being claimed in immediate response to an Other* – is at best secondary to the examples that illustrate that it is these that “wear the pants”,⁸ invoking the readers’ imagination and implicitly summoning them to scrutinise how they themselves understand the matter at hand.⁹ While thinkers such as Raimond Gaita, Christopher Cordner, R. F. Holland, and others have provided a multitude of examples to trace the crystallisations of this responsiveness,¹⁰ in this paper I will present my own rather simple scenarios, which I hope will be nonetheless expedient in elucidating what I am after.

2. Morally Salient Properties and the Fact/Value Distinction

When philosophers make the case for the moral status of a group of beings, they usually proceed along the following lines: 1) a group of beings on the ‘moral margin’ that is deemed to be mistreated is identified and the question of the group’s moral status is raised; 2) the focus of attention shifts towards what is considered the moral core group, i.e. human beings,¹¹ a group considered to consist of equally morally salient members; 3) there is a resort to the property(/-ies) by virtue of which human beings are

³ For an overview of the various groups for which moral status is claimed, as well as of the types of moral status themselves, cf. Agnieszka Jaworska and Julie Tannenbaum, ‘The Grounds of Moral Status’ and Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (Oxford: Clarendon Press, 1997).

⁴ Cf. Steve Clarke and Julian Savulescu, ‘Rethinking our Assumptions of Moral Status’, in *Rethinking Moral Status*, edited by Steve Clarke, Hazem Zohny, and Julian Savulescu (Oxford: Oxford University Press, 2021), pp. 1–19, at p. 1.

⁵ Cf. Christopher Cordner, *Ethical Encounter: The Depth of Moral Meaning* (London & New York: Palgrave Macmillan, 2002).

⁶ In the text, I will often refer to this simply as ‘ethical responsiveness’ or ‘ethical encounter’.

⁷ This includes at least some of the proponents of the Swansea School (e.g. Roy F. Holland, Peter Winch) and contemporary philosophers influenced by them (e.g. Christopher Cordner, Raimond Gaita, Hugo Strandberg, and Joel Backström).

⁸ Raimond Gaita, ‘The Personal in Ethics’, in *Wittgenstein: Attention to Particulars*, edited by D. Z. Phillips and Peter Winch (London & New York: Palgrave Macmillan, 1989), pp. 124–150, at p. 148.

⁹ This makes it possible that the readers may not share the picture of moral significance with which they are presented, thus allowing for disagreement. This kind of ‘real disagreement’, however, is integral to the kind of moral philosophy in question. I will return to its relevance in section 6.

¹⁰ To illustrate only a few significant instances, cf. Raimond Gaita, *Good and Evil: An Absolute Conception* (London & New York: Routledge, 2004), p. xv–xviii, or Christopher Cordner, *Ethical Encounter*, p. 67.

¹¹ Sometimes the adjectives ‘typical’, ‘ordinary’, ‘healthy’, or ‘adult’ are added for further delimitation.

ascribed moral status;¹² 4) it is shown that the same property(/-ies) are, either wholly or partly, to be found in the respective marginal group, thus exposing the irrationality of our established attitude and calling for a transformation of our conception of, and action towards, those beings.¹³

This way of proceeding reveals a conception of morality as being concerned with rational action, that is, action called-for on pain of inconsistency in practical deliberation. How one ought not to act is thus framed in terms of irrational action or, put differently, immoral action is taken to be action that violates the rationality of an underlying theoretical framework to which one is committed. While theoretical frameworks diverge, one widespread common denominator is, as indicated above, the assumption that any ascription of moral value presupposes an independently established factual basis framed in terms of empirical properties.¹⁴

It is thus held that moral status, if it is to be properly determined, must be grounded in properties,¹⁵ and that these properties are to be determined empirically, that is, through empirical perception and especially through the more exact empirical science. The empirical determination of properties is taken to deliver the factual basis for the ascription of moral value, an ascription that is treated as a strictly separate endeavour. This commitment is found explicitly in Goodwin:

The concept of moral standing (or moral patiency) is fundamentally evaluative, because it pertains to the moral worth, value, or considerability, of a particular entity. In contrast, the notion of psychological patiency pertains simply to whether an entity has the capacity to suffer (or feel pleasure). It must be kept conceptually separate from the moral-evaluative concept of moral standing (or moral patiency).¹⁶

Goodwin makes clear that psychological standing – the factual psychological properties of a given being or group of beings that are determined empirically – is clearly distinct from moral standing, that is, our evaluation of these properties.

If, for instance, the question arises as to what kind of moral duties we have towards, say, sheep, one would first ask what sheep are (the answer to which will include that they are hoofed herbivores, mammals, that they feel fear, pleasure, pain, etc.). The second step would be to ask which properties, if any, confer some form of moral status on their bearer. In order to determine this, reference is made to the moral core group, i.e. human beings, in relation to which it is assumed to be a given that certain properties, for example the propensity to feel pain, having agency, being a subject-of-a-life,¹⁷ and so on, *do* confer moral status on their bearers. Once it is determined that the marginal group in question does in fact exhibit the morally salient property(/-ies), then the only philosophical task left is to expose the inconsistency between our practical deliberation on, and treatment of, other human beings and the members of the marginal group.

According to this approach, there are two corresponding ways by which people may come to have their views of what is morally salient changed: either by learning new facts (thus changing the

¹² Cf. Clarke and Savulescu, 'Rethinking our Assumptions of Moral Status', p. 4

¹³ Ibid., p. 6; cf. also Gaita, *Good and Evil*, p. 166 (although in a critical spirit). It should be further noted that the just sketched structure 1)–4) is usually not overtly articulated in just this way; my point is rather that on closer examination, contemporary discussions of moral status tend to reveal this underlying logic.

¹⁴ As the debate on the fact/value distinction is far too extensive to account for it in detail here, I will restrict myself to a simplified sketch to illustrate my point. For an overview of the debate, cf. Philip S. Gorski, 'Beyond the Fact/Value Distinction: Ethical Naturalism and the Social Sciences', *Society* 50:6 (2013), pp. 543–553.

¹⁵ For a brief overview of the different theoretical accounts of property-grounded moral status cf. Clarke and Savulescu, 'Rethinking our Assumptions of Moral Status', p. 4.

¹⁶ Geoffrey P. Goodwin, 'Experimental Approaches to Moral Standing', *Philosophy Compass* 10:11 (2015), pp. 914–926, at p. 915.

¹⁷ Depending on the theory, the morally salient property(/-ies) are defined as, for example, the propensity to feel pain, having agency, having interests, and so on.

data on the basis of which moral evaluation takes place) or by detecting and straightening out irrationalities in their evaluations of the facts¹⁸. Now, although I do not think these two ways are necessarily fruitless, I hope to cast doubt on their efficacy in the following reflections.

Let us assume that someone who eats factory-farmed meat (and is fully aware of how the animals he eats are kept) is presented with the following two reproaches: 1) "*You should not eat this kind of meat because, after all, the animals suffer terribly from their horrible living conditions.*" Is it imaginable that the one who knows how the animals lived before they were slaughtered does not know that they suffered? Is it possible that he actually believes that they might be automata with clockwork-like bodies yet unable to feel pain? It *does* seem to me to be imaginable that someone would actually *claim* to believe that. However, I find it hard to imagine that if someone like that were confronted with the 'information' – perhaps even backed up by some kind of empirical research – that animals, in fact, do feel pain, he might honestly respond, "Oh, really? I did not know that at all! Thank you for letting me know; from now on, I will only be kind to animals." If someone claims that animals cannot feel pain, what evidence could be produced to make him change his mind? After all, to whatever behavioural or neuronal data is presented, he may simply reply along these lines: "Sure, their behaviour and neuronal activity does look like pain, but it simply *isn't*; what appears to be a soul is merely an illusion.' This is the crux of the Cartesian picture of the animal machine.¹⁹

2) "*You should not eat this kind of meat because doing so is irrational: you ascribe moral value to human beings' preference not to suffer pain but fail to do so in respect to animals despite the fact that they exhibit the very same property.*"²⁰ Here, it is easy to imagine that someone might simply reply, "Well, sure, animals don't want to feel pain, just as we don't. The difference is that *our* preference matters and *theirs* doesn't." How does the proponent of the empirical-property view respond to that? It would be pointless for him to appeal to rationality, i.e. to a self-contradiction in the thinking of the disagreeing interlocutor, because her point is precisely that our preference is *not* equal to that of the animals. When asked why she thinks so, the objector may simply reply, "This is just how I feel about it." It seems that here our philosopher has reached a wall, and one that is erected on the basis of his own commitment to the fact/value distinction.

Let me elaborate. Our philosopher may raise the objection that how the subject evaluates (or ought to evaluate) is dependent on the object's factual properties. When seeing a child drowning, we would all say that we ought to try to save it, which, according to our philosopher, means that the given empirical data (i.e. the child exhibiting the preference to live) yields a certain evaluation (i.e. that one ought to try to save it). But here, the philosopher turns matters upside down. Even on his own view according to which fact and value are strictly separate, it is not the property in question – the preference to live per se – that elicits a certain kind of moral response. It is the other way around: the respective property is only deemed morally relevant *because we evaluate it to be so*. This follows from the assumption concomitant with the fact/value distinction that the world is nothing but a "tideless factual sea"²¹ into which value only enters through *our* acts of evaluation. So the concurrence of our respective subjective evaluations makes it (misleadingly) appear as if it were the property from which the moral relevance

¹⁸ For a similar point, cf. Joel Backström, 'Wittgenstein and the Moral Dimension of Philosophical Problems', in *The Oxford Handbook of Wittgenstein*, edited by Oskari Kuusela and Marie McGinn (Oxford: OUP, 2011), pp.729–751, at p. 747.

¹⁹ Cf. David Cockburn, 'Human Beings and Giant Squids', *Philosophy* 69:268 (1994), pp. 135–150, on pp. 138–139.

²⁰ This argumentative route is, for instance, taken by Singer in his attempt to expose and efface speciesism and thus to 'expand the circle' of those beings that we acknowledge to be morally considerable. Cf. Peter Singer, *Animal Liberation* (New York: Open Road Media, 2015), at p. 41.

²¹ Roy F. Holland, *Against Empiricism: On Education, Epistemology and Value* (Oxford: Blackwell, 1980), at p. 105. It should be noted that Holland does not share such a view of the world; the expression "tideless factual sea" is hence to be read in a critical and, I think, slightly lampooning tone.

can be inferred. It is only because – or to the extent that – our evaluations concur that the property will appear to elicit a certain moral response.

This means that if the sketched empirical-property outlook wants to avoid the pitfalls of relativism, the only authority left to appeal to is common sense. Ultimately, the philosopher may only revert to claims along the lines of “That is simply how one evaluates it.”²² But this is precisely what is challenged by the above objector who values differently from how ‘one’ does. Not only is the philosopher’s outlook unable to argumentatively appeal to such a misfit but the very possibility of such a misfit sheds light on how the entire project of attempting to empirically determine morally salient properties is, as it were, rotten to the core.

3. Value and Socialisation

The critical objection may be raised that I am oversimplifying the nature of evaluation by presenting it as the act of the individual subject. Instead, it may be held, our evaluations should be understood as arising from processes of socialisation: while the act of evaluating is indeed carried out by the individual subject, it presupposes values.²³ These values, however, are not produced by the subject itself but are instead acquired by being initiated into a social world. According to this picture, values are the socially acquired criteria that every act of evaluation presupposes. So, when I am confronted with a drowning child, I do not simply happen to judge this as a situation requiring my intervention in the form of help. Instead, in order to judge the situation thus, I must have already undergone a process of socialisation in which I have come to internalise certain values – such as the value of human life and the concomitant acknowledgement that it should be protected whenever possible – that serve as the background conditions for my judgement that I ought to help. This account is compatible with the fact/value distinction. It could be said that small children, for instance, may register the objective facts of a situation – say, of a severe accident – but given that they have not yet come to learn that a human life is of great value, they will not evaluate it as a grave event.²⁴

While I do think that our social environment plays a crucial role in our moral development, the above account is far too vague. The question is what role exactly others play in this development. Consider the following situation: a girl and her brother are playing in the garden while their parents are inside. She sees the boy trip, fall, and hit his head with considerable force, causing him to cry out in pain. Although the girl witnesses the situation unfold, she remains unfazed, ingenuously continuing to play. Is it imaginable that she perceives what was happening, i.e. that she registers the empirical facts, including the fact that her brother is in pain, but that she simply does not care about it because she has not (yet) acquired certain values?

Now, it seems to me that to the extent we try to make sense of the girl’s experience of the situation from the position of a detached observer – under philosophical laboratory conditions, as it were – we will not arrive at a satisfying answer to this question. The answer to the question how someone experiences certain a situation requires that the one who is to reply must in some way ‘encounter’ the one whose experience stands at issue – otherwise, she will simply not know what she is talking about. As Wittgenstein suggests that if we want to understand pain, we cannot do so in abstracto

²² Appeals to common sense are indeed very frequent in the literature on moral status. For example, cf. Jaworska and Tannenbaum, ‘The Grounds of Moral Status’, esp. Chs. 1 & 6.

²³ For an overview of thinkers who share this outlook, cf. Kyle M. Matsuba, Theresa Murzyn, and Daniel Hart, ‘Moral Identity Development and Community’, in *Handbook of Moral Development*, edited by Melanie Killen and Judith G. Smetana (New York & London: Psychology Press, 2014 (2005)), pp. 520–521.

²⁴ Cf. Hugo Strandberg, *Forgiveness and Moral Understanding* (Cham: Palgrave Macmillan, 2021), at p. 218.

but must imagine what it actually means to be in the presence of someone's pain²⁵, so I suggest that instead of thinking in abstracto about what it means for someone to experience a certain situation, we have to imagine what it would be like to actually be in this person's presence. What is required is thus that we imagine someone to be there in the presence of the girl and her brother, witnessing the situation unfold and responding to it. The perspective that first comes to mind is that of the children's parents. Let us thus imagine how they might understand, and respond to, their daughter's apparent indifference.

First-off, it is probably safe to say that every parent would be taken aback when one of their children were to give the impression of being so utterly indifferent towards the suffering of another. The question is how exactly they would understand, and respond to, this apparent indifference. First an account that I take to miss the mark: Let us assume that the parents come on the scene. Seeing that the boy is hurt and crying, the mother goes over and looks after him, caressing and comforting him, perhaps applying a plaster to the wound. Meanwhile, the father, irritated by his daughter's demeanour, takes her apparent indifference to be indicative of the fact that she still lacks the values required for evaluating her brother's predicament as would be called-for. Accordingly, he tends to her and tells her (although probably in a way more suited to a young child), "If you see that your brother is in pain, you should not simply continue to play, but you should help and tell your mother or me about it!" If the father then realises that the girl fails to grasp why she should do so, he may continue by saying, "You have to do that because others are important and because it is bad to let them suffer." If she still does not get the point, then he can of course try to rephrase it in different ways, hoping that she will catch on. As long as he is caught up in this role of the teacher of shared values, however, he will have only two ways of responding to her apparent lack of understanding, namely either by imparting to her ever more facts about existing mores or by trying to convey a sense of the importance of these facts by reverting to how they, after all, shed light on 'our' shared values.

Engaging with his daughter in such ways may surely be fruitful in that it may make the girl follow certain practical instructions; indeed, it may even result in her accepting her father's teachings and thus internalising the values in question. If so, however, she will become like her father: she will help the one in pain because she has learned that Others are valuable, and that Others are valuable because, well, that is simply 'our' value. Part of her coming to think like this, however, will be that she, too, will come to develop a picture of the world as filled with morally neutral facts, on the one hand, and with socio-moral values that tell 'us' what 'one' ought to do, on the other. The girl who would have thus internalized her father's teachings, in other words, would also come to endorse a version of the fact/value distinction, yet not because she realized it to be the best way of understanding the world but because she, at least partly due to her father's misguided attempts at moral education, failed to come to see what it means for something – or someone – to be of genuine moral importance in the first place.²⁶ Ultimately, what the girl thus educated will 'have' is just more facts – for even a statement like 'X is what we value' is ultimately nothing but a statement of fact. In that regard, it does not substantially differ from the kind of statement of fact 'Human beings have preferences' (although of course the former is a social fact while the latter is a natural one). The important point is that neither entails a sense of moral significance on the part of the speaker. Neither because some entity or way of acting has certain properties nor because people generally ascribe moral value to it will it be seen as being of moral relevance. One could describe the girl who comes to conceive of moral demands in this way as having failed to see their *point*.

²⁵ Cf. Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Oxford: Blackwell, 1963), §286–7 & §302–303.

²⁶ Cf. Strandberg, *Forgiveness and Moral Understanding*, p. 218.

4. Rousing Someone's Moral Responsiveness

When I just stated that to the extent that the girl will merely act according to an instruction or an internalised value, she will not get the *point* of what she is doing, it could be assumed that what I am aiming at is that there must be a deeper level of rational grounding, such as a transcendental justification of the values in question. Showing why I think this does not work would unfortunately exceed the scope of this text.²⁷ What I can do, however, is to sketch my alternative, namely, that this 'deeper' level is not one of further justification at all but of the kind of morally charged encounter with otherness that I have adumbrated above.

I said that thinking within the kind of fact/value distinction sketched above only allows for a change of moral attitude either by presenting new information or by exposing inconsistency in thought. Yet, if one rejects this distinction altogether, a third alternative emerges.²⁸ I will now show that this alternative underlies the other two options, and I will elucidate this by modifying the above example.

In the example, the focus was on moral education in the sense of a passing-on of values by the parent to the child, together with the hope at least for compliance with, and at best an internalisation of, those values. But the father's reaction to his daughter's apparent indifference to her brother's pain can also take a different form, namely, that of an attempt to make her see the situation in a different light. Such a reaction will involve trying to make her receptive to her brother's pain, to let her be touched, or claimed, by it. If so, the focus of the father's attending to his daughter will shift away from a concern with values (i.e. with *what* is deemed important) and towards a concern with *him* (i.e. her brother) and his pain. One could say that the father's role has become that of someone guiding her attention, yet not merely as a signpost pointing in a certain direction but as someone who tries to convey a sense of the moral weight of the situation within the very process of redirecting her attention. This could be articulated in the father's saying (with an emphasis that expresses his sense of the gravity of his son's pain), "Look at your brother, look, he is crying and in pain! The poor boy! Do you see the wound on his forehead? That must have hurt!" Alternatively (or additionally), the father may simply take the girl face to face with her brother, confront her with his pain close-up, attend to him in a loving way that is plain for her to see, and perhaps at times turn to her so as to invite her to relate to her brother in a similar way. The father's speaking and acting in such a way may help to redirect her attention and thus to arouse in her a sense of the moral significance of the situation.²⁹

If he succeeds in touching her – or, rather, in her letting herself be touched by her brother's pain – it may well be that she will be saddened or even start to cry. Yet, that reaction will then not be a result of, say, the consequences she fears for having ignored his pain or of the recognition that she has violated a moral rule. Rather, it will be "an expression of the recognition of the pain he is in",³⁰ an expression inseparably tied up with her recognition of his reality and her sense of his moral importance for her.³¹ If it is, then she will get what I have called the *point* of why her brother's pain is of moral relevance.

I say the father can only 'help' his daughter to open up in this way because, ultimately, he cannot do it for her, nor can he teach her how to do it. The attending and the experiencing is something she can only do herself.³² That said, the fact that he can so much as play a role in the process presupposes that

²⁷ For lucid discussions exploring why rational justification by itself will not do and must presuppose a deeper experiential level, cf. Gaita, *Good and Evil*, Chs. 3 & 4, and Cordner, *Ethical Encounter*, Ch. 5.

²⁸ For another critical thematisation of the same issue, cf. Gaita, *Good and Evil*, p. 167.

²⁹ Cf. Cordner, *Ethical Encounter*, p. 108.

³⁰ Peter Winch, 'Who is my Neighbour?', in *Trying to Make Sense* (Oxford: Blackwell, 1987), at p. 163.

³¹ For an extensive discussion of the connection between the ethical encounter and the sense of the other's reality disclosed by it, cf. Gaita, *Good and Evil*, Ch. 4, e.g. p. 51.

³² In such a case, as in the case of Jesus' helping the man understand who his neighbour is, "no one truly has the answer who has not arrived at it for him or herself" (Winch, 'Who is my Neighbour?', p. 157).

she is already responsive to *him* (i.e. that his being touched by the boy's pain touches her) in such a way that her father's presence and his appeals help her awaken her responsiveness to her brother.³³ If so, then it seems that what the father does in relating to her is better described as (indirectly) helping her in her moral development than as (directly) morally educating her. It also means that her father will not understand the impression she gives – namely of being indifferent to her brother and his pain – to indicate a total absence of responsiveness towards him but rather one that is, for whatever reason, obfuscated. If the father would take the girl to be lacking *all* responsiveness in relation to her brother, then it would become unclear how his response to her – namely his attempt of rousing her responsiveness – could be understood at all, for it would then resemble the reaction of someone who, irritated by someone's blindness, would appeal to this person so as to rouse her vision and 'open her eyes'. So, if he would take her to be utterly unresponsive, he would most likely assume from the outset that every attempt to change that predicament would be in vain. His response to her shows that is not the case. He can only be understood as trying to *awaken* her responsiveness, in other words, if it is assumed that he takes her to already be responsive, in a however faint or obfuscated way.

There is obviously no guarantee that his words or deeds will be conducive to stirring his daughter's responsiveness. Still, it must be possible, not least because the above-mentioned reprimands, focusing on irrationality, presuppose that she has already come to develop a sense of the moral significance of the situation. Only once a direct moral responsiveness is developed will it make sense for the father to point out an inconsistency in the girl's different moral responses. The girl may, for instance, develop into a person who is generally morally responsive to Others' suffering yet may still, in a single instance, suddenly relapse into what appeared to be her former indifference. Her father may then say, "Hey, but you know he is in pain, right? Usually, you are there for him when something like this happens but now you are so cold and unmoved. What is going on?" (It should be remarked, however, that it would be quite strange to read this reprimand in terms of a *logical inconsistency* between the kind of moral understanding that he knows she has and her present failure to live up to that understanding for that would suggest that he takes her failure to be a failure to infer the right kind of information from the situation at hand, information that she does infer in other situations of the same kind. He would interpret the moral shortcoming as being a cognitive shortcoming at bottom. Yet, if a person known to be empathetic suddenly fails to display empathy, we would usually not assume that this person has failed to interpret the situation correctly, but rather that something has happened to cloud the person's responsiveness, making her somehow morally stunted. This is how I suggest the father's reprimand is best understood.)

But in what sense does the direct responsiveness described above 'ground' the fact/value distinction? If we assume that the girl indeed comes to develop a deepened responsiveness to her brother and his pain, then this will no doubt go hand in hand with a different description of the situation, that is, it will be reflected in what she takes to be the facts of the situation. Indeed, if we stay with the example, it may be questioned whether prior to her awakening, the girl even had a conception of her brother's pain. It could be imagined that she used the word 'pain' primarily because she learned that others use it to describe similar behaviour.³⁴ If it is assumed that this usage was barely coloured by her personal experience of Others' pain, however, then it can hardly be said that she grasped the reality – i.e. the reality of an Other's suffering – captured by it. A sense of this reality is inseparably tied to our

³³ Cf. Strandberg, *Forgiveness and Moral Understanding*, p. 218; Gaita, *Good and Evil*, p. 164: "Actions have the power of revelation; a certain kind of love, for example, might reveal its object to us."

³⁴ A state that, I think, would be considered morally deeply troubling in the case of a child who is no longer an infant. Accordingly, it is near unimaginable that a girl old enough to use the word 'pain' has no experientially enriched understanding of what it may mean.

relation to it, i.e. to how it claims us in response.³⁵ Or, as Peter Winch puts it, “recognizing another as a fellow human being is in a certain way inseparable from behaving towards him as a fellow human being”.³⁶ In a similar vein, the scientifically minded philosopher’s assumption that pain is a plain empirical fact – the kind of “psychological patiency” that Goodwin has in mind – stands in need of amendment. If it makes sense to speak in this respect of plain empirical facts at all, it would perhaps be in reference to a given entity’s bodily movements or its neurological brain activity. But none of that is pain per se. It requires one to experience such facts *as pain* in order to regard them as part of the factual make-up of the situation; this experience is “[w]hat gives us so much as the idea that living beings, things, can feel”³⁷ (in this case, that they can feel *pain*). And the very fact that we are ‘always already’³⁸ inclined to speak of certain behaviour as pain behaviour (irrespective of a possible classification of the being exhibiting it) shows that at times we simply do experience Others as being in pain, an experience that can only be understood with reference to our response to it. Thus, articulating pain in terms of mere ‘psychological patiency’ will no longer appear as the clearer description, cleansed from all remnants of ‘merely’ subjective feeling. On the contrary, it will appear the result of an abstraction, an abstraction that may be necessary in order to conduct empirical research but nonetheless one through which the meaning of the object of investigation (i.e. the pain) will likely be thinned out, if not distorted.³⁹

The flipside of the coin is that the kind of seeing in question is in itself morally charged, i.e. it comes with being claimed by the Other’s presence, in our case by the presence of an Other in pain. The moral *responsiveness* elicited in the direct encounter with the Other must be presupposed in order to meaningfully speak of the kind of *responsibility* on which action-centred moral philosophy focuses.⁴⁰ The sister can only be responsible for failing to help her brother if she can be assumed to be morally responsive to him, just as we are responsible for inflicting suffering on animals because we are morally responsive to them. One could say that the kind of being claimed by an Other’s presence – in the examples above, by the Other’s pain – is the experience of the ‘inside’ of moral normativity. It is the experience in which one feels the pull towards the Other – in this case, the pull to attend to him and alleviate his pain – yet in a way in which the taking-in of the situation and the reaction to it are not yet separated. As such, it lies beyond – or rather, at the roots of – any possible subsequent separation of fact from value, say in order to conduct empirical research. At the same time, however, this experience is also what prevents a total severing of the tie between fact and value, lest we lose sight of what we mean when speaking of pain. In other words, our experiences of moral responsiveness to Others and the senses of moral significance arising from them must continue to nourish our thought in order for us to meaningfully speak of what we owe to Others (and how we may fail to live up to what we owe them). Now, much needs to be said about how, according to my account, it is to be understood that we can fail to live up to the Other’s claim (and, hence, of what we owe to Others), but that would require another text. Instead, I will conclude this essay with a brief outlook on what follows from the above reflections for the discussion of moral status.

³⁵ Cf. Gaita, *Good and Evil*, p. 59: “The ‘reality’ of moral value is inseparable from the reality of it as a claim on us, and serious responsiveness to that claim is internal to the recognition of its reality.”

³⁶ Winch, ‘Who is my Neighbour?’, p. 156; emphasis in the original.

³⁷ Cf. Ludwig Wittgenstein, *Philosophical Investigations*, §283.

³⁸ This transcendental formulation is not supposed to indicate a commitment to a Kantian outlook but simply to render the *Unhintergebarkeit* of the experience of some behaviour as pain behaviour.

³⁹ Cf. John McDowell, ‘Values and Secondary Qualities’, in *Mind, Value, and Reality* (Cambridge, Mass.: Harvard University Press, 1998), pp. 143–145 (although in reference to fear instead of pain.)

⁴⁰ Cf. Stanley Cavell, *Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism* (Chicago: University of Chicago Press, 1990), at p. 25.

5. Categorising Experiences of Moral Responsiveness

Because I have focused on an example that features (unimpaired) human beings, let me conclude by clarifying what it means to think along the same lines in relation to other beings and their moral relevance for us. As stated above, moral status is commonly ascribed on the basis of properties: one identifies that a creature has (a) certain property(/-ies) deemed to be of moral relevance in respect to human beings, and concludes that other beings with the same property(/-ies) must, at least in that respect, be ascribed the same moral relevance.⁴¹ My discussion has turned this account on its head. I have tried to show that we do not ascribe moral relevance to human beings because they are bearers of certain properties, but rather, inversely, we ascribe certain properties to human beings because we experience them as claiming us in a morally charged response to them.⁴² Similarly, we do not first identify that human beings prefer not to suffer pain and therefore decide we will / ought to try to avoid inflicting it on them; instead, the very response to how they claim us already contains the understanding that whenever possible they are not to be harmed. The explicit articulation of the moral obligation to spare the Other's pain whenever possible is thus not separate from the experience of the Other but rather a spelling-out of that very experience. But if the morally charged encounter with Others lies at the root of coming to understand them as morally significant, then no detour via empirical facts or Singer-style arguments from analogy is called for in order to show that they are of moral import. If the encounter is foregrounded, the question whether it is a human being or a member of a 'moral margin group' is secondary. Many encounters with other beings, including many of those who constitute the so-called moral margin, are 'always already' *experienced* as being morally significant before any attempts can be made to ascribe to them a determinate moral status. This is not a common sense claim like the one criticised above but rather the precondition both for there being a common sense *and* for the possibility of deviation from it. Even the Cartesian who denies that animals do in fact feel pain can only do so by having earlier experienced them as being able to suffer.⁴³ So, in order to fathom what moral relevance Others may reveal themselves to have means primarily to engage with them face to face and in an open way. It is on the ground of such encounters that we will describe other beings as being able to feel pain, fear, etc., in a way that is morally meaningful to us.⁴⁴

This insight will not always yield simple solutions. While in encounters with infants and the cognitively impaired, we would all certainly experience ourselves as morally summoned by their presence, perhaps even more than in the case of the typical healthy human adult. In other encounters, matters will be less clear. I am certain that I would experience the presence of a seriously wounded sheep as claiming me in an intense moral response, yet I doubt that the presence of a wounded fly or a damaged house plant would claim me in similarly gripping way (although experience may yet prove otherwise). While I would probably be quick to end the fly's misery out of a sense of pity, this act would surely be far more gut-wrenching if the animal were a sheep.⁴⁵ Moreover, it is much easier to imagine

⁴¹ Cf. Raimond Gaita, *Good and Evil*, pp. 114–115.

⁴² Cf. David Cockburn, 'Human Beings and Giant Squids', pp.145–146.

⁴³ In this sense, there is thus something self-defeating in the Cartesian's claim, at least that animals *generally* do not feel pain. One may obviously doubt whether a *particular* animal may not fake pain behaviour. But even that presupposes an experientially substantiated understanding of genuine pain.

⁴⁴ Cf. David Cockburn, 'Human Beings and Giant Squids', at p.148: "That we can see these similarities between the behaviour of flies and squids and that of human beings is a *reflection* of, not a condition of, our ability to ascribe the pain or fear. We might then, with some justice, reverse Wittgenstein's remark, writing instead: 'Only of what has sensations; sees; is blind; hears; is deaf; is conscious or unconscious can one say that it is a living human being or resembles (behaves like) a living human being.'"

⁴⁵ It should be emphasised that what I have in mind when speaking about *the* sheep or *the* fly is precisely not an encounter with them as instances of an overarching species, the knowledge of which allows me to infer whether the

a genuine disagreement over the kind and intensity of moral claim exerted by flies or house plants than by, say, human infants or the cognitively impaired. If someone were to tell me that she feels little remorse for smashing house flies simply because they annoy her, I would take this as much more credible and much less morally troubling than if she said she would relate in that way to annoying infants. Yet, that does not mean that I would any more agree with her, let alone be pacified by relativistic slogans reverting to the subjectivity of perspective. Given the fundamentally experiential nature of being ethically claimed by an Other, such “real disagreements”⁴⁶ may not be solved, and if the ethical experiences seem to diverge, arguments will be of little help.

This being said, it is also possible – and of great ethical importance – that how someone else reacts to such beings may help oneself open up to a deeper ethical responsiveness.⁴⁷ Some years ago, when I commonly used to swat annoying house flies, I met someone who always carefully caught them in a matchbox and released them on the balcony. This was no deep moral revelation, but it did make me come to regard my previous handling of the insects as somewhat brutish and callous. More importantly, however, it made me relate differently to the animals; not only do I now act differently towards them (I adopted the other person’s way of dealing with them) but seeing her treat them so gently has given rise to what I would call a deepened sense of moral responsiveness to them.⁴⁸

The upshot of the above is that the experience of being claimed in immediate response to an Other conditions that this Other is taken up in the class of beings that are considered morally significant, and not vice versa. It is not by identifying a being – regardless of whether it is human or not – as belonging to a certain class, distinguished by certain properties, that I ascribe a certain moral status to it, from which I can then deduce which kinds of actions towards it are morally prohibited, allowed, demanded, and so on; rather, it is through morally loaded encounters with individual Others that I can detect similarities and differences between those Others and thereby make out different forms of responsiveness. It is only on the basis of such experiences of similarities and differences between the ways in which Others claim me in response that I may then subsequently (and more or less clearly) categorise different forms of moral considerability, i.e. trying to circumscribe what is owed to which kind of being.

The cognitively impaired, the sheep, the fly, and the house plant are members of some of the typical moral margin groups the moral status of which is nowadays common to discuss in moral philosophy. Focusing on the experience of being morally claimed, however, shows that these beings, in addition to all those ‘normal healthy adult humans’, simply *do* call forth my moral responsiveness to them. That is sufficient for saying that they all simply are of moral concern and, if one wants to use this kind of language, can thus be said to have some moral status⁴⁹. Perhaps they will, either in some respects or generally, not be considered our moral equals, but that point will boil down to their being morally less significant only if moral significance is attached to, and inferred from, certain properties, so that lacking those properties that are deemed morally salient in respect to *us* will result in *their* being of less moral import. If one rejects this view – as I do – it may simply mean that the ways in which *they* claim *us* are different from how *we* claim *each other*, not that these claims are less significant (although, of course they may be). Ultimately, only the encounter with them will tell.

respective individual animals do feel pain and whether this pain is morally salient. On the contrary, it is the experience with individual animals that will fundamentally shape how one understands the species.

⁴⁶ Rush Rhees, *Without Answers* (London: Routledge & Kegan Paul, 1969), at p. 94, although his entire discussion (pp. 94–96) is of relevance for my point.

⁴⁷ Cf. Hugo Strandberg, *Forgiveness and Moral Understanding*, Ch. 9.

⁴⁸ It may be even more appropriate to say that her gentleness not only deepened my responsiveness *towards flies* but that it also coloured my overall responsiveness to Others – it changed me as a person. In this way, how one morally relates to Others is deeply tied up with the kind of person one is.

⁴⁹ Joel Backström, ‘Wittgenstein and the Moral Dimension of Philosophical Problems’, at p. 743.

One last note to anticipate a possible objection: My overall point is *not* that moral status talk should be done away with altogether. I do think such talk may indeed be called for, especially as a theoretical aide for the kind of political discourse concerned with the development of laws serving to ensure that not only those who have the legal status of *persons* receive just legal treatment. I think Backström is correct when he claims that a language reform “can be introduced for special purposes, practical, scientific, political and so on” while simultaneously agreeing with Wittgenstein that such a reforms is possible only “in very definite and small areas, and it presupposes that most concepts remain unaltered”⁵⁰. We can indeed artificially attempt to reshape the meanings of our moral language for concrete purposes and perhaps with good reasons behind it but we should remain aware that this leads to a rupture between our creation and the deeper seated moral understandings expressible by this language. (The present paper was merely an attempt to bring out those deeper-seated understandings.) If, thus, the moral status of certain groups is defined in order to be able to guarantee them just legal treatment, it should be done in the awareness that any such definition is, ultimately, ‘grounded’ in our shared senses of how the members of those groups claim us – each of us individually – in immediate, morally charged response to them. Due to its being rooted in the individuals’ experience, any such definition must remain inherently unstable and, thus, tentative at best.

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⁵⁰ Ibid.

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Grounding Basic Equality

James Orr

Although egalitarianism has been the dominant orthodoxy in Anglophone social and political philosophy for many decades, there have been surprisingly few attempts to account for the axiom on which it rests, namely that human moral worth does not come in degrees. This article begins by rehearsing and evaluating two families of approaches to the grounding problem. The first favours accounts that seek to preserve consistency with metaphysical naturalism, while the second relies on more philosophically contentious claims about the metaphysical status of the human person. I then outline reasons for supposing that none of these accounts of basic equality offers a convincing theoretical foundation for egalitarianism. I conclude by sketching permutations of a theological account before arguing that one of these variations satisfies many of the explanatory criteria that a successful solution requires.

Introduction

Few propositions are more tightly woven into the moral imaginary of modernity than the claim that we are one another's equals. Appeals to equality in public discourse are still more convincing candidates for the status Ronald Dworkin once famously ascribed to rights: the demand for equal treatment operates as a 'trump' across even more swathes of public policy, from distributive justice to employment law.¹ So it is all the more paradoxical that the virtually unanimous support for egalitarianism among political philosophers and policy-makers is founded on a moral proposition—namely, that every human being possesses an equal moral worth—that has received scant philosophical elaboration or defence among moral philosophers or religious ethicists. What explains the asymmetry between the attention given to social or economic forms of moral egalitarianism?² Pragmatic agnosticism on these questions is attributable in part to the influence of John Rawls' well-known insistence that 'comprehensive doctrines' in metaphysics should be

¹ Dworkin 1977: ix. Central to Dworkin's thought is the insistence all members of a political community are to be treated with equal respect and concern; but he never offers to explain the theoretical justification for treating this abstract principle as foundational. It is posited without argument as 'The Deepest Moral Assumption' (Dworkin 1977: 184).

² The small handful of treatments to emerge in the last five or six decades would include Berlin 1960; Williams 1973; Spaemann 1977; Lloyd Thomas 1979; Pojman 1997; Waldron 2002; Berman 2008; Carter 2011; Sher 2014; Waldron 2015; Arneson 2015; and Sher 2015. Almost all these approaches to the problem of grounding equality either conclude that it is futile or offer an extremely tentative sketch of what a successful account might look like.

bracketed when formulating the principles of an ideally just society.³ Yet the entire edifice of *A Theory of Justice* rests on at least one comprehensive doctrine, namely that basic equality is true. Rawls does not explain why his injunction does not apply to basic equality, even though it is no less comprehensive and historically contested a proposition than those he does not refrain from bracketing.⁴ That this contradiction at the heart of so influential a project is persistently ignored indicates that, as an axiomatic assumption of Anglophone political philosophy, moral egalitarianism has come to resemble nothing less than a secular dogma.⁵

Yet it turns out that grounding basic equality is a remarkably difficult philosophical task. The chief source of the challenge can be stated straightforwardly enough. If basic equality is true, there must be some feature that all human beings equally possess that justifies moral concern. But there does not seem to be any *descriptive* feature that all human beings equally possess that justifies moral concern. Human beings differ on almost every plausible metric one could apply, whether it prehensile strength, cognitive ability, physical height, and so on. As Rawls himself concedes, '[t]here is no natural feature with respect to which all human beings are equal, that is, which everyone has (or which sufficiently many have) to the same degree ... We still need a natural basis for equality.'⁶ So basic equality is false. If basic equality is false, then the many and various forms of egalitarianism that take it for granted lack any fundamental justification. At this point some philosophers would insist that the quest for grounding basic equality presupposes a naïve objective account of human nature and that hopes of resolving it are vestiges of a foundationalism that represents, in Richard Rorty's words, a world well lost.⁷ On this view, what is needed is not a solution to the problem of basic equality, but rather its therapeutic dissolution.⁸ In a similar vein, Kai Nielsen has suggested that since basic equality is a historically emergent and contingent proposition, the best that can be hope for in the wake of foundationalism's collapse is a coherentist justification of it, a reflective equilibrium

³ E.g. Rawls 1993: 13. There have of course been many and various kinds of egalitarianism developed and defended in recent decades, but Rawls advances what is plausibly the most influential and systematic egalitarian theory of distributive justice.

⁴ Rawls' tacit reliance on basic equality was noted early on by Dworkin 1977: 179-83.

⁵ Rawls might respond to this objection by claiming that basic equality is one of 'the conditions embodied in the description of the original position ... that we do in fact accept' (Rawls 1971: 19; cf. Rawls 1971: xx: '[E]quality as it applies to the respect which is owed to persons irrespective of their social position ... is fundamental'). He goes on to suggest that 'if we do not, then perhaps we can be persuaded to do so by philosophical reflection.' This article is an attempt to engage in the kind of philosophical reflection Rawls recommends; but, as we shall see, any such reflective exercise cannot be conducted without getting caught up in assessing the competing merits of comprehensive metaphysical frameworks. In other words, the tools needed for the task of clarifying basic equality, the most important constitutive principle of his project, are precisely the ones Rawls excludes from his methodology.

⁶ Rawls 1971: 444. Rawls offers an extended discussion expressly titled "The Basis of Equality" (Rawls 1971:

§77), but far from setting out foundations for basic equality that section parses it as a label for the total constellation of conventional rights to be ascribed to each citizen in Rawls' ideal society. That leaves us with an account of basic equality that is not 'basic' in the relevant sense: it consists only in the strength of the social contract to which a particular society decides to bind itself, if indeed the members of that society accept the need for a social contract in the first place.

⁷ Rorty 1972.

⁸ Rorty 1998. Rorty here presses his rejection of foundationalism—and, indeed, metaphysics *tout court*—into the service of critiquing efforts to find a substantive justification for human rights.

‘widely accepted over cultural space and historical time,’ in which the principle of equality plays a regulative function.⁹

My assumption in what follows is that these sceptical strategies are ill-founded: the absence of a substantive justification for basic equality should concern those who insist that civic and legal doctrines of egalitarianism are enabling conditions of a morally flourishing society and culture. The first half of this article takes up two families of approaches to the puzzle. Section 1 explores solutions elaborated within the compass of metaphysical naturalism while Section 2 considering approaches that draw on more metaphysically contentious assumptions. None of these approaches, I contend, offers a promising way forward: a comparative analysis merely casts into sharper relief the intractability of the problem of grounding basic equality. The difficulties motivate the argument of Section [3], which surveys and assesses how theological frameworks might yield a solution to the problem of basic equality that avoids the pitfalls of secular approaches.

It is not the aim of this paper to establish or defend a particular account what constitutes human value as such. That question is not at all irrelevant: a convincing defence of basic equality must presuppose some workable account of human worth if the claim that human beings are equal is to be a morally substantive one.¹⁰ But since the problem has received sustained attention in recent decades, notably in the course of many epicycles of debates on the nature of human rights,¹¹ for the most part I shall simply assume that each approach to basic equality I consider offers a moderately plausible analysis of human value. Where I do question the merits of a particular analysis, I simply note it as an additional explanatory burden for the relevant account to discharge rather than attempting a comprehensive critique of why it cannot do so. My focus is not on the nature of human value as such, but on the different theoretical challenge of finding a basis for human value that does not come in degrees that renders intelligible the widespread intuition that moral egalitarianism is true.

1. Naturalistic Basic Equality (I): An Austerity Model

I suggested earlier that one obvious explanation for the neglect shown towards the problem of basic equality is a Rawlsian allergy for anchoring social and political ideas in contentious theoretical foundations. But there is, perhaps, another contributory factor, namely the dominant commitment of many Anglophone philosophers to metaphysical naturalism. The reason it may be a factor is that a naturalistic ground for basic equality would need to be formulated in scientific terms – or, at least, in terms reducible to scientific terms – and it is not at all clear what scientifically describable features every human being possesses equally that could also justify moral concern. The intuition that variations in the empirical features of persons could never count as criteria for differentiating their moral worth has brought about some of the most consequential moral revolutions in history. Yet

⁹ Nielsen 1988: 67-9. Nielsen advocates something like a ‘Moorean Shift’ in defending basic equality: we know that basic equality is true more firmly than we know the premises of any sceptical argument to the contrary. It is hard to reconcile that strategy, which implies that intuitions about basic equality run as deep as the intuition that the external world exists, to his claim that basic equality is a historically contingent idea that continues to be much more widely contested than a realist stance towards external reality.

¹⁰ For a trenchant critique along these lines of the quest for basic equality, see Westen 1982.

¹¹ This body of literature that is now quite extensive: see, for instance, Gaita 2000; Perry 1998; Ruston 2005; Wolterstorff 2008; and O’Donovan 2009.

if the intuition that empirical features could not be relevant to adjudicating moral worth is true, then given that naturalism rules out appealing to any nonempirical features that are irreducible to empirical ones, it is hard to see how it could offer any defence of basic equality.

One strategy that the naturalist might adopt is to specify a *threshold* for an empirical property beyond which possession of the property to varying degrees ceases to count in the estimation of moral worth. This is the well-known proposal developed and endorsed by Rawls.¹² The basic idea is to transform a *scalar* property that would be intrinsically unsuited to grounding equality into a *binary* property by introducing a boundary on the scale, thereby turning it into a *range* property, namely a scalar property that, by ranging across every point on the scale above a particular threshold, can be treated as a non-scalar property. Statutory restrictions on age operate in a similar way: taking a citizen's age as a scalar property, a statutory restriction stipulates a threshold above which a particular activity is legal, thereby introducing a binary distribution between citizens who are and who are not legally permitted to engage in that activity. At the same, the law specifies a range within which no point is treated in scalar terms, so that citizens are treated with parity whether they exceed the legal age by two years and or two decades.

As a method for incorporating characteristics that are always likely to be dispersed in different degrees among human beings into a formula for moral equality, this approach is undeniably ingenious; but there are at least three reasons for thinking that this solution is not in fact as promising a solution to the problem as many egalitarians suppose. In the first place, since the moral salience of the threshold would be derived from some other more fundamental property, it is not clear why that more fundamental property should not be preferred as the basis for moral worth, even if it is a scalar property (that is, one capable of being possessed to different degrees). Second, the threshold cannot be introduced by fiat: there must be some clear and principled rationale for doing so.¹³ Third, even if a plausible candidate could be identified it would still not explain why that property would confer moral worth on a person if possessed up to a specified degree but cease to confer greater moral worth on those who possessed it to a greater degree.

A more radical response would be to embrace the paradox and abandon attempts to ground basic equality between human beings altogether. Peter Singer, for instance, invites us to infer from the fact that empirical facts could not ground equal moral worth between human beings as a reason for concluding that that there could not be any moral justification for excluding nonhuman animals from the parameters of equal concern. But that approach risks reducing basic equality to an entirely trivial moral proposition, since it would not explain why the parameters of equal concern should not be extended to include inanimate objects as well.¹⁴ Singer anticipates this objection by identifying *sentience* as the property limiting the scope of equal moral worth to animals alone:¹⁵

No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering—insofar as rough comparisons can be made—of any other being. If a being is not capable of suffering, or of experiencing enjoyment or happiness, there is nothing to be taken into account. So the limit of sentience ... is the only defensible boundary of concern for the interests of others. To mark this boundary by some other characteristic like intelligence or

¹² Rawls 1971: 444-5.

¹³ Waldron 2002: 76.

¹⁴ On this point, see Sher 2015: 18.

¹⁵ Singer 2002: 8-9.

rationality would be to mark it in an arbitrary manner. Why not choose some other characteristic, like skin color?

There are a number of problems with Singer's approach, but for our purposes by far the most pressing objection is that sentience does not seem to be a feature that is equally dispersed among the beings whose moral worth it is supposed to justify. Whether or not every sentient being – including sentient beings that belong to the same species – possesses the same determinate degree of sentience as every other is a highly contested question. But since sensory states vary so widely in terms of their content, intensity, and duration, sentience seems an unlikely candidate for constituting *equal* moral worth between all the beings that possess it, even if one accepts that it could constitute moral worth. Whatever the merits of Singer's proposal, most philosophers hold that determining the moral status of nonhuman animals does involve a different set of considerations, even if there is disagreement on the question of how to apply a fine-grained scale of value to the animal kingdom and even if it is granted that human exceptionalism is true – that is, even if it is granted that human animals should be located at the highest level of that scale of value. It seems reasonable to assume that those considerations would involve features that would not apply in the same way – let alone to the same degree – as they would to human persons.

Some naturalists might be tempted to ground basic equality in the kind of nonempirical features that other approaches invoke for the task, but to construe them in a naturalistically acceptable way. They might, for instance, endorse the proposal that basic equality consists, as George Sher has argued,¹⁶ in our equally possessing a distinct centre of subjectivity. Alternatively, they might attempt to naturalise a Kantian conception of equal human worth based on the free agency or rational capacities of human beings. But sort of strategy would only leave naturalists with a dilemma. For if they advance accounts of subjectivity, freewill, or rational capacity ontologically robust enough to ground equal moral worth, that would cut sharply against their metaphysical commitments.¹⁷ If, on the other hand, the relevant ingredient is analysed reductively in terms of natural facts, those commitments are preserved, but at the cost of generating the problem of the variability of empirical features with which we began: basic equality would be grounded in an unfathomably complex matrix of physiological states on which the relevant feature was treated as supervening, a matrix that would need to be quantitatively identical for every human person.

¹⁶ Sher 2014: 81: '[W]e are moral equals because we are equally centers of consciousness ... The fact that we are equals in this respect ... explains why each person's interests are of equal moral importance.'

¹⁷ Perhaps it does not place *intolerable* constraints on naturalism, at least to the extent that more ontologically expansive theories of the mental are taken to be consistent with it. Take, for example, a property-dualist analysis of subjectivity as a candidate for grounding basic equality. Suppose one could work out a convincing account of mental properties according to which they were construed as ontologically irreducible to physical states without undermining the principle of causal closure of the physical on the basis that mental states were related to physical states by logically necessary supervenience relations, such that any change to the subvening physical states entailed a change to supervening mental states. The same problem arises: a chief attraction of subjectivity for grounding basic equality is that it is a *binary* property, one that does come in degrees. A person either is or is not a centre of subjectivity. But given the strength of the supervenience relations linking subjective states to underlying neurological states, in the final analysis subjectivity would be analysable in terms of an empirically available set of *countable* physical states, states that would have to be arithmetically equal from person to person to be plausibly constitutive of basic equality.

A final worry: even if a naturalistic ground for basic equality could be identified, the overall account would ultimately need to be reconciled to an exclusively evolutionary account of the origins and development of human persons. Since differences in the adaptive fitness of human beings are intrinsic to the evolutionary account of human development, it seems odd to suppose that those inequalities should suddenly cease to be relevant. And, more generally, naturalistic basic equality would also need to find a way of addressing the kind of sceptical arguments from evolutionary theory against realist conceptions of value advanced in recent years by Sharon Street and others.¹⁸ It may well be possible to defend basic equality without relying on a realist stance towards moral value, but antirealist candidates for the relevant grounding property would have to be ones that are ascribed to every human being (and only human beings) in equal measure. It is simply not clear what those candidates could be.¹⁹

2. Naturalistic Basic Equality (II): An Inflationary Model

If an austere rendition of naturalism seems an unprepossessing approach to the problem, perhaps a more expansive model could deliver the explanatory goods. One obvious way of relaxing the metaphysical constraints would be to turn to Aristotelian doctrine of categoricals, suitably reprinted. When applied to biological species, that doctrine states roughly that there is a set of characteristics that individual members of a species ought to possess in order to be a flourishing instance of it, where the normative force of that judgment is rooted not in what is statistically normal for members of the species, but in a teleological propensity that is intrinsic to each individual in virtue of belonging to that species. Since sheep are quadrupeds, every sheep in world *ought* to have four legs, even if it happened to be the case that, as a matter of descriptive fact, none of them do. Since Aristotelian categoricals provide a normative basis for forming normative judgments about biological organisms, they might also support an axiologically substantive basis of basic equality, one that offends the fewest possible naturalistic scruples. Following Michael Thompson and Philippa Foot, we might suppose that basic equality consists in the fact that every human being qualifies as a member of the same species through sharing a common 'life form,'²⁰ an essence that, as the animating principle of a human person, is constitutive of that person's soul.²¹

The approach has undeniable attractions. It has the theoretical resources for fixing the scope of equal concern in a more principled way than austere naturalism: there are objective biological criteria for treating human beings as distinctive from other beings. It also seems to offer a basis for making evaluative judgments in relation to human beings. But there are, I think, reasons to hesitate before endorsing this approach. One problem is that evaluative judgments about what traits human beings ought to possess are simply not the same kind of judgments as evaluative judgments about the moral worth of human beings. That Priscilla ought to have thirty-two teeth is a judgment that might ground deontological judgments ('Priscilla ought to visit the dentist'); but it does not belong to the same category of judgment as an evaluative judgment about Priscilla's overall moral worth. To evaluate human beings against a teleological horizon of biological or

¹⁸ Street 2006.

¹⁹ Carter 2011: 542.

²⁰ Thompson 1995 and Foot 2001: 38-51.

²¹ For Aristotle himself, of course, ensoulment is a property shared by every living organism: what distinguishes human from non-human organisms is their *rational* ensoulment.

physiological or rational flourishing simply does not yield an immediately obvious justification for treating them with moral concern. And even if it did, that would not explain why moral worth would not be commensurable with the varying degrees to which different human beings happen to attain that horizon.

That would seem to be the approach taken by Aristotle himself, who measured human worth against the benchmark of moral achievement that involved maximising goods such as greatness-of-soul or philosophical contemplation.²² That seems to be why Aristotle endorsed slavery even though he also held that since human beings belong to the same species they are of the same substance,²³ and that since there are no degrees to being a substance, no human being can be more or less of a human being than any other.²⁴ Although he subscribed to a formal doctrine of equality – since he believed that slave and serf, no less than master and ruler, possessed a soul endowing them with a bare capacity for reason – Aristotle also insisted that differences in the exercise of that capacity justify stark differences in their legal and social status. As a way out of our predicament, a strategy that recognises a formal but morally vacuous equality between human beings in this way is plainly doomed to failure.

Space prohibits rehearsing some of the more familiar objections to the metaphysical commitments of expansive naturalism as formulated along Aristotelian lines, but they are not trivial.²⁵ In the final analysis, it does provide a way of explaining normatively distinctive features of human beings; but while all human beings do share equally in that status, it no more explains why moral worth is equally distributed than the fact that every human person possesses chromosomes unique to human beings. Relaxing the constraints of the reductionist rendition of naturalism does yield a clear metaphysical basis for delimiting the scope of basic equality, but at the cost of reducing basic egalitarianism to the vacuous claim that human beings are equal to human beings because human beings are human beings. What began as a conundrum has turned into a banality.

3. Kantian Basic Equality

Faced with the difficulties of securing basic equality on naturalistic foundations, we might prefer to abandon our egalitarian intuitions altogether. There may, of course, be naturalistic solutions that I have not considered, though the startling scarcity of attempts by contemporary philosophers to reconcile naturalistic and egalitarian intuitions would suggest otherwise. But abandoning the quest at this stage would mean overlooking the figure of Kant, who supplies the ingredients for what is the most widely endorsed strategy for grounding basic equality. Transcendental idealism is often put quietly to one side by those who draw inspiration from Kant for approaches to problems in moral and political

²² As MacIntyre 1998: 51 puts it, '[Aristotle's] great-souled man's characteristic attitudes require a society of superiors and inferiors in which he can exhibit his peculiar brand of condescension. He is essentially a member of a society of unequals ... He is very nearly an English gentleman.'

²³ *Metaphysics*, 1058a29-b25; 1017b23-6; 1018a4-12.

²⁴ *Categories*, 3b33-40. Reconciling Aristotle's account of human nature to his acceptance of natural slavery is not straightforward, but his justification seems to have been that collective social flourishing may legitimise the unequal treatment of human beings for social ends even if it is recognised they also have equal moral standing.

²⁵ Defenders of immanent universals, for example, defend the existence of an entity—the universal property of rational ensoulment, for example—that is capable of instantiation in multiple locations at the same time, while a realist stance towards natural kinds implies a strong essentialism about species that many philosophers of biology who are open in principle to metaphysical essentialism would reject.

philosophy,²⁶ but given the importance of finding a nonempirical ground for basic equality, one might be tempted to make the most of the noumenal realm. One obvious solution would be to treat moral worth as equally distributed to all human persons analysed as noumenal selves, confining observable variations from person to person to the phenomenal realm.²⁷ Still, an immediate concern is that even if it would be plausible to treat Kant's domain of noumenal selves as an egalitarian realm, the fact remains that moral behaviour occurs in plainly empirical circumstances. These scenarios would therefore need to be evaluated in observable ways conducive to public justification, which would not be case were basic equality to rely on a metaphysical thesis as contestable as the existence of noumenal selves. And if basic equality does after all consist in capacities exercised causally in the phenomenal realm, then the Kantian approach returns us to the original problem of grounding equal human worth in empirical features that will vary from person to person, though saddled with considerably less parsimonious commitments than on the naturalistic approaches. Moreover, although the noumenal self's capacity to act freely in a pervasively mechanistic world is a highly distinctive feature of the framework Kant's conception of human nature, it does not follow that it is *also* distinctive in endowing the noumenal self with intrinsic moral worth, which is what a successful account of basic equality requires. This basic strategy would also involve weighty metaphysical commitments, most notably acceptance of a noumenal realm as axiologically fundamental, that few accepted in Kant's day, and fewer still would accept in ours, including many political and legal philosophers who might otherwise adopt Kantian stances on less theoretically fundamental questions. In sum, I think it is fair to suggest that there are few who would reject Bernard Williams' assessment that '[t]he very considerable consistency of Kant's view is bought at what would generally be agreed to be a very high price.'²⁸

A more conventional version of Kantian basic equality might focus less on the noumenal self as a convenient vehicle of value, but rather on the value constituted by our freedom as moral agents equipped with the capacity to discern through practical reason what the moral law demands of us. Now in invoking nonempirical features once again, this approach would once again preserve a theoretical advantage over naturalistic accounts. Yet the worry immediately arises that freedom can be circumscribed to different degrees for different agents and that a capacity for moral deliberation will also vary considerably from person to person. To observe that some of us make good moral decisions and others appallingly bad ones is not much less contentious than it would be to note difference in our empirical features. Some human beings are so cognitively impaired that they are incapable of moral deliberation or rational action. If the axiological status of a person is taken to be rooted in these capacities, we would expect variations in those capacities to generate corresponding changes in that status; and, if that is correct, it is hard to see how Kantian egalitarianism so construed could get off the ground. Even if it is granted that a capacity for moral reasoning and action is itself constitutive of moral worth—a claim that unhappily elides deontic and axiological considerations—the Kantian account would still need to explain how to identify particular uses of a given capacity as a distinctively moral one. After all, some capacities will be more salient to living a moral life than others; and these same capacities may be just as conducive to success in nonmoral scenarios and, in those scenarios, would be likely to vary from person to person in just the same way that other natural capacities would vary.

²⁶ E.g. Strawson 1962.

²⁷ Sangiovanni 2017: 48-50.

²⁸ Williams 1973: 235.

One final worry: the mere possession of some capacity does not in itself qualify as a sufficient criterion for basic equality, even if that capacity were equally distributed to every person. For it must be the case that there is equality not only in the simple possession of a feature, but also in the degree to which it is possessed. It could be said of two sprinters, for instance, that they equally possess the capacity for locomotion. But that would be a trivial form of equality. If both sprinters were equally fast—that is, if the capacity were always exercised to the same degree—there would be a substantive form of equality between them. Which of these two forms of equality more accurately describe the Kantian person's capacities for freedom and practical reason?

I suggest that although the capacity for action is a necessary condition for right action, it could not be a sufficient ingredient for any substantive form of equality. One can make sense of the notion that freedom has an instrumental value, especially if one accepts Kant's claim that fulfilling our moral duties presupposes that we are free to do so. Yet how plausible is the claim that freedom is not only a *condition* for bringing about moral value but actually *constitutive* of the moral value of the person who possesses it? One might be tempted to attribute moral worth to a person who consistently used his freedom to act rightly and reasonably, but since not all human beings use their capacities this way, moral worth would not be equally distributed. Kant himself insists that a good will is the only unqualified good. But if that is correct, what is the basis for attributing the same value to a person in possession of a good will as to a person in possession of a bad one?²⁹ Considered on their own terms, free agency and practical reasoning are instrumental goods inasmuch as they are the conditions for morally meaningful agency, but they are not intrinsic to or constitutive of moral worth.

4. A Cartesian Coda

One approach that bears some resemblance to the first Kantian strategy would involve grounding basic equality in a Cartesian conception of human personhood. Cartesian souls are metaphysically simple: not being made of any parts, every human person shares equally in a qualitatively identical kind of entity. Since the Cartesian ego is more straightforwardly constitutive of what it is to be a human being than the Kantian self, ensoulment on this view would also fix the scope of equality to include every human being and exclude every nonhuman one. Since the ontological status of the Cartesian ego as Descartes articulates is, in fact, more straightforwardly immaterial than the Kantian self, it would also insulate an account of basic equality against objections from the variability of empirical properties. While substance dualism certainly does not exercise the influence it once did among philosophers, this approach boasts an interesting historical pedigree, especially in the late seventeenth century.

Cartesian egalitarianism was astutely deployed, for instance, by the philosopher Mary Astell (1666-1731), who used it to argue that biological sex could not be relevant to determining the scope of basic equal concern, since the locus of a person's value resides not in physical features, including secondary sexual characteristics, but the soul.³⁰ The

²⁹ Wood 1999: 133; cf. Wolterstorff 2008: 327-8.

³⁰ Detlefsen 2017: 196: Astell's equality feminism starts from a commitment to a Cartesian ontology of the human, specifically his dualism of soul and body according to which the thinking soul is the mark of the divine within each of us and is our human essence ... Since sex attaches to bodies and not to souls, women's human essence is identical with—and thus equal to—that of men. This is the bedrock of Astell's feminism, and it informs her prescription for how women ought to treat themselves.

Cartesian case for the equal treatment of women drew much of its strength from a suspicion of scholastic philosophy's tendency to infer truths about the immaterial nature of human beings from their observable physical characteristics, an inference that the clear metaphysical distinction proposed by substance dualism between mental and material substances did not need to invoke.³¹ Similar arguments were advanced by François Poulain de la Barre (1648–1723), who, like Astell, argued for a radical version of substance dualism according to which God grafts sexless souls into bodies and, since ensoulment is a binary rather than graded property and bodies not souls that possess secondary sexual characteristics.³² He added that since the immaterial mind is equal for all beings regardless of the significance of what it is directed towards, and since it functions in the exactly the same for all beings endowed with one, there could be no relevant evaluative difference between men and women.³³ Since that reasoning can be generalised to all minded human beings, Cartesian egalitarianism may strike some as an attractive strategy, even if it may in the end prove too much, since it would seem to follow that any being possessing an immaterial mind—including angels and even God—would be on par in evaluative terms with every other minded being.

Both Astell and Poulain de la Barre accounted for the axiological status of souls in theological terms. They did not assume that souls possessed an intrinsic (equal) moral worth independently of a divine bestowal of value on them.³⁴ But to repeat a point raised earlier in the context of the noumenal self, while it might be tempting to suppose that the value of a Cartesian soul consists in its metaphysically distinctive status, the fact that it transcends spatial constraints, temporal flux, and mechanistic processes does not entail that it is axiologically distinctive. After all, if they exist at all, geometric forms transcend space, time, and mechanistic processes; but it does not follow that they are evaluatively significant denizens of abstract reality. Immaterial objects are not intrinsically more valuable than material objects, even if it is more plausible to infer equal status between immaterial objects belonging to the same kind. In other words, it is not clear how a Cartesian defence of basic equality could explain why the equal possession of metaphysically distinctive souls should have a bearing on their axiological status any better than a Kantian one.

5. Theistic Basic Equality

We have scrutinised several possible attempts to a coherent and convincing account of basic equality. Naturalism was vulnerable to objections from the variability of empirical properties and from the reducibility of plausibly normative candidates—in particular subjectivity, capacities, freedom, and reasoning—to empirical ones. The other three candidates we considered—Aristotelian categoricals, Kantian noumenal selves, Cartesian souls—were more weakly committed to empirical properties as the ground for equality and therefore more plausible than austere naturalistic egalitarianism; but for all of their

³¹ Clarke 2013: 38–41.

³² My thanks to John Cottingham for drawing my attention to this text.

³³ Poulain de la Barre 2013: 157–8.

³⁴ In Book 8 of *On the Trinity* Augustine offers a theological argument for the claim that women no less than men bear the *imago dei* on the basis of the impropriety of supposing that God could be imaged in material form. The claim that it is the immaterial mind or soul that is the locus of value and not any bodily feature plainly anticipates the one taken by Astell and Poulain de la Barre.

respective advantages, each of these struggled to defend a perspicacious moral egalitarianism.

Taken together, it seems to me that these difficulties should motivate the dispassionate egalitarian to consider a religious basis for basic equality. For many philosophers, especially within the Anglophone tradition, metaphysical theism may be still more contentious than transcendental idealism and substance dualism. Yet the claim that basic equality is a distinctive theological contribution to the history of moral thought is hardly a historically contentious claim.³⁵ As Richard Arneson has noted, '[s]o far as the Western European and Anglo-American philosophical tradition is concerned, one significant source of [basic equality] is the Christian notion that God loves all human souls equally.'³⁶ But the various historical treatments of the origins and development of theological egalitarianism have not touched on the reasoning underpinning it and there remain, moreover, strikingly few contemporary attempts by theologians to defend it.³⁷

But where might such an account begin? There is a cluster of theological ideas that connote basic equality. Scripture endorses *hamartiological* egalitarianism: all have sinned and fallen short of the glory of God.³⁸ There is also an *eschatological* egalitarianism: God desires that all shall be saved from the sin in which all have a share.³⁹ In his letter to the Galatians, Paul elaborates a *Christological* basic equality that insists differences in ethnicity, legal status, and sex are abolished for all those who are 'in Christ.'⁴⁰ There is a scriptural basis for *circumstantial* egalitarianism, according to which basic equality is grounded in the universal vicissitudes of human experience from which even moral probity is no shield, since God makes his sun rise on the evil and on the good, and sends rain on the just and on the unjust.⁴¹ Finally, there is *existential* basic equality between human beings, who are all creatures dependent for their existence at every moment on God, who has an equal concern for all of them.⁴²

In a tentative recent defence of one version of theistic basic equality, Jeremy Waldron argues that there are likely to be several constitutive ingredients in a religious account of basic equality, cautiously refusing to specifying one conceptual lodestar on the basis that no single idea could sustain a sufficiently comprehensive theory of equal dignity.⁴³ Following Waldron's proposal, it might seem appropriate to weave these egalitarian threads in scripture together into a single cumulative case. But while his arguments for which elements should be included in such a theory are among the most careful and insightful in contemporary debates on basic equality, Waldron's holistic strategy strikes me as misguided. In a different dialectical context, Anthony Flew once remarked that if one leaky bucket cannot hold water there is no reason to suppose that ten

³⁵ Siedentop 2017: 64-5: 'For Paul, the gift of love in the Christ offers a pre-linguistic solution, through a leap of faith—that is, a wager on the moral equality of humans ... [I]n Paul's writings we see the emergence of a new sense of justice, founded on the assumption of moral equality rather than on natural inequality.'

³⁶ Arneson 2013.

³⁷ Notable exceptions would include Forrester 2001 and O'Donovan 2005: ch. 3, though each of these treatments focuses almost exclusively on the concrete application of egalitarian ideals to social and economic concerns.

³⁸ Rom. 3:23.

³⁹ Ez. 18:23; Matt. 23:37; 1 Tim. 2:4; 2 Peter 3:9.

⁴⁰ Gal. 3:28.

⁴¹ Matt. 5:45.

⁴² Mal. 2:10.

⁴³ Waldron 2015: 203-5.

can. And it turns out that many of the most theologically tempting approaches to formulating a theological case for basic equality are far from watertight.

Consider in the first instance basic equality parsed in harmatological terms. That human beings are all equally sinners before God is a perfectly coherent claim and, for the Christian theist, a true one. But sinfulness seems an odd basis for ascribing value to human beings, even if it could qualify as a reason for treating them equally; Christian soteriology is historically consistent on the point that God loves human beings *despite* their sinfulness.⁴⁴ And since Christian theism is committed to the claim that some sins are worse than others,⁴⁵ hamartiological measures would be an unconvincing benchmark for equal human worth. What about eschatological or Christological basic equality? Both approaches seem vulnerable to the worry that Christianity's salvific economy is structurally unequal: some human beings are saved, others are not; some are 'in Christ,' others are not. That certainly seems a compelling worry if God is understood to destine human beings to unequal eschatological ends independently of foreseen merit along the lines Calvin seems to suggest.⁴⁶

An obvious rejoinder for the theist would be to rule out double predestination in favour of some other way of reconciling creaturely freedom and divine sovereignty. Suppose the theist could successfully defend one of these solutions, perhaps by arguing that eschatological egalitarianism obtains even if the eschatological destinations of human beings differ on the basis that God equally bestows on human beings the freedom to choose their destination. In that case the theist faces the same challenge as the Kantian egalitarian of explaining why freedom is generative of human worth rather than an instrumental means for achieving it and why an instrumental means that can be used for ends that are not plausibly constitutive of human value is not evaluatively inert. What, finally, of circumstantial and existential egalitarianism? These approaches seem to be the weakest avenues for a solution since they do not explain why the scope of equal concern encompasses *only* human beings, since the circumstances of all creatures include goods and evils (and to varying degrees), and all creatures by definition depend existentially on God's sustaining agency. As I have already suggested, if there is no non-arbitrary way to delimit the scope of equal concern, basic equality ceases to be a substantive moral ideal.

Since the various modes of theological reasoning considered so far have not yielded any perspicuous dialectical advantages over other accounts, the problem is perhaps better approached more obliquely. Considering two brief passages from what can justly be claimed to be one of the most notable defences of basic equality in this history of moral theology. Gregory of Nyssa's fourth homily on Ecclesiastes is arguably the first sustained critique on an institution that exemplified more sharply than any other just how unintelligible basic equality once was as a moral proposition:⁴⁷

What did you find in existence worth as much as this human nature? What price did you put on rationality? How many obols did you reckon the equivalent of the likeness of God? How many staters did you get for selling the being shaped by God? God said, let us make man in our own image and likeness (Gen 1.26).

⁴⁴ Rom. 5:8

⁴⁵ Matt. 5:19; Matt. 12:32; 1 Jn. 5:16-18.

⁴⁶ John Calvin, *Institutes* III §3: 'All are not created on equal terms, but some are preordained to eternal life, others to eternal damnation; and, accordingly, as each has been created for one or other of these ends, we say that he has been predestinated to life or to death.'

⁴⁷ Gregory of Nyssa, *In Ecclesiastem* §4 (Hall 1993: 74).

As a theological justification for the intrinsic human worth, the rationale that Gregory advances has an undeniable force, one that any secular theorist of human rights might envy. By foregrounding the claim that human beings are created in the *imago dei*, he injects a special momentum to his objection against the commodification of human beings. As an idea, the *imago dei* can claim to have catalysed more shifts in the moral imagination of the West than perhaps any other,⁴⁸ and it continues to be the most common way of articulating a religious metaphysical justification for contemporary rights-based doctrines.⁴⁹ But could the *imago dei* support the intuition that human moral worth is *equally* distributed?

One immediate problem with appeals to the *imago dei* is that despite its clear scriptural pedigree in Judaism and Christianity, it is a persistently indeterminate idea. Neither dogma nor doctrine, it is at best a theologoumenon, a useful conceptual touchstone for formulating anthropological doctrine.⁵⁰ Often it seems to function as a kind sacral gloss to secular accounts of human value.⁵¹ Gregory's own preference is to identify the *imago dei* with the rationality of human beings, a rationality reflective of divine reason. That connection was, to be sure, a common interpretation of the motif, one that was made by both Augustine and Aquinas.⁵² And there is some degree of plausibility that comes with recognising a divine spark in human reason: divinised reason would certainly constitute human worth more convincingly than reason alone.

Still, as a basis of basic equality this particular theological approach is, I suggest, underwhelming. Divinised reason might qualify as a threshold property along the lines discussed in Section 1; but that would not explain why it should ground moral worth up to the relevant threshold and cease to do so beyond it. And if possessing the *imago dei* means being endowed with a divinised rationality, we are forced to return once again to the objection that confronted a Kantian account of basic equality, namely that the rational capacities of human beings, divinised or not, are capacities that are possessed and exercised by different persons to different degrees. Bernard Williams once described the role of respect owed to each person as a rational agent in Kant 'as a kind of secular analogue of the Christian conception of the respect owed to all men as equally children of God.'⁵³ To identify the *imago dei* with rationality would involve the reverse move, since it would turn the idea into a theistic analogue of the Kantian conception of reason as constitutive of human worth.

A little further on in the same homily, Gregory sets out more explicitly a rhetorically powerful theological defence of moral egalitarianism:⁵⁴

⁴⁸ Justice McLean's reasoning in the landmark case of *Dred Scott vs. Sanford* (1856) at the US Supreme Court makes express use of the idea when claiming that a 'slave is not a mere chattel. He bears the impress of his Maker.'

⁴⁹ See e.g. Perry 1998; Ruston 2004; Wolterstorff 2008; O'Donovan 2009; Waldron 2010.

⁵⁰ My suspicion is that the widespread appeal of the *imago dei* is partly explained by its definitional vagueness and uncertainty regarding its theological authority. No tradition in the history of Christianity has contested the idea and many traditions have deployed it as a political idea and rhetorical motif (see Willis 2009: 114-32).

⁵¹ For the same worry, see Waldron 2010: 220: 'I want to insist on due caution and counsel against just grabbing at the doctrine [of the *imago dei*] because it seems like an impressive bauble to produce as a distinctive religious foundation.'

⁵² Augustine, *On the Trinity*, Book 14, §4 ('the human person is 'made after the image of God in respect to this, that it is able to use reason and intellect in order to understand and behold God'); and Aquinas, *Summa Theologiae* IaIIae, q.100, 2 ('man is united to God by his reason or mind, in which is God's image').

⁵³ Williams 1973: 235.

⁵⁴ Gregory of Nyssa, *In Ecclesiastem* §4, PG 338:14ff. (Hall 1993: 75).

I see no superiority over the subordinate accruing to you from the title other than the mere title. What does this power contribute to you as a person? Not longevity, nor beauty, nor good health, nor superiority in virtue. Your origin is from the same ancestors, your life is of the same kind, sufferings of soul and body prevail alike over you who own him and over the one who is subject to your ownership—pains and pleasures, merriment and distress, sorrows and delights, rages and terrors, sickness and death ... If you are equal in all these ways, therefore, in what respect have you something extra, tell me, that you who are human think yourself the master of a human being.

Here Gregory advances two general arguments for basic equality; but it seems to me that neither inches us any further towards a convincing version of theistic basic equality. The first approach looks like an argument from the biological—or, perhaps more precisely, Adamic—kinship of human beings. That delimits the scope of equality correctly, but it does in itself explain why biological solidarity is axiologically significant. The second argument looks like a version of the argument from sentience, which, by identifying a ground for basic equality that would expand the scope of equal concern to all sentient organisms, returns us to the objections confronting Singer's account discussed in Section 1. We are, it seems, no further forward.

6. Divine Love and Basic Equality

If it is to offer a more watertight case for basic equality, Christian theism would need a determinate, transparent, and authoritative conception of equal human value and, ideally, one that could be endorsed by the many and various strands of its disparate theological traditions. Before I turn to sketch the outlines of a solution, let us briefly take stock of the criteria that have emerged so far that a successful defence of basic equality would need to meet. We noted early on the broad consensus that since there are no empirical features that are plausibly constitutive of human worth and invariant from person to person, the basis for basic equality could not be an empirical one. That requirement, as we saw, appeared to rule out naturalistic solutions. Second, the basis for basic equality must be universal in scope: all human beings must fall within the parameters of equal concern only in virtue of being human. Strategies appealing to rational capacities or subjective awareness as constituting basic equality could rightly claim to be invoking non-empirical features, they could not explain how human worth could be grounded in those features given the obvious variations in the degrees to which these features are possessed and the phenomenon of human beings with severe cognitive disabilities. Third, it became clear that basic equality applies distinctively to human beings: a convincing account must explain not only why all human beings are included in the scope of equal concern but also why only human beings should be included. An obvious attraction of Aristotelian, Kantian, and Cartesian approaches were their respective theories of ensoulment as the basis for including human beings in a discrete metaphysical class. Since being ensouled is a binary property that constitutes a person, what grounds basic equality is not the possession of features—empirical or otherwise—that vary from person to person. Finally, difficulties in discerning how ensoulment could itself be constitutive of human value made it clear that the ground of basic equality must be one that motivates moral concern.

The theological authority invested in the claim that God is love is unimpeachable. As Simon May has put it, it is in the New Testament that love is first introduced as 'the

fundamental principle of the moral universe.⁵⁵ For God to love a person is for God to endow that person with moral worth.⁵⁶ And, since God shows no partiality to his creatures,⁵⁷ divine love does not vary from person to person: there are no differences in the degree of moral worth that God's love constitutes in every human being. To the extent that God is understood a maximally perfect being and the ultimate source of value, there is no value a person could possess that could supersede the value bestowed on him by God's love for that person. To borrow the description by Bernard Williams of the theologically modulated humanism of the Reformation:⁵⁸

The human condition is a central concern to God, so central, in fact, that it led to the Incarnation, which in the Reformation context too plays its traditional role as signalling man's special role in the scheme of things. If man's fate is a very special concern to God, there is nothing more absolute than that: it is a central concern: period.

Could this simple sequence of uncontroversial theological claims ground basic equality? To what extent does it satisfy our theoretical criteria? It does not, of course, locate equal moral worth in anything empirical. It applies the scope of equal concern universally to every human being: God's love for human beings is not conditional on any of their contingent capacities, abilities, or accomplishments. And while it is true that God has a loving regard for everything he has created, it seems plausible to suppose that God's love tracks differences in the classes of objects of he loves – that is, that God's love for human beings is qualitatively distinct. There is, after all, significant scriptural support that God's regard for human beings is distinct from his concern for other creatures and that it elevates human beings above other beings in creation.⁵⁹ If that approach is correct, the theist has a non-arbitrary reason internal to a particular tradition circumscribed by credal and scriptural orthodoxy for supposing that whatever degree or kind of value attributable to nonhuman animals, divine love grounds human worth in a metaphysically distinctive way.

Finally, an account along these lines deflects the objection that the basis for equality is axiologically empty, since on the model proposed here the metaphysical equality of human beings is grounded in the possession of whatever criteria a being has to possess for God to recognise that being as a human being. It is virtue of this conception that it takes an agnostic stance towards the question of what those criteria might be. Perhaps it is naïve to suppose that those who reject Kantian noumena and Cartesian egos as metaphysically extravagant are any more likely to tolerate the metaphysical commitments of theism; but to the extent that transcendental idealism and substance dualism are rejected for reasons of plausibility, or for lack of internal coherence, this particular theistic account remains viable. That is because equal human worth is constituted by God's equal loving regard for every human being, whatever the correct metaphysical account of human nature. If human beings are Cartesian egos, God has an equal loving regard for Cartesian egos; if they are hylomorphic composites or noumenal selves, those are the respective objects of equally distributed divine love. Even an outlandishly physicalist conception of human beings would be consistent with this approach. If that conception is correct, then basic equality

⁵⁵ May 2011: 85.

⁵⁶ For a similar approach, see Wolterstorff 2008: 357-61.

⁵⁷ Acts 10:34.

⁵⁸ Williams 2006: 136.

⁵⁹ This, I take it, is what explains the adverbial intensifier in Genesis 1:31, where the addition of human beings to creation renders it 'very good.' For scriptural attributions of a unique or exalted status to human beings, see: Gen. 5:1; Gen. 9:6; Ps. 8: 3-8; Ps. 115:16; Ps. 144:3; Mk. 2:27; Jas. 3:7.

consists in the equal worth bestowed by God's equal loving regard for every sum of physical parts that constitutes a human being.⁶⁰ While theism's dialectical flexibility on this point is not commonly recognised by its critics,⁶¹ it does provide an obvious theoretical advantage that may for some offset the theoretical cost of its other assumptions.

Conclusion

Whether a theological defence of basic equality along these lines is more convincing than non-theological accounts will, of course, depend on one's prior metaphysical assumptions. However internally coherent it may be, few who do not already share the theological backdrop informing it will be willing to pay the additional price of the commitments it entails. Some may be tempted to invoke a *reductio ad theologiam* by way of response: if theism is the price to be paid for basic equality, so much the worse for basic equality. In its absence, it might be suggested that we fall back on Rorty's pragmatist strategy of retreat. On this quietist view, there is no difficulty in (i) accepting that an egalitarian approach to distributive justice, no less than rights-based jurisdictional edifices, is an idea that rests on metaphysical quicksand and (ii) denying that we should not be troubled by that fact.

Others may be tempted to abandon what Ian Carter has called the 'wild-goose chase for defining characteristics'⁶² and follow Richard Arneson's advice that '[i]n this area of thought, the alternative positions are all bad.'⁶³ For Nietzsche, of course, egalitarianism was the clearest evidence of *ressentiment* of society's weaker members.⁶⁴ His rhetorical posture can make it tempting to overlook the arguments that animate it, but they are not so implausible that basic equality does not need to be buttressed philosophically. It is not self-evidently misguided, at least, to worry that egalitarianism undermines the common good by valorising the mediocre over the exceptional, by reducing the natural diversity and distinctiveness of human beings to a monotonous sameness,⁶⁵ or by erasing individuality in favour of a kind of homogeneity that may well be a catalyst for social decline.⁶⁶

⁶⁰ I have in mind here the various provocative defences of the compatibility of traditional theistic commitments and a bodily criterion of personal identity advanced in recent decades by George Mavrodes, Peter van Inwagen, Trenton Merricks.

⁶¹ Sangiovanni 2017: 34 claims that a theistic account of human dignity is unworkable either because it relies on Thomistic hylomorphism or a conception of the soul as an immaterial substance, which would be 'highly sectarian.'

⁶² Carter 2011: 547

⁶³ Arneson 2015: 52.

⁶⁴ As Leiter 2019: 392-3 argues, Nietzsche correctly predicted a slow dislocation between the metaphysics of Platonism and Christianity, which was largely repudiated by the end of the nineteenth century, and its moral framework, which persisted in the moral egalitarianism explicit or implicit in Kant, Bentham, and Marx, and continues in self-consciously secular moral egalitarians such as Peter Singer and Derek Parfit.

⁶⁵ Nietzsche 2002: 57: 'Christianity has been the most disastrous form of arrogance so far ... [P]eople who were not noble enough to see the abysmally different orders of rank and chasms in rank between different people. People like this, with their "equality before God" have prevailed over the fate of Europe so far, until a stunted, almost ridiculous type, a herd animal, something well-meaning, sickly, and mediocre has finally been bred: the European of today'; cf. Nietzsche 2006: 232: '[T]hus blinks the rabble—"there are no higher men, we are all equal, human is human, before God—we are all equal" Before God!—Now, however, this God has died. But we do not want to be equal before the rabble.'

⁶⁶ Nietzsche 2005: 212: "'Equality" (a certain factual increase in similarity that the theory of "equal rights" only gives expression to) essentially belongs to decline: the rift between people, between

Absent convincing arguments for belief in basic equality, there is no reason to suppose that a commitment to it will simply endure as a conventional platitude in virtue of its pragmatic social benefits. That is especially true if contemporary conceptions of human nature continue to win support that are functionally akin to a Nietzschean one. To return to an earlier example, if a Neo-Darwinian account of the origins and development of human beings comes to be seen as a comprehensively true philosophical picture of human nature, historically contingent intuitions about basic equality will be uprooted from the metaphysical soil in which they grew and will soon cease to have any traction in our moral culture. And since traction of that sort is a crucial factor in determining the criteria of public reasonableness—criteria that Rawls assumes could float free of a society's moral imaginary—public justifications of human value may quickly be analysed exclusively in terms of adaptive fitness. Of course, as Jeremy Waldron has noted, the hope that religious premises can be bracketed without undermining basic equality is indispensable to the success of political liberalism and crucial for secular liberalism more generally.⁶⁷ But the chief burden of this article has been to suggest bracketing those premises *does* undermine it and that those who take the moral proposition of basic equality as paramount should weigh theistic options more carefully.

In his contribution to an important recent collection of essays on the equal moral worth of human persons, Héctor Wittwer has claimed that '[o]nce the religious dogma that all human beings were created in God's image has been excluded from scientific and philosophical discourse, there is not good reason left for assuming that all humans *qua humans* do possess an inherent moral worth.'⁶⁸ I have noted some reasons why the theist should prefer grounding basic equality in divine love rather than the more perplexing and indeterminate notion of the *imago dei*. But the thrust of this article has been to suggest that theism—and Christian theism in particular—offers better prospects of success for those seeking to underwrite our egalitarian intuitions than is usually acknowledged. Since those intuitions are rooted more firmly in the historical hinterlands of Christianity than the other accounts we have considered, that may not be an especially surprising conclusion. Christian theism may or may not offer the best explanation of why human beings possess moral worth.⁶⁹ One may indeed take the view that its explanation of why they do is the least convincing of the many and various philosophical approaches to that question. What I have sought to argue is that on the assumption that theism can advance a minimally plausible account of human moral worth, it does explain more convincingly than its rivals why human worth does not come in degrees. If that judgment is correct, the claim that we are one another's moral equals is not a reflexive secular piety, but a substantive religious truth about ourselves.

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classes, the myriad number of types, the will to be yourself, to stand out, what I call the *pathos of distance*.'

⁶⁷ Waldron 2002: 44-5.

⁶⁸ Wittwer 2015: 81.

⁶⁹ While this article has paid special attention to the resources of the moral theology and anthropology of Judaism and Christianity, I should note that the basic explanatory architecture of the solution I have examined can be found in Islam as well, even if certain modifications would be necessary and even if some of the points of inflection would be different. For discussion of the role of egalitarianism in the early history of Islam, see in particular Marlow 1997: 13-30.

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The Grounding Problem of Equal Respect: A Theistic Alternative to Constitutivism

Kevin Jung

In this paper, I explore three theories of value to illuminate how nontheistic and theistic accounts may differ in grounding human dignity: neo-Aristotelian ethical naturalism, Kantian constructivism, and a theistic account of good simpliciter. The theistic account of good simpliciter that I offer adapts Robert Adams's notion of the transcendent Good as the Excellent. In this account, I explain how Adams' thesis that goodness is a property consisting in a sort of resemblance to God may be understood in a new way, using ideas drawn from contemporary mathematics and quantum mechanics. On my account, we must value human beings neither because such valuing would be beneficial or necessary for human flourishing nor because it is a logical outcome of anything we care to value. Rather it is because we recognize the property of self-similarity in all of us, which may be understood as a resemblance to God as good simpliciter.

1. Introduction

Can we explain normative reasons in wholly non-normative terms by characterizing them as a specification of the kind of action, agency, or other features that we essentially exercise or possess as human species? If we can, we may justify certain normative claims, such as moral obligations, in virtue of explaining certain non-normative facts about us after all. In this paper, I consider two contemporary versions of constitutivism to illustrate some difficulties a metanormative theory may face when attempting to ground the normativity of moral obligations in non-normative facts. Constitutivism is not the only approach that makes such an attempt, and the difficulties to be identified should give us reason to consider other approaches. I present a theistic grounding of moral obligations as one alternative.

Constitutivists argue that we can ground normative claims in non-normative facts about our agency or action in virtue of a non-causal explanation. They attempt to justify normative facts by appealing to the constitutive features of things that we are allegedly all committed to or cannot escape in virtue of being agents. In contrast, I will argue that no non-normative facts can sufficiently ground (i.e., determine or instantiate) normative facts, even

though the latter are both epistemically and metaphysically supervenient upon the former.¹ If this is right, no facts about the natural world, including about human agency, can successfully explain what makes universal moral claims (e.g., there is a reason to treat every human being with equal respect) normative. I offer a theistic metanormative account of certain normative facts that are deontological in kind (hereafter, moral obligations). My account is metaphysically realist in that moral obligations are part of reality and thus cannot be derived from what is constitutive of our agency, and also epistemically realist in that knowledge of moral obligations is held to be accessible to most rationally competent agents via due rational reflection upon natural facts as well as through divine commands understood as the expression of divine desires.

Regarding the grounding problem of normativity, moral obligations are grounded not in natural facts but in God's relevant desires. This makes divine desires, not divine commands, the determining ground of normative reasons for action. On this theistic view, the normative force of treating each person with equal respect is metaphysically grounded in God's desires, although it can be epistemically overdetermined by natural reason and divine commands.

2. Reasons for Action and the Ground of Normativity

Before I explain what constitutivism is, I need to situate it in the wider context of many contemporary metanormative theories about reasons for action. First-order normative theories concern standards of rightness, goodness, or rationality that determine how one should arrive at normative judgments (e.g., "It is wrong to deny them the same treatment"). Metanormative theories concern the *nature* (e.g., "What is the nature of moral obligations?) of first-order normative questions and judgments. In what follows, I shall focus on the nature of the normativity of actions since my central question in this paper is what grounds the normative judgment that there is reason to treat all human beings with equal respect.

In metaethics, reasons are understood as considerations that stand in favor of beliefs or actions. Reasons for belief have to do with epistemic rationality, and reasons for action have to do with practical rationality. Since I focus on reasons for action in this paper, I should note two rival schools offering different solutions for the grounding problem of reasons for action: reason-based and *rationality*-based accounts. According to *reason*-based accounts, reasons for action are explained in terms of what would give us decisive (sufficient) reasons for doing something.

This can be done broadly in two ways. Subjective theories about reasons hold the view that we have decisive reason to do whatever would best realize our present desires (or aims) or our informed ones under ideal conditions. In contrast, objective theories about reasons claim that reasons for action derive their normative force not from our desires or aims but from "the facts that give us reasons to have these aims. These are the facts that make these aims relevantly good, or worth achieving."² Thus, in the case of subjective theories, it is often said that our present or informed desires give us reasons for action, whereas, in the case of objective

¹ As an analogy, not all instances of killing a person instantiate a murder, even though the normative judgment of murder is epistemically and metaphysically supervenient upon the descriptive fact of killing a person.

² Derek Parfit, *On What Matters: Volume One* (Oxford: Oxford University Press, 2013), 45.

theories, it is commonly argued that the value of the objects of our desires or the fittingness of our attitudes toward an object is what gives us reasons for action.

A few things are worth noting about these theories here. Let me briefly discuss some well-known objections to them to set the stage for constitutivism and my theistic account. Regarding subjective theories about reason, while it is true that people desire certain things more than others and desires have a motivational force, it is not clear why the satisfaction of these desires gives us a decisive reason to do it. After all, desires can be unstable, ill-informed, and even harmful to agents.³ Objective theories about reason, in contrast, face different sorts of challenges. Critics raise objections ranging from questioning the distinction between intrinsic value and instrumental value to which things possess intrinsic value. In recent years, there has been robust discussion about the so-called the Wrong Kind of Reason problem (WKR) in response to some who advance the fitting attitude theory of value (FA). FA is an objective theory of value, but unlike value-based theories, which derive normativity from the value of an object (specifically, its value-featuring properties), FA insists that we analyze what is valuable (or what we have reason to value) in terms of the fittingness of a pro-attitude. If it is *fitting* to favor an object based on its natural properties, then the object is valuable for its own sake, rather than if we find something intrinsically valuable, it is fitting to favor it. FA theorists want to avoid deriving normativity (reasons for action) from normativity (what is valuable). In doing so, they pass the “buck” of deriving normativity to non-normative properties of a thing that provide reasons for valuing it.⁴

The problem with FA, according to WKR, is that “it appears that in some situations we might well have reasons to have pro-attitudes toward objects that are not valuable. Or vice versa: we might have reasons not to have pro-attitudes toward some valuable objects.”⁵ If an evil demon threatens me in order to get me to admire him, this does not make the demon valuable even though I may nonetheless have reason to have a pro-attitude toward him. The upshot of this example is that value-based theories can have difficulty distinguishing the right kind and the wrong kind of reason to value something as long as a reason to do something is analyzed in terms of a fitting attitude. Later in the paper, I return to this particular problem in discussing my theistic account of normativity.

In the case of *rationality*-based accounts, claims about reasons for action must be settled by claims about rational agency. This is because proponents of this view consider the reasons we have to act to be decided by the requirements of rational agency.⁶ Unlike reasons-based accounts, rationality-based accounts do not have to appeal to what reasons people actually

³ For critiques of desire-based theories of reason, see Richard Kraut, “Desire and the Human Good,” *Proceedings and Addresses of the American Philosophical Association* 68, no. 2 (1994): 39–54; Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998), 113–23; Parfit, *On What Matters*, 73–82.

⁴ Scanlon famously said, “to call something valuable is to say that it has other properties that provide reasons for behaving in certain ways with regard to it.” Scanlon, *What We Owe to Each Other*, 96.

⁵ Wlodek Rabinowicz and Toni Rønnow-Rasmussen, “The Strike of the Demon: On Fitting Pro-attitudes and Value,” *Ethics* 114, no. 3 (April 2004): 392.

⁶ Thomas Scanlon expresses a rationality-based rationality in the following general form: “The fact that *p* is a reason for a person to do *a* when and because rationality requires such a person to count this fact in favor of doing *a*.” Thomas M. Scanlon, *Being Realistic about Reasons* (Oxford: Oxford University Press, 2014), 7.

have or would ideally have to derive the normativity of action since rationality-based accounts are more interested in articulating what a rational agent must be inescapably committed to in order to arrive at any normative content for action. In the next section, I introduce the constitutivist view of practical reason as a rationality-based view of value that grounds normativity in what is already true of the agent.

3. Varieties of Constitutivism about Practical Rationality

According to rationality-based views of normativity, what counts as considerations in favor of doing something is not what reasons the agent has—what the agent treats as reasons—but what is required of the agent by virtue of being a rational agent. Constitutivists claim that “we can justify certain normative claims by showing that agents become committed to these claims simply in virtue of acting.”⁷ This view assumes that agency necessarily has a certain constitutive feature (e.g., aim, principle, or the fact of one being of the human species) that explains why certain events are intentional actions and sets a normative standard for what reason we have to value X. While there is no consensus among constitutivists about what thing is the constitutive feature of our agency, they agree that this constitutive feature functions as a goodness-fixing kind and specifies the ordering of valuing in dealing with first-order desires. For instance, consider a common analogy involving playing chess. Chess players aim at checkmate (E). E is the constitutive feature of chess-playing (O), and it serves as a goodness-fixing kind. E specifies the ordering of what to value in O, meaning that any actions involving the movement of pieces, such as pawns, should be ranked in light of their contribution to E. If constitutivists are correct, the normativity of action is generated by the natural fact that we are agents. There are many versions of constitutivism in the contemporary literature. Given space constraints, I will limit myself to considering just a couple of constitutivist accounts to illustrate some main features of constitutivism.

3.1. Korsgaard’s Constructivism

Christine Korsgaard is known for her defense of unrestricted constructivism, which takes all normative truths as constructions reached through procedural reasoning on some constitutive aim of agency. She also views reasons for action as derived from the constitutive aim. That constitutive aim is *self-constitution* which, she claims, every agent has by virtue of being an agent. To be an agent, she argues, one must have the capacity to constitute oneself as a unified agent. She bases this claim on the idea that actions aim to create a practical identity. We are not merely the cause of our actions—a movement is attributed to us as agents—but our actions also create our practical identity. We are responsible for our actions not just if we brought them about but if, in choosing our actions, our actions create a practical identity that serves as the source of reasons. For Korsgaard, “practical identity”, which she defines as “a description under which you value yourself and find your life worth living and your actions to be worth undertaking,” is not merely about a sense of oneself; it also serves as the source of normative

⁷ Paul Katsafanas, “Constitutivism about Practical Reasons,” in *The Oxford Handbook of Reasons and Normativity*, ed. Daniel Star (Oxford University Press, 2018), 367.

reasons.⁸ She argues that, in choosing an action, our choice is governed by our practical identities, which serve as “standing sources of incentives” and “principles in terms of which we accept and reject proposed actions.”⁹

But not all practical identities work the same way. Korsgaard notes two kinds of practical identity: contingent practical identities and “an essential form of practical identity, our identity as rational or human beings.”¹⁰ Though both provide reasons for action, we acquire contingent practical identities by circumstances or adopt them voluntarily. At the same time, we inherently possess a different sort of practical identity by virtue of being rational beings.¹¹ On this conception of practical identity, one necessarily is inescapable in that all rational agents are logically committed to it by virtue of willing any particular ends or valuing anything in the first-order sense. This conception of practical identity *necessarily* values rational agency in oneself and others because we, as self-conscious agents, want to bring about our intentional actions successfully. As rational beings, we not only are at reflective distance from our first-order desires when choosing to act but also must consider ways in which our actions must conform to the constitutive standards of self-constitution, the aim of agency. Analogically, a smartphone is supposed to (i.e., “ought to”) perform certain features to be a “smartphone,” and these features are constitutive of the practical identity of a smartphone. Similarly, Korsgaard thinks that our practical identity as rational beings generates normative standards of action.

For Korsgaard, successful self-constitution demands that we allow ourselves (or others) to act only for ends that we (or they) want to bring about and voluntarily set for ourselves (or themselves): “A good action is one that constitutes its agent as the autonomous and efficacious cause of her own movements.”¹² Thus, she claims that we must conform to hypothetical imperatives and categorical imperatives. On the one hand, a hypothetical Imperative is a constitutive principle of action because conformity to it constitutes you as “the *cause* of that end.”¹³ Also, an agent is efficacious “when she succeeds in bringing about whatever state of affairs she intended to bring about through her action.”¹⁴ On the other hand, a categorical Imperative is another constitutive principle of action, one concerned with the question of the self-determination of the act as one’s own: “an agent is autonomous when her movements are in some clear sense self-determined or her own.”¹⁵ Autonomy requires that our actions express the principles we have freely chosen, and efficacy requires that we do not merely cause an action but that we be able to identify it as *ours*.¹⁶ However, both the autonomy and efficacy principles of action rest on the Formula of Humanity as an End in itself in that no rational action is possible unless the agent must first find their own humanity valuable.

⁸ Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (New York: Oxford University Press, 2009), 20.

⁹ Korsgaard, 22.

¹⁰ Korsgaard, 22.

¹¹ Korsgaard, 24.

¹² Korsgaard, xiii.

¹³ Korsgaard, 68.

¹⁴ Korsgaard, 82.

¹⁵ Korsgaard, 83.

¹⁶ Korsgaard, 84.

3.2. Foot's and Hursthouse's Aristotelian Naturalism

The idea that normative facts can be explained by facts about the constitutive feature of agency or agents is also found in some Aristotelian versions of ethical naturalism. In *Natural Goodness*, Philippa Foot tries to extract normative facts (or human goods) from the standards of success necessary for the flourishing of the human species. Just as there is natural goodness and defect in all living things regarding their proper functioning, she argues that moral evaluation of human action should be understood in terms of the distinct kind of natural beings that we are.

Foot's naturalistic ethics breaks away from both G. E. Moore's non-naturalism and varieties of non-cognitivism (e.g., emotivism, prescriptivism, and expressivism) that arose in critical reaction to Moore, who treated goodness as a "simple" and "indefinable," non-naturalistic property.¹⁷ On Foot's view, moral judgments are supposed to neither represent a reality independent of human attitudes nor merely express the conative state of the individual speaker. Moore's non-naturalism makes the mistake of taking goodness as a non-natural property and conceiving goodness as a predicate ("as if 'X is good' could be taken as the standard form of predication for it").¹⁸ In contrast, non-cognitivism makes the mistake of treating moral judgments as conditions of utterance about an individual speaker's subjective state. An unfortunate consequence of non-naturalism is failing to understand goodness in natural terms, and an unfortunate consequence of non-cognitivism is taking an agent's desires as reasons for action. Foot's position, then, is straightforward: practical rationality can only be understood in terms of our excellences and defects with respect to the kind of living things that we are. Foot rejects the view that we must first start from a desire-satisfaction or self-interest theory of action to explain the rationality of action. Nor does she believe that practical rationality should be subsumed under the umbrella of morality, as if moral considerations must always override all other normative judgments.

Foot contends that "the evaluation of human life depends also on essential features of specifically human life."¹⁹ In her view, the form of "X is good for Y" is no longer about how X would *satisfy* Y or whether X has the non-natural property of goodness but about how X would be a *constitutive* content of a flourishing human life. For instance, Foot explains that human parents who fail to teach their children the skills necessary for flourishing are defective for not giving the children the tools they would need for this goal.²⁰ More generally stated, her point is that forms of goodness appropriate to the human species are to be evaluated in terms of the necessary conditions for human flourishing. In fact, Foot treats judgments of goodness and badness as "a special grammar when the subject belongs to a living thing, whether plant, animal, or human being."²¹ Good and bad are *attributive adjectives* whose standards are intrinsic to the nouns that they modify: "natural goodness, as I define it, which is attributable only to living things themselves and to their parts, characteristics, and operations, is intrinsic or 'autonomous' goodness in that it depends on the relation of an individual to the 'life-form' of its species."²²

¹⁷ G. E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1966), 15.

¹⁸ Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press, 2001), 2.

¹⁹ Foot, 14.

²⁰ Foot, 15.

²¹ Foot, 26.

²² Foot, 26–27.

In his naturalistic ethics, similar to Foot's, Richard Kraut also articulates the meaning of goodness this way. For something (G) to be good for a living thing, S, is to "refer to the conformability or suitability of G to S. It indicates that G is well suited to S and that G serves S well."²³ This implies that while human beings and non-human animals share many biological inclinations, what is good for humans is not identical to what is good for other animals. Humans are rational animals "capable of using reason to make choices and to mold our desires and emotions," which makes the human good "an object of rational choice."²⁴ That is to say, the achievement of this good also "requires the training of desires and emotions so that they take appropriate objects as determined by reason."²⁵

This last point also explains why Foot's naturalism is Aristotelian and does not align well with those ethical views that try to naturalize normative properties in terms of the language of reproductive fitness.²⁶ Like Aristotle, Foot is concerned with human flourishing as the end of moral life and with the necessary conditions of flourishing suitable for human animals. We share many biological tendencies with other animals but also differ from them in that we are *rational* animals that can perceive goods that are suitable for distinctively human flourishing. Those who recognize certain considerations as compelling reasons for action (reason-recognition) and act on them (reason-following) in view of human goodness possess virtues.²⁷ This is why Foot seeks to derive normative facts from the constitutive features of the human species as living things and yet, as Rosalind Hursthouse notes, wants to "explicitly disavow any intention to use the terms 'function' or 'species' in the technical senses of evolutionary biology."²⁸ Hursthouse argues that Foot is not using the term species in the Darwinian biological sense. For Foot, the human good is far richer than the life of survival and reproduction; it "contains many goods which have nothing to do with either, and the human good is 'deep happiness.'"²⁹

In her ethics, Hursthouse continues Foot's denial that normative facts are accessible from "a neutral point of view."³⁰ Like Foot, Hursthouse wants to navigate between non-naturalism and subjectivism, insisting that moral objectivity is still possible without this objectivity being non-natural and scientific in kind. She concedes that "the truth of the judgment [that this action is right] does depend in some way on human interests and desires."³¹ However, she rejects the view that what determines the truth of moral judgments depends on the agent's interests and desires or social construction. Hursthouse believes that we can still establish objectivity concerning moral judgments not from a neutral point of view but from "the Neurathian procedure" by which she means that "validation must take place

²³ Richard Kraut, *What Is Good and Why: The Ethics of Well-Being* (Harvard University Press, 2009), 94.

²⁴ Kraut, "Desire and the Human Good," 47.

²⁵ Kraut, 47.

²⁶ For a Darwinian critique of realist theories of value, see Sharon Street, "A Darwinian Dilemma for Realist Theories of Value," *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 127, no. 1 (2006): 109–66.

²⁷ Foot, *Natural Goodness*, 12–13.

²⁸ Rosalind Hursthouse, "The Grammar of Goodness in Foot's Ethical Naturalism," in *Philippa Foot on Goodness and Virtue*, ed. Micah Lott (Palgrave-Macmillan, 2018), 341.

²⁹ Hursthouse, 346.

³⁰ Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press, 1999), 241.

³¹ Hursthouse, 240.

from within an acquired ethical outlook.”³² The main idea is that forms of goodness appropriate to the human species and necessary for human flourishing cannot be simply read off the book of nature as if they are “brute givens” but require “a coherent account of the roles the character traits on the list [the standard list of the virtues] play in our lives, an account that coheres not merely with our ethical outlook but with all the empirical and other facts that we bring into play.”³³ As Hursthouse insists, “ethics is not a branch of biology.”³⁴ The key is that we are “rational” animals that can rightly see what things are worthy of love, that is, what “we can see as good, as something we in fact enjoy and that reason can rightly endorse.”³⁵

3.3. Problems with Constitutivism

I have thus far discussed two different accounts of constitutivism about practical rationality. In this section, I mention a few objections raised against them to show what types of challenges constitutivist accounts of practical rationality may face in general.

The first objection concerns the metanormative project of grounding normative principles in descriptive facts about agency. Constitutivists often start with identifying the constitutive feature of agency and then develop a procedure aimed at delivering normative truths by specifying a set of values or principles that make the constitutive feature possible. Such a procedure can take a variety of forms, such as “employing principles of formal or instrumental rationality; mutually disinterested utility promotion behind a “veil of ignorance”; transparent and reasoned discussion among persons regarded as “free and equal”; or pursuit of (narrow or wide) reflective equilibrium.”³⁶ In Korsgaard’s case, there are principles that all rational agents must affirm in order to constitute themselves as unified agents. No agent can supposedly escape these principles because they are all necessary conditions for being unified agents.

But why should I be an agent? asks David Enoch. What if I don’t care about self-constitution? Enoch imagines a “shmagent” – “a nonagent who is very similar to agents but who lacks the aim (constitutive of agency but not of shmagency) of self-constitution.”³⁷ Just as not every chess player aims or must aim at checkmate—it is conceivable that some chess players don’t care about the game itself or winning it—one does not have to aim at self-constitution at all in acting. Enoch’s more significant point is that any aim said to be a constitutive feature of agency or action requires a reason to do it. He writes, “If a constitutive-aim or constitutive-motives theory is going to work for agency, then it is not sufficient to show that some aims or motives or capacities are constitutive of agency. Rather, it is also necessary to show that the “game” of agency is one we have reason to play, that we have reasons to be

³² Hursthouse, 165. “Neurathian” is a term attributed to Otto Neurath’s image of ship-rebuilding in his antifoundational account of knowledge.

³³ Hursthouse, 241.

³⁴ Hursthouse, 22.

³⁵ Hursthouse, 223.

³⁶ Hallvard Lillehammer, “Constructivism and the Error Theory,” in *The Continuum Companion to Ethics*, ed. Christian Miller (Continuum, 2011), 69.

³⁷ David Enoch, “Agency, Shmagency: Why Normativity Won’t Come from What Is Constitutive of Action,” *The Philosophical Review* 115, no. 2 (2006): 179.

agents rather than shmagents.”³⁸ Put otherwise, Korsgaard’s metanormative project of justifying normative principles in *naturalistic* terms of the constitutive aim of agency fails because that constitutive aim itself is *normative*! If this objection is right, many similar constitutive attempts to ground normative facts (e.g., our moral obligation to treat all human beings with equal respect) in descriptive facts about agency are doomed to fail.

What about the attempt to ground normative facts in descriptive facts about human flourishing? Can the notion of the human species function as a goodness-fixer kind, specifying normative facts? Critics take note of the Aristotelian teleology at work in Foot’s and Hursthouse’s ethics. Foot, for instance, is unapologetic about her use of the connection between Aristotelian categoricals and evaluation. Certain features in a given species have to do with self-preservation, nourishment, and reproduction of the individual member, even if not “not all general propositions about a species have to do with the teleology of living things of this kind.”³⁹ That is to say, many features of a life form can be given teleological explanations for their functions in terms of positive consequences for the bearers without presupposing some intentional design by the will of the deity.⁴⁰ However, can these teleological explanations sufficiently generate the normative force of reasons for action? Many people do not care about what would be considered human goods by Foot, including the good of having children.⁴¹ To put this more precisely, not only is there a wide range of human actions that do not always serve a teleological function in the Aristotelian sense, but many seem to find reasons insufficient to play such a function. This is why Scanlon says, “given the heterogeneity of natural properties that can provide reasons it is not plausible to suppose that there is some natural property, amounts of which determine the relative strength of all reasons.”⁴²

Foot’s and Hursthouse’s teleology can also open the door to a different kind of criticism.

Michael Smith, who himself subscribes to a different kind of constitutivism, points out that with “so much emphasis on human goods, Foot’s view thus builds an implausible human chauvinism into morality.”⁴³ Why is her view vulnerable to the charge of human chauvinism? Because human beings serve as a goodness-fixer kind that specifies what reasons we have to act. Thus, both excellences and defects in making us realize the human good (i.e., human flourishing) become virtues and vices. While Foot’s version of constitutivism, with its focus on goods that are integral to human flourishing, thus avoids both the egoistic and relativistic tendencies of some subjectivist ethics, including some Humean forms of constitutivism, it suffers from a “species-specific ranking” that orders normative facts around distinctively human interests.⁴⁴

I have thus far briefly considered some versions of grounding normative reasons. Next, I want to present my theistic alternative.

³⁸ Enoch, 186.

³⁹ Foot, *Natural Goodness*, 31.

⁴⁰ Foot, 31–32.

⁴¹ Michael Smith, “Constitutivism,” in *The Routledge Handbook of Metaethics* (Routledge, 2017), 377.

⁴² Scanlon, *Being Realistic about Reasons*, 110.

⁴³ Smith, “Constitutivism,” 377.

⁴⁴ Smith, 377.

4. A Theistic Account of Normative Reasons

On my account of normative reasons, normative reasons and motivating reasons are distinguished, which is not uncommon among some philosophers. Motivating reasons are what the *agent* takes to favor her actions, whereas normative reasons are considerations that count in favor of someone acting in a certain way. Unlike the former, the latter does not require the agent's beliefs or desires. Put otherwise, a motivating reason explains what someone's reason for acting (e.g., my desire to stay dry is the reason for bringing an umbrella) is, and a normative reason is the reason that justifies one's doing something (e.g., the principle of confidentiality is the reason *in the light of* which I won't divulge sensitive information). What gives us normative reasons are facts, i.e., true propositions, and thus they differ from motivating reasons, which are subject-given. In the context of respecting human persons, I hold this distinction to mean that the reason for treating other persons with equal respect should be grounded not in the presence of certain of the agent's desires or beliefs but in the relevant fact itself, understood as a true proposition.

Now the question is, "How do we obtain these facts that can sufficiently ground normative reasons, and what is the nature of these facts?" My view on this question may be briefly stated as follows:

(T1) Normative facts supervene *epistemically* upon, although neither analytically nor metaphysically identical to, non-normative facts.

(T2) *Some* normative facts of a deontological nature can be *epistemically* overdetermined by different sources of moral knowledge.

(T3) Some deontological moral facts are *metaphysically* grounded in God's relevant desires.

Let me elaborate on these three points. (T1) expresses, in short, the idea that normative facts are epistemically supervenient upon non-normative facts. Very roughly, the idea is that after due reflection upon the relevant natural facts, most rational human beings can form normative judgments that have positive epistemic status in virtue of their non-inferential justification. Unlike the cognitivism of ethical naturalism, however, normative facts or properties are not identical to natural facts or properties in terms of meaning or the nature of properties. Thus, my view stands in the ethical non-naturalism school of thought that may be broadly construed as moral realist and intuitionist.⁴⁵ What this school argues for is the epistemic autonomy of morality, supporting the view that moral knowledge is not historically contingent but available to those who examine the relevant natural facts seriously to arrive at normative facts. In other words, one does not have to be a religious person, much less a believer in a particular religious tradition, to have moral knowledge taken as at least justified true moral belief.

Contrary to common mischaracterizations, most contemporary intuitionists do not claim that all moral truths can be immediately known to everyone. Epistemic fallibility is fully

⁴⁵ For contemporary intuitionists, see Robert Audi, *The Good in the Right: A Theory of Intuition and Intrinsic Value* (Princeton, NJ: Princeton University Press, 2005); Parfit, *On What Matters*; Noah Lemos, *Common Sense: A Contemporary Defense* (New York: Cambridge University Press, 2004); Michael Huemer, *Ethical Intuitionism* (New York: Palgrave Macmillan, 2005); Russ Shafer-Landau, *Moral Realism: A Defence* (Oxford, UK: Oxford University Press, 2005).

compatible with ethical non-naturalism (intuitionism), as most defenders of this theory are modest foundationalists. Foundationalism refers to the view that beliefs can be justified when they receive strong support from other beliefs that are properly basic (i.e., justified non-inferentially), thus avoiding an infinite regress of supporting epistemic beliefs (i.e., those that require the activity of showing one's justification) as opposed to basic beliefs (i.e., non-epistemic beliefs requiring only the *state* of being justified). Unlike strong foundationalism, according to which all justified beliefs are infallible and indubitable, modest foundationalism holds that justified beliefs can be revised in light of countervailing basic beliefs.

It is important to note that ethical non-naturalism need not be at odds with divine command theory. One may hold without contradiction that some normative facts, i.e., the moral facts of the deontological kind (or simply obligations), may also be epistemically available through divine commands. What (T2) expresses is the idea of the epistemic overdetermination of some moral facts. Roughly, the idea of epistemic overdetermination is that some of our beliefs could be overdetermined, i.e., "have more than one justification, each of which is sufficient to justify the belief in question in the absence of the others."⁴⁶ The kind of epistemic overdetermination relevant to (T2) is epistemic overdetermination by different sources. For instance, the second table of the Ten Commandments, often understood as divine commands, may be an additional source of our moral knowledge, which is otherwise also available through natural reason. Again, the sort of divine commands I have in mind applies only to our knowledge of rightness and wrongness, not goodness and badness. Not only is it not necessary for a theory of rightness to be tied to a theory of the good, but also a divine command theory (broadly construed) that seeks to explain the nature of the good in virtue of the concept of divine command must face the arbitrariness objection in the Euthyphro dilemma. As Robert Adams shows in his *Finite and Infinite Goods*, it is possible to develop a theory of the good independently of a divine command theory, which I won't discuss in this paper.⁴⁷

As for (T3), I argue that obligations can be *metaphysically* grounded in God's relevant desires. Consider Kant's second formulation of the Categorical Imperative, known as the Humanity Principle: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."⁴⁸ If deontological properties are metaphysically grounded in divine desires (in distinction from divine commands), we may view the Humanity Principle as indeed grounded in what God desires for us to do. On this view, the reason for *X* being required is not in *X* being *commanded* by God – which could raise the question, "What grounds the normativity of the command?" – but in *X* being *desired* by God, who is understood as omnipotent, omniscient, and omnibenevolent (I will shortly answer the next obvious question, "What grounds the normativity of divine desires?"). But this does not mean that God's commands should play no role in our moral knowledge. As Christian Miller notes, the divine desire theory acknowledges "that God's commands play an important

⁴⁶ Albert Casullo, "Epistemic Overdetermination and A Priori Justification," *Philosophical Perspectives* 19, no. 1 (2005): 47.

⁴⁷ See Robert M. Adams, *Finite and Infinite Goods: A Framework for Ethics* (New York: Oxford University Press, 1999).

⁴⁸ Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis White Beck (New York: Prentice-Hall, 1997), 46.

epistemic role in communicating how human beings are to behave, but it is certain prior mental states themselves,” desires in this case, “which are the metaphysical basis for deontic properties.”⁴⁹

Now let’s try to illustrate the idea of metaphysically grounding some normative facts in divine desires by way of analogy. Imagine that what underlies our universe is what the astrophysicist Sylvester James Gates and others call error-correcting codes, similar to computer codes, embedded in reality.⁵⁰ Being neither a scientist nor a mathematician, I will not try to explain, much less prove or disprove, this claim. But this theory of physics might help us imagine how a normative fact, such as the Humanity Principle, might be metaphysically grounded in a divine desire. If there is God who created the universe using something like a computer code, the code must reflect the programmer’s desires, namely, God’s. Those who are somewhat familiar with a programming language would know that programming languages contain command lines. A command line is a text-based user interface used to run programs. It takes in commands and passes on to the computer’s operating system to run. The point here is that it is not the commands that ground the normativity of action but the programmer’s desires expressed in those commands. Once we understand the ground of normativity this way, we may also see moral obligations as grounded in divine desires.

Finally, I would like to discuss a possible advantage of my theistic grounding of moral obligations over other non-theistic accounts, including those of constitutivism. Earlier, I discussed the Wrong Kind of Reasons objection, often raised against the fitting attitude theory of value (FA). As some philosophers have pointed out, it is sometimes appropriate to value an intrinsically valuable object, but we may do so for the wrong reason (e.g., obeying God out of fear). If so, it is possible to have both the fitting attitude and the suitable object of value, but we may still have the wrong reason. On my theistic account, what determines the fitting attitude toward an object of value must match the *nature* of the object that is considered valuable in itself. Thus, I derive normativity (moral obligations) from normativity (God’s commands) and derive the normativity of God’s commands *ultimately* from the normativity of God’s desires whose desires are taken as good in themselves.

Now, critics may ask what grounds the normativity of God’s desires. What makes God’s desires good in themselves? It is crucial to note that I do not reduce the question about the *nature* of goodness to the *meaning* of goodness by taking the latter as an attributive adjective (i.e., good in terms of a thing’s function or a thing’s contribution to another thing).⁵¹ Most contemporary secular theories of the good thus err, in my view, by asking, “What is goodness good for?”⁵² This question already takes it for granted that we can skip the question about the archetype of goodness—a metaphysical question, “What makes something intrinsically

⁴⁹ Christian Miller, “Divine Desire Theory and Obligation,” in *New Waves in Philosophy of Religion*, ed. Yujin Nagasawa and Erik J. Wielenberg (New York: Palgrave-Macmillan, 2009), 105–24.

⁵⁰ C. F. Doran et al., “Relating Doubly-Even Error-Correcting Codes, Graphs, and Irreducible Representations of N-Extended Supersymmetry” (arXiv, May 30, 2008); Natalie Wolchover, “How Space and Time Could Be a Quantum Error-Correcting Code,” *Quanta Magazine*, January 3, 2019, <https://www.quantamagazine.org/how-space-and-time-could-be-a-quantum-error-correcting-code-20190103/>.

⁵¹ Peter Geach, “Good and Evil,” *Analysis* 17, no. 2 (1956): 34.

⁵² Christian Piller, “What Is Goodness Good For?” in *Oxford Studies in Normative Ethics, Volume 4* (Oxford: Oxford University Press, 2014).

good?" —and instead focus on the problem of the meaning of goodness in terms of "goodness-for." What do I mean by the *archetype* of goodness? I think that Adams is right in insisting that goodness is explained as a property consisting in a sort of resemblance to God, who is the transcendent Good itself.⁵³ For Adams, God is the transcendent Good, whose goodness is independent of whether it has a utility that serves as the basis for our valuing. He rejects those accounts of goodness, like the ones we considered earlier, that try to fix the reference of goodness to the valuing attitudes of the agent or some natural properties. Another word that Adams uses for the transcendent Good is excellence, which he likens to beauty. Just as people can experience beauty (e.g., in the sight of auroras in the Nordic night sky), even when the objects of beauty don't hold any utility for us, goodness is treated as an irreducible and attractive property inherent in the object. As such, it is worthy of love or admiration for its own sake. He then suggests that all goodness of the non-instrumental kind, including moral goodness, is to be explained as a sort of resemblance to the transcendent Good, the standard and exemplar of goodness.

Adams's account of goodness is metaphysically realist in that the term 'goodness' refers to an objective fact, i.e., the fact about a thing possessing the property of resembling God, not merely to a favorable attitude.⁵⁴ Goodness, understood as Godlikeness, is a property that objects of evaluation possess objectively, i.e., independently of what one may think or feel about it. This theistic account of goodness is markedly different from all others that treat goodness as an attributive adjective. I suggest that we try to understand Adams's account of goodness with the help of the property of *self-similarity*. An excellent example of this property of self-similarity is a "fractal."⁵⁵ I am proposing that we view divine goodness as the metaphysical *archetype* of all non-instrumental goodness, of which all acts of moral goodness can be viewed as temporal replicas. On this view, moral obligations such as the Humanity Principle can only be metaphysically grounded in the relevant divine desires, even as they are known to us via both natural reason and divine revelation. What then is the significance of my theistic alternative? We may understand that the normativity of moral obligations, such as giving equal respect to every human person, is metaphysically grounded in the archetype of all intrinsic goodness, i.e., divine desires. In doing so, we may avoid grounding moral obligations in the unstable quicksand of human agency where normativity is quickly reduced to contested claims about non-normative facts about us.

5. Conclusion

One of Aesop's Fables is a story of a donkey carrying a sacred image. As the image is being moved to the temple by the donkey, people bow their heads reverently, paying honor to the image. But the donkey mistakenly thought the honor was for himself. When his driver realized

⁵³ Adams, *Finite and Infinite Goods*, 14.

⁵⁴ Adams, 18.

⁵⁵ In 1975, the mathematician Benoit Mandelbrot wrote an influential book on fractals that has transformed how we view the structure of nature beyond the world of mathematics. A fractal is, by definition, a figure that has the property of self-similarity. He expresses this property in the mathematical form of an equation: $z = z^2 + c$ (where z and c are complex numbers). The equational pattern, now called the Mandelbrot set, is often illustrated by natural shapes such as snowflakes, leaves, and lightning.

that the donkey had become arrogant and brash, he beat the donkey with a stick, saying, “the honor is not meant for you but for the image you are carrying.”⁵⁶

In this paper, I have tried to briefly illustrate what problems often surface when we try to ground the normativity of action in non-normative facts about human agency. Undaunted by these problems, many philosophers still work to refine their solutions. Despite many differences that distinguish their sophisticated arguments, they share the assumption that there is something about us, our agency, action, or goals, that warrants a certain normative way of treating human beings. I applaud their indomitable spirit but contend that a theistic alternative like mine can be a viable alternative in explaining the normativity of our obligations toward other human beings.

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⁵⁶ Aesop, “Library of Congress Aesop Fables,” accessed May 23, 2022, <https://read.gov/aesop/053.html>.

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In defense of a ‘thick’ formal equality principle in healthcare resource distribution

Lars Sandman

Given resource constraints in healthcare, demands justice and equity require the constant development of material principles for resource distribution. In many cases, such material principles are formulated as mid-level principles, well-adapted to handle healthcare distribution but suffering from aspects outside the healthcare context that affect their application. In healthcare, factors outside the healthcare system will sometimes affect patients’ equal opportunity to receive treatment and achieve health. Examples of such factors might include an individual’s economic means, the cost of drugs, geography, etc. This article explores whether the formal equality principle could help us address such problems. It is argued that the traditional (thin) formal equality principle can aid in priority setting, both as a heuristic tool to aid in consistency and also in handling under-determined cases. However, it appears to be too ‘thin’ to handle problems caused by factors outside the healthcare context. In the article, I explore a more robust version of the formal equality principle and argue that such a principle can be used to address such cases. However, even a more comprehensive formal equality principle will need to consider whether some other actors have a moral responsibility to address the problem or whether the issue could be solved more effectively by others. Furthermore, such a principle needs to consider whether the opportunity cost of achieving ‘thick’ formal equality is acceptable, given the material principles of distribution.

Introduction

Consider the following case:

Patient A is suffering from a debilitating common disease X, with a high impact on quality of life (QoL) and with shortened life expectancy. There is now a new pharmaceutical treatment available on the market that will cure X in Patient A. It will meet the accepted cost-effectiveness threshold, given the severity of X, and A is granted access to the treatment.

Patient B is suffering from a rare disease Y, with an identical impact in terms of QoL and life expectancy on Patient B as X has on Patient A. There is now a new pharmaceutical treatment available on the market that will cure Y in Patient B.

However, since the global prevalence of Y is very low, the price for this treatment has been set very high (to meet R&D costs and include a reasonable profit for the pharmaceutical company). Accordingly, this treatment cannot meet the cost-effectiveness threshold given the severity of Y, and Patient B is not granted access to the treatment.

These types of situations, which are becoming more and more common, given the increased development of ‘orphan’ drugs over the past few years, have raised the issue as to whether a higher cost-effectiveness threshold should be allowed to accompany orphan drugs that target rare diseases.¹ Many healthcare sectors are now accepting different thresholds to secure access to orphan drugs – either explicitly, like in Sweden and England (through NICE) – or implicitly.² However, the exact normative rationale for this is debated. In a previous article, I (together with Erik Gustavsson) have tentatively suggested that a potential normative rationale can reference formal equality.³ In short, A and B, in the aforementioned case, both suffer from diseases with a similar impact on their health, and there is treatment available that would cure them both, but they are granted differential access due to a factor (drugs being developed within a for-profit-market) that would seem to be of normative irrelevance for how we should distribute limited healthcare resources. This would seem to be a breach of formal equality, according to which equal cases (in terms of relevant factors) should be treated equally. An article by Juth is critical of introducing this interpretation of formal equity since he views it as too costly for the healthcare system and worries it would risk contributing to a more arbitrary system.⁴ Basically, he draws the conclusion that this implies that we would compensate for all irrelevant factors influencing whether equal patients end up with unequal treatment, the much feared ‘bottomless pit’ in priority setting. Furthermore, it is argued that formal equality is a normatively empty principle and cannot carry any real normative weight, and it is also argued that it is too vague in terms of how formal equality should be balanced against other normative principles in healthcare distribution. The aim of this article is to develop a more robust idea of how a formal equality principle can carry normative weight in healthcare distribution by developing what I will call a ‘thick’ formal equality principle.

Some background assumptions and conceptual clarifications

I will assume that we are dealing with healthcare distribution in a healthcare sector of a welfare system, where healthcare is funded by public resources that are distributed based on need. To simplify the analysis, I will assume that the needs-based approach is largely

¹ Quintiles IMS. *Pricing and market access outlook* (2017 edition). Online at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjE4ciXz-HiAhWPIIsKHTgADOsQFjAAegQIBBAC&url=https%3A%2F%2Fwww.iqvia.com%2F%2Fmedia%2Fquintilesims%2Fpdfs%2Fpricing-and-market-access-outlook-magazine-web.pdf&usq=AOvVaw2ONUf2jXI_LwfVkQXK5eOE (accessed 2023-03-30).

² SOU. *Läkemedel för djur, maskinell dos och sällsynta tillstånd—hantering och prissättning [Pharmaceuticals for animals, machine administered dosage and rare conditions—/management and pricing.]* (2014). Stockholm: Socialdepartementet. NICE. *NICE Highly Specialized Technology Guidance*. Retrieved from <https://www.elmmb.nhs.uk/elmmb-formulary/joint-medicines-formulary/appendix/nice-guidance/nice-highly-specialised-technology-guidance/> (accessed 2023-03-30).

³ Sandman, Lars and Gustavsson, Erik. The (ir)relevance of group size in health care priority setting - a reply to Juth. *Health Care Analysis*. Vol. 25:1. (2017), pp. 21-33.

⁴ Juth, Niklas. ‘For the Sake of Justice: Should We Prioritize Rare Diseases?’ *Health Care Analysis*. 25:1 (2017), pp. 1-20.

prioritarian.⁵ This implies that the worse off a patient is, the greater the moral value of improving the situation of this patient, and hence, the more resources we are willing to spend on this patient. These are approaches found in countries like Norway, the Netherlands, and Sweden, among others.⁶ For operational reasons, this is often expressed in terms of assessing the severity of the patient's condition and allowing that to set a cost-effectiveness threshold for how much we are willing to spend to improve the health of a patient at different severity levels. Now, we could have another distributional approach to, e.g., a largely egalitarian approach or some more complex form in which we combine different approaches. However, for the sake of simplifying the argument (and since we find this approach in several countries), I will assume a prioritarian approach.

I will also assume that this prioritarian approach is operationalized in terms of mid-level principles.⁷ This implies that they are adapted to handle distributional problems within the healthcare context; i.e., they are adapted to a specific context without taking a stand as to whether a prioritarian approach should characterize societal distribution at large. This is a more substantial assumption—in terms of being the reason we might need a thick formal equality principle—so allow me to expand upon this assumption. From a theoretical perspective, it might be argued that normative consistency requires us to apply the same distributional approach to whatever social goods we are considering. Michael Walzer and others have, on the other hand, suggested that different goods require different distributional approaches. This, in turn, has been criticized for being relativistic and too dependent on contingent historical facts.⁸ In this article, the assumption is not based on a definite stand in the theoretical discussion (even if I tend to side with Walzer's critics) but on the ambition of addressing a real practical problem in healthcare distribution in a normatively consistent way. As indicated above, we generally find specific distributional approaches to healthcare resources that we do not generally find in society; hence, the focus is on mid-level principles in this article. An advantage (but also a potential problem) of mid-level principles is that they are adapted to handle concrete and well-defined areas of moral controversy—in this case, distributive problems in healthcare. In this, they might more effectively guide action; the potential problem is that they do not concern themselves with what happens outside this well-defined area. Let me return to this in the analysis.

The following terms are central to this article: formal equality principles versus material distribution principles and 'thin' versus 'thick' formal equality. A principle of material distribution implies making claims about what characterizes whether a system that might be used to guide or assess whether a specific distribution is fair (or more or less fair). On the other hand, a principle of formal equality can only guide or assess whether two (or more) distributions fulfill requirements of equal cases being treated alike and not whether these two (or more) distributions are fair or not, per se. Hence, two distributions

⁵ Parfit, Derek. 'Equality or Priority?' In *The Ideal of Equality*, ed. Matthew Clayton and Andrew Williams, Basingstoke: Macmillan (2000) pp. 81-125.

⁶ Prop. 1996/97:60. *Prioriteringar inom hälso-och sjukvården [Priority setting in healthcare]*. Stockholm: Socialdepartementet. Stockholm. NOU. *Åpent og rettferdig-prioriteringer i helsetjenesten [Open and fair - priority setting in health care]*. Oslo (2014) Van de Wetering EJ, Stolk EA, Van Exel NJA, Brouwer WB. Balancing equity and efficiency in the Dutch basic benefits package using the principle of proportional shortfall. *The European Journal of Health Economics*, (2013). 14(1), pp.107–115.

⁷ Beauchamp, Tom L., and James F. Childress. *Principles of biomedical ethics*. 7 ed. New York: Oxford university press. 2013. p. 250–251.

⁸ Walzer, Michael. *Spheres of Justice: A Defense of Pluralism and Equality*. Oxford: Robertson. 1983. Tännsjö, Torbjörn. *Setting Health-care Priorities: What Ethical Theories Tell Us*. USA: Oxford University Press. 2019.

might fulfill formal equality requirements without fulfilling fair material distribution requirements. In saying that a formal equality principle is “thin,” I emphasize that it only contains these formal requirements. If the formal equality principle does incorporate aspects of materiality, i.e., it makes claims that will be relevant from a material perspective, I have chosen to call such a principle a “thick” formal equality principle. This might sound like a contradiction in terms. However, if my argument is successful, I will show that such a ‘thick’ formal equality principle still fulfills the role of a formal equality principle and that the materiality of this principle is still dependent on material principles of distribution, to which it functions as a corollary.

The formal equality principle

Beauchamp and Childress start their chapter on justice in healthcare by mentioning the formal principle of justice and attributing it to Aristotle: “Equals must be treated equally, and unequals must be treated unequally.” However, they claim that it “lack[s] all substance,”⁹ and both the relevant group of equals, and the relevant differences (as well as the irrelevant differences, one might add) need to be defined.

The formal principle of justice or equality, as it is also termed, has not received much attention in discussions of distributive justice in healthcare (more than being mentioned in passing) since the publication of *Principles of Biomedical Ethics* in 1979. In an article by Carr, formal justice is related to distributive justice in general. In analyzing the relationship between formal and material principles¹⁰ of justice, Carr argues that what he calls the “equal treatment principle” (henceforth the ‘formal equality principle’) is not a logically independent principle but simply the logical implication of applying (any) material principle of justice.¹¹ Hence, if a material principle of justice requires a certain line of action towards a specific individual, it follows from that very material principle that all other individuals relevantly equal to this individual should be treated equally. Carr even goes one step further than Beauchamp and Childress and labels the formal equality principle a “philosophical illusion.” Drawing on Feinberg’s discussion of comparative justice, he concludes that this also holds true when it comes to material principles of distributive justice.¹² MacKay claims that it only requires that people are treated equally in a formal sense, not taking characteristics into account that can influence whether equal opportunities can be taken advantage of.¹³ Basically, people should be given the exact same offer (in his case, to participate in research). To a large extent, I find this line of argument convincing; however, with an important caveat. In the article, Carr discusses cases when material principles of justice are under-determined but draws the conclusion that differences in interpretation and application for similar cases in such situations cannot be solved by reference to a formal equality principle. I will argue that it can, at least to some extent.

⁹ Beauchamp and Childress, *Principles of biomedical ethics*, p. 251.

¹⁰ Material principles are principles providing substantial guidance as to what should characterise just or fair distribution (if we focus on distributive justice), like achieving equal outcomes, or equal opportunity, or benefiting someone more the worse off they are, etc.

¹¹ Carr, C. L. The Concept of Formal Justice. *Philosophical Studies* 39:3. (1981), pp. 211–226.

¹² In the article, Carr primarily discuss other forms of justice (e.g., different legal or semi-legal cases). Feinberg, Joel. Noncomparative justice. *Philosophical Review* 83 (1974), pp. 297–338.

¹³ MacKay, D. "Fair subject selection in clinical research: formal equality of opportunity." *Journal of Medical Ethics* 42:10 (2016), pp. 672–677.

In Daniels and Sabin's discussion of accountability for reasonableness (A4R), we find a similar argument, with reference to the difficulty of agreeing on material principles and the moral uncertainty regarding how to interpret or balance different reasons for and against a certain course of action in individual situations.¹⁴ Daniels and Sabin seem to conclude that *not* following the formal equality principle, and treating equal cases alike, is tolerable—but the tolerability might depend on the type of healthcare system in which it occurs (i.e., a more or less centralized system). However, a sentence, written and read in passing, indicates that a formal equality principle might fulfill a more pragmatic role in: '...[demonstrating]...a lack of fair process and a kind of arbitrariness within an organisation.'¹⁵

Such a pragmatic use of the formal equality principle seems heuristically important and even *sine qua non*, especially given research on how psychological biases and underlying discriminatory attitudes might influence decision-making.¹⁶ My own experience working on priority decisions in healthcare showed the need to invoke such a heuristic tool every now and then to assess the consistency of and demonstrate a lack of unjustified biases in decision-making.

However, assume that such a heuristic application of the principle ends up concluding that no foul play occurred. Let us then assume there are no psychological biases involved, and we are applying a rational approach (with the agreement of what rationality requires) to the situation with full knowledge of what the moral principles require. Still, we might end up with different assessments in similar cases. Let us look at Daniels and Sabin's case of Harpo and Groucho.¹⁷ They both suffer from the same condition, a condition that is similar on all relevant accounts, and are the object of a decision as to whether to receive potentially life-saving treatment. Since these decisions are made in different contexts, the decision-makers, all following due process, come to different conclusions. For example, using the above-described prioritarian approach, different contexts might apply a different balance between severity and cost-effectiveness (to which there is no real principled answer).

Daniels and Sabin argue that this might be morally acceptable and that there might not be a complaint based on formal equality since we must accept moral uncertainty. Still, at this point, we should make a distinction between moral uncertainty, in terms of being genuinely uncertain which moral principles to apply to a situation despite moral conscientiousness, and the moral principles we are certain will be under-determined. MacAskill et al. have (in my opinion, convincingly) argued that there are rational norms to apply in order to resolve moral uncertainty; for example, maximizing expected choice-worthiness.¹⁸ Given that the cases of Harpo and Groucho are identical, save for the context in which the decision is made, it seems reasonable to accept that if these norms to resolve uncertainty give an answer in the case of Harpo, they should give the same answer in Groucho's case. If not, we will have to claim that there is a morally relevant difference between Harpo and Groucho, i.e., that the difference in context is morally relevant in some

¹⁴ Daniels, Norman, and James E. Sabin. *Setting limits fairly. Learning to share resources for health*. 2nd ed. Oxford: Oxford university press. 2008.

¹⁵ Daniels and Sabin, *Setting limits fairly. Learning to share resources for health*. p. 81.

¹⁶ Kahneman, D., J. L. Knetsch, and R. H. Thaler. Anomalies—The Endowment Effect, Loss Aversion and Status-Quo Bias. *Journal of Economic Perspectives* 5:1 (1991), pp. 193–206;

Wiss, J., D. Andersson, P. Slovic, D. Vastfjall, and G. Tinghog. The influence of identifiability and singularity in moral decision making. *Judgment and Decision Making* 10:5 (2015), pp. 492–502.

¹⁷ Daniels and Sabin, *Setting limits fairly. Learning to share resources for health*, p. 79–81.

¹⁸ MacAskill W, Bykvist K, Ord T. (2020) Moral Uncertainty. Oxford University Press, Oxford.

sense. If Harpo receives treatment and Groucho does not, Groucho will have a reasonable complaint based on formal equality. This complaint might, of course, imply that the process of decision-making in the two different contexts requires adjustment. In this case, the formal equality principle is still empty in the sense that it only reflects the requirements of rational decision-making in identical situations. However, imagine that the problem in the two contexts is instead that the applied principles are under-determined. We might, for example, be convinced that the aforementioned prioritarian approach – where we balance severity against cost-effectiveness to arrive at a decision – is the correct moral principle or approach. The prioritarian principle does not tell us exactly what an acceptable level of cost-effectiveness is given a certain severity; therefore, it is under-determined, given this balance. If, within the same healthcare sector or ‘moral’ jurisdiction, a decision is made to provide Harpo with treatment at a certain cost-effectiveness level, formal equality would provide us with a strong reason to accept the same cost-effectiveness level for Groucho. Obviously, since our principle is under-determined if a decision was made first for Groucho in a different context, they might have ended up with a different cost-effectiveness level, thereby driving the decision-makers to also accept this cost-effectiveness level for Harpo. Now, when deciding on Groucho’s case, it might be argued that given a different level of effectiveness in their healthcare system – e.g., a different level of marginal productivity – accepting the same level as for Harpo would have more serious consequences in terms of the opportunity cost of lost health.¹⁹ Accordingly, they need to establish a different level. Still, they would then still have strong reasons to be guided by the acceptable opportunity cost of providing Harpo with treatment and to apply the same level to Groucho – even if this implies accepting different cost-effectiveness thresholds. In effect, formal equality would still be a relevant driver of decision-making once the existence of an under-determined principle has been established.

In conclusion, I would argue that the formal equality principle (what I will call the ‘thin’ formal equality principle to distinguish it from the principle being discussed in the rest of the article) should play the following roles in situations of distributive justice (in healthcare):

- When material principles of justice (or a procedural approach) provide a fully determined answer to decisions regarding how resources should be distributed in individual cases, the formal equality principle is *normatively* redundant. The same goes for situations of moral uncertainty when norms for resolving uncertainty provide answers.
- However, in such situations, the formal equity principle can also fulfill an important heuristic role in exposing unjustified considerations being ‘smuggled’ into the decision.
- In situations when material principles of justice (or a procedural approach) are under-determined, the formal equality principle fulfills a normative role in providing a *prima facie* reason based on considerations of fairness to act in accordance with precedent.

¹⁹ Siverskog J. *Opportunity cost in healthcare priority setting*. Thesis. Linköping: Linköping university press. 2022.

When the Formal Equality Principle might be *too thin*

Let us return again to our introductory example:

Patient A is suffering from a debilitating common disease X, with a high impact on quality of life (QoL) and shortened life expectancy. There is now a new pharmaceutical treatment available on the market that will cure A from X. It will meet the accepted cost-effectiveness threshold, given the severity of X, and A is granted access to the treatment.

Patient B is identical to A in terms of suffering from a rare disease Y, which has the same impact on Patient B as X does on Patient A. There is now a new pharmaceutical treatment available on the market that will cure B from Y. However, since the global prevalence of Y is very low, the price for this treatment has been set very high (to meet R&D costs and include a reasonable profit for the pharmaceutical company). Hence, this treatment cannot meet the cost-effectiveness threshold, given the severity of Y, and Patient B is not granted access to the treatment.

Applying the normal 'thin' formal equality principle presented in the former paragraph does not seem to help us here. The patients are identical regarding relevant aspects like severity and patient benefit of treatment. The balance between severity and cost-effectiveness has been set before and therefore drives us to accept a similar level in these two cases. What differs between A and B is that the cost of treatment is much higher for B's treatment. We might then argue the following: if the level of cost is a relevant but given factor to how we should prioritize access to care, then A and B have different costs, the situations are not equal, and the formal equality principle has nothing to say or is not violated. Compare the following situation:

Patient C is identical to Patient A in terms of suffering from another common disease, Z, with the same impact on C as X has on A. There is now a new pharmaceutical treatment available on the market that will cure C from Z. However, since the price has been set very high due to high expectations of profit, inefficient production, etc. (or a combination of these factors), the treatment does not meet cost-effectiveness thresholds given the severity of Z, and C is not granted access.

In this case, it seems strange to claim that we should accept a higher cost-effectiveness threshold for accepting treatment for Z and thereby a higher opportunity cost for other patients within the healthcare system to satisfy stock owners, or to encourage further inefficiency in drug manufacturing, etc. These considerations, it might be argued, belong to a different distributional sphere and should have nothing to do with how we spend healthcare resources. However, let me qualify the last statement since it is far too simple.

First, talking about different distributional spheres here does not imply that we must accept Michael Walzer's idea about different spheres normatively requiring different distributional principles due to historical patterns, etc. It is simply an acknowledgment that if we have accepted pharmaceutical treatments developed on a for-profit market, this will have consequences for pricing, availability versus profitability, etc. The pharmaceutical industry will invest in treatments they think will be profitable and will expect a certain profit from developed treatments in order to remain in the market, etc. Society might impose restrictions or provide incentives to guide or steer the market, but even so, there will be market dynamics healthcare systems will have to relate to and adapt to. Furthermore, this specific industry might be part of a society, largely applying a

prioritarian approach to distribution by taxation and redistribution, i.e., applying the same distributional approach all over society.

Ideally, the level of cost-effectiveness accepted for introducing new treatments into the healthcare system will be a balance between the added value, the opportunity cost for patients already within the system, market considerations, etc. From a healthcare perspective, the question is: how much pressure can we apply to the price, thereby lowering the opportunity cost and still gaining access to valuable new treatments and stimulating the development of new valuable treatments?

In effect, once we have found acceptable cost-effectiveness thresholds for different severity levels, taking the above into account, we might argue that we need not bother with the market considerations of the pharmaceutical industry. If such a threshold can be generally met for new treatments by the industry, we have no (or very weak) reasons to make exceptions for those companies that cannot or will not meet them. Addressing these kinds of reasons would also signal the wrong sorts of incentives to the industry at the cost of the healthcare system.

So, why should we make exceptions for orphan drugs for rare conditions (if indeed we should), and how is this related to the formal equality principle?

Formal equality expanding

Consider the following example:

Patient D, a poor and homeless man with trouble finding the economic means to feed and support himself, suffers from condition H (but has no other health problems). H is not caused by the choices made by D. The doctor provides him with a prescription for treatment H(t) at the cost of 20€ to the patient. He does not collect the prescription and continues to suffer from H.

Patient E, a middle-class woman working as a teacher, suffers from condition H (but has no other health problems). H is not caused by the choices made by E. The doctor provides her with a prescription for treatment H(t) at a cost of 20€ to the patient. She collects the prescription, and her condition is cured.

To apply the 'thin' formal equality principle to this case would imply that the two patients are treated exactly the same in this situation—which they are. So, D could not complain with reference to the formal equality principle in this case. However, due to what happens outside the distributional decisions of the healthcare system, D is disadvantaged. We might argue, from a normative perspective, that this other distributional system should work differently and that people should not be so destitute not to afford to pay 20€ for medicine. However, in the above situation, the healthcare system will have to relate to the fact that some people are destitute the same way D is.

Now, we could argue that in the situation with D and E, we should not allow irrelevant factors to impact whether they receive treatment. For example, even if their respective genders are different between D and E, to allow that to make a difference (without being related to severity or capacity to benefit from treatment, etc.) would be a breach of the formal equality principle. Unless we think there is a morally relevant difference between doing and allowing in these cases (and I would argue we should not generally do so in healthcare), it is difficult to see why we should not take D's economic situation into account. For example, if D had a functional disability that would impose on his ability to take the medication, we would find it reasonable to make arrangements so he

would get it. If not, he could make a complaint based on the formal equality principle. In the above case with D and E, we could argue that under a somewhat 'thicker' formal equality principle, which does not allow irrelevant factors to impact equal treatment for equal cases, we should provide D with treatment H(t) free of charge (i.e., at the cost of the healthcare system).

If, generally, the formal equality principle claims that "equal cases should be treated equally," we need to provide an answer to when cases are equal and what follows from that in terms of equal treatment. A tentative answer to this, given the above example, is that this implies only distinguishing between cases based on normatively relevant features and only allowing such normatively relevant features to make a difference between cases.

In our first case between A and B, the fact that B belongs to a small patient population is not a normatively relevant difference and should not impact equal access to treatment, given that both patients are equal in normatively relevant aspects. In a similar vein for D and E, the fact that D is poor and cannot afford treatment is a normatively irrelevant difference (within healthcare) and should not impact equal access to treatment. However, accepting that we should provide D with treatment, free of cost, within the healthcare system would seem to imply that we should also provide B with treatment at a higher cost and then, accordingly, provide the same to C. In all these three cases, the reason they do not gain access to treatment under the existing approach are factors that fall outside of the healthcare context. This would have far-ranging consequences, implying that healthcare systems should compensate and thereby bear the opportunity cost of every irrelevant difference (associated with other distributional spheres) that might impact equal access to treatment (cf. Juth 2017 for this line of argument).

This line of reasoning indicates a potential difference between the thin and thick versions of formal equality, i.e., that the latter has a potential difference in opportunity cost between equal cases that are not associated with the former. Let us examine this in the next section.

The Opportunity Cost of Formal Equality

Every time we make a decision to use healthcare resources, there is an opportunity cost to this decision—we could have used these resources differently. Ignoring more practical differences between A and B or D and E (things like the time needed to make an assessment of the new drugs in the first case or the time needed to make a diagnosis in the second case), the potential opportunity cost for treating A is the same as for B (or for C), if we only apply the thin formal equality principle, and the same goes for D and E. In applying a thicker version of the formal equality principle, we are also accepting a higher opportunity cost for one of the patients in order not to allow irrelevant factors to impact equal (or equal access to) treatment. This difference in opportunity cost also indicates that the thick formal equality principle is far from thin or empty but that there is more 'distributional materiality' to this principle. This, in turn, indicates that applying the principle will impact the general distribution of resources in healthcare. The resources needed to live up to the thick formal equality principle, which need to be redistributed from other patients within the healthcare system. If the thick formal equality principle has more materiality than the original thin one, why not simply introduce a material principle doing the same job as a thick formal equality principle? Let me explore this in the next section.

Incorporate material principles to handle the effects of other distributional spheres

Regardless of in what way other spheres affect whether the distribution of healthcare resources is viewed as just or fair, it seems that some form of equal opportunity principle would be our best bet in terms of an added material principle.

In the discussion of general distributive theories, equality of opportunity for welfare has been advocated by, for example, Arneson.²⁰ Following Arneson, people should have equal opportunity to achieve equal outcomes of relevant benefits, but personal choice might then result in unequal outcomes. Later, this idea further developed in the discussion on luck-egalitarianism.²¹ A problem with this general idea, or set of ideas, is that they make the distribution, to some extent, dependent upon personal choice or responsibility – an idea that has been heavily criticized on several accounts.²² Now, we might imagine another idea about equal opportunity, without reference to personal choice, but rather an idea about equal opportunity of treatment.²³ In an article discussing and discarding different arguments for why rare diseases warrant special treatment in priority settings, Niklas Juth analyses such an idea by reacting to a preliminary argument I made.²⁴ Juth explores a number of different interpretations of the idea of equality of opportunity for treatment as a general and material principle of justice in healthcare: as access to all available treatments, as an equal probability to achieve health, as the luck-egalitarian version mentioned above, and as an equal probability for patient groups to gain access to treatment – and discards them all with convincing arguments.

Let us, therefore, try a more limited idea about equal opportunity, namely that patients fulfilling the same relevant criteria of our material justice approach to distribution should have equal opportunities to receive healthcare. If our prioritarian approach implies that the severity of the condition and the cost-effectiveness of treatment are relevant aspects to consider, and two patients score equal on these aspects, they should have equal opportunity to actually receive treatment. In the example with D and E, they do fulfill the same relevant criteria in terms of severity and cost-effectiveness (only looking at the cost for treatment) and hence should have equal opportunity to receive the prescribed treatment. In the case of A and B, they do not score equally on all aspects since the treatment differs in terms of cost-effectiveness due to a difference in cost. If we want this equal opportunity principle to be also applicable to the case with A and B (or A and C), we need to qualify it further. One way of doing so is to look at the underlying reasons why patients end up differently on the relevant aspects. Are there factors unrelated to the rationale for healthcare distribution that led to the difference?

Hence, we would need to formulate an equal opportunity principle for patients, scoring equal on relevant aspects, or when scoring unequal opportunities, this is the result of some morally irrelevant or problematic difference unrelated to the underlying rationale for distributing resources in healthcare that we then need to compensate for.

²⁰ Arneson, Richard J. Luck Egalitarianism: An Interpretation and Defense. *Philosophical Topics* 32 (2006), pp.1–20.

²¹ See for example Segall, Shlomi. *Health, Luck and Justice*. Princeton: Princeton University Press. 2010.

²² See for example Björk, J. *Just Responsibilities? On Responsibility for Health in Swedish Health Care Priority Setting*. Thesis. Karolinska institute. Stockholm. 2021.

²³ Juth, 'For the Sake of Justice: Should We Prioritize Rare Diseases?', pp. 1–20.

²⁴ Carlsson P, M. Hoffman, L-Å. Levin, L. Sandman, and J. Wiss . *Prioritering och finansiering av läkemedel för behandling av patienter med ovanliga sjukdomar. Rapport till Läkemedelsutredningen*. [Priority and financing of pharmaceutical for treatment of patients with rare diseases. A report to the Pharmaceutical inquiry.] Prioriteringscentrums rapportserie 2012:1

This would imply a fairly complex material principle to be added to our basic prioritarian approach (or whatever approach we apply). Such a material principle would obviously be related (to some extent) to underlying egalitarian theories, even if it is more restricted in scope. However, such a principle has no independent standing as a distributive principle since it requires that there are other material principles defining the relevant aspects that must be taken into account and whether they are fulfilled in the right way. So, this would imply that we add a material principle (with a less developed rationale) to material principles with a more developed rationale. At the same time, this material principle would have to have a similar function as a thick formal equality principle.

So, let us scale it down again, returning to the example with D and E. What we need in this example is a principle that would change things for D but not necessarily do so for E. E is doing just fine, picking up her prescription and paying her 20€. Expressed in other words, we need a principle that could help us handle situations when our mid-level principles, in this case, the prioritarian one, do not seem to give us a fully satisfying answer. As we said above, formal equality principles have been advocated as an aid to help us solve under-determined cases. Hence, it seems we need a formal equality principle of sorts, but which sort since we also concluded that the traditional thin formal equality principle did not do the job? A reason for this was that, in the example, nothing was under-determined from the perspective of the healthcare system.

In the choice between adding a material principle or an expanded or thicker formal equality principle, I would argue that we have reason to focus on the latter (even if both have a similar function). This is because:

- The thin formal equality principle is already an implicit part of any set of material principles.
- Expanding it somewhat further is in line with its suggested role in solving under-determined cases or working as a corollary.
- The expansion is related to the role it plays in treating equal cases equally but expands the relevant area in which this is applied (i.e., while also taking into account possible reasons affecting equality outside a strictly-defined healthcare context).

Towards a 'thick' formal equality principle

When dealing with mid-level principles, we need to distinguish between how they handle the context in which they are developed and how they handle aspects outside this context. Mid-level principles can provide fully determined answers within their specified context but will, for obvious reasons, generally give under-determined or no answers when considering aspects outside this context. In that sense, we can claim that the example with D and E is both fully determined and under-determined. Only considering aspects regulated by our mid-level material principles, there is no indeterminacy as to which answer it provides as to whether patients D and E should receive treatment—they have the same diagnosis, the same severity, would benefit from the same treatment, and this is equally cost-effective for them (only looking at treatment cost). However, when considering how aspects outside healthcare affect patient D's ability to benefit from treatment, these principles are under-determined. I am suggesting that a 'thick' formal equality principle could handle such borderline indeterminacy.

So, what characterizes a formal equality principle as distinguished from a material justice principle? As has been noted by several authors, even those who, in the end, refute the need for a formal equality principle, a formal principle is not a sufficient principle to solve problems of justice.²⁵ It can, at best, function as a corollary to material principles.

If we assume that our material mid-level principle for distributing healthcare resources is prioritarian, claiming that what should guide resource distribution is a balance between the severity of the patient's condition and cost-effectiveness, allowing a higher cost-per-effect for more severe conditions. Let us assume that our application of this prioritarian mid-level principle is fully determined for our healthcare system. Knowing the severity of a patient's condition, we will also know which level of cost-effectiveness is acceptable for treating this severity. This level has been set, taking into consideration things like the workings of the pharmaceutical market, the effectiveness of the system in producing health, etc. In order to avoid moral hazards and overuse of the system, we could introduce co-payments.

If, given this, we face situations like the ones including A, B, C, D, and E above, we need to consider whether this is a problem that should be solved within the healthcare system or in some other way. In line with this, we need to decide whether the opportunity cost for such a solution should be borne by the healthcare system or by some other actor in society. There are several factors that could impact whether the healthcare system or some other actor should be responsible for solving the problem: how large is the opportunity cost for the healthcare system (and for the other actor); which actor would be most effective in solving the problem; and how is moral responsibility attributed in solving the problem?

Moral responsibility

Given the normative basis for the healthcare system, if we have an equity and needs-based system, the healthcare system will have a moral responsibility to see to the healthcare needs of its patients in an equal and equitable way in line with these founding norms. It is not normally responsible for tending to the *economic* needs of citizens in the society in which it operates. Nor is it responsible for maintaining or stimulating a growing life-science sector (even if that is sometimes argued to be the case by the pharmaceutical industry). If there is a moral responsibility to do these things, they will rest with other actors in society – with social services, or with industry development programs, etc. In a market economy, one might argue that no one (except the company in relation to its shareholders) is responsible for maintaining and allowing the business of a single company to grow or flourish (there might still be general support systems not allowing entire business sectors to go under, support for unemployment, etc.). At the same time, from the perspective of the healthcare system, it might be argued that in order to tend to the healthcare needs of patients in an equitable way, the healthcare system needs to strike a balance between using resources as effectively as possible and stimulating continued development of new treatments for (at the very least) severe diseases. If the system would put pressure on the prices of new drugs to the extent that the pharmaceutical industry within a specific field would not survive or that the aforementioned pressure would lead to a reduction in innovation, this might not be in line with the healthcare system's overall moral responsibility to patients in terms of treating patients with equal needs in an equal way. On the other hand, accepting any and all prices from the pharmaceutical industry –

²⁵ Beauchamp and Childress. *Principles of biomedical ethics*; Carr. *The Concept of Formal Justice*.

as in the case of Patient C suffering from Z—would be taking that responsibility too far. Even if it would affect the survival of that single company, it is not generally necessary in order to have a thriving pharmaceutical industry within this area. Allowing higher prices in the case of patient C could, therefore, not motivate the increased opportunity cost for other patients within the system.

Effectively handling the problem

Another aspect of this is whether the healthcare system is the most effective agent when it comes to solving the problem of unequal access. Even if the opportunity cost for the healthcare system is negligible in providing D with treatment with no co-payment, social services might be better equipped to effectively solve D's economic problems instead of forcing the healthcare system to make a number of exceptions. This might also involve considerations of what is most effective in the long run. The healthcare system might set an example in the case of D that might lead to a less effective way of dealing with the problem than what a more specialized actor could manage.

In a similar vein, if the pharmaceutical industry needs different forms of incentives or stimulants to develop drugs for specific areas—e.g., rare diseases—this is probably more effectively handled by agents other than those in the healthcare system and by means other than having the healthcare system pay higher costs for drugs.

Opportunity cost

Even if, all things considered, the healthcare system does have a moral responsibility to address the problem and there is no other actor that could address it more effectively, the opportunity cost of doing so needs to be taken into account. As mentioned above, a thick formal equality principle will have an opportunity cost. In some cases, like in D, the opportunity cost is negligible and needs not to be considered (unless such a practice is more systematically implemented). The case with B and C is another matter. To allow for a higher cost-effectiveness threshold, in different healthcare sectors, we might see thresholds in the order of two-to-ten times as high as the threshold for a common drug, which will incur a substantial opportunity cost.²⁶ To take a real-life example:

A Swedish estimate when the drug Orkambi for cystic fibrosis was introduced concluded that introducing Orkambi gained 404 QALYs at the expense of 3457 QALYs in the system—or an 86 ratio given the marginal productivity level in Swedish healthcare (estimated to about 20,000 €/QALY). This is because Sweden allows a cost-effectiveness threshold for orphan drugs for highly severe rare conditions up to 200,000 €/QALY. For common highly severe conditions, Sweden allows up to 100,000 €/QALY—five times the marginal productivity level.

With a large number of orphan drugs coming on the market, this opportunity cost will be substantial. There is also a balance between the raised cost-effectiveness threshold and what is a necessary level from a market perspective, and what is possible given market considerations and access in other countries (given the global mobility of patients, etc.). With a prioritarian approach to healthcare distribution, we might argue that if the

²⁶ Siverskog, J., Henriksson, M., (2021), On the role of cost-effectiveness thresholds in healthcare priority setting, *International Journal of Technology Assessment in Health Care*, 37(1).

opportunity cost of a specific intervention risks access to treatment for patients (or patient groups) that are equally or more highly prioritized, then it is not motivated. Ideally, the opportunity cost should affect lower-prioritized patients or patient groups. However, that requires that the healthcare system has control over how resources are redistributed, which seldom seems to be the case. Such uncertainty, in terms of what the impact on the healthcare system will be, might need a second-order approach, in line with suggestions from MacAskill et al.²⁷ Consider the following example:

A healthcare system is considering whether to accept a higher cost-effectiveness threshold for orphan drugs. Two options are on the table. A threshold double the one for common drugs with equal severity, or a threshold that is three times as high. Given the extent that this would impact the healthcare budget, we have the following situation:

2x threshold: it is likely resources will be taken from treatments assigned a lower priority, given the size of the budget for these treatments and the potential for effectivization.

3x threshold: it is likely resources will be taken, at least in part, from equally highly prioritized treatments, given the size of the budget and the potential for effectivization.

Ideally, in both cases, there are resources available for lower prioritized treatments to be redistributed – but there is a political cost to this, and previous experience of how redistribution works, such a strategy does not seem likely.

Whether we go for the 2x threshold or the 3x threshold, it is theoretically possible to redistribute resources to pay for the opportunity cost from lower-prioritized patient groups. However, this is not how things are normally done, and it is also practically difficult due to system dynamics. To save resources on rationing, we can either stop paying for what we buy externally from providers – e.g., drugs from the pharmaceutical industry – or let go of the healthcare staff providing the rationed care. Given the ratio between the cost of drugs and staff, about 10% of the total budget in the former case and about 45% of the budget in the latter case (in the Swedish context), the fact the main part of the drug budget does not target low-prioritized patient groups (where cheap drugs and staff interventions are likely to be more common), the rationing of lower prioritized patient groups will need to affect staffing.²⁸

However, since healthcare staff distributes their time over both higher-prioritized and lower-prioritized patient groups, this will imply removing some of the tasks for staff. At the same time, work legislation will make it difficult to require that staff get a lower fraction of work time (with lower pay). In effect, ethically-required redistribution is difficult to achieve. Given this uncertainty about what exactly will happen in the system, it seems reasonable to adopt the 2x threshold before the 3x threshold, given that the higher likelihood of more equal access to orphan drugs in the latter case is bought at the expense of equally highly-prioritized patient groups.

²⁷ MacAskill et al. *Moral Uncertainty*.

²⁸ SKR. *Ekonomirapporten* [The Economy Report]. Stockholm:SKR, 2022.

A tentative suggestion for a thick formal equality principle

Based on the above reasoning, we might then formulate a suggestion for a thick formal equality principle.

A thick formal equality principle applies when two of the following criteria hold true:

1. When two (or more) patients are equal in all relevant aspects given our material principle(s) of justice within the healthcare system but differ based on irrelevant factors outside the healthcare context, OR
2. When the only difference between two (or more) patients regarding relevant aspects within our system depends on irrelevant aspects falling outside the healthcare context, AND
3. this will affect these patients differently in terms of access to treatment.

The thick formal equality principle then provides a reason to even out such differences, dependent upon the following:

To what extent the healthcare system has a stronger moral obligation than an alternative actor to correct the situation?

To what extent some alternative actor can correct the situation more effectively than the healthcare system?

To what extent the increased opportunity cost for correcting the situation can be motivated, given the material principles of justice in the healthcare system?

Let me illustrate how this principle could be applied to a different case.

Patient F, who lives a ten-minute walk away from the hospital, has a risk of developing condition Z. If she, in fact, does develop Z, she needs the advanced treatment T within 1 hour, or she will die.

Patient G, living alone in the wilderness, is on a 2-hour flight by helicopter from the hospital and has a risk of developing condition Z. If he, in fact, does develop Z, he needs the advanced treatment T within 1 hour, or he will die.

Unless we do something, patients F and G— who are similar on all accounts following our material principle, in our case, a prioritarian principle— will be treated differently in this case. What would our thick formal equality principle say about this case?

Both patients have the same disease, with the same risk of developing a severe condition where they would benefit equally from treatment, and this treatment would be equally cost-effective, given the actual cost of treatment to the healthcare system. Hence they are equal, given the relevant aspects of our prioritarian approach. Still, they will have different access to treatment due to the geographical distance to the hospital from their respective homes. Geography is not a relevant factor to consider following our material principle. Hence, the entrance criteria 1 and 3 for applying the thick formal equality principle apply. Let us then look at the other three criteria.

Is there any other actor that is responsible for addressing the problem in this case? Other actors in society are obviously responsible for how public transport is organized and made available, but even so, it seems to extend beyond their responsibility (but also the possibility) to offer transport for patient G on a systematic basis that would overcome the

required distance. Neither is it likely that such a solution would be a more effective solution than what could be offered within the healthcare system. One might argue that G has the moral responsibility to move closer to the hospital instead of expecting the healthcare system to compensate for his choice to live in the wilderness at an increased opportunity cost for other patients. At the same time, this would lead us into a more general discussion as to what extent we should expect patients to make certain choices in order to reduce the chance that their healthcare needs will be contingent on luck.²⁹ Hence, to what extent we could argue that G has a certain degree of moral responsibility for solving the problem depends on to what extent we accept this to be generally within our healthcare system; in other words, whether such considerations are part of our material principles. Let us assume they are not.

Hence, in this case, a preliminary assessment is that the healthcare system has the major moral responsibility to try to solve the problem and will do it more effectively than any other actor. However, imagine that this could be done in different ways. We could set up this treatment at the nearest primary care facility (about 50 minutes away from G) and employ staff to provide the treatment. This, in turn, could be done in different ways. We could train the staff at the primary care facility to provide the treatment (which would require renewed training to keep up competence, but at the same time imply less skillful management due to the lack of actual provision), or we could have a circulation scheme for trained hospital staff, where they spend every tenth week at the primary care facility instead of at the hospital. Since this involves highly specialized staff, they might not be skilled at doing much else other than waiting for when G needs the treatment. Looking at these two different options, there is a greater opportunity cost to the latter, while the former will imply a somewhat reduced probability of successful treatment in case G needs it. To assess whether any of the options are reasonable, it should also be considered how the redistribution of resources to enable these options would take place.

Still, we might make the assessment that the former option strikes a reasonable balance between cost-effectiveness and opportunity cost. Hence, treatment is set up with training for existing staff at the primary care facility.

Summary and practical implications

In this article, I have argued that we need a thicker formal equality principle to complement material mid-level principles for healthcare distribution. Such a thicker formal equality principle is supposed to handle fairness problems arising from factors outside the context of healthcare affecting equal opportunity to benefit from treatment within the healthcare system. However, being a *prima facie* principle, the opportunity cost and displacement of other patients in the healthcare system need to be taken into account when applying such a principle. Moreover, if the fairness problems are better solved somewhere else in society, we might have reason to do so from the perspective of efficacy.

Let me return to the question of why this is important and the role such a principle might play in practical priority setting within healthcare. The distribution of scarce resources in healthcare is one of the most ethically challenging tasks of decision-makers, where decisions (regardless of on what grounds they are made) will have winners and losers among the population. It has been observed that one essential basis for making such decisions that can be accepted as legitimate is that the reasons for making them are robust

²⁹ Björk J, *Just Responsibilities? On Responsibility for Health in Swedish Health Care Priority Setting*.

and consistent.³⁰ For this reason, several healthcare jurisdictions have decided to develop normative frameworks or principles to guide priority setting and enable consistent reasoning when making hard decisions. These are developed for ‘internal’ use within the healthcare system and do not regulate the distribution of resources outside of the healthcare system. At the same time, aspects outside the healthcare system will sometimes have an impact on the extent to which patients can access healthcare interventions. In such cases, our principles or frameworks for the material distribution of healthcare resources are silent or will give counter-intuitive results (as indicated by the examples in this article). Avoiding ad-hoc solutions and continuing to rely on robust and consistent decisions requires a principled approach. Here we seem to have two possible choices: to add another material principle that is supposed to guide these borderline cases or to develop the formal principles we are already using within the existing system. That is, either implicitly or explicitly, our material principles or frameworks are also complemented by formal equality principles to make sure we do not allow irrelevant considerations to affect our decisions. In this article, I have argued that developed and ‘thicker’ formal equality principles might work better than yet another material principle and may imply less of a change to the principles we are already applying within our systems. In the Swedish case, we have already used such a formal equality principle to change how we make decisions pertaining to orphan drugs, testing the practical relevance of such a principle as a complement to our existing material distribution principles. The more robust formulation of such a principle, as developed in this article, might hopefully offer better support in other cases when deciding to what extent we should take distribution patterns and aspects outside of healthcare into account when making priority decisions within the healthcare system.

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³⁰ Daniels and Sabin. *Setting limits fairly. Learning to share resources for health*.

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