

## Clinical ethics and values: how do norms evolve from practice?

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**Abstract** Bioethics laws in France have just undergone a revision process. The bioethics debate is often cast in terms of ethical principles and norms resisting emerging social and technological practices. This leads to the expression of confrontational attitudes based on widely differing interpretations of the same principles and values, and ultimately results in a deadlock. In this paper I would like to argue that focusing on values, as opposed to norms and principles, provides an interesting perspective on the evolution of norms. As Joseph Raz has convincingly argued, “life-building” values and practices are closely intertwined. Precisely because values have a more indeterminate meaning than norms, they can be cited as reasons for action by concerned stakeholders, and thus can help us understand how controversial practices, e.g. surrogate motherhood, can be justified. Finally, norms evolve when the interpretations of the relevant values shift and cause a change in the presumptions implicit in the norms. Thus, norms are not a prerequisite of the ethical solution of practical dilemmas, but rather the outcome of the decision-making process itself. Struggling to reach the right decision in controversial clinical ethics situations indirectly causes social and moral values to change and principles to be understood differently.

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### Introduction

#### French bioethics and ethical principles

The French approach underlying bioethics laws and public debate can be characterized as “principle-based”. In a preliminary report in view of a public consultation on the revision of the 2004 bioethics laws which deal with assisted reproduction, genetics and organ donations,<sup>1</sup> the National Ethics Advisory Committee (CCNE) reaffirms that the law is based upon a few founding ethical principles, which are explicitly defined as “deontological”<sup>2</sup>: the respect of human dignity, the best interest of the child—as opposed to the right to a child—, as well as the non-commodification of the human body and its corollaries, the gratuity and anonymity of donation of human organs and products, including sperm and oocytes. These basic principles are meant to constitute a “platform” which guarantees and promotes the “common good” of the society (CCNE 2008, p. 3). They are expressed in a normative

<sup>1</sup> The revision process has just been completed. A new version of the law was passed on July 7, 2011 (law no. 2011-814, published in the *Journal officiel* no. 0157 of July 8, 2011: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024323102&fastPos=1&fastReqId=791984027&categorieLien=cid&oldAction=rechTexte>; accessed on February 11th, 2012).

<sup>2</sup> CCNE (2008). Critiques of the “utilitarian” attitude geared towards the promotion of medical beneficence are commonplace in France: in no way should a therapeutic purpose serve as a justification for medical action which violates overarching ethical principles.

form, rather than in an evaluative one. In other words, instead of indicating general, open-ended and distant ideals worth pursuing through different medical practices, principles refer to general obligations which generate specific norms of conduct, whose purpose is to determine what one is, or is not, allowed to do. Ethical principles are very often characterized as “safeguards” (ibid.) against the tyranny that new technical possibilities can exercise on potential patients and clients by creating new needs and leading them to request access to new treatments and technologies: responsible ethicists must resist a tendency for medical ethics to “run after science” and caution its advances a posteriori or “after the fact” (ibid.).<sup>3</sup> Thus, the role of bioethics is often presented in terms of the limits that society should impose on technological and societal changes in the name of ethical principles: “Must bioethics laws reflect the evolution of common culture and account for existing practices, or on the contrary distance themselves from them in order to keep certain foundational principles as references?” (ibid., p. 9).

The conclusions of the public consultation on bioethics laws held in 2009 confirm the positions taken by various official preliminary reports and prefigures the conclusions of revision of the bioethics laws in 2011: both citizens and public officials overwhelmingly endorse the provisions of the 2004 laws (forbidding surrogate motherhood, limiting access to ART to medically infertile couples of reproductive age, maintaining anonymity in egg and sperm donations, forbidding embryonic stem cell research, etc.).<sup>4</sup> One is struck by the highly consensual and ultimately very conservative views endorsed by the citizens with respect to both their specific recommendations and their underlying deontological principles: dignity, the sacredness of human forms of life—both potential and actual—and the “natural way” of facing up to fundamental life events.

Upon reflection, this outcome is not surprising. On the one hand, a principle-based approach to ethical questions generates general obligations which can be translated into legal norms more easily and naturally than values. On the other hand, the government conceived and set up the consultation as a tool for constructing a common vision of the good rooted in those principles, rather than as an opportunity for assessing their relevance in the light of scientific and social change. In the final report on the public consultation, Alain Graf writes that a proper information effort, one of the main declared purposes of the event, will further “a conception of progress at the service of what is human, guided and supported by clearly defined ethical

principles” (Graf 2009, p. 10). Thus, the consultation should serve to forge an “anthropological reality” where technological advances would be properly assessed in the light of the principles, “their import determined” (ibid., p. 4) and duly kept in check. Accordingly, rather than being viewed as representing people’s preferences and values—disparagingly defined as the “opinion poll” approach—bioethics legislation is designed to embody what Rousseau called “general will”: “The general will which the law must express is not the sum, or the abstract juxtaposition, of particular—antagonistic at times—wills or desires. Rather, it is the result of an exchange of views and must be fashioned by collective reflection, which prompts single individuals to find a common agreement about some principles which transcend his/her immediate interest” (ibid., p. 5).

#### Problems with a principle-based approach

This principle-based approach is consonant with a long standing deontological tradition in France, and certainly succeeds—to a certain extent at least—in providing those safeguards it purports to set up.<sup>5</sup> However, in the present situation, it has a few negative consequences.

Firstly, it does not guarantee a proper level of integration between society and the practice of medicine. There are signs that the medical community itself is uneasy about its role and is torn between two incompatible and equally unsatisfying roles: guaranteeing the respect of immutable ethical principles (life, dignity, etc.), and serving as mere provider for accommodating emerging needs driven by new social practices and technological advances.

Secondly, the public debate tends to focus on irreconcilable conflicts of principle and leads to the expression of antagonistic, dogmatic views, presented as stark alternatives from among which one is supposed to choose, whereas it could aspire to a reasonable adjustment between emerging social needs and medical possibilities. In the debate over surrogate motherhood, for example, dignity is viewed by some as an inherently flawed concept (Baud 2003) undermining freedom and human rights (Ogien 2008), by others as a necessary and sufficient reason for banning the practice (Agacinski 2009; Frydman 2009). In matters of prenatal diagnosis, non discrimination is opposed to autonomy (Sicard 2007; Leymarie and Leporrier 2007). As for access to ART, equality of rights militates in favor of enlarging potential beneficiaries, but the “natural” frontiers of procreation are seen as definite

<sup>3</sup> See on this point Descamps (2010).

<sup>4</sup> All these different reports can be found on the public consultation website (<http://www.etatsgenerauxdelabioethique.fr/base-legislative-et-documentaire.html>) (accessed on February 11th, 2012).

<sup>5</sup> This is true with a proviso: what is called “procreational tourism” is rampant in France, in the case of single-parent and same-sex assisted reproductive technologies, as well as surrogate motherhood (see Shenfield et al. 2010).

unbreachable limits. In this context, the right-to-a-child principle is contested and opposed to children's rights, perceived as being potentially undermined by non traditional family models (same-sex couples, single parents, and surrogate motherhood). Children's rights are also used to demand an end to anonymous sperm donation, in opposition to the argument that anonymity is the only way to guarantee abidance with the principle of non-commodification of human body products and parts. Pitting proponents of radically opposed norms and principles one against the other, such conflicts often appear as irreducible and lead to confrontation rather than to a newly forged consensus. Moreover, when such consensus exists, as in many of the CCNE's recommendations, it often expresses "median, intermediary positions, most often formulated as prohibitions rather than authorizations. The 'neither... nor' might well be the most current symptom of this consensus" (Mehl 1999, p. 219). In other words, the French bioethics debate tends to produce either endless disputations or illusory and unsatisfactory consensus.<sup>6</sup>

Thirdly, this principle-based approach wrongly represents ethical norms as immutable, prescribing eternal constraints on possible actions. Respect for human dignity is a case in point: the Kantian principle that prescribes that one should always consider a person also as an end, and not only as a means for achieving somebody else's purpose, speaks against authorizing surrogacy, insofar as it involves using a person, the surrogate mother, only as a means for a different end—producing a baby for another woman. If we keep to this abstract definition, the principle of respect for dignity will forbid the procedure forever and irrespectively of the particular circumstances and of changing social realities. Indeed, it does not allow for multiple interpretations, once the factual issue of whether the surrogate is used only as a means to a different end is settled.

In this paper, I would like to suggest that one of the reasons for this unfortunate state of affairs lies in the emphasis put on deontological principles and the norms that these principles are supposed to justify, rather than on the values that people attribute to different practices. Focusing on values would lead to a more nuanced understanding of the bioethics debate rather than to conformity and sterile oppositions. More importantly, unlike ethical principles, values are a motor of change rather than a safeguard against scientific and societal progress. A discussion of values and their "sustaining practices" (Raz 2003) ultimately contributes to healing the contradictions of public debate and to finding a common ground between

society's changing habits and the new services that medicine can offer.

In the first part of the paper, I shall highlight some relevant differences between principles and values: whereas principles direct practices and cannot easily accommodate exceptions, values are flexible and play an existential role in motivating action and justifying practices. In the second part I shall show that values and practices are inextricably connected, and as a consequence values are constantly reinterpreted in the light of these practices. Indeed, the changing interpretations of fundamental ethical values are linked to—and enriched by—the reasons that people give for embracing certain medical and social practices. In the third part, I will argue that values are a crucial factor for ensuring the harmonious evolution of norms: by engaging in certain practices and endorsing them in a reasoned way through the values they see as relevant, involved subjects unwittingly contribute to the evolution of current norms and the creation of new, acceptable ones. In conclusion, I will argue that taking seriously and investigating the different reasons put forward by people involved in difficult and extreme medical decisions as well as the interpretations they give of the values they endorse contribute to a finer understanding of bioethical issues. This is why the clinical ethics setting, concerned as it is with individual medical decisions and the values they suppose, can enlighten and effectively enrich the public debate to a greater degree than general bioethics discussions.

### The importance of values: attachments and reasons for action

#### Norms and values

Ethical norms and values are two facets of moral experience. Although they are complementary and mutually supportive—values justify norms, and norms allow values to be effective in practice—they are traditionally distinguished from each other. Norms are "prescriptive" and are expressed as imperatives while values are "attractive" and are expressed as goods worth pursuing: "You always ought to treat another also as an end" is a principle, whereas "dignity" is a value.<sup>7</sup> While norms—be they social, legal, or moral—direct actions, tend to be precise in their formulation, and are backed up by sanctions, values identify desirable ends for actions, have a looser meaning, and are freely endorsed. In the Kantian deontological tradition norms are considered as primary with respect to values:

<sup>6</sup> We are far from the CCNE's original procedural approach, which was described as "provisional normative agreement" despite ideological differences, an agreement which is neither "minimal consensus" nor the "lesser evil unanimity" (Changeux 1997).

<sup>7</sup> On the distinction and interaction between norms and values, see Ogien and Tappolet (2008, ch. 2).

values are viewed either as unquestionable reasons for accepting existing norms—a conservative role—or as subjective tools for appropriating, and living by, overarching norms (Scanlon 1998).

However, for two different reasons, the traditional picture does not correspond to the way values are used in ethical deliberation. On the one hand, values cannot justify norms in a straightforward way. Indeed, one can easily observe that there is no one-to-one relationship between norms and values: the same norm can be justified by appealing to different—even incompatible—values; conversely, the same value can justify radically different norms. Thus, dignity can justify a norm permitting euthanasia, or active termination of life under certain circumstances, but it can also justify a norm forbidding it. Indeed, active euthanasia can be viewed as a means of preserving dignity in the sense of personal self-worth and can also be seen as denying the dignity members of humanity possess independently of their actual living conditions. Conversely, a norm allowing active termination of life can be justified by appealing to different and seemingly incompatible values: autonomy and compassion. Secondly, and more importantly, values can be interpreted in widely differing ways, all the more so that they are general abstract values like dignity, life, freedom, and welfare. Indeed, which definition of dignity should we endorse in order to decide about the moral acceptability of active euthanasia? Or of surrogate motherhood? (Canto and Frydman 2008).<sup>8</sup>

#### Values and attachments

We have to acknowledge, therefore, that values precede norms, rather than the opposite, and that they have the fundamental function of making norms meaningful: “Our imperfect but indefinitely perfectible ability to recognize the demands made upon us by various values is precisely what provides Kantian (...) ethics with content” (Putnam 2004, p. 134). Indeed, the main purpose of values is not to back up norms but to play an existential role: they serve to highlight objects and actions which are singled out as worth pursuing, and they continue to be an active motivating force for individuals even when norms are silent and practices still experimental. Values play this role through what Raz calls “attachments”; i.e., positive involvements with an object, a situation, or a practice. Attachments, writes Raz, “appropriate impersonal value and make it meaningful to us. (...) They endow it with a role in our lives, make it relevant to the success or failure of our lives”

<sup>8</sup> At best, such attempts at fixing the true definition of values are inconclusive. At worst, values can be written off as an unreliable guide in moral reasoning, since they can too easily be manipulated to justify any norm (Ogien 2007).

(2001, p. 18). Thus, whereas values create and sustain personal attachments, general norms and duties serve to back up, after the fact so to speak, valuable attachments. Moreover, not only do our attachments give life to the abstract values we cherish, but the opposite is also true: we cannot endorse certain abstract values without being attached to them and giving them pride of place in our life. Indeed, values constitute the very fabric of our moral experience. This is so because “values have a privileged relationship with the emotions”: something is valuable if it makes the corresponding emotion appropriate (Tappolet 2000). For example, to say that life is a value involves experiencing a certain feeling of awe towards any form of life as appropriate.

The existential role played by values and their relative independence from existing norms are perfectly compatible with the vague definition of values. On the contrary, a certain semantic openness is a necessary condition for values to play a useful role in our moral life. In an interesting exchange on the value of dignity, Ruth Macklin observes that the standard definition of the term—never using other people simply as means to a different end—is quite useless in practice (2003). Critics remark that even though the notion of dignity is hard—even impossible—to define in a general and uncontroversial way, “we can all recognize [a dignified practice] when we are faced with it.” Also—and more importantly—the fact of adopting dignity as worthwhile value, even in the absence of a fixed definition, can lead to improving certain areas of medical practice, as for example that dealing with elderly patients (*ibid.*).

#### Values and reasons for action

Raz (2003) convincingly argues that the semantic flexibility of values does not make them empty or useless. Rather, it allows agents to invoke values freely as reasons for the acceptability or unacceptability of a given action. The sociologist Max Weber (1993) insists that moral life is regulated by a special kind of rationality, axiological rationality, which is different from instrumental rationality: reasons—rather than interests or blind social forces—explain why moral beliefs emerge and norms are adhered to. For example, according to the result of the study on ART reported in this special issue, patients who request access to ART despite the fact that they are allegedly too old to satisfy existing norms give reasons for doing so that invoke an overarching value they endorse: a fulfilled family life. In their eyes, the realization of this important value necessarily involves the possibility of procreation; to that extent alone, they claim they have a right to a child: “In a loving relationship, it is good to have a child; she is the first woman with whom I want to construct something;” and: “It is

normal to have a child within a family.” In so doing, older people requesting access to ART reinterpret the value of a fulfilled family relationship quite apart from the “normal family” social norm.<sup>9</sup> Also, they encourage doctors to evaluate the “welfare of the child” requirement in the law in light of the eager parents’ commitment to a loving family life, and to stress the existence of adequate parental support, rather than the conformity with social standards defining what a normal family should be like. Finally, they clearly do not consider the child as such to be an object of egoistic desire, and even less the object of a formal individual right. Rather, the child contributes to the realization of a particular value they endorse, a fulfilled family life. Thus, the fact that certain couples—even a minority of them—embrace that particular value both explains the force behind their request, and potentially contributes to remap a complex web of values and norms which regulates ART.

We may wonder whether associating values with reasons for action destroys the universality of these values. Could the constant reinterpretation of values lead to a form of radical relativism, and undermine the effectiveness and credibility of norms which have been appropriately called the “cement of society” (Elster 1989)? In the next chapter, I shall explore in more detail the connection between values and practices, and explain why the different interpretations of values given by agents involved in certain practices do not undermine the universality of values; on the contrary, they foster a fruitful dialogue between holders of different ethical views.

### Values, practices and interpretation

#### The connection between values and practices

Several authors have convincingly argued that the value concepts which figure in the enunciation of principles such as: “You should not commit cruel acts” or: “You should respect the dignity of persons,” are “thick concepts.” “Cruel” and “dignity” defy the traditional philosophical distinction between facts and values: they both describe certain actions and assess them—negatively in the case of “cruel,” positively in the case of “dignity.”<sup>10</sup> The “thick”—as opposed to “thin”—character of the concept “cruel” derives precisely from the fact that its descriptive content (i.e. *what* is cruel behavior) cannot be separated

from its evaluation (i.e. *why* this behavior is bad): you cannot describe a behavior as “cruel” and maintain at the same time that it is praiseworthy (Putnam 2004, p. 34). Similarly, you cannot describe an action as respecting the dignity of persons and maintain at the same time that it is, as such, blameworthy.

Whereas Putnam is interested in showing that the use of certain concepts which describe actions or states of affairs necessarily imply an evaluative attitude of approval or disapproval, Joseph Raz has explored the tight relationship between values and practices in the opposite direction: values cannot function as ideals unless they are closely intertwined with actions and practices. Raz argues that what he calls “cultural” or “life-building” values directly depend on “sustaining practices.” A cultural or “life-building” value is ideal enough to motivate and direct practice and action, but it is not so abstract as to be devoid of specific content. A good example of a “life-building value” is precisely that of a fulfilled family relationship—to develop the example used above in discussing reasons for requesting access to ART. It is certainly a plausible ideal worth pursuing and at the same time it is not out of reach for people engaging in love relationships and procreation.

#### Life-building values and abstract values

As for abstract moral values, they are more general and formal than life-building values, but they can promote life-building values as well as valuable practices: love, for example is an overarching moral value which can foster not only fulfilled family relationships but also friendship, parental devotion, and erotic love, among others. Thus, abstract moral values are related to sustaining practices in a more indirect way than life-building values: their role is to promote the engagement of agents in practices related to life-building values. To that extent, abstract moral values are defined as “enabling values,” and their interpretation depends on the meaning of the particular “life-building values” they promote and the practices that “sustain” them. In a similar vein, Dewey argues that a value can be either an “end-in-itself” (a higher “enabling value” in Raz’s terminology) or an “end-in-view” (a “life-building value” in Raz’s terminology). As an end-in-itself, a value is what fits “in its proper place in the scheme of fixed values”; as an “end-in-view,” “it denotes a plan of action or purpose”: “The end-in-view of the man who sees an automobile approaching him is *getting to* a place of safety, not *safety* itself” (Dewey 1986, p. 168). Thus, the “end-in-view” value of safety is best understood as the coordinated set of valuable actions—what Raz calls a “practice”—one initiates, with the purpose of realizing a more general value or an “end-in-itself.”

<sup>9</sup> See the article by V. Fournier, P. Bataille, D. Berthiau and J. D’Haussy in this volume.

<sup>10</sup> As Hillary Putnam writes: “The characteristic of ‘negative’ descriptions like ‘cruel’ as well as of ‘positive’ descriptions like ‘brave,’ ‘temperate,’ and ‘just’ (...) is that to use them with any discrimination one has to be able to identify imaginatively with an evaluative point of view” (2004, pp. 39–40).

Life-building values, or “ends-in-view”—the cornerstone of our moral life—are a particular realization of one or more higher moral values and depend on the existence of sustaining practices for both their existence and their interpretation. Let’s take up again the example of a particular life-building value, that of a “fulfilled family life”: recognizing a particular set of relationships as a form of fulfilled family life and valuing it for that reason are one and the same thing. On a more general level, family life also partakes of more abstract moral values—love, freedom, respect for persons, etc.—since those embracing these higher values will be more likely to engage in fulfilled family relationships. As such, love, freedom, and respect for persons are (only) “enabling values.” Conversely, the cultural value of a fulfilled family relationship and its sustaining practices allow us to appraise and give a specific content to the general values of love, freedom, and respect for persons. Ultimately, therefore, both the importance and the definition of the higher moral values depend on existing practices of fulfilled family relationships that indirectly contribute to sustaining the value, rather than the opposite.

The dependence of values on sustaining practices, and the fact that value-laden practices rather than abstract values are the basic engine of our normative life, has three main consequences. First, it shows that there is no point to values without “valuers”, i.e. people who value. Secondly, it indicates that practices are more than organized patterns of actions. Rather, they include a particular mixture of interrelated values. Thirdly, it explains why life-building values can be constantly reinterpreted without undermining the universality of abstract values and leading to cultural relativism. I shall explore these three claims in detail.

#### Values and interpretation

Raz eloquently describes the function that values play in our normative life. As we have seen, important values are not “ends-in-themselves”—to use Dewey’s terminology—sitting immutably in a pantheon of similarly untouchable abstract entities, but ends-in-view, or life-building values. Values do not influence our moral life just by existing as distant references of possible actions. Rather, “the fact that an object has value can have an impact on how things are in the world only by being recognized. The normal and appropriate way in which the value of things influences matters in the world is by being appreciated—that is respected and engaged with because they are realized to be of value” (Raz 2003, p. 28). Thus, values exist insofar as we use them to justify our actions and projects.

Secondly, practices are defined with respect to the values they embed: a practice is a particular pattern of actions together with the attitudes of approval or disapproval which are espoused by the agents that actively engage in it. The

value of a given practice is assessed only with respect to the particular *genre* to which it belongs and its level of excellence depends on the particular mixture of different values it embodies: “The standard of excellence set by each *genre* is identified not only by the general values that go to make it, but by their mix, the nature of their ‘ideal’ combination” (ibid, p. 39). For example, a given instance of a family life will be judged to belong to the genre of a “fulfilled family life” according to the way that it instantiates to a high degree, but not necessarily in the same proportion, the abstract values of love, freedom, respect for persons, and a number of other lesser values like trust, good communication, and mutual understanding, to mention only a few. What is crucial in this respect is the fact that different instances of family life can equally belong to the *genre* of “fulfilled family relationships,” even though each of them may be constituted by a different mixture of interrelated values.

This leads us to discuss the third point, namely the constant interpretation of values in the light of changing practices. In a recent book, Raymond Boudon argues that modern individualism is not just the overriding consideration of one’s own interests in isolation from those of others, but includes the cultural values of tolerance and non maleficence. To that extent, it is a positive value (2002, p. 73). But the interpretation of values is not simply an intellectual exercise. Rather, values—especially Raz’s “cultural” or “life-building” values and Dewey’s “ends-in-view”—are constantly reinterpreted through their tight connection with practices. Ends-in-view, writes Dewey, “are framed in and by judgment (...). The question of their applicability in a new situation, their relevancy and weight with respect to it, may and often does, lead to their being re-appraised and re-framed” (Dewey 1986, p. 170).<sup>11</sup> Indeed, people reinterpret values when they give an account of the practice they are engaged in, and describe the reasons why a given practice is considered as either acceptable and valuable, or unacceptable and devoid of any value. For example, interpreting the value of a “fulfilled family life” does not mean defining it; that is, enumerating necessary and sufficient conditions for a set family relationships to be fulfilled. Rather, it means explaining why a particular instance of family life is indeed fulfilled—namely, why it exemplifies a particular set of interrelated values—and *at the same time*, why it is valuable.

This is so because value judgments are often indirect and implicit, and consist either in recognizing a given situation as being a good instance of a given *genre* or in defending the practice one is engaged in, as embodying a

<sup>11</sup> In their analysis of the 2009 public consultation on bioethics, Caroline Guibet-Lafaye and Emmanuel Picavet argue that experts reinterpret values and principles in order to find or block a “compromise” between social and technological change on the one hand, and ethical principles on the other (2009 and 2010).

particular set of interrelated values. For example, a person involved in a surrogate motherhood situation might recount to what extent her personal experience embodies (or does not embody) a particular mix of interrelated values—generosity, friendship, solidarity, love, chosen maternity, and so forth. The abstract value of dignity is thus reinterpreted in the light of the set of lower-order values cited as reasons for engaging in the practice. This is why understanding values requires a form of rich knowledge intimately connected to context and imagination.

### Values and relativism

It may be argued, however, that the tight relationship between values and practices, and the importance given to the interpretation of values, lead to moral and social relativism. If each agent can interpret what he/she considers as a “fulfilled family relationship” quite independently from an overarching common norm, then values as general common references dissolve into a series of individual preferences and desires. Also, if values emerge from practices, they are prey to the fluctuations of social change and they can hardly direct practices. A value-oriented approach to bioethics would favor an outright rejection of bioethics laws and a “minimalist” approach to ethics: anything goes, provided that proof cannot be made of substantial harm to another person. It is beyond the purpose of this paper to discuss the merits of the minimalist stance. What I would like to argue is that a value-based approach does not necessarily lead to ethical relativism and/or to minimalism.

Although this objection has to be taken seriously we can suggest three different responses. Firstly, since a practice is constituted by a dense texture of actions and values, different persons can evaluate a certain practice differently without necessarily contradicting each other: one instance of fulfilled family life can be valued because its members have no secrets from each other, and another can equally be valued, but for the opposite reason; i.e., because they respect each other’s privacy. Thus, disagreement about values is possible and depends on the way in which values “fit together, how they relate to each other, and (...) their relative importance” (Raz 2003, p. 55). Secondly, although values emerge and are interpreted through practices they can, so to speak, lead a life of their own and become relatively independent of their sustaining practice. Thus, even though several agents can give different interpretations of the same higher moral value, depending on the particular mix of lower-order values that are embodied in a given practice, they can all agree that the value as such is important. For example, two persons can agree that dignity is paramount in evaluating the ethical nature of the practice of surrogate motherhood, but interpret it in opposite ways.

If dignity means the absence of instrumentalization, in the Kantian sense, then the practice should be proscribed. On the other hand, a potential surrogate mother might consider that the practice is perfectly dignified because it involves freely realizing the fulfilling function of childbearing which a woman naturally possesses (Fleutiaux and Garat 2009; Delaisi de Parseval 2008). Finally, although different agents can endorse incompatible values—some may stress the importance of a fulfilled family life, others their professional engagement—, the only possible contradiction is internal to the agent himself, who may debate which course of action to accredit in his own life. Thus, stressing the importance of life-building values and their related practices leads to value pluralism rather than to radical moral relativism and incompatible world views. Quite to the contrary, one can argue that value pluralism allows for fruitful discussions among holders of seemingly incompatible value judgments. As Putnam argues: “If we give up the very idea of ‘rationally irresolvable’ ethical dispute, we are not thereby committing ourselves to the prospect of actually resolving all our ethical disagreements, but we *are* committing ourselves to the idea that there is always the possibility of further discussion and further examination of any disputed issue” (2004, p. 44).

But what about norms, and more particularly, legal norms? Is it sufficient to “agree to disagree” and dispense with them altogether? Whatever the appropriate answer to this question may be,<sup>12</sup> we can argue that norms, be they legal, social or ethical, can play their role of regulating practices only insofar as they are allowed to evolve, so as to adjust to newly emerging life-building values and their sustaining practices.

### Values, presumptions, and the evolution of norms

#### Two models of normative change

How do norms change or, better, how are they revised? The debate about normative change is usually cast in terms of either the emergence of new norms or the persistence of old ones; rarely does it tackle the revision of currently accepted norms and the modalities of their slow evolution.<sup>13</sup> There are two major approaches to normative change: the

<sup>12</sup> See on this point the article by Denis Berthiau in this volume.

<sup>13</sup> Naturalistic approaches have recently opened new perspectives on the debate about the emergence of norms. They focus on the evolutionary adaptation and/or selection of basic moral norms, like the no-harm principle. Although they can accommodate microsocial and cultural change to some degree, they mainly explain the emergence of a few basic universal principles (justice, beneficence, etc.), rather than focusing on their particular interpretations (see Nichols 2002).

functionalist/culturalist approach and the rationalist approach. According to the functionalist/culturalist view, a new norm comes into existence when it corresponds to an important need in the society and it persists when it serves the purpose of maintaining and regulating underlying social practices. Emile Durkheim, the founding father of this approach, writes: "New emerging ideas are related to, and caused by, changes [which occurred] in the collective conditions of existence" (2010, p. 87). The analysis of the emergence of the anonymity principle in sperm donation carried out by Laurence Brunet and Jean-Marie Kunstmann in this special issue is a good illustration of this approach. In this domain, norms may be changed—reluctantly, so to speak—when the social pressure coming from other domains becomes too strong, in this case the importance given to children's rights and the conformity with other provisions of family law. Thus, the functionalist approach is both collective and inherently conservative: barring revolutions, society as a whole normally resists change, because of the function that norms play in justifying and guaranteeing the cohesion of social practices.<sup>14</sup>

According to an alternative rationalist approach—more individualistic and progressive—informed by decision theory and game theory (Harsanyi 1986), new norms are purposefully and willfully enacted when they correspond to the economic and social interests of individuals freely interacting in a given social context. They may be revised accordingly when such interests and preferences change. A good example of this state of affairs is legislation on stem cell research: whether it is forbidden or authorized will depend more on the overwhelming interests of the research community than on widespread social, ontological assumptions concerning the embryo.<sup>15</sup> An example to the contrary concerns surrogacy. One may argue that the overall interests of the individuals involved in surrogate motherhood—couples, children born abroad, and surrogates—should lead to a reversal of the norm forbidding the practice, and to a new regulative approach. That this is not the case shows that the rationalist view may be too optimistic regarding the ease with which new norms emerge

and are accepted: wider ideological, political, and economic pressures are clearly at work, outweighing the interests of concerned individuals. Despite their fundamental differences, both approaches—the functionalist and the rationalist—do not easily account for the slow process of normative revision: they are either retrospective (Why did a new norm emerge and how did it answer novel needs in the society?) or too abstract (How would, and should, new norms emerge when the interests of all concerned parties shift?).

#### Presumptions and the revision of norms

Edna Margalit has interestingly focused on the gradual evolution of norms—what she calls "norm alteration"—, rather than on their emergence and persistence. Her analysis allows us to follow the process whereby norms evolve through a "piecemeal engineering" (1990, p. 767), initiated by agents faced with "relevant changes in information, beliefs, strategies, technologies, or preferences" (*ibid.*, p. 766). The thrust of her argument is that norm revision "reflects change rather than imposes it" (*ibid.*). Margalit distinguishes between two types of norms: "conclusive" norms and "presumptive" norms. Conclusive norms express outright interdictions or clear explicit conditions for an action to be legitimate. They take the form of "A if, and only if, *p* obtains," where *p* is sufficiently clear and non-controversial. This is the case for access to assisted reproductive technologies: in France the practice (A) is authorized if and only if it is requested by couples composed of a female and a male, who have been living together for at least 2 years and are of reproductive age, defined by clear age limits (*p*).<sup>16</sup> She notes that when norms of a conclusive sort appear to be out of line with new elements of practice or when the conditions of their validity are not sufficiently clear, they may be supplemented with "presumptive rules" such as "A unless *p* obtains": A is the rule unless some negative condition obtains. For example, access to assisted reproductive technologies might be relaxed to include people who are not of reproductive age (in the conventional sense), on condition that they are not "too old" to be parents, considering the particular context of their reproductive decision. Presumptive rules may allow for more leeway in interpreting the terms used in the enunciation of the norm or in the identification of the relevant facts: if such a presumptive rule were added, "reproductive age" would be interpreted in a wider sense than <38 years old for women and <60 years old for men,

<sup>14</sup> As several studies on constitutional change have shown, there is a puzzle as to how transitions from one normative system to the other can be managed when social norms and political systems undergo radical change: in times of flux "the difficulty that political actors confront lies in the fragmented, ambiguous and inadequate character of available interpretative resources and the distinctive sort of political conflict to which this gives rise" ("strategic conflict of interpretations") (Calvert and Johnson 1999, p. 100).

<sup>15</sup> This at least is what the Senate social affairs commission proposed, in accordance with the recommendation of the Conseil d'Etat in May 2009 (<http://www.conseil-etat.fr/cde/fr/rapports-et-etudes/la-revision-des-lois-de-bioethique-kh6.html>) (accessed on February 11th, 2012). The Senate voted this amendment on the new law on bioethics on April 8, 2011.

<sup>16</sup> Article L152-2 of the French Public Health Code. <http://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000024325489&idSectionTA=LEGISCTA000006171132&cidTexte=LEGITEX T000006072665&dateTexte=20120211> (accessed on February 11th, 2012).



the limits which are currently used in France, and would mean “social reproductive age” rather than “biological reproductive age”. Conclusive norms may also take on a “presumptive form” themselves. For example, during the latest revision process of bioethics laws, the French parliament had approved a shift from the outright interdiction of post-mortem embryo transfer to a presumptive norm expressing a conditional interdiction: “Non-A unless p.”<sup>17</sup> The Senate struck down this proposal and the 2011 laws have reaffirmed outright interdiction.

A second mechanism can intervene to modify norms even more radically: shifting presumptions. A presumptive norm forbidding a practice unless certain special positive conditions obtain can become a norm allowing the same practice unless certain negative conditions obtain. As Margalit writes, “a presumption (...) reflects a social decision as to which sort of error is least acceptable on grounds of moral values and social attitudes and goals” (1990, p. 759); shifting presumptions directly reflects changes in values. A clear example of this shift has taken place in the UK, concerning the welfare of the child provision in norms regulating ART: whereas before 2008, access was forbidden *unless* the welfare of the future child could suitably be guaranteed, the new interpretation of the welfare of the child provision inscribed in the HFEA code of practice states that access to ART is guaranteed *unless* the child is at high risk of suffering substantial harm: “There is a general presumption in favor of providing treatment for patients who seek it. However, in accordance with the requirements of the Act to take account of the welfare of any child who may be born as a result of treatment, treatment centers should assess the risk of harm to the welfare of such a child or any existing children in the family. Where it is judged that the child is likely to experience serious harm, treatment should not be provided” (HFEA Code of practice, 3.1., 2009, “Scope of the welfare of the child provision”).<sup>18</sup>

But how can these changes in the presumptive form of the norms be explained? One may argue that changes in the relevant practices force (so to speak) norms to change and adapt: practical constraints (the scarcity of human organs) or the emergence of new practices due to technological advances (PGD and ART) may well need normative adjustments. But these interest-, or society-driven, explanations are not sufficient to account for the fact that normative revisions are accepted as legitimate, and are

actually implemented and considered as appropriate by the agents involved in them. In other words, social pressure or instrumental rationality can explain the reluctant acceptance of a given norm, but not its endorsement. I believe that values are mediating between practices and norms, and that the changing interpretations of values in close contact with sustaining practices can explain the slow evolution of norms, through the addition of presumptive clauses and/or shifting presumptions. The interpretation of life-building values in close connection with practices will contribute to justify new norms. As Raz writes, “interpretation provides the bridge between understanding what there is and the creation of the new. The crucial point is to see how this transition can be gradual, almost unnoticed (...). What has been underdetermined by the old kind becomes the new standard of the new kind” (2003, pp. 58–59).

#### Living organ donations: normative change and values

Let’s develop the example of living organ donation. This practice has traditionally been considered as ethically problematic on the ground that it clearly violates the value of non-maleficence (*primum non nocere*) underlying medical practice, for it harms a person who does not benefit from the procedure. As organ transplantation became more effective, and because vital organs are in short supply, presumptive norms about living donations of the form “Non-A unless p” came to be justified in terms of the life-building value of family solidarity. Thus, in the 1994 bioethics law, living donations were only allowed between parents and children.<sup>19</sup> Exceptionally (*par dérogation*), sons and daughters as well as brothers and sisters could donate on condition that free informed consent might be duly certified. Spouses could only donate in emergency situations on the same condition. This normative change—from a conclusive norm forbidding the practice outright, to a presumptive norm forbidding it except in the family circle—can be justified by appeal to the value of family solidarity. The value of personal autonomy underlying the necessity for free and informed consent was not considered as paramount in the ethical justification of the procedure: parents often told the appointed committee that the only possible course of action conceivable to them was to donate for their sick child, and that risks matter little to them. Such statements have never resulted in a rejection of their plea to be donors, sustained on the grounds that it is “normal” for a parent to save his/her child’s life: kin solidarity rather than autonomy has come to be seen as the real justification of the practice.<sup>20</sup> As the need for living

<sup>17</sup> Post-mortem embryo transfer would still be forbidden, *unless* the father had given his written consent to the procedure before his death, and unless the procedure takes place between 6 months and 18 months from the time of death. (<http://www.senat.fr/rap/a10-381/a10-38110.html> (accessed on February 11th, 2012)).

<sup>18</sup> [http://www.hfea.gov.uk/docs/TomorrowsChildren\\_revised\\_guidance.pdf](http://www.hfea.gov.uk/docs/TomorrowsChildren_revised_guidance.pdf) (accessed on February 11th, 2012).

<sup>19</sup> Article L 671-3 of the French public health code.

<sup>20</sup> On this aspect of living organ donations, see the article by V. Fournier, N. Fourneur and E. Rari in this special issue.

organ donation increased and the practice developed, the circle of potential donors has been enlarged in 2004 to include other next-of-kin besides parents, children, and siblings: spouses and more distant family members.<sup>21</sup> The recent revision of the law even allows donors who “can prove that they have maintained a close and stable affective relationship with the recipient for at least two years”.<sup>22</sup> Thus, a norm forbidding the practice *except* in very special cases has slowly and imperceptibly evolved towards a norms indicating general, though conditional, acceptance: living organ donation is allowed *except when* a relationship of love is lacking or a clear pressure is present.

One might argue that this is merely the result of the necessity to make up for the dearth of organs in a situation of growing demand. Whatever the strength of this argument, we can also observe that the values involved have slightly shifted again, as reasons for justifying particular actions have changed: donations in the name of love and altruism over and above family solidarity are increasingly seen as legitimate, even though they are still a minority of cases. Autonomy is also more prominent in the special mix of values defining the criteria for a particular instance of living organ donation to be seen as morally legitimate. Indeed, the autonomous nature of choice can be ascertained all the more easily in cases involving living donation from outside of the intricate web of kin relationships, with its load of culpability and heavy responsibility: the freedom of a parent’s consent to donate might be more doubtful—and less important—than that of a donor having “an affective relationship” with the recipient. Should values associated with living donors sustaining practices shift again, and should the practice be justified by the agents themselves with reasons related to a sense of justice, the web of possible donors might well be further enlarged and the norms concerning living donors would change, to include friends and ultimately even unrelated recipients.<sup>23</sup>

### Conclusions: clinical ethics and public debate

Whereas bioethics concerns decisions on general issues—what practice should be authorized and under which

conditions—, clinical ethics is the branch of medical ethics which deals specifically with particular decisions “at the bedside”: is it acceptable to withdraw a respirator from this particular newborn? Should we operate on this elderly woman, who will probably make a successful recovery, even though she has lately been regretting not having died of a previous heart attack? Clinical ethics—with its emphasis on cases and on the specific reasons given by all moral agents involved—provides a precious window on new practices and the values they embed. When several agents involved in particular decisions argue for their positions, they put forward their own vision of what is good, and indirectly provide new interpretations of common values. A clinical ethics consultant may sometimes be called into help disentangle ethically difficult medical decisions and serve as a third-party facilitator.<sup>24</sup> Rather than asking whether the decision fits a predetermined definition of the relevant values, ethics consultants proceed from the opposite direction: they focus on the reasons why a given instance of a practice, say living donation, is or is not a good instance of that practice, and on the mixture of interrelated values the decision involves. Richard Zaner, who has reflected remarkably on the methodology of clinical ethics consultations, writes that ethics consultants’ work is “to consider, among available options, which are really most congruent or harmonious with each individual’s basic sense of what is worthwhile” (Zaner 1993, p. 46).

Thus, moral deliberation in the context of clinical ethics suggests that fighting over the meaning of abstract moral values (How shall we understand dignity in order to decide about surrogacy? How do we understand autonomy if we want to assess freedom of consent in living organ donations?) is usually inconclusive. Rather, we should start from the particular instances of a given practice which we consider as good instances and take seriously the life-building values that constitute them. Judgments about cases are not necessarily uncontroversial, but they summon up more agreement than general principles. Even when there is disagreement, discussion about cases is less sterile and produces subtle and interesting analyses of different relevant values and worthwhile engagements. As similar particular judgments are repeated through time, they tend to shift the relative weights of different arguments in the public debate and lead to the slow evolution of norms: “The new forms of the good take time, and require the density of repeated actions and interactions to crystallize and take a definite shape, one that is specific enough to

<sup>21</sup> Bioethics law, 2004, article L. 1231-1 of the French Public Health Code.

<sup>22</sup> <http://www.senat.fr/rap/a10-381/a10-3818.html> (accessed on February 11th, 2012).

<sup>23</sup> The recommendation of some citizens participating in the 2009 public consultation is precisely to extend living donations to friends with whom a potential patient may have stronger affective bonds than with family members (Graf 2009, Annexes, p. 35 and 131). A first step in this direction is the amendment voted by the Senate (April 8, 2011) during the current revision of the bioethics law authorizing “crossover donations”.

<sup>24</sup> On the principles of clinical ethics consultations, see the recent manual edited by the ASBH (American Society of Bioethics and the Humanities 2010).

allow people to intentionally realize it in their life or through their actions" (Raz 2003, p. 58).

Day-to-day practices change as new medical technologies become available and new possible life arrangements become widespread in a society. However, the evolution of norms does not merely reflect changing practices. Values associated with these sustaining practices are constantly reinterpreted in the process of deciding which particular instance is, or is not, acceptable and why it is so. Pierre Moor, who advocates what he calls a "flexible legal system," speaks of the interpretation of legal norms in a similar way. He argues that a legal system is the result of the decision-making activity rather than the opposite. Norms only exist "in and through their application" (2005, p. 22). But "application" is not quite the right word: judgments about particular cases "renew [the norm] and enrich it with new meanings" (*ibid.*, p. 69). Thus, as values—and concomitant visions of the good—evolve in close relationship with sustaining practices, they lead to the revision of norms through the addition of presumptive clauses or changing presumptions. Norms, in turn, do not "create" new practices, but merely regulate them, encouraging or discouraging people from engaging in them and promoting their good-enough quality, without determining any abstract standard of excellence.

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