
Where and When Ethics Needs Empirical Facts

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Abstract

It is argued in this contribution that applied ethics has to incorporate sociological and psychological data and theories in order to do the work it is expected to do. The necessity of taking into account empirical facts arises, first, from the necessity to assess the impact of its own principles on the concrete realities, which these principles are to influence. Second, it arises from the necessity to adapt the practice rules proposed to the norms and attitudes prevalent in their respective contexts of application with a view to prospects of acceptance, motivation, and forestalling of 'slippery slopes'. It is argued that this necessity holds alike for foundationalist and non-foundationalist approaches in applied ethics as well as (though with significant differences) for consequentialist and deontological basic principles. The relevance of empirical hypotheses for some of the perennial problems of applied ethics is shown in an exemplary way by the role played by empirical theories in the relation between utility maximization and (seemingly) independent criteria of distributive justice.

1 Introduction

An important stimulus to my reflections on the relation between the methodologies of ethics and empirical disciplines like psychology and social science was a paper on the differences and similarities between philosophical and empirical approaches to issues of social justice by the Singapore-based sociologist Volker Schmidt in the 1990s.¹ In the paper, Schmidt noted a curious "crossing-over" between both disciplines in point of

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¹ Part of this article is an update of Birnbacher 1999.

methodology: Whilst sociological analyses of the concept of justice in social contexts had begun to style themselves "moral science", philosophical studies of the "contexts" or "spheres" of justice (Walzer 1983) had adopted a more or less sociological methodology. Instead of setting themselves the traditional philosophical tasks of conceptual analysis, theory construction and critical evaluation, more and more philosophical studies of social justice followed a more or less descriptive methodology concentrating on the reconstruction of the social meanings of justice in a variety of social contexts. Not surprisingly, this approach was particularly widespread among authors roughly associated with the communitarian and the postmodernist school in social philosophy. As opposed to these developments, Schmidt insisted on the distinctness of ethics and social science both in aims and in methods: Without denying the complementary role of both approaches in the analysis and solution of practical problems, ethics and social science should work and understand themselves as separate disciplines, the one being concerned with questions of conceptual clarification and normative justification, the other with questions of empirical description, reconstruction and analysis (Schmidt 1994, 318).

This separation of disciplinary aims and methods seems sensible not only for sociology but also for psychology and the neurosciences, and in particular in areas where descriptive and normative questions overlap, such as in moral psychology and the study of the neurological foundations of morality. It is an open question in what way, if at all, neuroscientific evidence can have an impact on substantive moral beliefs, or, for that matter, on metaethical views such as views on the nature of morality in general. Marc Hauser in his book *Moral Minds* (Hauser 2006) has claimed that there are universal or near-universal tendencies of moral judgment due to the identity or at least similarity of the brain structures in which moral judgments are generated. To support this claim he presents impressive evidence from internet questionnaire tests which show that certain moral judgments and certain kinds of moral differentiation are universally constant in spite of the cultural diversity of his respondents. This suggests that at least some fundamental tendencies of moral judgment are hard-wired and transmitted from one generation to the next by biological pathways. At the same time, it leaves open the question of how far this fact (if it is a fact) is able to show that the judgments thus generated are adequate, or more adequate than alternative judgments. After all, a tendency of judgment universally instantiated in all human brains might be nothing more than a heuristic device leading us to adequate reactions in most, but not in all cases. In the worst case, it might be nothing more than a prejudice.

In a similar vein, Joshua Greene has argued that brain structures ensure that our intuitive moral judgments are more of a deontological than a consequentialist kind (Greene 2008). Differently from Hauser, however, he thinks that consequentialist judgments are in general more trustworthy because they involve cognitive functions to a greater extent than deontological judgments which are more or less a matter of emo-

tion. Whereas our spontaneous reactions and heuristics mirror the conditions that prevailed in the evolution of the human brain, consequentialist reasoning is able to overcome these restrictions and to face the changed realities of the modern world (Greene 2008, cf., similarly, Singer 2006, 146 ff.). But, again, it must be doubted whether a far-reaching conclusion like this can be derived from the evidence. The fact that intuitive judgments should never be the last word in moral matters does not imply that the last word must be a consequentialist one. It might just as well be a more refined deontological one, possibly modified by consequentialist elements. Or it might turn out, as Richard Hare (1981) would have it, that our intuitive judgments can, after all, be justified on consequentialist principles as far as they are interpreted as secondary rules that function as useful shortcuts in situations too complex to allow for a comprehensive calculation of consequences.

This is not to say that 'neuroethics', understood as the neuroscience of morality,² is irrelevant to ethics. Though neuroscientific findings cannot have a *direct* impact on our moral or metaethical beliefs, they may nevertheless be relevant to these beliefs in an *indirect* way, e. g. by challenging some of the presuppositions underlying these beliefs. By offering explanations for the capacity of making moral judgments, and partly even for the content of these judgments, in completely naturalistic terms, these findings constitute a challenge to interpretations of moral judgment in terms of supernatural factors such as divine inspiration or controversial items such as transcendent absolute values (cf. Churchland 2006, 3). Though neuroethics cannot by itself *refute* metaphysical conceptions of this kind, it substantially *weakens* this kind of view by making it plausible that morality is a product of natural evolution no less than other human capacities for which a supernatural origin is less likely to be assumed. In this way, *neuroethics* functions in a way analogous to *neurotheology* (cf. Newberg et al. 2001). Neurotheology can show neither the existence nor the non-existence of transcendent religious objects. Nevertheless, it is indirectly relevant to religious belief by offering naturalistic explanations for its existence and origin. The very possibility of a naturalistic explanation throws doubt on the assumption typically made by religious believers that their beliefs and feelings originate in the objects of their beliefs. While neurotheology inherently supports what David Hume (1956) called *Natural History of Religion*, neuroethics supports what might be called a 'natural history of morality'.

These interrelations between the realm of the descriptive and the realm of the normative do not, however, call into question the fundamental division between the descriptive and explanatory concerns of the sociology, psychology and neuroscience of morals on the one hand, and the normative and meta-ethical concerns of moral philosophy on the other. The close connection that exists between moral psychology and

² 'Neuroethics' in this sense should be distinguished from 'neuroethics' as the ethics of neuroscience.

normative ethics is in no way able to weaken the conceptual distinction between the empirical and the normative.

This holds for 'practical' ethics no less than for theoretical ethics. There is, however, a difference. 'Practical' or 'applied' ethics differs from theoretical ethics in the role played by empirical fact. As it will be argued in the following, empirical descriptions, theories and hypotheses are not only desirable supplements to applied ethics but a necessary part of it. Empirical elements play a variety of roles in applied ethics, their exact nature depending on the paradigm on which the respective contribution to applied ethics is modeled.

2 Empirical Facts as Parts of Applied Ethics

One reason why empirical descriptions, theories and hypotheses form a part of applied ethics concerns the *functional* context in which applied ethics is situated. Applied ethics purports to have practical import. Any serious attempt to influence practice, however, requires consideration of the pragmatic conditions of putting ethics into practice. Applied ethics cannot limit its view to questions of principle but must enter into questions related to how these principles are likely to be applied in practice. It must not only assess the contents, presuppositions and implications of the principles it advocates but also the conditions and consequences of this advocacy itself. To the extent that it steps outside the ivory tower and aims at influencing reality, it is under an obligation to take into consideration the repercussions its normative principles are likely to have in reality once they are publicly declared and advocated. And it has to reflect on these repercussions from the very start, already at the level of theory – which accords well with Kant's dictum that if a theory proves ill-suited to practice, the blame should be laid not on the fact that it is a *theory* but on the fact that there isn't *enough* theory (Kant 1923, 275).

Part of what is lacking in a theory which is incomplete in Kant's sense is a reflection on how the principles of the theory, once they are publicly declared, are interpreted (or misinterpreted), whether they are accepted or rejected, how they are integrated into individual belief systems and institutional arrangements and procedures, how they transform attitudes and evaluations, how they influence speech, behavior and policies, and how far they are suited to the practical ends they are designed to realize. A complex assessment along these lines necessarily exceeds the capacities of the armchair philosopher. He is bound to draw on the resources of the psychologist or sociologist or even better, to co-operate with them from the very start. In fact, he is in no other position than the lawyer dealing with proposals of legislation. Just as the lawyer's task is not only to make sure that a particular proposal of legislation is compatible with constitutional norms and the general principles recognized in the system of law concerned, but also to

look to the *practicability* and *effectiveness* of the proposed piece of legislation (given its aims), so the applied ethicist has the same dual responsibility. His role is not only to inquire into the theoretical credits of a proposed norm of practical morality (in terms of internal consistency, coherence with other rules of social morality, and compatibility with underlying principles) but also to consider its practical *feasibility*, its psychological *acceptability* and its potential *effectiveness* in changing attitudes and behavior in the desired direction. Or, to vary another of Kant's dicta: Sociology and psychology without ethics is crypto-normative, applied ethics without empirical facts is sterile. Sociology and psychology without ethics is crypto-normative because it often fails to make explicit the principles underlying its evaluations; applied ethics without empirical facts may be interesting as a theoretical exercise but easily ineffective or even harmful in practice. In so far the practical ethicist is interested not only in explanation analysis but also in changing views and attitudes he is well advised to take into account what moral psychology has to say.

3 Empirical Facts from a Foundationalist Perspective

There are quite a number of paradigms of applied ethics, and empirical facts play different roles in each of them. One paradigm is the *contextualist* one that starts from the normative givens of one of the various social contexts in which moral norms operate and explores their structure and functioning without relating them to more general principles. Another, which has become prominent in the practice of medical ethics, is *principlism*, the formulation of more or less universally accepted *principia media* on a more general level which are commonly appealed to in casuistic problem-solving. The distinctive feature of principlism is that it is indifferent to first principles. The 'principles' in this approach are open to being justified on a variety of different basic principles so that practical agreement becomes possible even when disagreement persists on fundamentals.

There are serious problems with both these approaches, theoretical as well as practical ones (cf. Birnbacher 1994), so that I will concentrate in what follows on the more traditional *foundationalist* paradigm of applied ethics. The foundationalist paradigm conceives of applied ethics as the 'application', literally understood, of theoretical principles to real-life cases via middle-range principles and contextual practice rules. Whereas in contextualism practice rules and in principlism middle-range principles are taken for granted, foundationalism attempts to derive these rules, as far as it goes, from more general principles such as the Utilitarian principle of happiness maximization or the Categorical Imperative. According to foundationalism, applied ethics deals with the 'translation', as it were, of theoretical principles into workable social moral rules, mak-

ing them available for everyday judgments and decisions. It is evident that this program essentially depends on empirical facts over and above those involved in the practice of applied ethics generally. Its very program of 'deducing' concrete consequences from a set of basic principles can be carried out only if these principles are supplemented with empirical premises.

Within the foundationalist paradigm the task of 'translating' basic principles into practice rules and of enriching their empirical content takes a different turn with *deontological* and with *consequentialist* basic principles. It is characteristic of deontological principles to leave much less room for considerations of empirical adequacy and efficiency than consequentialist ones. The reason is that in the process of subsuming individual cases under these principles, deontological principles stand in need of a *semantic* interpretation, whereas consequentialist principles stand in need of an *empirical* interpretation over and above the semantic interpretation. Once the exact meanings of the terms of a principle are fixed, a deontological principle determines more unambiguously than a consequentialist one what is to be done or not to be done in relevant situations. For Kant, this fixity in content of deontological principles was one of the central arguments in favor of such principles.

With consequentialist principles, the semantic interpretation has to be supplemented with an empirical assessment of how to realize the objectives specified by the principle under the given circumstances. A deontological prohibition to kill another human being simply does not seem to leave much room for empirical considerations of prospects and probabilities in the way a consequentialist principle of maximizing happiness or, for that matter, aggregate lifeyears, does. There does not seem to exist any logical gap between the ethical principle and the concrete rule of action which might have to be filled by empirical considerations. If, to take a famous example, the Kantian absolute prohibition of suicide is upheld, there is no room for taking account of consequences for others or for the suicidal person himself.

This impression is, however, misleading. Absolute prohibitions like the Kantian verdict on suicide or telling lies, are, even in deontological systems, the exception rather than the rule. Most deontological theories contain within themselves a 'consequentialist' component for which the moral rightness of an act depends, among others, on the moral rightness of the acts (the agent's own or others') following from it. According to the predominant interpretation of the deontological norms against abortion or against embryo research, for example, these norms do not only contain an injunction not to abort a human fetus or not to make human embryos an object of research, but also an injunction to take appropriate measures to prevent these acts by others. A 'deontological' axiology is combined with a consequentialist normative theory, postulating a moral duty to prevent actions held to be morally wrong in themselves. Thus, most deontological theories are really hybrids, combining deontological and consequentialist elements. As far as these consequentialist elements go, empirical elements come in. This is inevi-

table since the relation between the act of *doing* x and the act of *preventing* others from doing x, for example by suitable legislation, is an empirical relation. It is an empirical question which means are appropriate and efficient to prevent others from doing x. Under certain circumstances, even x, the act that is ethically prohibited, might be a means of preventing others from doing x, so that consequentialist consideration might make doing x legitimate even without overstepping the deontological paradigm. One such circumstance can be present when killing one innocent is the only means to prevent someone (a criminal, a tyrant, an enemy, nature) from killing a significantly greater number of innocents (see e.g. the “Jim case”, presented by Williams 1973, 98).

Cases of this kind exemplify a general pattern: that it seems legitimate or even obligatory, to do something wrong in order to prevent someone else from doing more wrong. What happens in these cases is that the basic principle is modified, or even turned upside down, by contingent factors making it *counterproductive* to follow it as a reliable guide to practice.

4 Empirical Elements in ‘Operationalizing’ Principles

What kinds of empirical elements are called for in order to ‘translate’ basic principles into practice rules within the framework of the foundationalist paradigm of applied ethics? Obviously this depends on the kind of adaptations required:

1. Psychological and other empirical elements go into the process of ‘translating’ basic principles into practice rules in order to take account of *limited information* and *limited rationality*. Practice rules must account for limitations of available information, information retrieval, information processing capacities or opportunities and of the capacity to reflect on what basic principles imply for a given situation. Limitations of rationality have been exposed especially in the context of probabilistic information and the attitudes to risks (see, e.g., Tversky and Kahneman 1974, 1981; Slovic et al. 1979; Gigerenzer 1999). It is an empirical matter how far these limitations go and what kinds of adaptations are necessary to account for them.
2. Basic principles are often too much at variance with intuitive or everyday standards to find sufficient *acceptance*, i. e. acceptance to a degree sufficient to realize the values inherent in these principles. Practice rules must therefore be formulated in a way that stresses their continuity with traditional moral beliefs. How this is best done is, again, an empirical matter.
3. Psychological hypotheses underlie judgments about the extent to which practice rules can be expected to *motivate* appropriate attitudes and actions. Rules cannot, by themselves, compel conformity. All they do is to prescribe, or recommend, a certain

course of action. In order to make someone act accordingly they have to rely on further factors. Moral psychological evidence strongly suggests, for example, that the capacity to make moral judgements is insufficient for acting in accordance with them (cf., e.g., Montada 1993, 268). Besides that, practice rules should demand neither too much nor too little. Both a tax rate that is set too low and a tax rate that is set too high miss the aim of taxation. The low tax fails to level the revenue required, the high tax does the same by provoking evasion strategies.

4. Sociological and psychological hypotheses underlie assessments of the degree to which practice rules are immune against potential misuse and abuse, and against the threat of 'slippery slopes' leading to applications which are no longer covered by the basic principle, either by excessive tolerance or excessive rigidity.³

5. In the framework of a consequentialist ethics, the selection of appropriate practice rules must take account of all morally relevant consequences which the acceptance and observance of a system of practice rules might have for the individual and for society. This, again, calls for a great variety of social, psychological and historical assessments: Is a proposed practice rule liable to confirm or to deepen socially harmful prejudices? Is there a risk of weakening attitudes and dispositions that are desirable on other grounds? Is the practice rule compatible with the maintenance of a stable 'core morality' essential to social co-operation and trust? In each case, the way a given basic principle is 'operationalized' depends on empirical considerations no less than on the content of the principle itself. The reason is that for a consequentialist applied ethics (and for a deontological applied ethics to the extent that it contains consequentialist elements) the relation between the content of the basic principle and its corresponding practice rules is contingent. It is possible, therefore, that this process may sometimes result in considerable qualitative changes and in extreme cases in a downright reversal of content and direction.

A reversal of content is the exception rather than the rule, but there are two kinds of constellation in which it may occur. The first constellation is *moral heteronomy*, the second a purely *functional justification* of practice rules. *Moral heteronomy* occurs when an agent A subscribes to a universalistic subjectivist axiology which obliges him to take into account, to a certain extent at least, the preferences of others. In asking himself what practice rules to follow with regard to a certain domain, his decision will partly depend on the preferences of others, including their *moral* preferences. If these preferences happen to be fundamentally opposed to his own, he may well end up with a practice rule that reflects the values of others more than his own (though, of course, it

³ For example, from the perspective of an utilitarian basic principle, a case of excessive tolerance would be a categorical prohibition of paternalistic acts (in relation to a legitimate principle of respecting personal freedom), a case of excessive rigidity a categorical prohibition of euthanasia (in relation to a legitimate principle of preserving life).

still reflects his own values in so far as these enjoin him to honor the preferences of others).

A contemporary controversy in applied ethics for which this constellation might in fact obtain is the controversy on *research on human embryos*. From the viewpoint of an agent holding a welfarist principle as his basic principle there is no direct moral reason to adopt a practice rule against embryo research: the embryos subjected to experimentation (up to a stage of development of two weeks, say) cannot be honored with any kind of conscious experience or subjectivity. This kind of research cannot, therefore, be opposed to the welfare or interests of those directly concerned, especially if, as is the case, the embryos chosen as objects of experimenting are destined to be discarded anyway. If it is certain that a human embryo will not reach the stage of development at which consciousness sets in, it must be indifferent, from the viewpoint of a welfarist ethics, whether experiments are carried out. It would even seem indefensible to miss the chance offered by modern reproductive medicine to acquire scientific and medical knowledge which could not be obtained otherwise.

On the other hand, embryo research meets with substantial negative reactions in a large proportion of the population and arouses feelings of uneasiness and anxiety of a sometimes quite powerful kind. Apart from that, this research is opposed to widely held moral notions of human dignity, at least wherever dignity is interpreted as covering all stages of human development from conception on.

Within the framework of a welfarist or interest-oriented ethics all these adverse reactions must carry weight in exact proportion to the *number* of third parties opposed to the research, the *intensity* of their adverse reactions, and their *resilience* in regard to information and appeals to rationality. This weight must be balanced against the prospects of the infringement of vital human interests implied by not doing or prohibiting embryo research. Given these conditions, such balancing may well lead to the result that the welfarist should favor a practice rule *against* embryo research.

This example may, at the same time, serve to bring out a further feature of practice rules: their *relativity*. While some of the factors determining the shape of practice rules are more or less constant (such as limited altruism and limited rationality as two fundamental anthropological givens), others are more dependent on cultural perspectives and local traditions which are themselves liable to change, for example by the progress of science and technology. Imagine, for example, that a promising cancer cure is discovered which can only be developed into a standard therapy by extensive embryo experimentation. It is perfectly possible that the reservations against embryo experimentation would in this case fade away (as the reservations against in-vitro fertilization have faded away) and that embryo research would not only be held to be permissible but even obligatory.

The other constellation which is not unlikely to lead to a reversal of content arises whenever a practice rule is given a purely *functional* justification, i. e. one that invokes

causal mechanisms leading from the observance of the practice rule to the satisfaction of the basic principle, independently of any semantic or otherwise internal connections between them. Examples of such purely functional justifications are to be found in some variants of *nature ethics*. The most well-known one is the *land ethic* proposed by the American pioneer of ecological ethics, Aldo Leopold (1949), advocating a comprehensive respect for all individual members of natural bio-systems as well as for these systems themselves.⁴ Though the standard interpretations hesitate to acknowledge the fact (with the notable exception of one of its commentators, Baird Callicott (1987)), Leopold's ethics is a multi-layered structure combining a conventional anthropocentric *ethics* at the level of basic principles with a decidedly anti-anthropocentric and holistic *ethic* at the practice level. Thus, the practice rules of the *land ethic* can be interpreted as one comprehensive 'rule of thumb' expected to adapt an underlying interest-based ethics to a particularly intransparent domain. Leopold himself characterizes the land ethic "as a mode of guidance for meeting ecological situations so new or intricate, or involving such deferred reactions, that the path of social expediency is not discernible to the average individual" (Leopold 1949, 203). As this quotation shows, Leopold's leading motive in proposing the land ethic as a system of non-anthropocentric practice rules was the limited human capacity to assess indirect and long-term effects of interventions in the biosphere. The land ethic, Leopold thought, might be better suited to protect nature from excessive, and ultimately suicidal, human interventions than a purely anthropocentric practical orientation, however enlightened.

In both examples, empirical premises are crucial for the selection of practice rules. This is evident from the fact that it is far from clear if these premises are really borne out by reality. Are the negative reactions to embryo research really as deeply entrenched and stable as the argument for a practice rule against embryo research presupposes? Should not the low degree of international consensus on this issue be seen as proof of the fact that the rejection of this research is bound up with 'local' peculiarities of perspective and attitude that cannot be taken for granted? Similar uncertainties surround Leopold's implicit assumption that the appeal to ecocentric ecological values is more motivating with regard to protective behavior than anthropocentric ones. The soundness of this claim has never been demonstrated. What makes one doubt is the observation that eco-activists of ecocentric persuasion quite frequently adduce anthropocentric instead of ecocentric reasons for the preservation of biodiversity. The motive behind this seems to be the conviction that an appeal to anthropocentric reasons is not less but *more* effective in gaining acceptance for preservation policies, which in turn has led to the dilemma that, as David Ehrenfeld complains, conservationists are thereby

⁴ In the words of the often-quoted key sentence of Leopold's land ethic: "A land ethic [...] implies respect for his fellow-members, and also respect for the community as such" (Leopold 1949, 204)



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