

within a context in which error is objectively possible, for when all standards are in the final analysis relative no error is, in the final analysis, possible and one need not defer to anything other than one's private commitments. Correlatively, if ethics requires recognition of the value of others it requires acceptance of the existence of a common reason that transcends contingent commitments or the lack of them.

Notes

¹ Solter et al. 2003: 232–237, and most fully, Beylveid and Brownsword (2007: Ch. 10).

² This is suggested by Gewirth himself (1978: 63). For full development of the idea, see Beylveid 1996 or Beylveid and Brownsword 2001: 79–86.

³ See Beylveid 2006. (This paper also contains some earlier, less developed reflections, on proceduralism within Gewirthian ethics).

References

- Beylveid, Deryck and Brownsword, Roger. *Consent in the Law*. Oxford: Hart, 2007.
- Beylveid, Deryck. "Legal Theory and Dialectically Contingent Justifications for the Principle of Generic Consistency." *Ratio Juris*, 9, 1, 15–41, 1996.
- Beylveid, Deryck and Pattinson, Shaun. "Precautionary Reason as a Link to Moral Action." In *Medical Ethics*. Michael Boylan (ed.). Prentice-Hall: Upper Saddle River, 39–53, 2000.
- Beylveid, Deryck and Brownsword, Roger. *Human Dignity in Bioethics and Biolaw*. Oxford: Oxford University Press, 2001.
- Beylveid, Deryck. "Rationality in Bioethics: Reasonable Adjudication in a Life and Death Case of the Separation of Conjoined Twins." In *Bioethics in Cultural Contexts: Reflections on Methods and Frontiers*. Christoph Rehmman-Sutter, Marcus Düwell and Dietmar Miehle (eds.). Dordrecht: Springer, 145–162, 2006.
- Gewirth, Alan. *Reason and Morality*. Chicago: University of Chicago Press, 1978.
- Kant, Immanuel. *Groundwork of the Metaphysics of Morals*, 1785. Translated with an introduction by Herbert James Paton as *The Moral Law*. London: Hutchinson, 1948.
- Solter, Davor et al. *Embryo Research in Pluralistic Europe*. Berlin: Springer-Verlag, 2003.

Needs and the Metaphysics of Rights

Bernard Baertschi

1 To Each According to His Needs

As everybody knows, Marxists would have written on the flags of the classless society: "To each according to his needs". It is the marxist formula of justice, but it reaches far beyond Marxism. Bernard Williams has proposed the same formula in the domain of health care and, at least in Europe, we can say with confidence that a majority of people consider it to be an appropriate formula for the distribution of basic goods like health care. Famously, Robert Nozick does not concur: for him, although needs determine who is susceptible to use the goods that satisfy these needs, this does not give the needy the *right* to have the goods they need; otherwise tomorrow we shave for free (cf. Nozick 1974: 233–234).

I don't want to enter this dispute, I but only to emphasize a critique often directed at Nozick's position: his argument, it is said, is not valid, because it confuses needs and preferences; though preferences (*mere* preferences as it is often added) do not generate rights, needs (*real* needs) do. As those expressions show, there is a link between needs and rights. Of course, not everybody acknowledges this, because there is no consensus on the nature of rights, and it is quite possible to disconnect rights and needs, for example if you conceive rights as entitlements conferred upon citizens by a political authority. I do not hold this last position, because I think that morality is not a political affair but is foremost linked to human flourishing; and to flourish, it is necessary to have real needs satisfied. This is why I want to investigate here the relationship between goods and rights and more precisely to elucidate this rather vague expression "generate" when we say that needs *generate* rights. As it will appear, it must not be confused with the question of justification: "Needs generate rights" does not mean "Needs justify rights": the first is an ontological or metaphysical question, the second an epistemological one; but of course, they are not independent, and I will contend that, here as elsewhere, metaphysical questions are foundational.

B. Baertschi

e-mail: bernard.baertschi@lettres.unige.ch

My analysis will focus on positive rights and for the sake of the argument, I wish to generalize Williams' thesis to all positive rights: they all depend on needs. It is probably not true, but by the end, I hope to convince you that my analysis remains correct for any item you would put in the place of needs.²

The model I shall use to elucidate the generation of rights is neither new nor original, it is the model of supervenience whose sketch has been devised by G.E. Moore and Richard Hare long ago. But it will be adapted and modified on certain crucial points.

2 The Supervenience of Rights

For Hare, moral features supervene on nonmoral features, that is on ontological features, as he says in this well-known passage: "Suppose that we say 'St. Francis was a good man'. It is logically impossible to say this and to maintain at the same time that there might have been another man placed exactly in the same circumstances as St. Francis, and who behaved in exactly the same way, but who differed from St. Francis in this respect only, that he was not a good man" (Hare 1952: 145). More generally, valuational properties supervene on ontological properties: A knife is good if its blade's edge is sharp. As we can see from these two examples, and as Jaegwon Kim has very clearly shown, supervenience is a relation of asymmetrical dependency: if SUP is the supervenient property and BAS is the ontological basis, it is not possible that something changes in SUP without a corresponding change in BAS, but the reverse is not true.³ So, two identical moral actions – two generous actions – can have a different ontological basis, but from such an ontological basis it is not possible to generate an immoral action – a mean one: two different actions cannot have the same ontological basis.

So far, so good; but I think it has not escaped your attention that I have somehow changed my topic: I should investigate the relations between needs and rights, and so far I have addressed ontological items and values. But if "to have a need" is an ontological or natural property, "to have a right" is not an evaluative one, as is "to have goodness". So, from the thesis that values supervene on the natural, it does not follow that rights supervene on the same basis. From "St. Francis has such and such properties that make him a good man" it does not follow that he has rights. True, but that is not the problem: I don't want to know if and how St. Francis' rights depend on his goodness – it would be a very peculiar and non-standard ethical theory – but to explore the relation between needs and rights. The difficulty of this project is located in one feature of rights, namely that it is not an evaluative concept, but a deontic one, and as we know the grammar of both is not the same (cf. Castañeda 1975: 185–190, 335–336).

This difference is perhaps not so important, and we would be better off frankly asking the following question: Are rights supervenient on needs? It seems possible to proceed in this way, because "to have a need" and "to have a right" are both properties of persons. So we can indeed ask: What is the relation between these two properties? Let us postulate that it is supervenience; what will this mean? BAS is

need, SUP is right; if rights supervene on needs, it implies that two identical rights can have other needs as their bases, but that two identical needs cannot result in two different rights (or the first in a right, the second in a no-right). Is this possible? It depends on how you construe needs and rights.

Two persons have the same need regarding health care: have they both the same right to it? Not necessarily: only one of them may have this right, if he alone is in possession of health insurance, or – but this is controversial – if he alone is not responsible for his condition. So supervenience is possible only if (i) rights are not conceived as institutional privileges only and (ii) needs are conjoined with other pertinent features.

Do rights so understood supervene on needs or on basic needs? Basic needs, of course. But how to discriminate between needs that are basic and needs that are not? The obvious answer is the importance of *goods* that persons need. Health (or health care) is an important good, to be two meters high is not (let us accept Norman Daniels' criterion: needs are basic when their satisfaction is "necessary to achieve or maintain species-typical normal functioning". Daniels 1985: 26). But the notion of "important good" is normative (let us say that the normative covers the deontic and the evaluative); it is even twofold evaluative:

- (A) X is a good = X has value
- (B) X is an important good = X has a great value

We are now confronted with another question: rights supervene on needs, but do they supervene on the factual properties of important needs or on their evaluative properties (to be tied to goods)?

3 Supervenience and the Role of Values

Here, we must be careful not to misunderstand our question. Goods that are the objects of needs are *not* moral goods. They are ontological goods, that is goods in virtue of what they are. Even if you are an antirealist with regard to axiological properties, if you think that we project values upon things, you must concede that the goodness or value of something depends at least partially on what it is: if bread is good for us, it is because of its natural properties (and of our natural properties). So the problem I address now is not the meta-ethical problem of the priority of evaluative properties on deontic ones, or vice versa – often misnamed the problem of the priority of the right on the good – I am not concerned here with the question of the *moral* good. Therefore I will not investigate the relationships between deontic predicates and moral-evaluative predicates – a problem that divides deontologists and teleologists – but only between deontic predicates – to have a right – and ontological-evaluative predicates – to have nonmoral value.⁴ The reason why is very simple: "right" is a deontic concept and "need" is not a moral one.

Now we can return to our question: do rights supervene on the factual properties of important needs or on their evaluative properties? What is a need? In their search

for transcultural and universal needs, Len Doyal and Ian Gough remark that when such a need is not satisfied, humans *as such* risk serious harm: "If such needs exist, they must be shown to constitute goals which all humans have to achieve if they are to avoid serious harm" (Doyal and Gough 1991: 45).

Needs are linked with "species-typical normal functioning"; if they are not satisfied, this functioning is put in jeopardy. We can describe this in biomedical terms, even perhaps partially in chemical terms, but of course it acquires human significance when we do it with expressions like "serious harm", that is with evaluative terms. So it is not plausible to tie the rights with a biomedical description of man: they supervene on the evaluative component of needs.

The evaluative component – i.e. value – is therefore situated somewhere between biological reality and rights. If you believe, following the Scripture's lessons, that man does not live by bread alone, you can add a spiritual-metaphysical reality to the biological one; with respect to this, my argument is quite tolerant. I do not wish to investigate here the relation between the two components of needs; it is probable that supervenience too can be invoked, but it is not my topic. So values form the basis (BAS) of rights. But simple value is not enough: every need does not generate a right, only basic needs do. That is, needs that are satisfied by goods which have important value. This is not surprising: rights are generally correlative of duties – duties of assistance or of non-interference – and one of the most accepted definitions of a right is: "A right or claim, then, is the [moral] position created through the imposing of a duty on someone else" (Kramer 1998: 9). But I can impose a duty on someone only if my interest is important, and basic needs are good candidates for such interests. If the interest is not so important, I can help the person to satisfy it, it is morally *good* if I help, but it is not my duty, it is not obligatory. The ontological values are always at bottom, but only some of them can generate and ground rights.

4 Supervenience and Justification

Only certain needs can *ground* rights: supervenience or justification? Both, in my opinion. Kim notes rightly: "We believe in the supervenience of epistemic properties on naturalistic ones, and more generally, in the supervenience of all valational and normative properties on naturalistic conditions" (Kim 1993: 235). The reason is simple: normative disciplines cannot hang in the air, they must be grounded in reality; the reality of our needs, of our desires or of our goals. This is an ontological dependency; but with it comes an epistemological one, as Kim adds: "If a belief is justified, that must be so because it has certain factual, nonepistemic properties".⁵ As we know since Tarski – and beyond since Aristotle – "It is raining" is true if and only if it rains. Of course, the conditions of justification are more complex than the conditions of truth – a justified belief is not only a true belief –, but the pattern is the same. It is therefore not surprising that *all* ethical doctrines mention nonmoral facts at the foundations of their conceptions when they are summoned to justify their principles. They ground their justifications in human nature (eudaimonism), divine

volition (theological voluntarism), human volition (contractualism), facts of reason (Kantism) or psychological facts like preferences (utilitarianism).

Supervenience is in fact ubiquitous where there is a relation of asymmetrical dependence. Mental events supervene on biological ones, biological ones on physical ones, justified beliefs supervene on facts, moral values on features of actions, behaviours and persons, rights on evaluative features of needs, and those values on biological features of needs. Moreover, it is easy to see that supervenience is often a transitive relation (think of the relations between the mental, the biological and the physical). Thus, we are confronted to a web of relations between different levels of reality, but always one-way.

Of course, this ubiquitous nature of supervenience does not give it a strong role in explanation, and indeed its role is much smaller than that of causality. But for our problem, that is to understand the relation between needs and rights, it nevertheless allows us to advance the following theses:

1. Rights are not groundless, for they depend on needs.⁶
2. If rights depend on needs, it is because needs have a valational feature.
3. If someone objects to a right – a moral right, not a legal one – the only good answer will be to mention a real basic need: supervenience grounds justification. Of course, it is possible for us to disagree as to what such a need is, but here, the answer is no longer ethical, it is biological, anthropological or metaphysical (it does not mean that the answer will be any easier to give or that the controversy will end any sooner).

So far so good, a skeptic about rights will think, yawning: all this makes sense only if rights exist; but why postulate their existence? We are born with two arms and two legs, but not with rights! Are they not "nonsense upon stilts", as Bentham so aptly said? And what morally interesting entity could supervene on stilts? In the remaining section, I shall make some remarks on this subject, which is so important when we examine the *metaphysics* of rights.

5 The Normative Unreality of Rights

The presence of rights in the furniture of the world has been doubted for long. Hare denies their reality in those terms: "They are not part of the fabric of the world, and do not exist *in rerum natura*, if those terms are used in the strict sense" (Hare 1985: 48) – but he is an utilitarian and a antirealist (his denial extends to all moral items). On the other side of the ethical fence, Loren Lomasky acknowledges that rights could be dispensable in principle: the ethical work can be done without them; they have only rhetorical force, but it is an important one for our morality as rhetoric is the art of putting something, here certain values, in a prominent place: "The very vigor and insistence of rights advocates may lead us to conjecture that the language of right has an importance which would not survive a shift of idiom" (Lomasky 1987:

10). Rights focus our attention on features of our moral life we deem important in our liberal conception of human being, but they don't create these features.

Are these philosophers right? If we listen to the common moral language and to official discourses, doubts will arise regarding their position: rights (and especially human rights) are ubiquitous and invoked at every moment; every kid proclaims, as soon as he can speak: "I have all my rights!" Which rights? He couldn't say, but for sure, he has them!

Then, who is right? Once more, I think that a little reflection on supervenience will show us the right way.

In the mind-body problem, the criterion of reality is causal power: mentality is real only if it has causal power, as physicality has. For physicalists, identity theorists or functionalists, only particles have real causal power, so only particles exist, even if mentality supervenes on its physical basis. And if Kim is right, if supervenience is a kind of reductionist relation, notwithstanding the opinion of many philosophers whose hope was to escape reductionism via supervenience, then physicalism is true (because it is better than two possible alternatives: epiphenomenism and eliminativism) (cf. Kim 1998: 119–120). Let us accept this position for the sake of the argument – and because it could well be true. Does it imply that morality is reduced to the status of unreality like mentality? Yes it does. However, this does not mean that it is reduced to unreality in a *relevant sense*: like mentality, its unreality only implies that it is reduced qua *physical* entity (and remember: reduction is not elimination or erasure). Like mentality, it does not belong to the furniture of the world. But physical reality is not the only reality. In the normative domain, we have another reality and therefore another criterion of reality: it is not causal power but practical justifying power – that is giving reasons to do.⁷ An entity has normative reality if it is irreducible in the domain of practical justification. Are rights irreducible? No, and it is very easy to see why: rights supervene on the axiological feature of human needs; all the justifying work can therefore be done by this feature; therefore values may replace rights altogether at the level of normative reality – sometimes, they are even identified and, interestingly, we put rights in the place of values: when we talk of human rights, we sometimes consider them not as imposed duties on others, but as ideals, objects of (rational) desire.⁸ But where rights strictly considered are irreducible, it is in the domain of rhetoric: rights have rhetorical reality, that is a very crucial reality in the realm of human relations and social life, a reality that plays a great role in the actual processes of justification (if you are not convinced, ask a barrister!).

But has not Hare given an argument to the contrary? Deontic concepts have a prescriptive force absent in axiological-ontological concepts: "Moral words have [...] a commendatory or condemnatory or in general prescriptive force which ordinary descriptive words lack" (Hare 1981: 71), and axiological-ontological concepts are descriptive ones (cf. Jackson 1998: Ch. 6). So you can't reduce the prescriptive to descriptive ones (cf. Jackson 1998: Ch. 6). So you can't reduce the normative reality, the descriptive, you can't eliminate prescriptive features from the normative reality. It is nevertheless easy to answer this objection, at least as far as rights are concerned: rights protect *important* needs and needs are important because of the *great value* of

the goods they aim at. So if prescription is expressed *only* in deontic concepts, it is obviously not grounded in them, but in evaluative ones: it indicates the importance of the value, whence their rhetorical force. And if prescription is reducible to value importance, as values supervene on natural properties, Hare's objection evaporates. Let me finish in summarizing my metaphysics of rights in a few sentences. If rights supervene on needs and if supervenience is a relation of reduction, then:

1. Unlike needs, rights have no physical reality
2. Unlike values, rights have no normative reality
3. Rights have rhetorical reality, and this is why they are so important in our social and moral life, but more important in the first than in the second, because rhetoric is a social phenomenon.

Notes

- 1 I have dealt with this subject in Baertschi 2003.
- 2 I think that it could be extended to negative rights or liberties too. The general reason in favour of this is simple: we need liberties to flourish. But I will not dwell on liberties here.
- 3 Cf. Kim 1998: Ch. 1. Supervenience can be defined as neither symmetric nor asymmetric, but so defined it is not a relation of interest to us. Cf. also Kim 1993: 67.
- 4 For the first question, see Baertschi 2004, in which I argue in favour of the priority of moral values on deontic norms.
- 5 Cf. also Kim 1993: 166 "valuations must terminate in non-valuation grounds".
- 6 That is on certain important interests.
- 7 In the normative domain we have motivational power too, but we will let it outside the picture lest it become too complicated.
- 8 We have various theories to explain the justifying force of values, some are rationalist, some empiricist. In my opinion, this force comes from their emotive power, tied to our desires and emotions: values are what is to be desired because of what its substratum is.

References

- Baertschi, Bernard. "La place du normatif en morale." *Philosophiques*, 1, 69–86, 2001.
- Baertschi, Bernard. "Exclusion et allocation des ressources médicales." In M. Giugni and M. Hunyadi (eds.), *Splènes d'exclusion*. Paris: L'Harmattan, 2003.
- Castañeda, Hector-Neri. *Thinking and Doing*. Dordrecht: Reidel, 1975.
- Daniels, Norman. *Just Health Care*. Cambridge, Mass.: Cambridge University Press, 1985.
- Doyal, Len and Gough, Ian. *A Theory of Human Need*. London: Macmillan, 1991.
- Hare, Richard M. *The Language of Morals*. London: Oxford University Press, 1952.
- Hare, Richard M. "Ontology in Ethics." In T. Honderich (ed.), *Morality and Objectivity*. London: Routledge & Kegan Paul, 1985.
- Jackson, Frank. *From Metaphysics to Ethics*. Oxford: Clarendon Press, 1998.
- Kim, Jaegwon. *Supervenience and the Mind*. Cambridge, Mass.: Cambridge University Press, 1993.
- Kim, Jaegwon. *Mind in a Physical World*. Cambridge, Mass.: MIT Press, 1998.