Theorizing Legal Needs:
Towards a Caring Legal System

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Abstract

Care ethics is primarily about responding to needs. Yet, surprisingly, attempts to apply the ethics of care in the domain of law have paid almost no attention to the concept of legal needs. This study fills that gap by systematically defining legal needs. It does this by revising current understandings of legal need through a unified conceptual framework for the philosophy of needs and a comparative analysis of legal action, and its major alternatives in dispute resolution and prevention. The conception of legal need that results is both more sensitive to preventative functions of the law and opens the door to a much wider range of policy options beyond legal aid. Legal needs are found to be a special case of institutional needs, i.e. needs that cannot be satisfied without an institution. I argue that the existence of institutional needs means institutions, rather than any particular actor within them, can be caregivers, but not all conceptions of the ethics of care are compatible with this kind of need. Joan Tronto's conception of care is found to be the most accommodating and is used as a framework for a series of policy recommendations to move us towards a caring legal system.

Acknowledgements

Introduction

"Justice, justice you shall pursue…"

-Deuteronomy 16:20

In the *Crito*, Socrates personified the laws as vulnerable parental figures invoking the loyalty of Socrates on the basis of all they had done for him as a child (Plato, 2000: 51). Whether or not he was sincere in presenting the laws this way, and what precisely he meant in doing so, remains a matter of some debate (Hecht, 2011). Whatever the truth of the matter, the fact that Socrates' interlocutor never took issue with the above characterization should be in and of itself intriguing to the contemporary reader. Contemporary characterizations of the law, whether as just or oppressive, are consistently impersonal and distancing. After all, the law at its best seems to be concerned with abstractions and universals, and at its worst with the unmitigated personal interests of the rich and powerful. No matter which way you look at it, the activity of a parent, nurturing and personal as it is, does not seem to be an accurate metaphor[1] for the law as we know it today. It was, in part, the experience of seeing "The Laws" presented in so counter-intuitive a way in Plato, at a time when I was first being exposed to the ethics of care, that prompted me to ask "what would it entail to think of the law not simply as an austere and imposing force but as caring?"

More precisely, the experience above has led me to formulate the central question of this study, namely, what would be required for legal systems like Canada's to be caring? There are decades of literature from lawyers and legal scholars on what the ethics of care might mean for lawyers, judges, and lawmakers. Furthermore, care theorists have long debated how the ethics of care relates to institutions and the ethics of justice, and by extension institutions of justice. But efforts to apply the ethics of care in the field of law are curiously silent on one point. As we will see shortly, care is about responding to needs in a particular way, yet in discussions of ethics of care and the law, it is difficult, though perhaps not impossible, to find any at-length discussion of *legal* needs. This study will try to fill this seemingly central gap by attempting to answer two questions: firstly, what is a legal need; secondly, how (if at all) could these needs be met in a caring way? These questions have both significant theoretical and empirical aspects. Consequently, it will not be possible to answer them definitively and exhaustively in a single study. Rather, I will aim to lay much of the definitional groundwork in a way that suggests what methods, both empirical and theoretical, could be used to ultimately achieve more complete answers. Before I can explain how this will be achieved, with what methods, for what practical purpose, and facing what potential pitfalls, it will first be necessary to offer a cursory introduction to the ethics of care, set out in contrast to the ethics of justice that we might expect to find in the legal system.

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[1] Perhaps the most stern father figure might be presented as a "judge", for instance, in the works of Kafka (see for example *The Judgement*), but this is a very different metaphor from the one Socrates presents.

The Ethics of Care: An Introduction

Put simply, ethics of care is a feminist approach to ethics that recognizes care as central to our moral lives. Since the first publication of Carol Gilligan's *In a Different Voice* in 1982, the feminine[2] ethics of care has largely, but not exclusively, been set up in contrast to the dominant masculine "ethics of justice" (Gilligan, 1982; Ruddick, 1995: 203). Before we consider the form and content of these two ethical approaches, it is worth briefly mentioning what makes one feminine and the other masculine according to the earliest proponents of this approach—namely, Gilligan and Nel Noddings.

Early theorists of the ethic of care began by suggesting (Gilligan) or asserting (Noddings) that many if not most women might have or in fact did have an ethic of care, while men were more likely to have ethic of justice (Gilligan, 1982: 2; Noddings, 1984/1995: 7). This distinction, however, has led to much divided empirical evidence, and theoretical debate (Spader, 2002: 69; Jack & Jack, 1989; Engster, 2007: 13; Stensota, 2010: 297). Theoretically, positions on this question range considerably. There are those who assert that the ethics of care is a gender neutral theory (Engster, 2007: 13; Zwier & Hamric, 1996), or who simply sidestep the question of gender altogether (Dancy, 1992: 450; Sevenhuijsen, 1998: 109). On the other side of the spectrum are those who retain the gendered language, but engage it critically (Ruddick, 1995; Tronto, 1993; Held, 2005: 22;). There is perhaps no better example of this latter approach than Sara Ruddick's (1995) use of the term mother and mothering to designate a practitioner/practice that could be occupied by a person *of any gender* (19-21). Those who fall on this side of the spectrum are also far more assertive in situating the ethics of care within broader feminist theory (Tronto, 1993: 3; Held, 2005: 22).

Across the spectrum, there seems to be a general comfort, however, with acknowledging that the insights of the ethics of care come to us primarily from the experiences of women (forced as most of them have been for millennia into the role of caregiver, though in different ways and to different degrees depending on class, race, ability, sexuality, religion, etc.), and that women continue to be devalued in the ethics of justice (Walker & Wall, 1997; Held, 2005: 23; Bender, 1990). This does not deny that non-feminine persons have given care and do not have important things to teach us about care. There has in fact recently been efforts to make the ethics of care far more intersectional (Hankivsky, 2014). But, at least in Canada, women, on average, still do overwhelmingly more hours of caring labour per week than others (Milan, Keown, & Urquijo, 2011).

I agree with this role-based link between the ethics of care and women at least as a pragmatic minimum. This approach informs this study in two ways. First and foremost, I acknowledge my enormous debt both to the theoretical work and caring labour of women that has made the ethics of care

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[2] I appreciate that there is a significant distinction between a feminine and feminist ethic. This thesis will be dealing with the ethics of care as the latter, but for historic context it is important to begin with the feminine.

possible and productive as a school of thought. Second, it should also be pointed out that there is little doubt of the theoretical and practical monopoly men have had over the articulation and elaboration of which needs and whose needs have been recognized and met by our legal system. As I will later argue, I believe that a better understanding of and closer attention to legal needs, not only among professionals but also by the general public, might offer us a clearer way to recognize the shortcoming of the current system for marginalized groups. I believe that if others build on the foundation that I hope to set out here, then the gendered implications of my seemingly gender-neutral arguments will become apparent. Indeed, while I agree with those who situate the ethics of care within a broader feminist theory that commitment will not always be explicit.

Let us turn now to what content distinguishes one the ethics of justice from the ethics of care. In my view, it is possible to usefully organize the difference between them along three axes: (1) starting point, i.e. description of people; (2) end point, i.e. goals; and (3) the means deemed appropriate to achieve its goals, i.e. both its epistemology and practice.

Firstly, ethics of care takes people as they are: enmeshed in relationships of interdependence (some chosen, some not); *needing* care at least in infancy, illness, old age, and indeed throughout one's life; possessing unequal power; and having their interests entangled with those of others (Engster, 2007: 8; Held, 2005: 14; Noddings, 1984/1995; Gilligan, 1982: 19; Tronto, 1993: 103; Sevenhuijsen, 1998: 96). This is all contrasted with the separateness (i.e. methodological individualism) and self-sufficiency, as well as special capacities (often rationality, sometimes the ability to do harm to others) that qualify individuals as equal rights holders, engaged in chosen relationships (e.g. social contracts) for the sake of mutual, though often conflicting, self-interest (Engster, 2007: 8; Sevenhuijsen, 1998: 96; Gilligan, 1982: 19; Noddings, 1984/1995: 8; Held, 2005: 10).

Secondly, the main question for the ethics of care is "how best to deal with dependency, responsibility, and vulnerability of particular others in specific situations?" rather than the ethics of justice[3] which asks "what are the highest moral principles required to resolve disputes between the competing rights claims of persons?" (Sevenhuijsen, 1998: 111; Held, 2005: 10; Gilligan, 1982: 19; Tronto, 1993: 106; Noddings, 1984/1995). Consequently, whereas the ideal of an ethic of care is ensuring the needs of all are met (Engster, 2007: 7), the ideal of an ethic of justice is said to be to protect equality and freedom so that there is no conflict between the rights of any persons (Held, 2005: 15).

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[3] I acknowledge it may be misleading to talk about *the* ethics of justice as if it were a unified viewpoint. Not without some irony I view this reductionism as analogous to Rawls' treatment of utilitarianism in *A Theory of Justice*: "There are many forms of utilitarianism, and the development of the theory has continued in recent years. I shall not survey these forms here, nor take account of the numerous refinements found in contemporary discussions…. I believe the contrast between the contractarian view and utilitarianism... remains essentially the same in all these cases" (20). Furthermore, because my goal is to introduce the ethics of care, how accurately I represent other theories, while important of course, is a secondary concern to how care ethicists understand themselves.

The only way these needs can be met is through attentiveness (to the other with the needs), trust (between the caregiver and recipient), competence (the know-how to actually meet the need), and responsiveness to needs (the actualizing of the care so to speak) (Tronto, 1993: 104-06; Held, 2005: 15). All this, in turn, requires both moral understanding and sensitivity (Held, 2005: 11; Slote, 2013: 280). These terms are meant to express the kind of inarticulable knowledge that the caregiver has. Like the parent who "understands" what the baby's cries mean, or the friend who grasps the underlying message of an unusual facial expression, this knowledge is not readily susceptible to rationalistic "on-paper" formulation. Taken together, I would call this the epistemology of the ethics of care. The epistemology works through narrative and contextual thinking (as opposed to formulaic and abstract thinking), and values emotion as a requirement to ascertain the dictates of morality rather than an impediment (Held, 2005: 11; Noddings 1984/1995; Sevenhuijsen, 1998: 110). Consequently, some have termed (not without expressing some reservations) the ethics of care a kind of sentimentalism or contextual morality (Tronto, 1993; Slote, 2013: 280).[4]

The primary activity of the ethics of justice, on the other hand, is following and applying universal rules or principles (Walker & Wall, 1997; Sevenhuijsen, 1998: 110). This requires moral judgement above all (Spader, 2002: 87; Held, 2005: 11; Slote, 2013: 280), a point which is of particular importance when discussing the legal system. On this account, moral knowledge consists in knowing these rules, their underlying principles, and what they entitle each person to (i.e. rights). Discovering this requires a formal and abstract mode of reasoning that is impartial, disinterested, and rational. As such, the epistemology of the ethics of justice has sometimes been called rationalism (Gilligan, 1982: 19; Tronto, 1993:27; Held, 2005: 11).

This stark portrait of the two ethical approaches would seem to suggest an incompatibility between them, and indeed, that was largely the position thought to be taken by early theorists, such as Gilligan and Noddings (although Gilligan at least denied that mutual exclusivity was really her position) (Held, 2005: 15). It is now generally accepted that they are not mutually exclusive opposites, and many care ethicists view them as co-dependent, i.e. proper care requires considerations of justice and proper justice requires considerations of care (Held, 2005: 15; Spader, 2002: 80; Engster, 2007: 6; Bubeck, 1995: 189; Kittay, 2002: 260; Rumsey, 1998; West, 1999: 9).

The view that care and justice are compatible or at least not mutually exclusive has raised, in turn, the following question: "how exactly do the ethics of care and justice fit together?" (Rumsey, 1998; Stensöta, 2010; Curzer, 2002; Held, 2005: 16). Many practical and theoretical solutions have been proposed in a number of disciplines, including education, healthcare, public administration, and law, but

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[4] This is a more robust claim than the more common assertion within care ethics that emotions are a source of moral knowledge.

in my view (and as will become clearer in the following chapters), there remain many questions to be worked through (Gremmen, 1999; Held, 2005: 16; West, 1996: 36; Sevenhuijsen, 1998: 116-117; Spader, 2002: 80).

As has been noted previously, this study will attempt to address the question of how care and justice fit together in the context of the legal system. It will do this by taking up one of the above mentioned suggestions, made first by Gilligan (1982) and later reiterated for the field of criminal law by Dean Spader (2002). Both scholars call for the articulation of a conceptual language of care, so that it can be both practically and theoretically available for (justice) officials in a way that makes it a viable alternative to mainstream languages (Spader, 2002: 76). I view the concept of "legal need" as crucial to accomplishing this by acting as a bridge between the vocabularies of those working in some areas of the legal system and in the field of care ethics. On the one hand, legal need is a familiar term to those working in legal policy. On the other hand, need is a concept of central importance to care ethicists. Consequently, by investigating how the conceptual tools of care ethics are relevant for the theoretical and practical demands of legal need, I hope to form a common vocabulary that will enable a conversation between disciplines. But how will this be done?

Plan of the Work

My first major task will be to define legal needs. Legal needs have already been given particular technical meaning by the decades of empirical studies conducted by legal aid providers, policymakers and scholars, so in chapter 1, I propose to review this literature on "unmet legal needs". Using a technique I call a "conceptual line of best fit" (to be explained later in this chapter), I will offer, for the first time ever, a single systematic definition of legal needs. I will then highlight the most pressing criticisms legal needs have faced in order to identify precisely what theoretical issues a renewed conceptualization will have to rectify to be worthwhile.

I hope to offer this renewed conceptualization through a two-part process. Firstly, in chapter 2, I will offer a conceptual framework of needs that will consolidate, to the greatest extent possible, many of the current conceptual frameworks in the philosophy of need. At the same time, in chapter 3, I will inquire into whether we really need the language of needs or if the rights-preference framework currently employed in the legal system is sufficient. Secondly, in chapter 4, I will offer a skeletal comparison of legal action to other dispute prevention and resolution approaches such as self-help, alternative dispute resolution, and political action, in order identify potential conditions of a dispute which render the legal system uniquely necessary for its resolution. In chapter 5, I will then bring together the insights of chapters 2 and 4 to offer a new formulation of legal need that answers the criticisms raised in chapter 1.

With this original and systematic definition of legal needs, I will then turn to the question of how, if at all, such needs could be met in a caring way. In chapter 6, I will review many of the major conceptions of care and inquire into whether, on these accounts, institutional care is desirable or even possible. It is here that I will introduce the notion of an institutional need, of which legal needs are an example. It will be seen that in fact not only is institutional care sometimes desirable but also necessary.

This leaves us with the question of how a legal system might be made caring. In chapter 7, I will look at some examples of how this question has been answered to date, by looking at the feminist jurisprudence school of relational feminism and two of its sub-literatures: relational lawyering and abortion rights. In chapter 8, I will consider why the recommendations made in these sub-literatures, due to inattention to legal needs, do not go far enough in achieving a caring legal system. Using Joan Tronto's conception of care as a framework, I make a series of practical and manageable policy recommendations. I close by considering some of the major objections and limitations that my project faces as a whole; and identifying the next steps for care theorists, legal theorists and policymakers more broadly. But how will this be done?

Method & Conceptual Framework

The two central concepts of this study are legal need and institutional care. I will articulate each concept through a series of literature reviews and analyses. Of course, as I will remark many times in this study, there is a certain irony to taking such an abstract approach to discuss an ethics that places such an emphasis on context. I flag this as an issue now, and will return to it throughout the study, dealing with it in full in the conclusion. For now, it will be important to explain the general method of the various literature reviews in this study, and two innovative aspects of these methods. I hope this will clarify that while my questions are quite large, my epistemic scope is actually relatively modest.

For chapter 1, I used a mix of database searches and snowballing techniques. I used the keywords "legal need", "legal problem", "justiciable problem" and other related terms to search the databases Proquest, JSTOR, Google Scholar, and the University of Ottawa Library Search+. I then selected studies that offered an explicit discussion, no matter how short, of the definition of legal need. I would then search the bibliography of those texts for more relevant searches. Of particular importance for this was Curran & Noone's (2007) "The Challenge of Defining Unmet Legal Needs".

For chapter 2, I used the keywords "philosophy of need", "needs theory", "normative needs" and other related terms to search the databases Proquest, JSTOR, and the University of Ottawa Library Search+. I used those texts that dealt exclusively with the conceptualization of needs, as opposed to the empirical study of needs. I then prioritized these studies according to "primary", "secondary", and tertiary based on their relationship to certain seemingly central collections of essays like Soran Reader's "The

Philosophy of Need" and Gillian Brock's "Necessary Goods". For chapter 3's discussion, I mainly used texts identified in chapter 2, since the relationship and justification of needs in relation to rights and preference figured highly in this literature.

In order to perform the comparative analysis in chapter 4, I mainly used introductory texts to alternative dispute resolution. Since this discussion was mainly conceptual rather than driven by the literature, these works served more as inspiration to determine what the categorical limits of the legal system might be. In particular, "Justice Without Law" by Jerold Auerbach, played an important if indirect role in my thinking on how to determine the unique function of the law by determining the limits of its major alternatives.

In chapter 6, I considered a number of conceptions of care. Because this list is not exhaustive, some explanation needs to be offered as to why the selected authors were selected. Based on my prior readings, it seemed to me that these authors taken together offered the best range of perspectives on the aspects of care that I wanted to explore, while also representing very influential positions within the literature. In these two ways, they serve as a good short-hand of the range of opinions in the ethics of care.

The texts focused on in chapter 7 were selected for their apparent influence (based on citation in other texts and relevance assigned by search engines) within a broader scoping review that was partially completed for the initial project proposal of this study. Three databases and one search engine were used for the initial search: ProQuest, HeinOnline, and WorldCat, as well as Google Scholar. After these searches were completed, results were then narrowed down in two phases according to the apparent relevance of their titles, and abstracts. At the level of abstracts, a "traffic light system" was used in which some articles were deemed green (definitely relevant), yellow (possibly relevant), and red (irrelevant)[5]. "Yellow" articles would only be used if "green" material was completed, which turned out not to be feasible.

With all the above being said, it might be objected that this study focuses too heavily on the literature and will leave little room for original contribution. I would respond that the way I organize the literature will in itself often be the argument and reveal things that might also have been shown by original arguments, but this approach has the advantage of immediately situating the new findings within current framework rather than try to reinvent well-functioning wheels. Beyond the various literature reviews explained above, there are also some important qualifications and innovations to how I have conducted these reviews that I believe also constitute original contributions in and of themselves.

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[5] Blue was also used for books and articles where no abstract could be identified to indicate the need to return and do further research on these sources.

What are these innovative methods? Firstly, in chapters 1 and 2, rather than offer a historical or typological review of past definitions of legal need or need in general, I will set out a single definition of legal need and conceptual framework of need in general. This definition and conceptual framework will not be identical to any previous definition or framework but encompass many of the possible positions taken by various definitions and frameworks on each aspect of legal need and need in general. I call this technique a "conceptual line of best fit"[6].

In math, a line of best fit is a line drawn as straight as possible while being as close to as many data points on a grid (i.e. a scatterplot) as possible. It is supposed to visually illustrate any underlying trend expressed by the seemingly chaotic set of points. Similarly, in the conceptual grid that is legal need or needs in general, various definitions and frameworks can take various positions on disputed questions. In order to see what underlying definitional trends are present, I try to set out a definition and conceptual framework that comes as close as possible to as many of the various positions simultaneously.

By definition, this method cannot achieve exactness unless there is a precise underlying pattern. Nonetheless, this method is useful in my case because there is not enough space to set out all the nuances of the various definitions and then make a thorough argument for or against each one. The result in each chapter will be a single definition or conceptual framework that can be used as a shorthand, to some extent, to speak about the literatures as a whole. This technique is not perfect, but it fills what I believe is a need in both the legal needs and philosophy of needs literature to work towards conceptual consolidation.

Secondly, in chapters 3, 4, 6, and 7, I will be offering illustrative arguments. By illustrative, I mean that the arguments are not meant to be definitive but to model a particular approach to the problem dealt with in each chapter. For instance, in chapter 3, I will be arguing for how needs should be understood to relate to rights and preferences, particularly with regards to the concern that needs claims are potentially paternalistic. I will suggest, make some arguments for, but ultimately not demonstrate, a framework in which needs, rights, and preferences are each mutually reinforcing and correcting rather than competitive modes of discourse. Similarly, in chapter 7, I will attempt to illustrate how the ethics of care has influenced legal systems in the vast literature on relational feminism, by considering just two sub-literatures. To be truly air-tight, both these arguments would require far more in-depth consideration of far more cases, but due to lack of space, I have instead argued for plausible accounts that offer a relatively clear path to those interested in the specific questions presented in each chapter. If I am successful, even in this initial suggestive task, much will be accomplished.

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[6] Because the definition and conceptual framework have more than two aspects, it would probably be more appropriate to use a 3-dimensional graph. I believe this is what some people call calculus, but my memory of math past grade 10 is hazy.

Practical Value

Legal need has been an important legal services policy/research tool and concept in the United States, Australia, New Zealand, the United Kingdom, and even Ontario and British Columbia for a time, among other jurisdictions (Curran & Noone, 2007; Marrone, 2002). In some jurisdictions, such as the United States and British Columbia, assessing (and therefore defining) legal need is legally mandated (Meeker et al, 1985; Legal Aid Society Act, 1979; Marrone, 2002: 1). It has been vital for quantifying the demand for and therefore making the case for increasing legal aid capacity. Yet to date, there has been no systematic theorization of the term. Furthermore, as will be discussed later, legal needs seem to be a hammer that makes everything look like a nail; that is, it seems to prescribe a lawyer for every social ill.

Grounding legal need in a broader philosophy of needs and looking for institutional responses in the ethics of care can, together, offer novel insights that resist depoliticizing certain kinds of problems and can recommend a much wider range of policy solutions, some of which will be explored in chapters 5 and 8. Additionally, this study will hopefully lead us to new methodological insights into how to study and map legal needs, insights that do not succumb to the problems of hidden judgements and subjectivity underscored in chapter 1. Most importantly though, it will offer some initial suggestions for truly systematic transformation of the legal system towards a caring ideal.

Prima Facie Issues

Before we begin, however, a number of objections to the starting assumptions of this investigation must be considered. Depending on the reader's background, they will have very different reservations about whether this project is even theoretically possible. For instance, if they work in the ethics of care, the central role coercion plays in the legal system will likely form a significant barrier to believing that the legal system's work as a whole could ever be considered caring. Critical, as well as realist, or marxist legal theorists may wonder at the validity of my naive identification of the legal system with the ethics of justice, when, they might say, it is really just an embodiment of various kinds of power struggles. On the other side of the spectrum, legal positivists may balk at how this work seems to take for granted the relationship between law and ethics. Because I will not be able to engage with these questions directly in the chapters to come, although I will return to some of them in chapter 6, I would like to offer some tentative arguments to at least address if not overcome some of these more significantly implausible or potentially problematic aspects of my project.

Firstly, while coercion is unquestionably problematic for the ethics of care, both care's champions and its critics agree that the ethics of care and care in general are capable of making use of coercion and in fact often do (Held, 2005: 139; Noddings, 2002: 228; Kelly, 2014: 125). The difference between the champions and critics lies in whether that coercion is viewed as genuinely necessary for the

meeting of the need that all agree should be met. Furthermore, care ethicists recognize that even if coercion is genuinely necessary, it would still need to be employed in such a way as to empower the care recipient to the utmost possible (Held, 2005: 139; Noddings, 2002: 228).

I am therefore faced with two questions with respect to the legal system: does it meet a need that requires coercion; and if so, can that coercion be employed in a way that does the utmost to empower those subject to the coercion? If current legal systems fall far short of this standard, that is not a reason to dismiss the possibility of a caring legal system. On the contrary, if the answer to the first question is affirmative, and I will argue in chapter 4 that it is, then we have all the more reason to look for answers to the second question. In chapter 3, when I consider the risk of paternalism that employing the language of needs raises, one model of how to recognize and thereby bring out the care recipient's power. If, when all is said and done, a caring legal system is still found to employ a regrettable amount of coercion, that in itself is still no reason not to make the inquiry, for, as they say, the better should not be sacrificed for the best.

Secondly, this study would seem to depend on a treatment of legal systems as concrete institutional embodiments of the ethics of justice. So if legal systems like Canada's are not embodiments of the ethic of justice, but rather an embodiment of class struggle (Stone, 1985) or simply an inconsistent series of decisions made based on personal ideological preferences and biases (Schauer, 2013: 755-56), then this investigation will be unable to help us answer how the ethics of care relates to the ethics of justice. While that is true, it is not exactly correct to say this study depends on legal systems being *perfect* institutional embodiments of the ethics of justice or even a good approximation. Rather, in order to be interesting, this investigation only requires that legal systems promise to be an institutional site of the practice of the ethics of justice to a greater extent than other institutions, preferably in the purest and most rigid way possible. If it turns out that this candidate that promises the purest and most rigid embodiment of the ethic of justice is neither so pure nor so rigid, then that is unfortunate, but it remains the most promising candidate.

What makes the legal system so promising? While the legal system may in different ways systematically fail to live up to the ethics of justice (a very large claim outside of the scope of this study to address), it is far less controversial to assert that it does so through at least the language and apparent logic of the ethics of justice (i.e. rights, personhood, interest, reasonability, etc.) to a far greater extent than other major societal institutions. This promise does not mean it is actually the best candidate, but it is a risk I am willing to take if only because one of the strengths of the ethics of care is precisely that it works and reminds us of the necessity to work from deeply flawed starting positions.

Finally, we have the question of how positive law relates to ethics, for which I offer the following argument. Within any system, actors make choices governed by the rules and principles of that system.

An exhaustive system is a system in which choices (regarding what to do, towards what ends, and in what way) can be made exclusively with reference to the application of that system's rules and principles. Consequently, in a non-exhaustive system, one must make choices (regarding what to do, towards what ends, or in what way), at least in part, based on factors other than the rules and principles of the system itself. The factors behind one's choices (which need not be confined to reasons in the rationalistic sense of the word) must either be normatively justified or not. The framework by which choices are consistently normatively justified is an ethical framework. It is preferable for choices to be consistently normatively justified. Therefore, in a non-exhaustive system, it is preferable that actors have an ethical framework. Legal systems like Canada's are non-exhaustive systems. It is therefore preferable that legal actors within these legal systems have ethical frameworks.

While I do not take this short argument to settle a fundamental question of jurisprudence, it, at the very least, suggests a formal necessity for ethical work in the legal system. Of course, the reader may detect a certain tension between this argument's focus on individuals within a system and my overall claim that a system itself can be capable of an ethically significant activity such as care. Without preempting much more detailed arguments to come, a *system* might be said to embody an ethic to the extent that adhering to a system's rules and principles consistently results in a pattern of activity that would be normatively justified by that ethic. Based on this, where the activity of an ethic must go beyond rule-following (as with the ethics of care), this would seem to either lead to the exclusion of that ethic from being institutionally embodied or to paradox (if not contradiction). This problem will be addressed in due course.

While the responses above may have left the reader with many worries unaddressed or may not have fully addressed the worries under question, I hope that these responses will indicate that some of the largest assumptions behind this work were made with some degree of care and awareness of the complexity of the subject matter. With this in mind, let us begin.

Part 1

Chapter 1: Legal Needs

It is the presumption of this study that a caring legal system is a system that meets legal needs in a caring way. Consequently, my first task is to define legal needs. "Legal need" is already a widely used expression among legal professionals (e.g. Law Society of Upper Canada, 2016; Rosenthal, 2011; O'Keefe, 2014). Yet, despite the centrality and wide usage of the term, its meaning is, quite surprisingly, for the most part taken for granted. The one major exception to this silence is the area of legal aid where the concept of legal needs has considerable practical importance informing funding and distribution decisions across many jurisdictions, including Canada, the U.S., the U.K., and Australia.

Since there are already some good historical overviews of the role "legal need" has played in these jurisdictions (Genn, 2001: 11-14; Pleasance et al., 2001), and fairly recent literature reviews of legal needs studies (Pleasance et al., 2001; Curran & Noone, 2007), I will not attempt to reproduce that work here. I will instead attempt to distill the essential conceptual features of legal needs into a succinct definition, which will hopefully offer a clearer object of analysis. This sort of work has been called for multiple times (Meeker et al. 1985: 225; Genn, 2001: 3; Curran & Noone, 2007: 64; Robertshaw, 1993: 4), although, to my knowledge, it has not yet been attempted.

Definition

Let us begin, then, with a short definition:

> [1] A person or group has a legal need if and only if they have [2] a sufficiently serious problem (i.e. a legal or justiciable problem) for which there is a necessary or sufficient legal remedy [3] known of and preferred by them and/or a relevant expert, [4] and almost always requiring the appropriately delivered legal services of a lawyer, such as advice, counsel, and/or representation.

I do not claim that this definition is comprehensive or even perfectly coherent. Rather, it is based on a composite of the general tendencies of the literature and attempts to encompass as many of the positions taken on the various aspects of legal need as possible. The remainder of this section will be dedicated to explaining each part of this definition. Some criticisms of this definition of legal needs will be anticipated where understanding the criticism is helpful in understanding the definition. However, the purpose of this section is purely expository, and consequently many critical issues will be passed over. The majority of criticisms within the literature as well as some of my own analysis both of the concept and its criticisms will be handled in the next section.

Let us begin with the question of who can have a legal need. The most common position in the literature would seem to be that individuals can have legal needs and no discussion of whether groups or other entities can have them (Sykes, 1969; Sackville in Hanks, 1987: 46; Meeker et al., 1985; ABA, 1994; Burns, 1998; Marrone, 2002; Legal Aid Alberta, 2007; Legal Aid BC, 2010: 7). However, there are important exceptions to this, namely exceptions that focus on the community level work of American legal centres which did work to advocate on behalf of entire classes of people (Goodman, 1980: 20). The question of whether groups can have legal needs is also occasionally raised elsewhere, usually implicitly through criticism of the concept of legal need for either necessarily individualizing problems or practically failing groups in its current form (White, 1973: Morris, 1973: 49; Lewis, 1973: 75; Marks, 1976: 197). Sometimes, though, the prospect of group legal needs is raised to suggest, or at least imply, that groups can in fact have legal needs and that the framework of legal need might serve them if only to a limited extent (Marks, 1976: 202; Duncanson, 1981: 120).

Part (2) of the definition expresses the fact that the literature universally ties legal needs to certain kinds of problems, called either legal or justiciable (Marks, 1976; Goodman, 1980; Lyon, 1983; Meeker et al, 1985; Genn, 2001: 11). These problems usually occur when a right has been violated (White, 1973; Hughes, 1980; Curran & Noone, 2007: 71). Indeed, the identification of legal need with right was mentioned repeatedly in the literature reviewed (National Legal Aid Advisory Committee, 1990: 256; Curran & Noone, 2007: 71). However, not just any violation of a right will do. I have attached the caveat "sufficiently serious" since at least some researchers seem to add the requirement that the failure to resolve the problem must result in some serious harm (Abel-Smith et al., 1973: 111). On the other hand, for some researchers, the mere existence of the problem seems to be sufficiently serious or else it is up to the respondent (not the researcher) to determine what is sufficiently serious (Genn, 2001).

To clarify, a legal problem is distinguished from other kinds of problems by the fact that legal knowledge/action offers: one possible resolution[7] (Abel-Smith et al., 1973; Morris, 1973: 51; Marks, 1971: 4; Marks, 1976: 195; Cass & Western, 1980: 104; Lyons, 1983; Curran & Noone, 2007: 72); the best possible resolution (Lewis, 1973: 75; Genn, 2001: 4); or the only possible resolution (Lewis, 1973: 74; Curran & Noone, 2007: 71; Legal Services Corporation, 2009). These three views obviously offer very different thresholds for qualifying something as a legal problem. Furthermore, it should be noted that this third position is only articulated in a small part of the literature; indeed, it usually comes in passing in articles that also posit one of the first two meanings without accounting for the difference (Lewis, 1973: 74-75; Curran & Noone, 2007).

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[7]In at least one case this was weakened to the level of where "legal assistance could be of value" (Cass & Sackville, 1975: 6).

For instance, Pauline Lewis (1973) defines a legal need as emerging from a problem "which *requires* legal knowledge or the taking of action before some legal institution" (emphasis added) to solve it (74). This is a clear example of the third sense, i.e. the only possible solution. Yet only a page later she writes "to say that someone has a legal problem is… to suggest that he should take a certain course of action, or that his situation could *best* be dealt with by taking such a course of action…" (emphasis added) (Lewis, 1973: 75). This second definition which reflects her ultimate view of the concept of legal needs is a clear example of the second sense. Obviously these are two meanings as different as "you need to try the pie here" (best solution to the problem of hunger) and "you need to eat" (only solution to problem of hunger) but no attempt at bridging the gap is made. One exception to this trend is the Legal Services Corporation 2009 report that makes the necessity embodied in the third sense central to its definition (1). They state that their mandate is the securing of "*necessary access to civil legal assistance*" (emphasis in original) to solve legal problems that touch "essential human needs" (Legal Services Corporation, 2009: 1).

As will be discussed later in this chapter, the labelling of a situation as being a *legal* problem came under criticism early on for allegedly masking a prescriptive judgement to undertake legal action as a merely neutral description of facts (Morris, 1973; Lewis, 1973; Marks, 1976; Lyons, 1983). This criticism takes the second sense for granted. Recently, partly in response to this criticism, the more modest term "justiciable problem" has been used (Genn, 2001; Pleasance et al. 2001; Buckley, 2010: 39; Currie, 2013). The label "justiciable problem" explicitly only makes the first claim that the legal system, in theory, offers a possible remedy (the first sense) (Pleasance et al., 2001: 25), rather than the more ambitious claim that legal action is best or necessary for the resolution of a given problem.

This leads us to the third part of the definition, namely, both the theoretical and empirical question of how we know somebody is facing such a problem. It seems to have become more or less the orthodoxy that legal needs (and therefore legal problems) are subjective and consequently not open to objective verification (Marks, 1971: 4; Morris, 1973: 50; Cass & Western, 1980: 41; Genn: 1999: 3). However, in and of itself this does not settle the question; after all, who can subjectively determine whether or not something is a legal need/problem? It has recently been suggested that Bradshaw's 1972 taxonomy of social needs has been taken for granted in the legal needs literature (Robertshaw, 1993; Curran & Noone, 2007: 67). This taxonomy contains four types of needs: normative need, i.e. need as defined by the "expert"; felt need, i.e. need as it is experienced; expressed need, i.e. need that is turned into action such as a request or appeal; and comparative need, i.e. the need inferred if people with certain characteristics have access to a service or resource that others with the same relevant characteristics do

not have (Curran & Noone, 2007: 67). The suggestion is a useful one since it does seem possible to organize the literature roughly along these lines, with only a few exceptions.[8]

Legal needs studies largely started from a "lawyer-driven model" implicitly treating legal need as normative need. In practice this meant that researchers, often lawyers, selected a limited list of legal problems primarily reflective of the use patterns of those currently using lawyers, with some further suggestions (Sykes, 1969; Abel-Smith et al., 1973; Lewis, 1973; Goodman, 1980; Lyons, 1983; Pleasance et al., 2001; Marrone, 2002: 1). It has since moved, with some exceptions (ABA, 1994), to a "client-centred model" attempting to ascertain felt need (e.g. through open ended questions) or comparative need (e.g. through economic proxy models[9]) (Curran, 1977; Johnsen, 1999; Marrone, 2002: 1; McEown, 2008: 2). In light of this rather linear presentation, two comments should be made. Firstly, even the early "lawyer-driven" studies observed how members of different groups, e.g. women and African-Americans, viewed situations and therefore their own needs differently from those who developed the studies (Sykes, 1969; Meeker et al., 1985: 226). Secondly, official state policy (e.g. Australia) continued to define legal need according to program priorities, which is another form of normative need, though not, strictly speaking "lawyer-driven" so much as policy driven (National Legal Aid Advisory Committee, 1990: 256). In sum, there remains a question as to who is best placed to determine the existence of a legal need but the tendency has largely been to increase deference to the client themselves.

As part [4] states, in order to achieve these necessary or sufficient legal remedies, the bearers of legal needs require legal services (Meeker et al., 1985: 227; National Legal Aid Advisory Committee, 1990: 255; Johnsen, 1999: 210; Pleasance et al., 2001: 7; Genn, 2001; Curran & Noone, 2007: 65), usually, but not always, provided by lawyers (Marks, 1971: 5; Marks, 1976: 199; Goodman, 1980: 22). This is perhaps unsurprising, given that this literature is situated within the legal services field. Before a person can access legal services, however, as pointed out by the Scottish "Hughes Commission" (1980), they must first be aware that they have legal recourse and that there are such services available. Legal information is therefore a prerequisite of the satisfaction of any legal need (Johnsen,1999: 226; Genn, 2001: 5; Curran & Noone, 2007: 81). This is why, although it may seem redundant (since preference implies some knowledge of the thing preferred), the above definitions stipulates "...known of and prefered by...".

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[8] For instance, whereas Marks (1971) talks about felt need as being the primary determinant of what makes something a legal problem (4), this is mediated through community standards.

[9] An economic proxy model, such as has been used in Australia, England and Wales to determine funding allotment, involves assuming a baseline of equal demand per capita between jurisdictions, and then weighting the demand by certain statistical demographic, socio-economic, and cost-increasing factors, such as: age, income, rural/remote status (Genn, 2001: 16).

Additionally, a minority of more recent, particularly Canadian, work has extended a need for services to a need for services to be delivered *in a particular way*, which is why I have written "...appropriately delivered..." (Legal Aid Ontario, 2012). For instance, Ab Currie (2006) talks about the need to give legal advice in a way that will be comprehensible to the client, who may have a cognitive impairment, low literacy, or a poor grasp of the English language (6-7). Legal Aid Ontario (2012) has looked at the specific barriers in services delivery for Francophone women and has (unsurprisingly) concluded that these women have both unique language requirements, as well as a consistently expressed need for empathy (largely owing to their sense of being out of place and judged by those who are supposed to help them) (45-46). Findings like these likely entail procedural reform as opposed to simply increased resources.

Finally, in a few cases, the literature has implicitly or explicitly suggested that it is possible to have a legal need for something that the legal system is not yet capable of delivering (Cass & Western, 1980: 74; Pleasance et al., 2001: 20; Curran & Noone, 2007: 72) or that lawyers do not yet deliver (Abel-Smith et al., 1973: 110). That is why, in the definition I have proposed above, "legal services" (as they presently exist) are only "almost always" the answer. This suggestion would seem to entail that a legal need can be for more than just legal services (at least as they currently exist), and may be for reform, not only of procedure but of substantive law, or at the very least legal training. As we will see later, this is a very important suggestion, but unfortunately, it is nowhere fleshed out and in some cases is denied (Robertshaw, 1993: 2).

A few more remarks ought to be made about the sources and normative foundations of legal need; although these may not be strictly part of the above definition, they necessarily operate in the background. To the question of what causes legal needs, the literature offers two complementary answers, one vague but comprehensive and the other precise but limited. Firstly, legal/justiciable problems are said to arise out of a social context, e.g. poverty, disability, race relations, language, etc. (Marks, 1976; Lyons, 1983: 166; Hanks, 1987; Currie, 2006; Curran & Noone, 2007: 84). Secondly, legal/justiciable problems are said to emerge out of the demands of the legal system itself (Morris, 1973: 65; Marks, 1976: 192-3; Duncanson, 1981: 114; Currie, 2006). To be fully fleshed out, the first answer requires a broad and systemic theory relating legal systems to their societies, as well as an account of how legal needs interact with other kinds of needs (not offered by the literature). Nevertheless, on its own, it does point us to the necessity of seeing legal problems as caught up in other kinds of problems (Hanks, 1987: 51; Curran & Noone, 2007: 72, 84). From this we can infer that any renewed understanding of legal needs should be able to situate the legal aspects of situations in the context of their broader social, political, and economic aspects. The second answer can be elaborated in greater detail fairly uncontroversially, primarily through the invocation of empirical research.

For instance, under the requirement for contested divorce proceedings in the UK, employing a lawyer was usually necessary; when this requirement was taken away, since uncontested divorce proceedings were far simpler, they could be much more easily navigated without lawyers, so lawyers' services became optional (Duncanson, 1981: 114). Similarly, in Canada's criminal justice system, individuals face institutionally created needs every step of the way, from things as simple as having to travel to the legal aid office for a required interview to the complex demands of the rules of evidence (Currie, 2006: 6, 8).

In sum, we may understand legal needs as being caused both "politically" (meant in the widest sense possible) and administratively. This is not to say that the administrative demands of the legal system are not themselves political. Only that there is a meaningful practical distinction to be made between the legal needs that are said to arise from a society's socio-economic structure (for example) as opposed to a particular courtroom procedure, if only because of the relative ease of removing the latter barrier as opposed to the former.

Secondly, legal needs studies are obviously not disinterested studies. That is, legal need is often measured in order to study the prospect of particular kinds of policy action, most often funding or reprioritizing of legal aid (Marks, 1971: 1; Pleasance et al, 2001 11-14; Buckley, 2010: 42). This raises the question: "why should we satisfy a legal need?" The literature has spent relatively little time on this question besides appealing to access to justice. One observation made early on and seemingly unopposed has been that the foundation of legal needs claims is an appeal to the principle of equality before the law (Lewis, 1973: 73; Johnsen, 1999: 205; Pleasance et al. 2001: 11). That is, if someone who could access legal services with private means would access these services in a particular situation, someone facing a comparable situation who did not have such access by private means ought to have it by public means (Meeker et al, 1985: 226; Lewis, 1973: 74; Lyons, 1983: 165; Marks, 1976: 198). As mentioned earlier, the principle of equality has also been extended to not only what services are formally accessed, but also whether they are substantively accessible (e.g. for people facing language and/or cognitive barriers) (Currie, 2006; Legal Aid Ontario, 2012). Nonetheless, the fundamental appeal to equality remains the same. More recently, the Legal Services Corporation (2009: 1) has grounded legal need in the meeting of other basic "human needs" such as safety. This latter suggestion will be taken up at greater length in the chapters to come.

In sum, I have attempted to offer a sort of conceptual "line of best fit" that both accounts for the diversity of views while identifying the core elements and tendencies within the literature. There are many possible combinations of positions that any given legal needs study could take on the various questions contained within the above definition, as well as many opportunities for silence. On the whole, however, with only a few exceptions that have not been fleshed out by the literature, all these

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combinations have been vulnerable to a number of common criticisms first articulated in the early 70s and repeated and expanded even in the most recent works (Lewis, 1973; Morris, 1973; White, 1973; Curran & Noone, 2007). In the chapters to follow it will be argued that all these criticisms could be answered through some clearer theorization of "need" and attention to the unique functions of legal systems. Nevertheless, the work that has been done so far, as well as the criticisms to which we now turn, is invaluable as a framework to direct this conceptualization and identify the demands that a renewed conceptualization must meet. This newly robust conceptualization of legal need will be crucial both for understanding what exactly a caring legal system would work to accomplish and making clear why care is a relevant standard for a legal system.

Criticisms

Underlying the many criticisms of the concept of legal need, there are really only two major interwoven claims. According to the critics, using legal needs as a framework for policy is (1) depoliticizing and (2) ineffective. There are three components to the "depoliticizing" claim. Legal needs depoliticize: by ignoring the source of problems; by failing to account for the reason for addressing the problem; and by taking for granted the means by which problems are addressed. This depoliticization is both intrinsically problematic and it compromises the effectiveness of the recommendations made by such a framework.[10] For each stage of depoliticization, I will summarize the argument, then either state the responses of legal needs defenders, or, if I could not find any, offer my own response, assess the merits of these responses, and then explain what each exchange entails for the standards that a renewed definition of legal needs would have to meet.

To begin, I mentioned above, there is a recognition that legal problems, such as domestic abuse, vandalism, wrongful evictions, etc., stem from social, political, and economic structures (Mayhew in Hanks, 1987: 50; Johnsen, 1999: 219-21); however, the law has a tendency to individualize problems and the legal needs literature has a tendency to not look beyond features of the individual (e.g. low income, low literacy, etc.) for explanatory factors (Cass & Western, 1980: 36; White in Curran & Noone, 2007: 67). What is more, legal needs cannot be neatly divorced from other sorts of needs either in the understanding or experience of people facing problems, and so any genuinely complete resolution of their problems must take this into account (Morris, 1973: 52); however, legal needs and the legal system in general are typically treated in isolation (Lewis, 1973: 50; Marks, 1976: 192; Morris in Curran & Noone, 2007: 68). Furthermore, the legal system itself may contribute to a problem (Johnsen, 1999: 224). The

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[10] The reader may have noticed that I go between the term "concept" and "framework" to refer to legal needs. I use one to talk about the idea and the other to talk about the whole approach, which includes measuring and responding to legal needs.

response has been to acknowledge the insufficiency of any isolated treatment of the legal system and to say that while law may not have all the answers, it still has a role to play in dealing with these societal problems, such as poverty and social exclusion (Sackville, 1975: 1; Buckley, 2010: 40)--presumably leaving other institutions and analytic frameworks to deal with the broader context.

The question is: can a legal needs framework make its own contribution effectively without engaging these broader political questions within itself? The answer of critics has been a resounding no. Definitions of need that fail to ask where the need comes from may inevitably strengthen the attendant bureaucracy at the expense of the people with needs "not of their own making" (Morris, 1973: 51). This point is particularly strong in the case of the legal system since, according to some critics, the legal system's tendency (and perhaps its very function) is to reassert the status quo that gave rise to the problems in the first place (Duncanson, 1981: 124; Lyons, 1983: 167; O'Malley in Curran & Noone, 2007: 70). What is needed, therefore, is a notion of legal need that both situates legal issues within broader systemic issues and is capable of not only recommending but criticizing the legal system, since it may be a contributing factor to the problem. In the chapters to come, I will do this on a theoretical level by situating the concept of legal need within a more comprehensive philosophy of need. This has some precedent in the Legal Services Corporation's 2009 framing of legal need as being legal assistance to meet the "human needs" caught up in civil legal problems (1).

Secondly, calling something a need has been criticized as a disguised and undefended political judgement masquerading as neutral empirical description (Lewis, 1973: 75; Lyon, 1983: 165; Johnsen, 1999: 210). As has been mentioned, a need is a need for something. But if we want to claim that legal needs have public relevance, unless we say all needs should be provided for, we have to say further that this something (e.g. a particular standard of living) is something for which the community should provide (Lewis, 1973: 75-6; Johnsen, 1999: 210). Consequently, calling something a need without further elaboration hides that this standard is political and therefore necessarily open to contestation (Lewis, 1973: 77; Genn, 2001: 4).

As explained above, one might respond that the standard is "equality before the law", but this standard has been accused of incoherence, as the cases of those who can and cannot afford legal services are fundamentally different to the point of incomparability (Lewis, 1973: 80), as well as ultimately inadequate, since the traditional services that satisfy the needs of the wealthy and middle class will only be of limited use to the most vulnerable (Lyons, 1983: 166). Therefore, any definition of legal need, if it is to meet this criticism, will have to explicitly offer an end (let's call it Y) politically defensible to the point that one need only point to the fact that X is needed for Y to make X publically relevant. Furthermore, this standard should not implicitly universalize the situation of a specific subset of society (e.g. the middle class) as this standard may be inappropriate or insufficient for the situations of others.

This is precisely the advantage of constructing our definition of legal need without reference to the possession or lack of the means to satisfy the need. However, as has been mentioned, what is asserted as needed (i.e. certain traditional legal services) may be reflective of one subset of society, so we must move on to the criticisms of the prescriptive element of legal need.

According to the critics, to call a problem a legal problem is not a description of facts but reflects an implicitly made political judgement about what course of action is appropriate for the resolution of that problem (i.e. legal action) (Morris, 1973: 53; Lewis, 1973: 75; Lyon, 1983: 165; Genn, 2001: 4; Pleasance et al., 2001: 12). Critics claim that a person always has alternatives to the legal system, at least nominally (Lewis, 1973: 84; Johnsen, 1999: 210), so the recommendation of the legal system requires some justification. Consequently, when a researcher asserts something is a legal problem they are concealing a value judgement that they have not defended, i.e. the value judgement that the legal system is the best way to solve one's problem. As noted above, the literature has responded to the charge of hidden judgement in two ways. One response has been to shift to the notion of "justiciable problems", which only asserts a legal course is one of many possible alternatives without necessarily prescribing it (Genn, 2001). At the same time, researchers have remarked that a finding of need is separate from advocating that it be met (Johnsen, 1999: 211). Secondly, by structuring survey questions in such an open ended way that respondents have greater latitude to define what is and is not a legal problem for them (Curran, 1977; Genn, 2001: 112).

In essence, legal need as normative need has been accused of masking the fact that it provides no justification by calling itself a need, when such a justification is required. In my view, both responses try in different ways to do away with the need for such a justification by doing away with normative need, either by avoiding having to make any judgement or by asking the respondent rather than the researcher to make the judgement (felt need). What this attempts to do is sever the observation of legal need from the recommendation that it should be met. This split ignores the normative dimensions of the concept of "need" so no political judgement has to be made. However, if we accept that genuine needs-claims always have a normative dimension (a position that will be outlined in the next chapter), then legal needs claims do depend on political judgements that ought to be justified, and so neither response is satisfactory.

The first is unsatisfactory because, in failing to assert the need for legal action, it self-consciously severs the connection between need and the situations it empirically observes, which is no defense of legal need at all (Pleasance et al., 2001, 25). The second is unsatisfactory because the problem is not simply that researchers made undefended value judgements about respondents (i.e. the problem of paternalism) (Morris, 1973: 55-56; Lewis in Curran & Noone & Curran & Noone, 2007: 69, 82), though that is a problem, but that undefended value judgements were made at all. That respondents instead of researchers make these undefended judgements, therefore, does not fundamentally improve the situation.

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Taken to its logical endpoint, this criticism of political judgement and the second response strategy (i.e. offloading the burden of normative judgement on the respondent) in particular has resulted in the view (mentioned briefly above) that legal needs are "subjective" and "not open to objective verification" (Hanks, 1987: 50; Genn, 2001: 4). A finding of this kind of legal need, then, can only recommend support for people's preferred courses of action (Pleasance et al., 2001: 15). But while this may get away from paternalism, it also masks the lack of justification for taking a legal route beyond personal preference.

Furthermore, the need for justifying particular interpretations of a situation arises even when one treats legal need as a purely subjective category, since conflicting interpretations need to be accounted for. For instance, normative and felt need will conflict when experts and recipients disagree about what the recipient needs; and felt and expressed need will conflict when those receiving funds are not the most vulnerable but the loudest (Morris, 1973: 50-51; Johnsen, 1999: 226; Genn, 2001: 5, 14; Curran & Noone, 2007: 66, 70). The response to these tensions and conflicts so far, however, has been to combine these strategies of tracking different actors' views of needs (Genn, 2001: 14; Buckley, 2010: 37), and to look for discrepancies between perceptions (Morris, 1973: 52), rather than to settle those discrepancies, seek any theoretical resolution, or judge who is right or wrong.

Rather than shy away from political justification, if legal need is to be preserved as a concept, any renewed conception of legal need has to be explicit that it is making a political judgement (Hanks, 1978: 38). It must do this while remaining attentive to the views of those with needs in a meaningful way so as to avoid paternalism[11] (Morris, 1973: 55-56; Lewis in Curran & Noone, 2007: 69; James et al., 1987), without allowing that input to replace justification. The reader may think such a balance is difficult though possible on a case by case basis, but wonder how it could be built into the very concept of legal need. I believe the answer lies in a stricter use of the term need, such that, for X to be needed it would have to have no alternatives. More will be said on this in the chapters to come.

However, under the current definition of legal needs, legal services remain one of many options. If we were being upfront about the need to argue for legal services as one of many options, would they be justified? The first thing the critics point out is that since most of the legal needs literature argues exclusively for legal services already being offered by the system, in so doing it has taken on the limits of whatever the status quo of that legal system happens to be (and likely much less than that due to resource restrictions [Pleasance et al., 2001: 22]) (Duncanson, 1981: 124; Marks, 1976: 192). So, for example, if group representation is not part of the traditional services offered by lawyers, then group needs either go unmet or unrecognized (Lewis, 1973: 75). Furthermore, the time and resources put into these legal services are always taken away from potentially more effective personal or community responses (Cass &

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[11] What this means in practice will be sketched out when we discuss the revised notion of legal need.

Western, 1980: 39). Such alternatives include less formal dispute resolution (Marks, 1971: 3), or social policies that might treat the social factors behind the problem (i.e. the cause and not just the symptom) (Lewis, 1973: 83; Lyons, 1983: 166-7; O'Malley in Curran & Noone, 2007: 70). Because legal action is one course among many, legal need, like any framework meant to inform policy, must be capable of grappling with finite resources, i.e. it must be able to prioritize (Johnsen, 1999: 232; Genn, 2001: 5-6; Pleasance et al., 2001: 7). Furthermore, legal action must be preferable to self-help, alternative dispute resolution, and political/policy action. I will specifically make this comparison in chapter 4.

This drain of resources from other strategies is all the more troubling to critics when they consider that in many cases the legal services that are "needed" are necessitated by "purely artificial" administrative requirements (i.e. lawyers are needed for certain functions because the Law Society regulates it so) (Morris, 1973: 65; Marks, 1976: 192-3; Cass & Western, 1980: 35; Duncanson, 1981: 114; Hanks, 1987: 50). Consequently, in failing to question the value and requirements of current legal systems, the actions recommended is ultimately less effective than it could be at treating the problem it is supposed to resolve. As mentioned in the previous section, there have been subtle hints and suggestions of the possibility of a legal need for something the system does not yet offer, as well as open recommendations for procedural changes (Currie, 2006; Legal Aid Ontario, 2012). These sorts of recommendations need to have a much more prominent place in legal needs discussions, for a conception of legal need to not be confined by whatever the traditional limitations of the legal system is at the time. In particular, and this is a suggestion I will develop later on, where an apparent need is purely artificial, a fuller conception of legal need would make clear that certain needs can be responded to by negation (i.e. removing the cause of the so-called need) rather than simply satisfaction.

Indeed, critics have asserted that substantive legal reforms that do away with the need for legal representation would be more effective than representation at resolving certain "legal problems" under certain cases (e.g. undisputed divorces) (Lewis, 1973: 83). I see no particular reason why legal need could not be conceptualized in such a way that such a recommendation would *stem from* rather than be *opposed to* an "observation" of legal need. On the other hand, claiming that a need is purely artificial (i.e. its source is administrative) should not in itself be accepted as a criticism. After all, in a hospital, it may be purely administratively determined that the nurses have to make their rounds at 7:00 PM as opposed to 7:01 PM or 6:59 PM, but that does not mean that the rounds should be eliminated or that there should no longer be a required time. Just because something is artificial does not mean it is not justified and just because something is justified does not mean it is not artificial. Rather, the relationship between administratively created needs and their deeper justification has to be more explicitly dealt within any renewed conception of legal need.

There is another "political" dimension to the administrative origin of needs that is worth briefly considering. It has sometimes been observed that it is in the interest of the legal profession that we recognize a high level of unmet legal needs, and indeed this interest may account for some of the success of the concept of legal needs to date (Lewis, 1973; Lyons, 1983; O'Malley in Curran & Noone, 2007: 70; Duncanson, 1981: 123). The response to the claim of vested interest has been to point out that the lawyers involved in delivering these services usually take a large pay cut to do so precisely because they have interests beyond their own wealth (Curran & Noone, 2007: 78). The actual motives of those who advocate for legal needs is an empirical question outside the scope of this study; however, I can still consider *potential* misuse of the concept as I formulate it. For instance, if a finding of legal need was always in the interest of lawyers, that would at least be fairly suspicious. Consequently, a concept of legal need logically capable of recommending some course of action not in the interest of the legal profession (for instance reform that renders legal representation unecessary) would be needed to dispel this worry. With that being said, since correlation is not automatically causation, if a conception of legal need is coherent and responsive in every other way and meets the other stipulations specified above, it should not be undermined or dismissed simply on the grounds that a finding of legal need is in some particular group's interest.

In conclusion, legal need as it has been conceptualized thus far is open to some serious criticisms, however, none of these criticisms should necessarily lead us to reject the concept of legal need as such, although some have suggested this course (Lewis, 1973; Marks, 1976: 204; Lyons, 1983; Pleasance et al., 2001: 14). Rather, these criticisms have provided us with vital guidance for what a renewed notion of legal need will have to look like. To meet these requirements, over the next three chapters I will address the following questions: what is a need; why use the language of needs; and when is the legal system needed? Together, these chapters will both provide the justification for preserving a concept of legal need, as well as suggesting how we could systematically conceptualize legal needs. Ultimately, this will provide us with a crucial part of the foundation of a caring legal system.

Chapter 2: What is A Normative Need?

Before we consider what a need is, the reader may be wondering whether such a lengthy discussion is truly necessary. After all, we all have needs and we all talk about needs quite a bit, so it is fairly natural to think there is not much to be investigated here. Shouldn't we all be experts by now? One possible response here might be: assuming your sight is perfect, when is an object going to be blurry? When it is either too far off or too close. That needs are a far off idea is not the problem. It is precisely how close needs are to all of us that makes them so difficult, on reflection, to theorize or agree on. After all, as we saw in the last chapter, some look at need as what you *feel* you need, others see need as what *an expert tells you* you need. Among the philosophers of need, there is even more controversy. Is it fair to call anything a need if it is required for some goal of ours (the instrumentalist position), or does it have nothing to do with our goals (the non-instrumentalist position)? When we say we need something, are we always leaving out what we need it for or are there certain needs that require no further explanation (i.e. are needs claims elliptical)? Are needs universal or particular, natural or artificial, objective or subjective? Perhaps most importantly, which are the normatively demanding needs? Are they what is required for us simply to survive, to be citizens, to be individuals, or something else? There are theorists out there with good reasons to take every one of these positions, yet not all of them are compatible at first glance. So despite the fact that we might each consider ourselves experts in our own needs, much discussion is still warranted.

In the face of this great diversity of views, the purpose of this chapter is twofold: firstly, and most importantly, to set out a unifying concept of need capable of serving as a foundation for a renewed understanding of legal needs, one that might address successfully the current criticisms without raising additional challenges; secondly, in setting out this concept, to offer a conceptual framework of need that reconciles, as far as possible, many of the apparent differences in the philosophy of need literature. Throughout, I will emphasize the great deal of agreement and common ground in the literature, as well as the compatibilities where there are differences. Because of the limited space, the case will most likely seem overstated and important nuances will surely be lost. I believe these limits are justified since my ultimate goal in this study is not to give an exhaustive account of the literature on needs but summarize, analyze, and organize what I believe will be most useful to the concept of *legal* needs. Furthermore, given the limited space, I believe it will be more useful for the philosophy of need literature to offer here a wide but fairly suggestive framework, indicative of the large common ground and the questions still to be settled, than to offer great detail on a very narrow set of questions. If this can be done, what will be achieved will be clarity on one of the most important words in our everyday moral vocabulary. This is not only important for the burgeoning group of moral theorists, such as care ethicists, for whom needs are

central, but also for the policymakers around the world whose chief mandate it is to meet the needs of the vulnerable.

Non-Normative need

To begin, while there are many uses of the term "need", the strictest sense is: Y is needed for Z, if and only if, without Y there could be no Z (Thomson, 1987: 3-4; Wiggins, 1987: 7; Doyal & Gough, 1991: 39; Miller, 2012: 17, 32). So when we say X needs Y, it is always possible (Barry, 48-49; Frankfurt, 1998: 21; Gasper, 2009: 348-49), if not always appropriate (Thomson, 1987: 20-21; Miller, 2012: 35), to formulate the claim as X needs Y for Z. This is not a psychological claim, since X may not desire or even know about Y and yet this does not change whether Y is required for being, having, or doing Z (Thomson, 1987: 11; Wiggins, 1987: 6; Doyal & Gough, 1991: 23, 41; Max-Neef, 1991: 27).

The first thing to note is that this sense of need (whether the content is physical or psychic) is objective and in most cases, though not always, publicly verifiable (Wiggins, 2005: 41; Reader, 2007: 51; Miller, 2012: 22). Even if Z and Y were both subjective states (e.g. Bill needs to be confused to be utterly perplexed), we could still ask "is subjective state Z possible without subjective state Y?" And the answer would be yes or no quite apart from what Bill or we feel about the matter or personally perceive. On the other hand, there is nothing in the objectivity of the need relation that ties it to biological survival as some might think. In the 1990s, I needed to have a Gameboy to play Pokemon Red, just as I needed to avoid losing in mortal combat to survive. It is therefore common in the literature to observe that people do not always know what they need, and it may often be possible for others to know in their stead (Miller, 2012: 19-20; Reader, 2007: 52).

Furthermore, I do not have to *want* what I need. That is, I do not have to want to play Pokemon Red for a Gameboy to be needed for the endeavour. Need and desire therefore are categorically distinct on this account, a point we will return to in due course. This is an important distinction because there is a tendency among critics of needs claims to view them as simply more insistent preference claims (Wiggins, 1987: 5; Doyal & Gough, 1991: 10). But this is clearly not the case. If A needs X, and X is identical to Z, then A needs Z; however, if A *prefers* X, and X is identical to Z, then it does not necessarily mean that A prefers Z (Wiggins, 1987: 6; Reader, 2007: 52). In this discussion, then, need and preference claims are understood as being distinct. This, of course, opens up needs-claims to the charge of paternalism. We will address this charge in the next chapter.

In its most global sense, then, "need" expresses an objective relationship of necessity between some end Z and some causal or constitutive prerequisite Y (Brandon, 1993: 128). That is, I could need to flick a light switch to turn on the lights (causal) or a light bulb could need filament (constitutive). But because there is no limit on what Z could be (Thomson, 1987: 6; Wiggins, 1987: 9), and not all goals are

normatively valuable (Braybrooke, 1998: 58; Reader, 2007: 55), "need" does not necessarily entail a normative claim and does not necessarily demand a moral response (Miller, 2005: 142), whereas a normative needs-claim does demand a particular response (Max-Neef, 1991: 24; Brandon, 1993: 128; Miller, 2012: 23).[12] I could just as easily say "I need a gorilla suit to get into the gorilla-suits-only club", as "I need food to survive". But what is the relationship of the two senses above (i.e. need in general and normative need in particular)? There are basically two options presented in the literature, either: [1] normative need is simply a descriptive needs statement with a normative objective (Thomson, 1987: 3; Brandon, 1993: 130; Hamilton, 2009: 342; Wringe, 2005: 190; Miller, 2012: 34-35), or [2] there is some distinct sense to need when it is being used normatively (Thomson, 1987: 20-21; Rauschmayer et al., 2011: 3; Miller, 2012: 18, 35). The second is by far the more dominant view.

Normative Need

On the first account "need" does not do any of the normative work. While the second account accepts that the more global descriptive meaning of need is included in its normative meaning (Thomson, 1987: 6; Doyal & Gough, 1991: 40),[13] proponents of this view contend that normative need actually has a more specific meaning. On this second account, need does do some of the work. Consider, "I need food to eat." versus "I need a pen to write a great study". Assuming that both writing a great study and eating are normatively valuable under the circumstances, the first position on normative need would view both these claims as a normative needs claims differentiated only by degree of importance. But Z could be normatively valuable and if someone asked "but do you need Z?" I could still sincerely say no (i.e. I do not need to write a great study, just enough to obtain the degree is fine). On the second view, with a genuinely normative needs claim, I would have to be able to keep answering yes (e.g. "Yes, I need to eat."..."Yes, I need to stay healthy."), until it is no longer appropriate to ask the question, although it may be logically possible (i.e. "but do you need to survive?") (Thomson, 1987: 20-21; Rauschmayer et al., 2011: 3; Miller, 2012: 18, 35).

This second account is likely dominant because it has the unparalleled advantage of explaining how "need" denotes a special kind of relationship, not only between Y and Z, but X and Z. Whereas on the first account, X's relationship to Z is at best purely instrumental (e.g. Z is a goal for X) (Thomson, 1987: 7), and so "need" could simply be replaced with "desire" or at least more neutrally "aims for"; on

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[12] What response exactly it demands is outside the scope of this chapter.

[13] With that being said, some theorists admit that there is an important change in the standard of necessity for a normative needs claims is not simply logical or physical, but practical. That is, it is sufficient to say that the prudential or moral cost of Y's alternatives are so high as to render Y the only practically available option (Thomson, 1987: 26; Wiggins, 1987: 12). This is the standard I will ultimately use.

the second account, "need" has a distinct meaning.[14] What are the features of this distinct meaning? We might think of the features of normative need as being the features of X's relationship to Z that guarantee that X will be able to justifiably answer "yes" until it no longer makes sense to ask the question.

This kind of normative need, has been alternatively called, "fundamental" (Thomson, 1987), "absolute" (Wiggins, 1987), "categorical" (Doyal & Gough, 1991; Copp, 1998), "constitutive" (Miller, 2005), and/or "basic" (see all of the above), among other names. Because there are some important differences between these terms, to denote what they have in common, I will simply use the term "normative need". Because of its succinctness and clarity, it will be helpful to expound the characteristics of normative need through the following definition: "To claim that X is a fundamental need of person A is to assert that X is a non-derivative, non-circumstantially specific and an inescapable necessary condition in order for person A not to undergo serious harm" (Thomson, 2005: 175). In the discussion that follows, elements of other definitions will be interwoven throughout, and so I do not defend the above definition as authoritative. Rather it will serve as a stipulative focal point. As we explore each aspect of normative need, the reader should keep in mind that these features will all help to address different criticisms of legal need.

Serious Harm

To begin, serious harm is the most widely agreed upon feature of normative need (Thomson, 1987: 4; Wiggins, 1987: 14; Doyal & Gough, 1991: 39; Copp, 1998: 124-25; Frankfurt, 1998: 23; Miller, 2005: 142; Brandon, 1993: 129; Gasper, 2009: 352; O'Neill, 2011: 27). Harm, on this account, in keeping with need generally, is not a state of mind, it is a state of deprivation of vitally important things (which are by no means exclusive to physical necessities as will be explained below)[15] (Thomson, 1987: 36; Doyal & Gough, 1991: 50; Max-Neef, 1991: 23). This accounts for the fact that a person does not always feel harm as harm (Thomson, 1987: 36; Doyal & Gough, 1991: 50). For instance, someone who has always been tired may not realize that they are being harmed by inadequate sleep. That is, they may not see being tired all the time as a problem although there might be an objectively observable relationship with them having more energy that could only be gained through sleep, and them existing as their ideal selves, for instance.[16] Similarly, harm is not dependent on us having chosen to have a particular desire (Frankfurt, 1998: 23; Doyal, 1998: 158; Thomson, 1987: 36). This follows, since, if need was dependent

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[14] One important implication of this distinction is that desire (or preference) do not *necessarily* play any part in needs-claims. That is, it is possible to need quite independent of desiring some end as will be discussed soon.

[15] "Things" here should be understood in the broadest sense. Beyond simply objects, it includes activities, relationships, and much more.

[16] The relationship of this ideal to the deprivation will be explained in greater depth soon and is the central normative crux.

on a chosen desire, whether or not the thing desired happened to be valuable, its link to harm would not be inescapably necessary, that is, we could, in principle, just choose not to have that desire no matter how difficult this choice may be.[17] In this way, normative needs pertain to the natural limits of choice, i.e. we cannot choose what we need (Thomson, 1987: 19). This is important because it could be said to settle the debate between felt and normative need definitively in favour of normative need.

To this, a skeptic might respond that it is possible to need something *and* to also choose it (i.e. I need healthy food, but I also choose to want it). To which we might respond that this is fine, but the harm that results from deprivation does not stem from the desire but from the prior needing, as evidenced by the fact that if one did not desire healthy food, it would not change the negative effects that result from being deprived of it . To clarify, then, serious harm in the sense of normative need must stem from the deprivation of something valuable to us in the least contingent way possible (Reader, 2007: 55), that is, the harm is *intrinsically* linked to what X is being deprived of (Thomson, 1987: 4; Doyal & Gough, 1991: 39). To put it slightly differently, our morally demanding needs are those needs that are most "inescapable" (Brock in Miller, 2012: 17, 28) or "entrenched" (Reader, 2007: 64) for the kind of beings that we are, and so the impact on our ability to persist as the kind of beings that we are is unavoidably negative if we lack certain things. To be clear, this is not necessarily identical to saying "necessary for the kind of organisms that we are" unless of course that is all that we are, which is a position no theorist takes in this body of literature.

The skeptic, challenging the idea of "inescapability" might reply that needs can change by virtue of a person pursuing their desires or by virtue of factors extrinsic to the kind of being they are. This is correct in one sense but calls for important qualification. What is intrinsically linked to potential harm does change, for instance, at different life stages (e.g. a baby not only needs food but to be fed, whereas an able-bodied adult does not) (Thomson, 1987: 27; Braybrooke, 2005: 209; Frankfurt, 1998: 29; Towle, 1987: 40), but the transition between these stages and what is intrinsically linked to harm at each of these stages is out of our control. Furthermore, although normative needs may change, this does not mean that needs can simply be acquired. Of course, this denial of acquired needs raises many interesting questions about the edges of normative need that we must consider if normative need is to offer clear guidance as a normative language.

Acquired Needs and the Problem of True and False Needs

A dependency, even a severe dependency (like heroin addiction), that can eventually be gotten rid of through effort is not a normative need (though it may still be normatively compelling to temporarily

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[17] Even if it was a deeply habituated desire, unless it was practically impossible to break, it still would not constitute a normative need because it would not be inescapable.

satisfy it for other reasons) (Thomson, 1987: 29). Heroin addiction is not integral to the kind of being that I am, even if it shapes me in important ways, it remains a matter of contingent circumstance. Normative need, however, cannot be circumstantially specific, because then a change of circumstance would eliminate the need and it would not be inescapable, consequently, I cannot be said to normatively need heroin.

Similar to addiction, though not exactly the same (because of the absence of objective physical characteristics), if one experiences harm not as a result of the deprivation of any intrinsic characteristics of a thing desired, but because of the character of the desire itself, e.g. fanaticism, consumerism, etc. this is termed a false need (Frankfurt, 1998: 27; Thomson, 1987: 29-30; Gasper, 2009: 350). This kind of desire does not reflect a need; rather, it creates one (Frankfurt, 1998: 28). This is one crucial way unjust societies are said to harm us (Frankfurt, 1998: 29). This is also one of the reasons that feelings taken on their own can often be a poor indicator of needs (Doyal, 1998: 157). However, while these false needs are artificially created, as we will soon see not all artificial needs are false needs.

The Paradox of Universality and Particularity

It follows from the "irrelevance" of circumstance that if x has a normative need, it must be by definition universalizable for all beings like x (Doyal & Gough, 1991: 39; Miller, 2012: 22; Copp, 1998: 123). Besides the claim that normative needs are objective, this is probably the most controversial aspect of normative needs, and it is not endorsed by everyone within the literature as true or even relevant to moral consideration (Ignatieff, 1985: 14, 28; Reader, 2007: 80). Theorists who oppose the universal tendency point to the requirement to respect and respond to particularity in order to truly meet someone's normative need, not only as a human being, but as a particular socially- and historically-situated individual (Ignatieff, 1985: 28; Reader, 2007: 81). This point is only strengthened when we consider how different needs seem to be across cultures and time periods (Max-Neef, 1991: 16; Hamilton, 2009: 344). Nonetheless, universality does seem to follow from the fact that altering circumstances (e.g. one's country, society, political institutions, etc.) cannot eliminate a normative need, or else it was never *inescapably* necessary.

It is possible to reconcile these seemingly contradictory positions of universality and particularity through the fact that while it is the case that to be a normative need, a dependency would have to arise under any set of circumstances (Thomson, 1987: 32), it must always arise under some *one* set of circumstances. Consequently, the innateness/naturalness and social particularity/artificiality of normative needs are not opposed but always go hand in hand (Thomson, 1987: 32). Or, to put it differently, our existence as natural beings and social beings cannot be separated without horror (Ignatieff, 1985: 35). For example, Michael Ignatieff (1985) writes of how the concentration camps of the Holocaust stripped

people of their particular individuality to single units of humanity (52). I believe it is as telling as can be that even under these circumstances people still manifested signs of sociality and individuality, including maintaining family bonds and religious observance (Davidson, 1984: 2). The reverse problem would be the attempt to establish a kind of sociality that totally denies any of the natural demands of the body, a community of the mind so to speak. This would be an equally impossible task. At the same time, the way in which the universality and particularity of needs are intertwined leads us to two crucial distinctions: between occurrent and dispositional needs, and between needs and satisfiers.

Occurrent and Dispositional Needs

When we speak of needs, there is a sense in which needs are acute, "episodic", manifest, and "occurrent" (O'Neill, 2007: 27; Miller, 2012: 4; Braybrooke in Miller, 2012: 18; Thomson, 1987: 12). For instance, I do not always need food but it is clear to me that I need food now because I am hungry now, and I feel this hunger acutely, perhaps even painfully. In this sense, I currently lack something that by its absence intrinsically causes me serious harm, so there is a sense of urgency involved (Thomson, 1987: 11; Wringe, 2005: 187; Frankfurt, 1998: 19; Miller, 2012: 71). There is a second sense of need that is chronic, "persistent", latent, and "dispositional" (O'Neill, 2007: 27; Thomson, 1987: 11; Braybrooke in Miller, 2012: 18). For instance, whether or not I am hungry, it could always be said of me that I am the kind of thing that needs food. This second sense describes an ongoing potentiality, such that if circumstances arise where I lack X, it is certain to cause me serious harm (Thomson, 1987: 12). The second sense is logically prior to the first in that for the first to be the case, the second is logically presupposed (Thomson, 1986: 11; Miller, 2012: 19). That is, I could not actually endure serious harm, if I did not previously have the potentiality to endure that harm when faced with those conditions.

On the other hand, the first sense is practically prior to the second. When we *experience* need (which is not always the case, as was explained above), we do not experience our general latent disposition, but some acute, urgent, and concrete particularity, e.g. some culturally and historically specific thing that will satisfy thirst, such as purple Kool-Aid (Max-Neef, 1991: 26; Braybrooke, 2005: 212). Yet the particular things, activities, and relationships that we would have to "experience and appreciate" (Thomson, 2005: 178) in order to avoid serious harm in the immediacy derive their value precisely from their ability to meet the requirements of the underlying dispositional need. So, for instance, supposing purple Kool-Aid was the only potable liquid in existence, purple Kool-Aid would be needed because it quenches my thirst, quenching my thirst is needed because it allows me to survive, until we get to something which is intrinsically needed. This final thing is needed in the *non-derivative* sense of the term (Thomson, 1987: 18). And so what we normally call need, i.e. food, shelter, etc., are not actually needs but satisfiers (of needs) (Doyal, 1998: 162; Max-Neef, 1991: 17; Braybrooke, 1998: 59). On the

other hand, there is still a distinction to be made between satisfiers in their particular form (e.g. purple Kool-Aid), and satisfiers in their universal, but not non-derivative form (i.e. thirst, hunger, shelter, etc.), since practically speaking, one does not normally get questioned past this level. As such, and given that what the literature has to say generally treats the universal satisfiers and needs alike. In the respects discussed below, I will continue to call the universal satisfiers needs.

Satisfiers therefore can be circumstantially specific. If there was some other way to quench my thirst besides purple Kool-Aid (for instance Great Bluedini Kool-aid), I would not *need* purple Kool-Aid. Similarly, if I only had a small amount of purple Kool Aid, I could make up the difference with Great Bluedini Kool-Aid. However, there is no alternative to the consumption of fluids to meet the requirements of the body, and no amount of some other type of satisfier that would make up for it. So whereas satisfiers can be more or less substitutable, normative needs can not (Reader, 2007: 69). Satisfiers are therefore distinct from the need which they satisfy (Copp, 1998: 123). And so, normative needs claims can indeed be relative to their social context in their content (Wiggins, 1987: 11; Adam Smith in O'Neill, 2011: 27), without this taking away from their underlying universality of normative needs.

Summary of Need Thus Far

To summarize then, need implies an objective, non-psychological[18] relationship of necessity between some end and some causal or constitutive prerequisite for that end. In its normative sense, the end itself is needed because it is intrinsically linked to the avoidance of serious harm. As a result, one cannot choose to need something or meet one need by satisfying another. Rather, what one needs is determined by the kind of thing that one is combined with some particular set of circumstances that one inhabits. The play between normative needs as constitutive and arising out of our particular situation leads to a number of crucial distinctions. The natural and constitutive elements of our needs are always found bound up in social and artificial elements. As a result, we can speak truly of the same need on a universal and abstract level for the kind of being that X is and on the particular concrete level, relative to place and time. This holds both for how the need is experienced and for how it must ultimately be satisfied. One implication of this fact, i.e. that needs always come to us in the particular, is that we may think we experience a need that is actually solely contrived from purely social contingent factors, but such contingent "needs" are not really needs, as they have no underlying basis that would carry over across other contexts. Finally, normative needs are not needed for any further end, whereas satisfiers are those

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[18] To reiterate, this does not mean that it is impossible to have psychological needs, e.g. to be free of debilitating stress. It means that the need *relation* i.e. between the person, debilitating stress, and psychological well-being is not itself psychological in nature. Even if, for whatever reason, the person did not feel a need to be free of debilitating stress, it would not change the fact that there is a need.

things, activities, and relationships required to meet those normative needs. Taken together, all this sets out the difference between normative and non-normative need--and will serve as the foundation of legal need--however it does not answer perhaps the most crucial questions: what do people need and why? It is to these questions we now turn.

What do we need?

The reader will recall that not all normatively valuable ends create needs, rather there is broad agreement that the scope of what we need is determined by the requirements of existing or functioning as the kind of things that we are, e.g. human beings, John Smith, etc. [19]. There are a number of apparently differing views on what normative standard the fulfillment of needs makes possible. There are those who emphasize flourishing or well-being (Rauschmayer et al., 2011: 3; Wiggins, 1987: 11; Ignatieff, 1985), agency or autonomy (Brock, 2005: 65; Miller, 2012: 36; Copp, 1998: 113), and life or existence (Reader, 2007: 55). At first glance, these seem to be three very different kinds of standards, but this divergence need not be fundamental, although it might be.[20] Firstly, there is nothing among the first group of theorists to rule out the central importance of agency assigned in the second. At the same time, it is clear that the second group at least sometimes identifies agency with flourishing (Miller, 2012: 16). Where a theorist does not speak of agency as identical to flourishing, it at least seems reasonable to conclude from the description of agency that will be given shortly that flourishing is probably impossible without it. This relationship of necessity but not sufficiency between agency and flourishing seems to be the most plausible relationship, since, as will be explained later, agency is treated in the needs literature as our capacity to individually and interpersonally enact our will (Miller, 2012: 24),[21] and there may be some needs that no amount of human power or striving (individual or collective) can guarantee, such as metaphysical consolation, or the love of others (Ignatieff, 1985: 38, 63, 76).

On the other hand, Soran Reader (2007), the only one who takes the third position, does so in order to avoid anthropocentrism (the assumption that only humans have morally relevant needs) (57). So while this third position takes a wider view of morally relevant needs, we are only focussing on human needs for now. It is sufficient to point out that theorists in the other groups do in fact identify flourishing and agency with what it means to be human, or to lead a human life, thus possibly presupposing or at

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[19] There is widespread agreement on this core point although different authors have different ways of formulating it. For instance, some stay at the level of generality "human being" (Anscombe in Wiggins, 2005: 29; Rauschmayer et al., 2011: 3; Wiggins, 1987: 11; Hamilton, 2009: 342; Brock, 2005: 65), whereas others accept that as being part of a much greater specification, e.g. John Smith (Reader, 2007: 55; Ignatieff, 1985: 15).

[20] Much of the compatibility that I am asserting rests on many questions that are not addressed by each theorist as much as those that are. In what I read, it is certainly possible that if, for example, Wiggins addressed the question of agency directly, his conception of flourishing would somehow exclude it. On the other hand, this seems unlikely.

[21] Agency is of course a contested concept, but it is outside the scope of this thesis to settle these questions.

least being compatible with the life/existence view, just for humans exclusively (Ignatieff, 1985: 15; Hamilton, 2009: 342; Brock, 2005: 65).

Unsurprisingly, though, the literature does not settle the two enormous philosophical questions called for by appealing to a standard of flourishing or "truly human life", i.e. that of human nature or what constitutes a good life. Indeed, theorists either explicitly (Ignatieff, 1985: 11, 14), or tacitly endorse the view that there are many good lives, particular to individuals and their choices (Doyal & Gough, 1991: 54; Reader, 2007: 47; Miller, 2012: 39). Whether this plurality of ideals is a metaphysical necessity or simply practical reality, the majority within the literature still believe we can talk meaningfully and usefully about what humans need generally (Doyal & Gough, 1991: 54; Hamilton, 2009: 342; Anscombe in Wiggins, 2005: 29; Copp, 1998: 113).

This is possible by focusing on those prerequisites of any of these many ideals, without deciding between them (Ignatieff, 1985: 14). The question of what we need then becomes the more specific question: what is required to pursue any given conception of human flourishing? I would formulate the requirements (or "satisfiers") for this attainment in terms of layers, as follows: survival, ideal-formation/grasping, and ideal-pursuit. That is, in order to flourish, we have to live long enough as well as have the capacities[22] and resources to form some ideal, and pursue it effectively.

Survival and its link to harm is the least controversial of these layers of needs, and is already widely embraced by current policymakers especially in international development (Ignatieff, 1985: 11; Brandon, 1993: 129; Doyal & Gough, 1991: 73; Reader, 2007: 65). Because of this general familiarity, it requires no more specification here than to say that mere survival is inadequate, and what is usually meant in the literature by survival is good physical and mental health (Doyal & Gough, 1991: 73). This first layer of need is special in that it sets absolute limitations on the others (Doyal & Gough, 1991: 37). That is, while it is conceivable without miraculous divine intervention to temporarily completely lose and restore one's ability to formulate and pursue an ideal, it is not possible, barring such intervention, to *completely* lose and restore survival. As a result, even in non-hierarchical conceptions of need, survival often trumps other needs (Max-Neef, 1991: 17).

It is important to note, however, that this special place for survival is not, as is commonly thought, due to the natural origin of physical needs (Reader, 2007: 65), nor is its primacy unqualified (Miller, 2012: 27-28). In the first place, as has already been discussed, natural needs always come to us in a socially embedded form, thus although someone who is hungry may be equally fed by a sirloin steak or by being thrown scraps, we would hardly find the latter an appropriate means of satisfying the need

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[22] The needs literature also discusses capabilities. Due to time and space constraints, I will not be able to treat it effectively, so I decided not to treat it at all, despite the fact that it deserves attention. I recognize this as a real limitation of this study and will discuss this limitation in the conclusion.

(Reader, 2007: 68). So except in the most dire of cases, we are never really talking about some purely natural need, even with regard to survival. Secondly, it is also important to note that many human ideals leave room for appropriate circumstances under which survival may be given up for the sake of some further end, e.g. refusal of idolatry, or death with honour on the battlefield. The satisfiers in the category of survival are (compiled from the various lists offered): oxygen, adequately nourishing food, potable water, shelter, mobility, rest, security (Hamilton, 2009: 342; Brock, 2005: 63; Max-Neef, 1991: 27; Copp, 1998: 124; Towle, 1987: 40).

The link between serious harm and ideal formation is perhaps a bit more abstract, but it becomes much clearer if we try to imagine a person who is completely without direction or motivation. For instance, consider the restlessness and dread[23] of a university student who drifts from program to program unsure of what interests them or what they want to do after they graduate. Alternatively, consider the loneliness and boredom of someone who cannot bring themselves to do *anything* (e.g. form relationships, start projects, learn, etc.).[24] We might also note that ideal formation/grasping presupposes survival (Wringe, 2005: 191). Beyond survival, it may be tempting to identify ideal formation/grasping with something like rational autonomy (Doyal & Gough, 1991: 53). While the literature accepts this as a part of what is required, there is widespread recognition of the fact that we need other people to meet our needs, and so we are fundamentally interdependent (Miller, 2005: 142; Reader, 2007: 72; O'Neill, 2005: 96). Autonomy must therefore consist of more than just rationality. It must also include the kind of emotional and relational skills required to negotiate these necessary relationships (Miller, 2012: 24). While some take this view to the extreme and conceive of human needs exclusively in terms of social role and position (Braybrooke, 1998: 59; Doyal & Gough, 1991: 51), the implication for ideal formation is actually far more mundane. It entails what common sense tells us, namely, that before we can start forming or grasping ideals, we have to learn about our surroundings, how to think, speak, and plan, etc. from other people. That is, ideal formation or grasping requires sufficient learning of social mores and language, general social roles, as well as some specialty knowledge (Doyal & Gough, 1991; 60-61). This is the beginning of agency, which is the central concept in the literature when discussing the requirements to pursue a particular goal.

In its theoretically robust form, the above insight has been championed as relational autonomy: ""relational autonomy" does not name a single view, but instead designates a loosely related collection of

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[23] Again, deprivation is not a psychological state, but its psychological symptoms help to illustrate its presence.
[24] The reader might be worried that I smuggling in a normative standard of life that is disciplined and active, but that is not the case. A student who is happy to drift from program to program because they are interested in all topics or simply denies any rigid disciplinary categorization does have a certain kind of direction. The student who wants to find something and cannot lacks direction. Similarly, somebody who pursues a passive way of life intentionally is very different from someone who might like to do any range of things, but *cannot* bring himself or herself to do it.

views that share an emphasis on the social embeddedness of the self and on the social structures and relations that make autonomy possible" (MacKenzie and Stoljar in Westlund, 2009: 26). Among these views there are some in which relationality as causally necessary and others in which it as conceptually necessary for autonomy, as well as disagreement on whether autonomy is a feature of a person's life or of a particular choice or action (Westlund, 2009: 27). Since there is little question of the causal importance of relations, the controversy of relational autonomy really consists in whether it is conceptually necessary for autonomy. Do we need to have particular kinds of relationships to be considered autonomous? This is an important question in order to determine how we would know precisely if a particular ideal was endorsed autonomously, but as I noted at the start of this chapter, I hope to offer a broad but only suggestive framework. Going forward, therefore, I will focus on uncontroversial cases where proponents of both the causal and conceptual views agree autonomy is compromised.

Before we turn to the question of agency, though, it is important to note that Reader (2007) cautions us against treating ideal formation/grasping too voluntaristically (63). For instance, concert pianists may have ostensibly chosen that career, and they may have even had a high degree of economic and social freedom in doing so. Yet the fact that their parents started them on the piano at age three cannot be ignored as having had a crucial contributing (if not determining) effect. Being a pianist, then, is not simply some life plan of theirs selected among many, but forms part of who they are. This highlights a certain divergence in the literature on that crucial question of what kind of thing humans are, which will ultimately lead to serious ambiguity in my conception of legal need.

This divergence is as follows. It is possible to look at people as ideal-forming and ideal-pursuing beings--as we might in some kind of Kantian or Rawlsian picture--or we could look at the ideals we form and pursue as reflective of some deeper truth about the kind of thing each of us is (i.e. a pianist, a Jew, a mother, etc.). While this is an important philosophical difference, it is not necessary to settle this question here, as the practical implication for what people need (described at this level of generality) is the same. In both cases, since we do not know ahead of time what each person could turn out to be, we talk of their needs as being the prerequisite for forming many kinds of goals. Indeed, this is reflective of the broader agnosticism I have already mentioned regarding the significance of the plurality of ideals. The satisfiers in the category of ideal formation grasping are the rather vague and broad terms: education and mental health (Doyal & Gough, 1991: 62; Towle, 1987: 40; Brock, 2005: 63; Max-Neef, 1991: 27; Copp, 1998: 124; Miller, 2012: 41-42). Much could be said about each of these, but, due to lack of space, they will have to simply serve as gestures towards what must be considered.

Finally, we come to the requirements for the pursuit of one's ideals. Once again, this layer presupposes the last two (survival and ideal formation/grasping). This last layer is captured in the concept of agency. Agency could be understood as "the ability to achieve some manner of results in the world, to

affect change in accordance with one's volition, and to maintain the ability to carry out projects (often self-determined) in a surrounding environment." (Miller, 2012: 24). Simply put, agency is the capacity to get things done, and is therefore a prerequisite of enacting one's ideal. On its own, this definition may lead to some confusion. Harm is not relative to attaining whatever one's ideal happens to be.

If one aims to be a rock star, but in reality one has no exceptional musical or performance talent and could never develop it, one is not therefore harmed by being denied rock star status, that is, one has not been deprived of agency for lacking the requisite skills. On the other hand, if one could develop that level of skill, if only one had access to a minimal amount of musical instruction and instruments, the deprivation of those goods and services may constitute harm to the extent that we are willing to accept musical performance as being constitutive of this person or the possibility of pursuing music as a legitimate goal that ought to be open to pursuit by anyone.

This example, a consequence of the earlier divergence, reveals just how blurry the edges of normative need really are. One solution is to say, as a number of theorists have, that needs at this layer (and possibly any layer) are necessarily open to communal negotiation (Braybrooke, 2005: 210), and no a priori list could be reliably formed (Reader, 2007: 47; Miller, 2012: 39). Yet we must recall that our task in formulating normative needs has become to identify those satisfiers that would be required for any ideal. So while musical instruments may not be universally required, perhaps the income to purchase equipment for a profession is more sensible.[25] What is certain is that some minimal participation in the social world, and the resources required to do that, will be needed for any kind of ideal-attainment (Doyal & Gough, 1991: 51). Furthermore, making any kinds of ideals illegal always risks compromising the needs of those who would endorse those ideals. Consequently, the satisfiers in this category are: recreational and spiritual opportunities, social recognition/decent social relations, opportunities for personal and creative expression, opportunities for political and social participation (Towle, 1987: 40; Hamilton, 2009: 342; Max-Neef,1991: 27; Brock, 2005: 63). For a full diagram of the conceptual framework this chapter has offered, see below.

To conclude, a few general observations about needs in all categories are in order. Firstly, the distinctions between and ordering of needs are to a large extent artificial. As Max-Neef (1991) said, "Fundamental human needs must be understood as a system, the dynamics of which do not obey hierarchical linearities" (49). It is of course tempting to say that physical survival trumps all, but such simple formulations fall apart when we consider the number of causes one is willing to die for. Secondly, these needs are never completely satisfied in a single moment, they are in an ongoing process of being met (Doyal & Gough, 1991: 55). Thirdly, as has been suggested already, meeting some needs might

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[25] This does not entail that income must be provided to everyone (although it might). Indeed, it is outside the scope of this chapter to discuss the normative implication of needs.

contradict others, as for example when one intentionally dies for the sake of pursuing an ideal (thus survival is compromised for ideal-pursuit).[26] Max-Neef (1991) lays out how satisfiers can be categorized according to their relationship to the broader system of needs, distinguishing between satisfiers that: actually destroy the capacity to satisfy a need (violators); fail to satisfy a need (pseudo satisfiers); oversatisfy one need at the expense of another (inhibiting satisfier); only satisfy a single need and are neutral towards others (singular satisfier); or satisfy many needs at once (synergic satisfiers) (31-34). How we balance the competing types of needs is as vital a question as how we balance meeting needs between different types of people, or which needs we must respond to when. It is not my intention to settle any of these questions here, but special attention will be paid in future chapters to how legal needs interact with other kinds of needs. It should not be taken for granted that they are always compatible.

Taken together, this chapter has provided a set of important insights and qualifications that we will be able to incorporate into a renewed conception of legal need. Consider the importance of just three of these findings. Firstly, from the very outset, the meaning of need offers considerable clarity. Y must be the only way to Z if it is truly needed. This clearly shows that when discussing legal need the law cannot offer one of many, or even the best; it must offer the only solution to the problem currently compromising access to what is needed. Secondly, whereas before we could only say that a problem must be "sufficiently serious", now we know that to qualify as sufficiently serious a problem must deprive a client of something required to persist as the kind of thing they are. Thirdly, normative need makes clear the underlying standard being appealed to: the preservation of people as people. Of course, an argument still needs to be made that preserving these people is publically relevant, but this makes the debate considerably more clear and transparent then the embattled justification of "equality before the law". We will explore these and other important insights in chapter 5, but for now we turn to the question of why we need the language of needs in the first place.

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[26] According to some there is a tragic element to this incoherence. We must be careful though to distinguish where the tragedy lies. Firstly, when the situation that brings about the conflict in needs is contingent, the tragedy lies in the situation and not necessarily in the conflict (i.e. attempted forced conversions). Secondly, where the conflict of needs is necessarily brought about by the system of needs itself and there is no prescription as to which need trumps (i.e. the conflict is intractable), the conflict reveals something self-defeating in the system and the tragedy lies in that. Thirdly, where the underlying ideal dictates that under certain circumstances certain needs trump others, the only tragedy can be in the ideal being incorrect. If the ideal is in any sense true, then however difficult it might be, there is no tragedy in the *apparent* conflict of needs, since neglecting one need is justified by the same impetus that would entail fulfilling that need in the first place (i.e. the achievement of that ideal).

Figure 1
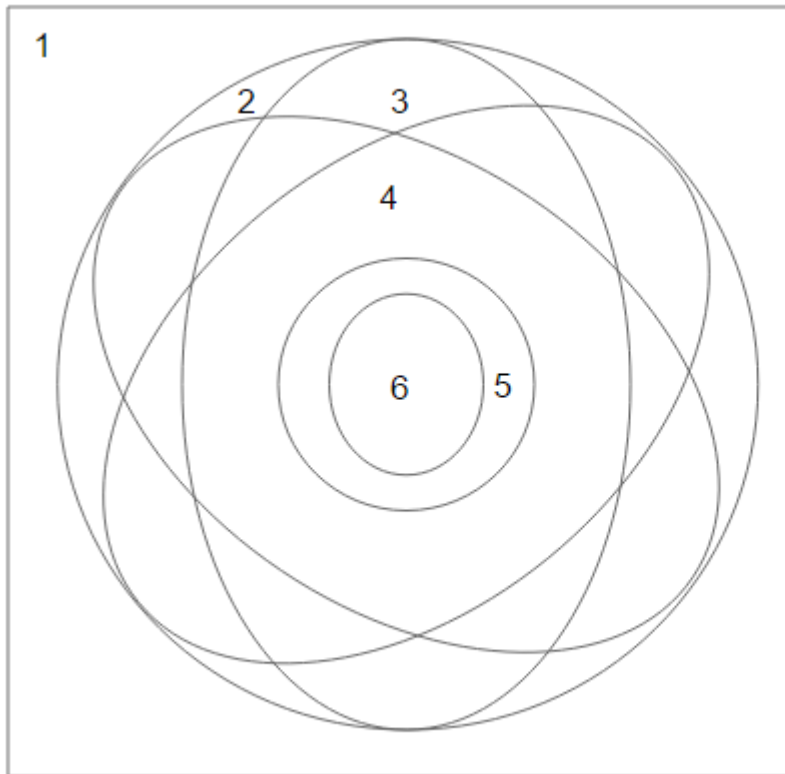
1-**Non-normative Need**: Y is needed for Z, if and only if, without Y there could be no Z

2-**Normative Need**: avoidance of serious harm, objective, non-psychological, unchosen, inescapable, non-circumstantial, natural & artificial, universal & particular, insubstitutable. not satisfiers.

3-**Flourishings**: There are many conceptions of the good life whose requirements overlap, however some requirements do not.

4-**Pursuit**: The resources and capacities required for the pursuit of any conception of flourishing.

5-**Goal Formation**: The understanding required to formulate some conception of what one should do.

6-**Survival**: Good physical and mental health.

Chapter 3: Needing Needs

Now that we have a clearer idea of what a normative need is, it is worth asking whether we actually need to use the language of needs as opposed to, for example, rights or preferences. The importance of this question to this study overall cannot be understated. After all, why should we go looking for a *caring* legal system, when we have enough trouble achieving a *just* system? That is, there are already many well developed frameworks for how we could systematically improve the legal system based on standards that are already widely accepted (e.g. rights). Investing all the energy, time, and resources in making the case for an apparently distinct language of needs and care might at best be redundant and at worst waste already scarce resources. However, if the language of needs, and by extension care, expresses something important that is overlooked or cannot be accounted for by more mainstream languages,[27] it is likely worth the effort.

What is it that "needs" express or help to explain that could not be captured in the legal and bureaucratic language of rights or the economic language of preferences that already dominate our legal policy conversations? Indeed, the landmark Hughes Commission (1980) defined legal needs as an individual's awareness of and ability to pursue their legal *rights* in the way they *prefer* (Genn, 2001: 5). This penchant for describing legal problems in terms of rights and studying legal needs (either implicitly or explicitly) as a matter of preferred problem solving strategies seems to be quite common across the legal needs literature (Marks, 1976: 195; Curran & Noone, 2007: 71). Alternatively, there are those who believe that rights are entirely explainable by, possibly reducible to, and certainly presuppose a list of basic human needs (Brock, 2005: 63-64). Rejecting both these proposals, it will be my contention in this chapter that the language of needs does, in fact, capture something worth including in our political discourse that escapes rights and preferences on their own or taken together.

To show both the need for the language of need and its relationship to rights and preferences, I will begin by explaining some of the most important and unique advantages that the language of needs

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[27] The reader may note a certain ambiguity in whether the language of needs are mainstream or not. The answer is that they are mainstream in certain areas such as legal aid and international development, but marginal in broader discussions of the legal or economic systems.

brings to describing[28] normatively demanding situations (i.e. situations that seem to *justify* some action on our part). I will then consider the most significant criticisms made against needs claims. I will respond to these criticisms by distinguishing between those that are simply misdirected and those that express the genuine limitations of needs claims. In the third section, I will explain how rights and preferences address the problems that needs claims face. In this section, I will attempt to show that these solutions do not come at the expense of needs. That is, even if we accept the full value and force of rights and preferences in correcting for needs, we will still see some further limits of rights and preferences left to be corrected by needs. Taken together, these efforts will serve as a way to justify and situate the project of a caring legal system (i.e. a system sensitive and responsive to needs) within the ongoing project of achieving a just legal system.

Unique Advantages of Needs

Let us begin with some clarifications. For the purpose of this discussion, I will work with the following definitions: "...rights are legally, coercively enforceable entitlements…" and preferences are "...avowed human wants that are subjective and particular to context, agent and time" (Hamilton, 2003: 2). With that in mind, imagine, if you will, a hungry crying baby. If we were to describe the situation we might use three different expressions:

<div align="center">

(A) the baby wants food;

(B) the baby needs food;

(C) the baby has a right to food.

</div>

The first thing we should observe is that all three statements can be true simultaneously (although they need not be), so we should not make the mistake of assuming that we need to compare them in an oppositional light (i.e. is A, B, or C the case?).[29] If we want to determine the unique advantages and limits of the language of need, then, the thing to do is determine what B expresses as opposed to A or C. It is of course, possible to combine A, B, and C in pairs, but for the sake of simplicity we will examine them each separately for now, and bring all three together in the next section.

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[28] The reader will notice both in the previous chapter and the chapters to come that in this first part of my thesis I do not talk about what particular course of action a finding of need entails, just that it entails some action. This is out of respect for the essentially context-dependent nature of needs. However, without knowing precisely what response is called for, we can still know *whether* to respond and *how* we should respond. By "how" I mean that there will be certain characteristics of a good response that hold across many, and possibly all responses to a need. These characteristics are captured in the ethics of care. This discussion will be addressed in the second part of this thesis.

[29] It has been remarked that the apparent conflict between these three is actually more attributable to certain historical facts. The relationship of rights and needs has been fraught due to a number of institutional factors such as their study in different disciplines as well as antagonism towards needs by libertarians and antagonism towards rights by socialists. (Gasper, 2009: 355).

Let us first consider B in contrast to A. Needs and wants both have the advantage of being firmly entrenched and widespread in our everyday language, such that it is plausible either *would* be used (Reader, 2007: 53; O'Neill, 2011; Doyal & Gough, 1991: 1), but there is a difference. Need, the way it is colloquially used, carries with it both a sense of urgency (Miller, 2012: 23; Frankfurt, 1998: 19; Osiatyski, 2012: 130), and a sense of priority that has greater intuitive and emotional force (Miller, 2012: 2; Braybrooke, 2005: 218; Wiggins, 1987: 24). This is because as has been explained "need" has an intrinsic link to harm, whereas want does not (i.e. a person may want to engage in sexual relations with another, but they are not therefore harmed if the other says "no"). Our colloquial use and intuitive response reflects this difference (O'Neill, 2011: 29). Furthermore, needs are inescapable, whereas wants (usually) can be overcome (Thomson, 2005: 175).

A skeptic might respond that unless I demonstrate the truth of some kind of an intuitionist ethics, the above does not actually reflect any normative advantage of needs. This doubt misses the point. I am not claiming[30] that because needs have intuitive force they are somehow a more accurate depiction of the normative stakes of the scenario. Rather, I am claiming that this widespread intuitive force is an asset that needs-language has, thereby enabling it to communicate certain normatively salient features of a situation like the presence of harm and the importance of responding. Furthermore, needs are viewed similarly across many cultures, which is not the case for either "want" or "right" so they are capable of communicating the above in a much wider array of contexts than these other two languages (Brock, 2005: 66; Reader, 2007: 66; Doyal & Gough, 1991: 26).[31] Insofar as the ability to quickly communicate this kind of assessment is vital for political or legal deliberation, then need, not preference, fills this role.

Another potential advantage needs claims have over preference claims is the way they offer an objective analysis as grounds for further evaluative analysis, whereas preference claims, insofar as they make *subjective want* the central concern, turn away from this possibility (Thomson, 2005: 175; Wiggins, 1987: 6; Reader, 2007: 52; Hamilton, 2009: 341). That is, even if the baby was not crying we could determine whether she *needs* food (e.g. by figuring out when the last time she ate was), however, without some kind of expression like tears, we could only infer the desire. This is an advantage particularly in cases with babies, and others who, for whatever reason, might not be able to express their wants. However, some may reply that in cases where a person can express their desires it is inappropriate to try to circumvent them by looking at their needs. I will address this criticism in the next section.

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[30] Whether the philosophy of needs literature claims this is a much different matter. Indeed, some appeal to studies in which participants overwhelmingly selected a basic needs to govern international justice over alternatives, such as Rawls' difference principle (Gasper, 2009: 352; Brock, 2005: 61-62).

[31] In fact, some have suggested that the term "evolved" precisely for this function (Reader, 2007: 53). I am not clear on what exactly this evolution entails, and while it would be a fascinating historical/linguistic study, it is outside of my scope to consider it in any detail.

In comparison to rights claims, needs claims have very different advantages. Firstly, as compared to rights, needs are far more flexible. Indeed, in order for codified rights to have the benefits they do, amendments to rights must be politically difficult (as is the case with Canada's constitutional amendment procedure, for example). But how could any list, no matter how extensive, anticipate the myriad variable situations in which a person's most basic interests might be compromised (Wiggins, 1987: 46)? Judges have tried to respond to this sort of concern with a "living tree" approach to constitutional interpretation that enables changing interpretations with changing societal conditions (Hogg, 2007: 36.8a). But the common law, bound as it is by precedent, is inevitably more constrained than the individual or group asked to recognize a need (Hamilton, 2003: 3).

Additionally, as Ignatieff (1985) has observed, "The administrative good conscience of our time seems to consist in respecting individuals' rights while demeaning them as persons". This is because there is more to respect in a person than their rights (13). We can speak of ensuring that entitlements are delivered, but that the entitlements are delivered in a fundamentally human way (e.g. to feed a child *tenderly*) cannot be enforced.[32] At the very least coercion cannot motivate this sort of affect, and at the very worst coercion breeds resentment. The result can be a heavy cost to social solidarity (O'Neill, 2005: 87-88). Needs claims on the other hand can (though not always) elicit these kinds of human responses.[33]

In sum, in comparison to preference claims, needs claims have the advantage of being able to communicate both urgency and priority with great intuitive appeal across a wide range of cultural contexts, as well as offering an objective yet evaluative assessment. In comparison to rights claims, needs claims are both far more flexible and go beyond the bare, emotionless delivery of entitlements.

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[32] This may be a disputable claim to, for example, certain studies show that faking a smile does make one happier (Lewis & Bowler, 2009). If these findings are applicable over a much wider range of complex actions, under great duress, and across longer periods (e.g. the nurse's 12 hour shift over many years), then that would certainly be troublesome for this claim. For now, though, I am content to observe that the public service is very far from successfully enforcing such affect.

[33] Is it important to consider why needs claims can do this? Not necessarily. It is only relevant if the mechanism by which needs claims can make these appeals successfully are somehow replicable in other sorts of claims. One popular theory is that the desire to have our needs met is universal (Noddings, 2002: 17), It may seem at first like this cannot possibly explain the unique power of needs claims since, on the one hand, the desire to have preferences met is also universal, and, on the other hand, needs claims are not universally successful. In the first case, the difference between wanting a preference and a need to be met is that we can probably remember times where we would have been glad if our preferences had not been met (e.g. eating too much candy at a birthday party), but not so for needs. Regarding why needs claims are not universally successful despite this universal experience, it is interesting to note that the most often repeated commandment in the Torah is "Be kind to strangers because you were strangers in Egypt." If the pain of having one's needs denied was in itself sufficient to bar one from denying others, such a commandment would be pointless and certainly not worth repeating. Unfortunately, it is often those who have experienced such denials of need (e.g. for love), who are least equipped to meet it in others (Glasser et al., 2001).

Criticisms of Needs

Each of the above-stated advantages, while being important, comes with its own particular cost. The intuitive appeal as well as the flexibility of needs claims comes at the expense of guaranteed enforcement and predictability. The claim to universality comes with the risk of reducing the appeal to the lowest common denominator. The objectivity of needs (even if they are not always easily discernable) comes with the risk of paternalism and abuse. The personal nature of needs claims come with the risk of humiliation and exploited vulnerability. Defenders of needs claims spend much time responding to these concerns, and have formulated many responses. It will be seen that ultimately each one of these concerns can be addressed or accounted for in a way that only *reinforces* the importance of needs as a political language.

Firstly, let us consider the emotional force of a needs claim. In essence, to make an appeal based on need is to make an appeal to the benevolence of the potential responder (O'Neill, 2005: 86; Ignatieff, 1985). But benevolence is not as predictable as, for example, an entitlement-based institution (e.g. court or welfare bureaucracy), and as a result many needs-claims go unanswered. The well-functioning entitlement-based institution works precisely in a way that renders the administrator's personal disposition irrelevant. The result is that this predictability is importantly tied to the inflexibility of the institution. The institution sets out ahead of time fairly stable set of application criteria and within this criteria (if the system is functioning as it is set up to), the qualifying applicant should be certain of what their appeal will obtain.[34] Because needs claims involve the admission of a vulnerability to someone who then has power to accept or deny our appeal, among other reasons, it is often remarked that making a needs claim can be humiliating (O'Neill, 2005: 76; Towle, 1987: 44; Reader, 2007: 72).

Secondly, the universality of needs is said to only be possible because it focuses our attention on the absolute bare minimum, particularly the physical/biological (Hamilton, 2009: 343; Reader, 2007: 67; Curran & Noone, 2007). At the same time, this universality requires a great deal of generality. The more specific a needs claim, the easier it is to falsify it, since there will no doubt be many only slightly different, but nevertheless adequate, alternatives (Wiggins, 1987: 22). The result is that truly universal needs claims might be overly vague (Wiggins, 1987: 25) and offer a pitiful minimum (Ignatieff, 1985: 36).

Thirdly, the objectivity of needs is mainly criticized on the grounds that it leads to paternalism and is easily abused. It results in paternalism when the determination of needs is based on a conception of human flourishing that is different from the conception of the person with the alleged need (O'Neill, 2005: 77; Hamilton, 2003: 10). The objectivity of needs is also said to make the person with the need

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[34] Of course, this is a best-case scenario. I fully acknowledge that many entitlement-based institutions do not work so smoothly in practice.

passive, since it makes it possible for an expert to assess a person's needs without their participation (O'Neill, 2011: 36, 77; Ife, 2001: 78). Consequently, anyone in the position to determine someone else's needs, (e.g. doctor or a social worker) could abuse their position (Ignatieff, 1985:11). This works on the level of entire classes as well (Doyal & Gough,1991: 14). For instance, psychiatrists as a group may collectively abuse their power over the supposedly mentally ill.

Together, these criticisms against objectivity and universality culminate in a long recorded history of allegedly need-based policy errors that were both authoritarian in nature and ultimately incorrect because they failed to account for all the particularities of the people on which they were being imposed (Wiggins, 1987: 18; Doyal and Gough, 1991: 1). Often, the needs assessments on which these policies were based reflected the particular preferences and values of the class in power (Doyal & Gough, 1991: 14). Additionally, some make the argument that some of these policies were not errors as such, but reflected the underlying conflict between different needs (e.g. solidarity versus liberty related needs) (Ignatieff, 1985: 18). It is this historical record above all that is the most damning for needs in the eyes of the critics. Now that we have considered all the criticisms, let us turn to the literature's responses.

The uncertainty of positive responses to needs claims does seem to be a genuine problem. At best, the response from the literature has been to try to demonstrate that there is in fact an obligation to respond to needs for those who can (Copp, 1998: 114; Doyal, 1998: 165; Miller, 2012). In most cases, though, this just amounts to arguing for a right to have certain needs met, and so does not defend needs claims *as such* but shows they must crucially be understood in conjunction *with rights*.

The response of some needs defenders to the criticisms of needs as universal have been to point out that when one realizes people are more than just human beings but individuals with unique identities, that so-called bare minimum that needs claims allegedly pushes us towards becomes plainly inadequate *from* a needs perspective (Reader, 2007: 67). It might be responded that this provokes the opposite problem of prohibiting any generalizations. If the reader will recall our universality-particularity discussion, it is quite possible both to maintain a certain high-level and admittedly vague a priori conception of needs, while still insisting that these needs come to us in fully fleshed out and particular forms. That is, the particularity of people is itself universal and furthermore this particularity has certain common limits that must be respected. Later on I will suggest how to determine what these common limits are in practice.

Because paternalism is a particularly significant problem for needs as a political language, needs defenders have offered numerous responses. Firstly, the risk of paternalism does not necessitate it, i.e. good careful practices can mitigate the risk (O'Neill, 2005: 78). Secondly, both the concept of need and the proper response can be conceptualized and practiced in a way that guards against the dangers of paternalism and abuse (Doyal & Gough, 1991: 4; Miller, 2005: 143). Thirdly, if we consider a sense of

direction and control in deliberating about one's own ends to be a need, then passivity can be criticized on the grounds of need (O'Neill, 2005: 78). At the same time, whatever autonomy one imagines in opposition to paternalism will crucially depend on certain needs being met (O'Neill, 2005: 78-79). Fifthly, it is not only experts who can be wrong about our needs, but us as well, which is precisely why we need people to correct us when we falter (Ignatieff, 1985: 12). That these judgements are difficult does not mean we should not make them, indeed, we must (Reader, 2007: 80). Finally, the charge that certain needs are contradictory, and so needs-based policies can lead to abuse (even when there is no error), is fully acknowledged by Max-Neef's satisfier typology, but he as well as others insist that we must understand needs in their fullness, enmeshed and intertwined (Max-Neef, 1991: 34; Wiggins, 1987: 21). Simply put, the critics have valid concerns, but these are directed against those who have misunderstood needs and how to properly respond to them, rather than the concept of needs itself.

To the above list, I would only add the following. I believe the criticism that treating needs as objective leads to paternalism tacitly identifies objective knowledge with what I will call "unilateral knowledge". By unilateral knowledge, I mean that somebody could have knowledge about someone without fundamentally depending on them in any way to generate or confirm that knowledge. On this account, there is a categorical epistemic power imbalance between the expert and the "subject", which is surely a breeding ground for paternalism. This link to unilateral knowledge seems to be reasonable given the emphasis that needs theorists place on the possibility of someone other than the need-bearer knowing what they need when they themselves do not, yet this possibility does not in itself entail the dangerous power imbalance. Knowledge can be objective and still necessarily collaborative thereby implying interdependence between the expert and layperson rather than epistemic independence of the expert.

Consider a simple game. I am thinking of a number in a language that I do not understand but you do, and I ask you to figure out the number. You will likely devise some strategy, proceeding with questions that I will be able to answer, perhaps about its sound or its shape. In this game, it is impossible for you to know the answer for sure without me, since the task is not just to know the number but know which number *I* am thinking of. Because I am an indispensable part of the game, I can be an active participant. I can give more or less obvious answers and consequently make it easier or harder for you. I could refuse to answer, or ask that you explain or reformulate the question. I need not only submit passively to your questioning, although I might. And yet, if you play the game successfully, by the end, you will know something about me that I do not (i.e. the significance of what I am thinking).

I believe this could be offered as a model for much expert knowledge, and can make room for the epistemic importance of individual preference (Hamilton, 2003: 7), without compromising the worth of truths about us beyond our self-understanding. It would however entail a more supportive role for the expert, more akin to a partnership (Ife, 2001: 88). In the case of law, the individual would go to the

lawyer with something that happened to them, but they are uncertain of what it means in the foreign language of legalese. By a series of questions that to be effective crucially depend on the individual's understanding them so as respond with the correct answer, the lawyer comes to some conclusion about the likely legal significance of what occurred. When it comes to selecting a course of action, legal scholars have already recognized the need for lawyers to admit that clients have vital information that the lawyer does not, such as knowledge of the economic, social, and religious impact of a choice (Zwier & Hamric, 1996: 419). Furthermore, the selection of action would depend to some degree on the individual's own priorities and disposition not so much to determine the legal need as such but to situate that need within the individual's broader network of needs. Just as in our game the expert is beholden to what the layman is thinking, in the lawyer-client interaction, the lawyer must respect the fact there are certain things only the client can know that will be vital to determining how to proceed (such as their preferences and values).

Now, of course, there is still the risk of paternalism after the game. But with this discursive approach in place we can fall back on the more general answer that, the best needs-responders will, upon discovering a need, explain to the person with the need the potential legalistic meanings of their experience in lay-speak, and empower them with options. Of course, this "solution" also depends on the client understanding the power they have in this interaction or they might erroneously believe they have to be passive.

This model is a theoretical, and admittedly optimistic, answer to an essentially practical problem, but it does show that the risk of paternalism has a lot more to do with how we think about objectivity than how we think about needs. Similarly, if making a needs claim is humiliating, it is not because needs or even vulnerability itself is humiliating but because of *how we think about vulnerability*. In short, we would do better to improve our societal appreciation of objectivity and of vulnerability (as countless feminist care theorists have argued) than throw needs away for fear of the harm our accompanying misconceptions might do us. With that being said, insofar as these are very real misconceptions we must now turn to rights and preferences to see how to overcome these risks.

In sum, needs claims are often criticized for being unpredictable, setting standards at the lowest common denominator, and opening the door to paternalism, abuse, and humiliation. Defenders of needs have responded by admitting some of these limitations but also by pointing out that these problems stem (in most cases) not from needs themselves but from a misunderstanding and distortion of need. Furthermore, on the one hand paternalism and abuse result from a mistaken equivocation between objective and "unilateral" knowledge. On the other hand, to truly reconcile the universal "lowest common denominator" of needs with the particularity of needs as they are experienced, we must give a very special

place to preference; and in order to practically address the risk of paternalism, abuse, and humiliation, as well as a lack of enforcement, rights have an integral role to play. It is to these proposals we now turn.

But before we do, it is important to note that because these problems stem from misunderstanding needs, we do not avoid them by ignoring needs. By refusing to think in terms of needs we allow our undeveloped misconceptions to exercise themselves implicitly in what we do rather than be overcome through explicit efforts. This is precisely why a legal system geared towards fulfilling rights and satisfying preferences is insufficient. As we will soon see, even where rights and preferences correct for the limitations of needs, they still depend on us conscientiously answering needs as well.

Rights, Preferences, and Their Limits

As explained above, rights and preferences correct for a number of the limitations that needs claims face when made on their own. While some propose either one or the other as a replacement for needs (Curran & Noone, 2007; Genn, 2001), we will see that in fact for either to be an effective replacement, it would have to make recourse to need.

First of all, let us consider the problem of enforceability. "Subordinate groups can describe their needs at length, but doing so has often not been politically effective, (e.g. as it has not been for African Americans). Williams asserts that what must be found is "a political mechanism that can confront the denial of need," and rights have the capacity to do this." (Held, 2005: 144).That is, we saw that needs claims have the force of a strong emotional appeal, but rights have the status of a legal, and therefore coercive, obligation. Consequently, in those circumstances when the people with the power to respond are insufficiently moved or unwilling to be moved by intuitive appeal, needs claims will in themselves prove fruitless, and rights claims may still be effective.

It might then be argued that rights provide the ideal framework for individuals to have the possibility of satisfying their own needs, wants, and goals, without being beholden to others, i.e. maintaining normative authority over themselves (Schaber, 2014: 109, 113), thereby rendering needs claims obsolete. There is no doubt that rights help to meet some needs (Osiatyski, 2012: 106). However, there are two crucial caveats to this. Firstly, it is possible, and in fact quite common, to enforce rights to such an extent that it will actually hinder people meeting their needs (e.g. property rights and the homeless) (Wiggins, 1987: 40). Secondly, there are needs that simply cannot be enforced, many of which cannot be unilaterally pursued either. To name just a few, these include: love,[35] companionship, metaphysical consolation, acceptance, recognition, and self-respect (Ignatieff, 1985: 19; Wiggins, 1987:

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[35] It is perhaps worth remarking on the different connotations that the expressions "I need you" and "I want you" have. I believe the difference is telling for why preference of course has a role to play in love but in the end cannot replace need.

37; Osiatyski, 2012: 132). I believe the existence of these needs alone shows why a language of rights will never be able to replace the language of needs.

Let us now consider the problem of needs and universality. The more we emphasize what all people have in common, the lower the standard of need is. Yet this only follows if we equate universality with uniformity. The paradox of needs claims is that to treat people equally beyond a shameful minimum we must treat people unequally, that is, according to the due of their particular historical and social position (Ignatieff, 1985: 36).

To put it more concretely, if we want uniformity, perhaps all we can say of the need for food globally is that all people need a certain number of calories and some quantity of a set of nutrients. But the history of food aid has shown us the dangers and ultimately self-defeating tendencies of attempting to put such an ideal into practice without any consideration for local dietary traditions, tastes, distribution structures, etc. (Clapp, 2013). To truly reconcile the universal "lowest common denominator" of needs with the particularity of needs *as they manifest concretely*, we must give a very special place to certain kinds of preferences. That is, we must respect not only nutritional requirements, but what people have grown accustomed to, the tastes they have formed, the cultural and personal investments they have made in particular ways of satisfying needs.

But we do not simply respect preference as preference, otherwise respecting tradition could be every bit as falsely general a condition as the policy-mandated food. These dietary habits and customs have reasons behind how and why they formed. Simply looking at preference ignores how and why preferences were formed in the first place even if these reasons are not readily observable or articulable (Gaspers, 2009: 351; Hamilton, 2009: 341). Provision of needs, like the needs themselves, are fundamentally intertwined, and food production is no exception. Nutritional, spiritual, economic, and environmental needs are all being addressed at once. In many cases these webs and knots have been tied over centuries if not millennia. It is difficult and not necessarily productive for policymakers to try to disentangle these webs and knots to isolate the purely necessary.

By the same token, where preferences have been formed due to oppressive and/or manipulative conditions, then these preferences may actually undermine or contradict the satisfaction of needs. And so these preferences should not *necessarily* be provided for although they also have the status of long-time and ingrained preferences. For instance, if a nutritionally deficient dietary preference emerged primarily because of decades of intensive and manipulative advertising it would not benefit from a needs-based justification. At the same time, this is not to say that, all else being equal, the satisfaction of preference, or providing choices, is not also valuable (especially if there is an independent need for autonomy). All else being equal, there is probably something to be said for being able to choose the red car or the blue car. In

brief, satisfying a needs claim requires attention to preferences, but not in such a way as to give preferences a "trump".

Now that we have considered the problem of universality, let us turn to the problem of objectivity. As I mentioned previously, there is a collaborative conception of objective knowledge that would go some way to ruling out the dangers of paternalism and abuse if fully embraced. Yet, as the name would suggest, collaborative knowledge requires cooperation by all parties. The practitioners who are most likely to engage in paternalistic and/or abusive behaviours are also probably least likely to engage in these kinds of collaborative practices. In these uncooperative situations, process rights are crucial for a politics of needs interpretation (Dean, 2008: 9), but if these rights ignore needs, they may give pride of place to preference which undermines the purpose of the process in the first place (i.e. to determine a person's need) (O'Neill, 2011: 36).

To clarify, in the absence of due regard for needs, these process rights can quickly become something like a "customer is always right" mentality. But, when it comes to needs interpretation (rather than simply execution), experts are precisely useful in those cases where we really do not know what is best or at least cannot be sure. If these experts become simple instruments of how we choose to implement our entitlements, then we may both fail to meet our own needs and, ironically, degrade the experts. In short, while rights have an important part to play in combatting paternalism, it cannot be to the exclusion of needs, without other major dangers manifesting.

Finally, formulating needs as rights seems to alleviate the humiliation associated with making needs claims but not without some ambiguity. On the one hand, a rights claim puts the power in the claimant's not the respondent's hands (O'Neill, 2005: 87). On the other hand, the experience of welfare institutions teaches us that it is insufficient to simply transform needs into entitlements and expect the humiliation to disappear, though the transformation might be welcome (Ignatieff, 1985: 16). Rights alone do not guarantee positive societal attitudes, and some things simply cannot be framed as preferences without negative connotations (e.g. welfare application). Indeed, social stigma can be a barrier to the collection of welfare entitlements if they are means-tested services (O'Neill, 2005: 77).

This is a fitting place to close as it gets us to what I believe is precisely the crux of why if rights and preferences are looked to as a way to overcome having to make needs claims, they will never be sufficient. We build judicial, political, and policy tools to satisfy our needs without having to be beholden to others, but precisely because we do this to avoid acknowledging our inescapable vulnerabilities, we cannot treat the shame that motivated us in the first place. As people, we are capable of autonomy, but this is only part of what we are, and to focus on it exclusively in our political language is to not only miss but mistreat the rest of what we are (O'Neill, 2011: 37). This is why a caring legal system is not an ideal opposed to a just legal system. If our legal system is to be just, it must be caring.

Limitations and Conclusion

There are some very significant limitations to this chapter as an argument for the language of need. This discussion has left out much to recommend needs, and has necessarily had to operate on a very abstract level when the challenges to need (particularly paternalism and abuse) are deeply situational. In lieu of being comprehensive, I believe this chapter has tried to do two things: illustrate a fruitful disposition towards the many theoretical tensions implicated in the debates between needs, rights, and preferences; and make a number of "argumentative skirmishes" into some of the most critical debates. In the first place, I have tried to exemplify a conciliatory disposition that values, and seeks to make the most of, the various kinds of claims common in our political vocabulary. In the second place, I believe some novel arguments were made about how needs theorists can recognize the positive contributions of rights and preferences without losing sight of the fundamental contributions needs makes to both concepts.

Additionally, perhaps noticeable by its absence was any discussion of whether there is a *right* to have one's needs met, and if so, which rights, etc. This discussion features heavily in the literature (Copp, 1998; Wringe, 2005; Doyal, 1998: 165; Brock, 2005: 65). This was avoided primarily because the main discussion of the legal system's impetus to respond to legal needs will be made in the second part of this study. The goal of this chapter was largely to show that even if we assume needs and rights are distinct kinds of claims, one would not preclude the other and the resulting standards for our legal system therefore do not preclude each other.

In sum, it should be clear to the reader that "need" is a politically valuable concept whose shortcomings and risks should not dissuade us from pursuing it in greater depth, or formulating our policy responses in terms of it. On the other hand, we must be careful not to think of it completely in isolation from rights or preferences.

Chapter 4: What Makes a Need Legal?

I have now offered some detail as to what "need" means and argued as to why needs offer us a politically useful and compelling framework. In this chapter, I will attempt to answer the question: what makes a need a *legal* need? The reader will recall that the answer offered in chapter 1 was "when legal services offer a solution to a serious problem", but this seems to me to be unnecessarily narrow. We depend on the legal system in many ways that do not involve the direct receipt of any legal services *after* a problem has occurred. As I will explain later, this is because the legal needs literature to date has been overly focused on occurrent needs to the detriment of dispositional needs. For now though, I will simply say that when we have a legal need what we need is the legal system, but even this requires some elucidation and clear, basic distinctions. Overall, if we can get a clear, even if only partial, picture of when a need is a legal need, it will be much clearer what elements of the legal system will be most important to meeting these needs and therefore forming a caring legal system.

There seem to me to be at least two basic complementary types of legal needs corresponding to two potential positions the legal system might have within the basic need relation: X needs Y for Z. The first meaning, which I will call the normative sense, is: X needs the legal system (i.e. Y) for Z. This need is legal because the legal system is needed. For this to be a normative need, as explained in the previous chapter, Z must also be needed (e.g. for bodily security). The reader will notice that this bears resemblance to the meaning of legal need invoked by the Legal Services Corporation (2009). The second meaning, which I will call the positive sense, is, X needs Y for the legal system. The need is legal because it stems from the legal system, whether or not the legal system is itself needed, which is why it is purely positive. A positive need is a need "created" by the legal system in order to access it or because of it, e.g. the need to hire a lawyer or pay a fine.[36]

Current conceptions of legal need unfortunately conflate these two meanings. The reader may recall that one of the major criticisms against legal need is that it takes for granted whatever legal services the system currently deems necessary, in the service of meeting unclear ends (i.e. solving "sufficiently serious" legal problems). This is an example of not grounding the second meaning of legal need in the first (i.e. what I need because of the system without clear regard for whether I need the system). In this chapter, therefore, a substantial part of my task will be to disentangle these two meanings by clarifying the first and then showing its relationship to the second.

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[36] We will see later this is not quite right and that in fact such "needs" can sometimes just be demands.

Method of the chapter

To determine whether X needs Y for Z in the normative sense, there are two questions that must always be asked in some form: (1) is Z possible without Y?; and (2) is Z needed? This raises the question: For what Z might the legal system be the only Y? Because legal systems have so many functions (Berman & Greiner, 1972; Grilliot & Schubert, 1989), I will not attempt to answer this question exhaustively (although an exhaustive treatment would be required for the fullest possible understanding of legal need). Rather, I will focus on two of the most uncontroversial functions of the legal system, dispute resolution and prevention, as opposed to, for example: restoring, creating, or maintaining social order[37]; articulating common values; ordering government benefits; or penalization (Summers & Howard, 1972; Grilliot & Schubert, 1989). Obviously, these functions all intersect, and the divisions between them are often artificial. One advantage of focusing on disputes is precisely that it brings many of these functions together and covers wide ground no matter how we divide up the list. Furthermore, it is most often the dispute resolution aspect of the law that the legal needs literature focuses on (Genn, 2001).

Since the legal system is so notoriously difficult to define (Carter, 1974: 5; Berman & Greiner, 1972: 16), it will not be possible for me to determine when it is needed by definition. Instead, I will consider whether the legal system is the only possible means to resolve and prevent disputes by comparison with its major alternatives (as identified in chapter 1 by the critics of legal needs): "self-help"[38], "Alternative Dispute Resolution" (ADR), and political action. After self-help is briefly considered, I will examine some of the most prominent mechanisms of ADR, including: negotiation, conciliation/mediation, and arbitration (Auerbach, 1983: 4; Nolan-Hailey, 2013). From these comparisons, we will see certain circumstances in which the legal system alone is capable of achieving dispute resolution and/or prevention. I will then ask whether, under these circumstances, political action could also achieve dispute resolution and prevention. When these other courses of action are capable of resolving and/or preventing disputes, the legal system cannot be deemed necessary. On the other hand, where these alternatives are categorically incapable of resolving or preventing certain disputes, there is good reason to think the legal system is necessary.

Once the exclusive sphere of the legal system is identified, I will take a step back and ask whether dispute resolution and prevention are themselves needed by examining how they contribute to survival, ideal formation/grasping, and ideal pursuit.

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[37] Obviously dispute prevention and resolution has something to do with this, but this function is a bit grander in that it presumes a particular social order and the law's conservative relation to it, as opposed to simple interpersonal conflicts.

[38] A term used in the literature that describes any strategy one employs without appealing to external intervention.

Limitations

Due to the size and complexity of the question "what are legal systems needed for?" there are bound to be important limitations to what can be done in a single chapter. Three of these limitations are of particular importance: not being able to consider all alternatives to the legal system; exaggerating the difference between the legal system and its alternatives; and exaggerating sameness within each type of action.

Firstly, since this chapter does not consider all possible alternatives to the legal system, it cannot, strictly speaking, demonstrate the necessity of the legal system, but at most strongly suggest it. Nonetheless, this exercise remains valuable both for its ability to illustrate how the question of when the legal system is needed can be pursued, and for suggesting the general circumstances under which the legal system is likely to be needed. Indeed, the most important alternatives available to a person facing a dispute will be considered, which should theoretically cover the majority of cases under present conditions.

The second limitation is that there are both good practical and theoretical reasons for not treating each alternative as starkly distinct from the legal system. In the case of self-help, for instance, sociologists have observed that in certain poor neighbourhoods that lack social cohesion, criminal court is simply one way of harassing antagonists as part of a wider non-legal strategy (Engle Merry, 1995). There are also a number of reasons to think of ADR as not starkly distinct from the legal system. To begin, in most cases (though not all (Auerbach, 1983: 4)), ADR is not actually meant to be an alternative to the legal system as such, but to the court system and litigation in particular (Blake, Browne & Sime, 2014: 5; Chatterjee & Lefcovitch, 2008: 14). Indeed, it is increasingly the case that ADR processes are mandated by the court and are operated as part of the formal legal system (Chatterjee & Lefcovitch, 2008: 33; Nolan-Hailey, 2013: 9). Additionally, it is hard to distinguish some of the more formal/binding arbitration processes from the court system itself (Chatterjee & Lefcovitch, 2008: 5). Furthermore, the court system will actually enforce certain mediation and arbitration agreements as it would other kinds of contracts (Nolan-Hailey, 2013: 137; Chatterjee & Lefcovitch, 2008: 133). Finally, there is a sense in which even if ADR is in no way officially part of the legal system, it is always done "in the shadow of the law", that is, with legal considerations, potential actions, etc. operating in the background (Menkel-Meadow, 1995/2001: 51). Consequently, it is misleading to think of law and ADR as a stark dichotomy and more effective to think of them as a spectrum from the least judicial to the most judicial (Tannis, 1989: 13-14).

Nonetheless, it is in fact possible to regard legal systems and ADR *essentially* in a binary fashion. We will see from our examination of the most important ADR processes, that each of them lacks one or both of the following criteria: [1] a standing set of rules and [2] enforcement of those rules by a central authority. Any dispute resolution process that categorically depends on both standing rules enforced by a

central authority will fall into the category of judicial, whereas those processes that are not categorically dependent on such authoritatively enforced standing rules, whether or not they benefit from such rules and enforcement in practice, are in essence non-judicial.

Finally, as we will see, a stark dichotomy between legal and political action depends on a certain exaggeration of the binding nature of precedent and a minimization of the role that societal values play in legal decisions. In time, we will see that while this is an exaggeration, the difference on these points are large enough that they are worth taking as genuine differences.

The third limitation, exaggerating the sameness between and within each process is well expressed in the following:

> "...both categories of "settlement" and "adjudication" contain enough variation within them to make them almost meaningless concepts to compare in the abstract.... that we must, for the purposes of argument, consider these categories as little more than "ideal types"." (Menkel-Meadow, 1995/2001: 47)

While the above is certainly true, ideal-types are useful because they help to distill the most essential features when a process is working as it is supposed to. This way of proceeding is particularly useful for my investigation for two reasons. Firstly, the literature is primarily American, but at the level of ideal-types, ADR is similar enough in both the U.S. and Canada. Secondly, a negative answer to the question "Is Z possible without Y?" does not guarantee that Z is possible with it. There is no contradiction, for example, in saying "I need to go to court to resolve my dispute", and "I went to court and was unable to resolve my dispute." Consequently, if the self-help, ADR, the legal system, or political action processes often fail to exhibit in full the ideal features discussed below, this does not change when a legal system is or is not necessary for dispute resolution and prevention, though it changes when it is sufficient. With these cautions in mind, let us now proceed to the investigation.

Self-Help and ADR in Brief

The court system as a process of dispute resolution occupies a special place in Canada as well as other North American societies, however, "(t)he adjudicative process is… only one way of bringing human relations into a workable and productive order" (Fuller, 1971/2001: 5). Indeed, the majority of disputes are never taken to court, and of those that are, the vast majority are resolved prior to trial (Tannis, 1989: 8). Three of the most common alternatives to a court process are: negotiation, conciliation/mediation, and arbitration (Nolan-Hailey, 2013). I will not consider violence or unilateral actions (for instance, fixing a leaky faucet because one's landlord will not), because the first is a method of escalation not resolution, and the second is a method of avoidance. There are circumstances where either might be appropriate, but they are not forms of resolution as such.

Firstly, negotiation, on its own, as opposed to a practice as part of a formal ADR or court process, can be considered both a form of self-help and ADR. In both cases it is a consensual bargaining process that is characterized by a lack of third party involvement either to determine the norms of interaction or oversee the process (Nolan-Hailey, 2013: 19; Tannis, 1989: 9; Chatterjee & Lefcovitch, 2008: 16).

Secondly, conciliation/mediation[39] both involve going to a trusted and neutral third party to assist the disputing parties in determining a solution in a non-binding way (Chatterjee & Lefcovitch, 2008: 18, 20, 22).[40] Conciliation involves the third party reorienting participants to come to see one another in a new light, so that the renewed mutual understanding of the relationship enables the parties to come to a resolution (Fuller, 1971/2001: 23). Mediation may involve this, but it may also be a simple process of the mediator gathering information from disputing parties to make a recommendation and subsequently persuading the parties to pursue it together (Fuller, 1971/2001: 6). Again, the process must be consensual, and--independent of the court system--there is no enforcement of any resulting agreement.

Thirdly, arbitration involves the disputing parties going to an expert third party and agreeing to follow their assessment of the dispute as definitive (Nolan-Hailey, 2013: 168; Chatterjee & Lefcovitch, 2008: 24). While arbitration processes can sometimes be as formal and rigid as a court process (Chatterjee & Lefcovitch, 2008: 24; Nolan-Hailey, 2013: 161, 168), arbitration is set apart by the amount of control it affords the participants in selecting what set of procedures will be followed and who the judge will be (Nolan-Hailey, 2013: 168).

Categorical Limitations of Self-Help and ADR

Self-help and ADR are limited both by what they require in order to succeed and what they can deliver even when they succeed, not only to the parties, but to the public. Firstly, as was just explained, all of these processes crucially depend on the consent of all disputing parties. Therefore, where one party is not cooperative, wants to delay indefinitely, will not bargain in good faith, or is willing to lie, these alternatives simply cannot function properly (Chatterjee & Lefcovitch, 2008: 11; Fuller, 1971/2001: 28; Newman, 1999: 29). The court system on the other hand can compel the involvement of parties (e.g. through an arrest warrant), and employs penalties (e.g. for perjury) and investigatory methods that are precisely suited to reveal and challenge those unwilling to participate honestly (e.g. cross-examination). It can therefore overcome these difficulties. This is particularly true when the dispute involves conduct that is clearly prohibited by the law (Menkel-Meadow, 1994: 110).

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[39] When discussing conciliation and mediation, it is important to clarify that conciliation and mediation are technically distinct processes, although the terms are often used interchangeably (Chatterjee & Lefcovitch, 2008: 18; Fuller, 1971/2001: 6).

[40] Mediation can sometimes be binding, but it is in essence a non-binding procedure.

Furthermore, as has also been stated, self-help and ADR depends on the parties' consent to and ongoing compliance with whatever solution is ultimately agreed upon, suggested, or handed down. However, ADR, on its own, that is, without the support of the court system, simply cannot guarantee enforcement of the solution (Fiss in Tannis, 1989: 24; Chatterjee & Lefcovitch, 2008: 6, 26). Consequently, when a disputing party after the process decides not to comply, ADR must depend on, rather than simply benefit from, the legal system (Chatterjee & Lefcovitch, 2008: 26), thereby undermining its status as a non-judicial settlement process.

The one exception to this limitation of ADR may be where it is conducted within a normatively homogenous community. Indeed, the success of non-legal dispute settlement, according to some, has always depended on a coherent community vision (Auerbach, 1983: 4; Chatterjee & Lefcovitch, 2008: 26). This is less true now as ADR has become professionalized, but in the past, it was not a profession but churches, family members, or community elders that oversaw ADR processes (Tannis, 1989: 8). While these kinds of ADR processes may have had standing rules in the form of religious doctrine, these rules would not be enforced by a central authority, but rather, by the diffuse power of the community as a whole. Consequently, as more and more of these communities have disintegrated or weakened, so has the efficacy of these processes, and their members have increasingly turned to the legal system (Auerbach, 1983: 7). Furthermore, where some common conception of the good never existed, as between members of radically different communities, some have claimed that the legal system provides a kind of "social cohesion" (Auerbach, 1983: 11). We should be careful not to exaggerate the depth of this cohesion, however. Such a cohesion is achieved by a mutual aversion to the inconvenience of a court process, or at worst describes the thin sociality of Hobbesian men "overawed" by a common power (Hobbes, 1668/1994: 76). Under conditions of pluralism, therefore, the legal system's ability to compel involvement is necessary.

With that being said, even when self-help and ADR is fully successful in delivering a solution that satisfies all disputing parties (and they go on to comply with that solution), there remain certain categorical limits on whether this solution can serve the public. Self-help processes are by their nature private and ADR processes are confidential (Blake, Browne & Sime, 2014: 14; Newman, 1999: 29), and neither creates binding precedent for others (Fiss in Tannis, 1989: 24; Blake, Browne & Sime, 2014: 16; Nolan-Hailey, 2014: 4). This is not a problem if the dispute is both of a highly private and unique nature. Indeed, these features may even be virtues in such circumstance. However, where a case is common and/or of enormous public significance, and the very publicity of the case contributes to the achievement of justice (e.g. class action lawsuits against tobacco companies), self-help and ADR may satisfy the particular individuals involved but completely fail to serve the wider public who might share the needs and interests of one of the parties. Indeed, the fiercest critics of ADR insist that justice and peace are two

distinct (if often overlapping) goals, and ADR accomplishes the latter at the expense of the former (Fiss in Tannis, 1989: 24; Luban in Menkel-Meadow, 1995/2001: 43). That is, what parties are willing to settle on is by no means identical with a fair resolution, especially if there is uneven bargaining power (Fiss in Tannis, 1989: 24; Newman, 1999: 29). The same could be said of self-help.

Each dispute in common law systems, on the other hand, contributes to the set of standing rules that then serves as a tool of: dispute prevention, by offering guidance to individuals in what is and is not allowed; and dispute resolution, by offering parties a degree of certainty in what to expect if they appeal to the legal system (e.g. an identical accident would yield a certain monetary remedy). This is not only true for precedent, but for laws as a whole. That is, legal systems offer categorically more guidance "ahead of time" than ADR processes do, unless those ADR processes are grounded in, for example, a spiritual legal system (e.g. Judaism or Islam).[41]

In sum, the legal system is necessary when not all disputing parties consent to the process or share a conception of the good. Furthermore, there is no guarantee that what parties agree to in an ADR process will be fair if parties have significantly different bargaining power. Even if the results of ADR were satisfying to the parties immediately involved, dispute resolution through legal systems is uniquely capable of assisting the present and future public in addressing their similar disputes through precedent. Consequently, the legal system is capable of dispute prevention unavailable to the ad hoc means of ADR's dispute prevention. With that in mind, we can now investigate if political action could offer solutions under any of these conditions that seem to demand the legal system.

Political Action

In *The Pure Theory of Politics,* Bertrand De Jouvenel (1963) attempts to set out the most essential features of politics, i.e. its most simple parts, similarly to what is done in pure chemistry (ix-x). He identifies the "radical" of political action as follows: A tells[42] B to do H (De Jouvenel, 1963: 110). While De Jouvenel means this in the widest sense (1963: 110), I will be using this relation to denote political action in the special case where A is a disputing party, and B is not directly one of the disputing parties (since this could be self-help or ADR) and is not a judge (since this would be engaging in the legal system). That is, for an action to qualify as a political action in my sense, it must be addressed to an uninvolved third party (e.g. the public), and/or a non-judicial public office holder.

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[41] This, again, suggests the importance of law under pluralistic conditions. However, one may respond that even under conditions where a state's population is entirely of the same religion, there may still be competition between civil and religious law. This is certainly the case. The above point is only that religious law has the *potential* to offer this guidance, whether or not it is heeded.

[42] "Tell" seems a bit too strong to me, it could be "request", "suggest", "recommend" or many other variations and still count as political action. Nonetheless, this is his formulation and it does communicate the essential meaning.

Before considering political action in greater depth, the reader will surely wonder why I have chosen De Jouvenel's account of political action as my starting point. After all, there are certainly more influential theorists of the political. Firstly, De Jouvenel's conception of political action is immediately accessible. That is, unlike more nuanced conceptions of political action (such as Arendt's), there is little room for misinterpretation and scholarly debate over the exact meaning of the conception in the first place. This is important given my limited space. Secondly, the "bare-bones" nature of his conceptualization makes it both theoretically flexible and well-suited for the "ideal-type" level of abstraction at which this chapter is operating. Indeed, I have attempted to characterize the legal system, ADR processes, and self-help in terms of the absolute minimum each requires to be designated as such, and this is precisely De Jouvenel's project for politics. Thirdly, this bare bones conception of politics comes from a similarly thin overall picture of politics, whereas more influential definitions are embedded within much larger more complex conceptions of politics. Consequently, taking a definition of political action out of such a complex theoretical framework would likely distort the meaning of the definition used. Fourthly, as we will soon see, De Jouvenel himself sets up political action in contrast to judicial action, thereby making the connections quite clear. This does not mean that De Jouvenel's view of political action is unobjectionable; indeed it may fall apart entirely on closer inspection. But, if only for heuristic purposes, it offers a clear and concise illustration of how one would go about determining when the legal system is needed in comparison to a broader political system. Fifthly, I would be remiss if I did not mention that I find this definition has a certain plausibility. There are perhaps conceptions of political action that are much wider than interpersonal interaction proposed below, but I do not see how any conception of political action could exclude it. In this sense, De Jouvenel at worst offers us a necessary though incomplete part of political action, but it is precisely at the level of necessity (rather than sufficiency) that I am speaking of law's alternatives.

Political action, according to De Jouvenel (1963), consists of two parts: instigation and response (69). Instigation means that A must communicate her demand to B in some way. Indeed, whether the means is a vote, a boycott, a strike, a public awareness campaign, a hostage taking, a rally, a letter, or anything else, if it is a political action, they all have in common that they are a more or less elaborate way for A to propose H to B. Once the demand has been communicated to the public or public office holder, they have a choice whether to comply or not to comply with the proposal, this is called response (De Jouvenel, 1963: 69).

At first glance, political action seems so wide and flexible as to potentially be suitable in any of the circumstances under which we previously determined the legal system was necessary, i.e. one party does not consent to the process; no shared conception of the good is required; there can be significantly different bargaining power between parties; and the outcome serves the wider public. Yet there are some

fundamental differences between political and legal action (at least on this idealized level) that leave an--albeit smaller--sphere of conflict resolution and prevention cases in which the legal system remains necessary.

In the first place, according to De Jouvenel (1963), B's decision to comply will be based on some mix of "who" and "what" factors, i.e. the characteristics of A and of H (75). In the judicial process, however, justice is supposed to be blind, and so A's characteristics will only be considered instrumentally to get at H, (e.g. is A a minor thus making sexual activity statutory rape). In the political process, on the other hand, not only are A's characteristics permissible to consider, but they are sometimes the sole determining factor quite independent of the merits of H. In the Canadian political system, the paradigm case of this might be an election. When a sufficient number of voters instruct a government to stay in office or not, the members of government comply regardless of the merit of the choice.

De Jouvenel calls the propensity of a person to receive compliance from a greater or lesser number of people, who are more or less likely to comply, "authority" (1963: 100). On the other hand, he calls the entitlement to such compliance and the correlative duty to comply "Authority" (De Jouvenel, 1963: 100). On this point, the difference between political and legal action should be clear. In the case of political action it is vital that A have authority, not only to gather others so as to instigate (e.g. organizing the rally) but to actually garner a response, i.e. move B to action. For legal action, on the other hand, while authority may under some circumstances be required to instigate a legal process (e.g. the ability to hire a lawyer), it is by law never a requirement to move the judge to act. The judge makes their decision with reference to standing rules and the facts of the case. Indeed, the legal system thinks in terms of the disputing party's Authority, i.e. their entitlement to certain responses by the other disputing party. Consequently, the legal system is necessary where a disputing party lacks authority but has Authority. We may view this finding as a qualification of the "unequal bargaining power" finding.

If the first difference had to do with the instigation, the second difference has to do with the response. That is, De Jouvenel distinguishes between how the legal and political office holders come to their decision to comply or not to comply. In the strictly judicial case, disagreements are purely over matters of facts in the past, as well as the previously established rules that apply to them and how to apply those rules (De Jouvenel, 1963: 147-48). In the political case, the disagreement can be over the current facts of the case, future likelihoods, as well as the values associated with preferring one outcome over another (De Jouvenel, 1963: 151. 158). From this, two significant differences become evident regarding the other previously established unique features of the legal system.

Whereas the legal system renders differences in conceptions of the good moot by attempting to replace controversial questions of value with a set of standing rules,[43] the political process is very much open to the ongoing relevance of these differences. Consequently, a difference in the conception of good does not in and of itself derail the political process, however, certain seemingly intractable differences might (e.g. Zionism and Palestinian nationalism). Therefore it is not simply differences in conceptions of the good but *intractable* differences in conceptions of the good that necessitate the legal system.

A second consequence of the inclusion of contingencies and value judgements in the political decision-making process is that the results produced are not in most cases binding precedents. A political decision may for various reasons be difficult to alter, e.g. because of the reputational cost, a popular consensus, or at least insurmountable disagreement on what else to do, but by default a future political process is always open to altering a past political decision. A judicial precedent in a common law system, on the other hand, is by default binding on future judicial processes subject only to limited kinds of criticisms, such as inconsistency with the primary elements of the set of standing rules (i.e. a constitutional challenge), or a predetermined appeal procedure. It is worthwhile to note that the most fixed kinds of political judgements (e.g. constitutions, treaties, etc.) are often turned over to the protection of judiciaries for precisely this reason. Consequently, in order for either process to work effectively as a dispute prevention mechanism very different conditions hold. In cases where supportive political office holders are certain to be replaced, and majority support is such that the decision that might have prevented dispute will be reversed, the judicial system will be necessary.

In sum, political action and legal action differ in two respects that qualify the circumstances under which the legal system can be said to be truly necessary: consideration of the disputing parties' authority or Authority, and the treatment of static facts and rules or dynamic facts, contingencies, and values. As a result, the legal system remains needed where: a disputing party lacks authority but has Authority; differing conceptions of the good are intractable; and a political decision that would prevent future disputes will be overturned.

What needs does this serve?

Now that we have established under what circumstances dispute resolution and prevention through the legal system is necessary, we can comment briefly on whether the dispute resolution and

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[43] This is not to say that judicial decisions do not make controversial value judgements, but that these elements are political components of a judicial process (De Jouvenel, 1963: 162). The incorporation of these elements does not challenge the stark dichotomy I am setting out here because they demonstrate the insufficiency of the legal system and not that it is unnecessary.

prevention itself is necessary. The reader will recall that the three "layers" of needs are survival, ideal formation/grasping, and ideal pursuit.

In the first place, the legal system seems to be most associated with how its dispute prevention function ensures the security of those subject to it. Drawing on Hobbes, some authors presented the legal system as a common power to "overawe all men" (Summers & Howard, 1972: 6-8). Disputes, however, do not only emerge out of aggression, but can equally arise out of confusion. Consider, for instance, the case of traffic law in helping to prevent avoidable death and injury. The legal system is therefore necessary for security not only under the circumstances where we assume that without overwhelming fear people would necessarily do serious injury to one another, but also in risky situations where communication in the moment is difficult and so a common reference point of conduct is vital.

As was explained in the last chapter, networks of relationships are required for meeting people's needs at every layer. Indeed, particularly in North American cities, vast networks of consumer-distributor-producer relationships are necessary for the provision of almost everything necessary for day-to-day survival (Post, 1963: 3). Yet the consumer cannot have a relationship of trust and mutual respect in which expectations are clearly discussed with most producers. This is due both to the nature of international commodity chains, and the role of abstract commercial entities (as opposed to natural persons) operating at each stage. That is not to say that there are not direct relationships of trust between those who do have contact at each stage, but where a dispute arises, it does not always arise between those side-by-side in the chain (e.g. the smoker may not take the convenience store clerk to court but the tobacco company). A set of authoritatively enforced standing rules works to facilitate communication across these vast impersonal chains (e.g. nutritional information). This is a form of dispute prevention.

In the second place, the legal system is necessary to protect the education of, for example, a child (i.e. one who lacks authority but has Authority), in those cases where there is not a community with sufficient power or will to compel the uncooperative parents/guardians to allow or provide the child to pursue that education, or work on the child's behalf to lobby others to do so. A legal system is necessary because self-help, ADR, and political processes all require that all parties have sufficient capacity to participate, but that is precisely what is at stake here (i.e. the capacity of the child to participate in society). Alternatively, where different uncooperative and mistrusting parents/guardians have intractably conflicting views of what constitutes appropriate understanding and education due to differing conceptions of the good, especially where self-help and ADR processes have failed in the past, the legal system may be necessary to avoid prolonged or permanent disruption to the child's development. Similarly, in the case of mental health where an individual has been abused from such a young age or to the point that they are not capable of or willing to express a distinct perspective from the uncooperative person committing the abuse, the legal system will be necessary to resolve the underlying conflict

(although there may be no apparent conflict), since self-help, ADR and political processes depend on the plurality of views being openly expressed.

The third layer of needs is perhaps the most interesting, since I have framed it in relational terms, and the distinction we have found between law and ADR is, simply stated, that law does with rules what ADR does with relationships. That is, law seems to come in when relationships break down, so if the third layer depends on relationships what can the law do? A legal system is needed when the social relations that allow a person to pursue an ideal are constituted by standing rules, and especially when the majority of currently empowered community members oppose the inclusion of the excluded party.

To clarify, a relationship constituted by rules is not the same as a heavily regulated relationship such as landlord-tenant or employer-employee relationship. These latter relationships may significantly benefit from the legal system, but they do not depend on it.[44] That is, I could work out a private arrangement with someone who controls a space (either legally or otherwise) or has funds to pay wages, without necessarily involving any public authority in the arrangement. These relationships are possible without it. The relationships I am speaking of really are a very special subset of relationships. The most important example of this special relationship in the Canadian case is the voter-Member of Parliament relationship. One cannot determine who will control public Authority (short of a violent overthrow) without somehow involving public Authority. Because these relationships depend on the law, and in so far as they are themselves required to achieve a wide range of ideals, the legal system is itself necessary for the pursuit of these ideals.

In sum, the unique role of the legal system in preventing and resolving disputes under conditions of uncooperative (or at least non-cooperative in the case of its coordinating function) intractable pluralism makes it necessary for: coordinating and maintaining the relationships required for the delivery of survival goods; ensuring the vulnerable gain the means to formulate ideals; and creating the special relationships constituted by rules vital for the pursuit of those ideals.

Normative and Positive Legal Needs

Now that I have explained the normative sense of legal need, let me briefly explain its connection to the positive sense of legal need. The reader will recall that a positive legal need is a demand made by the legal system. There are essentially three kinds of relationships positive legal needs might have to normative legal needs. The positive need might be created by a feature of the legal system that is necessary for it to satisfy the above-mentioned needs. For instance, in order for the legal system to be able

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[44] This does not mean that a person's dispute with their landlord cannot be a matter of legal need because they could theoretically solve it through alternative means. Rather, it means that what makes the legal system necessary is not the nature of the relationship itself, but certain incidental features, such as the uncooperative attitude of one party.

to enforce the entitlements of a person with Authority but no authority, there must be someone to use force on their behalf (e.g. a police officer). In this case, the positive need for the police officer is also a normative need since it is caught up in the chain that traces back to the ultimate normative need (e.g. security). The positive need might be created by a necessary feature of the legal system, but is not itself uniquely necessary. For instance, in order to do what the legal system does, communication is necessary. This may be by mail, fax, e-mail, in person, etc., but it must be one of these. Consequently, communication has the status of a normative need, and these methods are satisfiers. Finally, the positive need may be created by an incidental feature of the legal system. For instance, a particular proceeding may not in itself require that participants have legal representation, but court regulations demand that a lawyer be employed. It is clear that in this case the positive legal "need" is not a normative need, and indeed is not really a need at all in the sense articulated in chapter 2.[45] Rather, it is a demand.

Conclusion

In chapter 1, we saw how legal needs are thought of. In chapter 2, I set out a conceptual framework for need and in so doing, made plain what requirements something must meet in order to be "needed". This offered us crucial insights with which to counter the criticisms in chapter 1. In chapter 3, I stepped aside from the general progression of the study to defend why it is worthwhile to speak of needs in addition to the more dominant languages of rights and preferences. This chapter has positioned us to re-assess the criticisms made in chapter 1 by determining when the legal system meets the requirements set up in chapter 2. As has been previously mentioned, this exercise is open to the criticisms that it is reductionist, overly abstract, and incomplete. Indeed, it is all three.

That being said, I still believe it manages to show how we might begin to think about when and why legal systems are necessary and what relation these limited but vital circumstances have to our normative needs. If anything, this exercise has served as an invitation for others to do a more exhaustive and potentially empirically informed analysis. It also demonstrates a very clear relationship between normative legal needs, normatively significant positive legal needs, and positive legal demands. In spite of its generality, as we return to the subject of chapter 1, this chapter will provide with crucial precision in addressing the arguments against legal need.

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[45] This does not mean that it does not have normative standing. For instance, a comfortable chair in the lobby of the courthouse may indeed be normatively valuable to make a difficult experience slightly more bearable for people, however, it is not justifiable by reference to legal need.

Chapter 5: Reconceptualizing Legal Needs

Now that we have an idea of what need is, and some idea of when the legal system is needed, we can return to our original question: what are legal needs? The reader will recall that we will have to answer this question in a way that is capable of: one, overcoming the many challenges set out in chapter 1; two, not forfeiting what is centrally compelling about needs in the first place and; three, still offering a usable definition for research and policy analysis. I will do all this in this chapter in three parts. Firstly, I will bring together all that has been said into a set of three definitions. I will then consider how these definitions taken together answer each and every one of the criticisms outlined in chapter 1. Finally, I will show how this new conception of need overcomes some of the most important new criticisms to which it gives rise. This new conception offers a firmer, if not perfect, theoretical foundation for an innovative research program, and a systemic legal policy program well beyond legal aid funding.

Revised Definition

My renewed conception of legal need is best viewed through three distinct definitions: normative legal need, normative positive legal need, and positive legal demand. This division is necessary since the practical implications of finding the first two (e.g. substantive legal change, adding resources) are radically different from the third (e.g. removal of institutional barriers), and because, as I have mentioned and will soon show, many of the criticisms of legal need result from erroneously conflating the first two senses with the third. I will set out each of these definitions and explain them in contrast to the definition offered in chapter 1.

1. [1] X has a normative legal need if and only if X has normative status and [2] the legal system is [3] practically necessary for [4] X to avoid the deprivation of those Zs inescapably required for X to be the kind of thing X is.
2. X has a normative positive legal need for Y if and only if X has normative status and features of the legal system necessary for the satisfaction of normative needs entail that X have Y either to access the legal system or be in compliance with it.
3. X faces a non-normative positive legal demand for Y if and only if purely artificial features of the legal system unnecessary for the satisfaction of normative needs require that X have Y either to access the legal system or be in compliance with it.

Let us begin with normative legal needs. Firstly, in chapter 1 we discussed the question of whether only individuals or groups can have legal needs. In the new definition, the range of potential subjects is left open to maintain the possibility raised by Soran Reader (2007) that all kinds of beings (not

just people) can have normative needs (57). This is particularly pertinent in the case of legal need since entities like corporations, as purely legal persons, seem to meet the above definition of having normative legal needs. This, of course, raises the issue of whether all normative legal needs call for the same kind of action or any action at all. To account for the challenge this question might raise to the scope of my definition, I have included the rather vague caveat that X must have normative status. For the purpose of this discussion, normative status is just a shorthand for: it must be normatively important to preserve X.[46] That is, the legal needs of a shell company may not be normative, whereas the legal needs of an Amnesty International or even an Enron may have normative status.[47] This does not settle the question of what entities have normative status and why, but that normative status is required and that it applies to a wide range of "legal creatures" seems reasonable. This wider scope also has the advantage of reflecting colloquial uses of "legal need" when referring to corporations (Rosenthal, 2012).

Secondly, as has already been discussed, the legal needs literature's understanding of legal need is for the most part highly focused on legal services. As has been mentioned, this is overly narrow for a number of reasons. It is overly focused on occurrent needs as opposed to dispositional needs. That is, the legal system is in an ongoing process of fulfilling certain dispute prevention functions that we are always in need of, whether or not this becomes manifest by the occurrence of an actual dispute, e.g. theft laws might act as a deterrent against theft. Legal services may be necessary responsively, but only the legal system as a whole can be necessary in this preventative way.[48] Additionally, focusing on legal services is also overly narrow because, as we will discuss in the next section, it draws our attention away from the cases where substantive legal reform, rather than additional services, is the proper response to a finding of legal need. Furthermore, all people have this kind of legal need as opposed to a subset who do not have the resources to access legal services.

One consequence of this expansion beyond the occurrent or "acute" normative legal need is that we must do one or both of two things. One, we might significantly expand the notion of a legal problem to include cases where a right *might* be violated in the absence of legal protection, similarly to how Hobbes includes the threat of violence in his definition of the state of war. Two, we could also do what I

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[46] It is perhaps important to clarify that I am not trying to make any substantive claims about what it means to have "normative status" but rather looking for a fairly neutral phrase to express what would otherwise be a long and awkward formulation.

[47] In the latter case, if only because of the number of people who depend on the persistence of the company to in turn have their needs met. This, of course, raises thorny moral questions, but the difficulty of the issue does not mean it should not be recognized. I believe it is precisely this kind of normative debate that goes on when some talk about certain corporations being too big to fail, or in the assignment of certain special copyright protections to companies like Disney. The more obvious explanation is of course naked interests and power, but while that might have considerable explanatory power it can make little sense of the arguments these sorts of actors attempt to make on their own behalf. Unfortunately, I do not have the space to explore this question any further here.

[48] That's not to say that legal services are not needed in a preventative way. For instance, drafting a will and estate.

have done, which is to define legal need in such a way that it is not exclusively linked to the existence of a legal problem. The reader may wonder what this means for the empirical measurement of legal need given that to date it has focused on the observation of legal or justiciable problems. This is a concern I will address in the third section of this chapter.

Thirdly, in chapter 1, we saw that the legal needs literature for the most part considered legal need where the legal system offered a possible or even the best remedy for a particular problem. As I emphasized in chapter 2, the new definition offers the much more stringent standard of "necessity", which is just to insist on the meaning of the term "need". If one's needs are attainable without recourse to the legal system, even if the legal system offers the best solution, then one does not, strictly speaking, have a legal need.

Now, I have attempted to include some reasonable flexibility by making the standard practical rather than absolute necessity. While this does weaken the stringency, it helps to combat the opposite problem of a definition of need that is overly narrow. For instance, the reader will recall that in chapter 4, I only very perfunctorily considered violence as an alternative to legal action. Strictly speaking, however, if one has a conflict with another person, murdering the other person will end the conflict with that particular person (likely much quicker than the legal system), thereby rendering the legal system unnecessary. Nonetheless, for practical purposes, I believe it is reasonable to rule out murder without having to consider it every time one has a conflict.[49] There are a range of options like murder whose practical and/or moral costs are so high as to be safely excluded in our day-to-day consideration of need (where this line is however, is obviously up for debate and I believe one should generally err on the side of caution).[50] Consequently, it seems to me to strike the right balance to make *practical* necessity the standard for legal need. Although unlike the rest of the definition of normative legal need, this was not conceptually but practically determined and in that sense is most open to objection.

Fourthly, whereas the current definition of legal need is fundamentally subjective, being either a function of the knowledge and preference of the person with the need or a relevant expert, this new definition instead offers an objective criterion. That criterion is the deprivation of Z's that are inescapably required for X to persist as X. According to the literature explored in chapter 2, deprivation is an objective state and not a psychological one (though it might have psychological implications). This is shown clearly by the fact that death[51] deprives the dead of the capacity to experience and so of course the dead do not experience this deprivation. Consequently, X need not necessarily feel this deprivation for it to be the

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[49] This exclusion becomes more difficult in circumstances where the legal system is fundamentally broken, and/or violent revolution seems to be at least a potential option. These are exceptional cases worthy of some consideration but, unfortunately, I do not have the space to address them here.

[50] For a comedic treatment of this problem see Mitchell and Webb's "Kill the Poor", available on YouTube.

[51] I mean death in the absolute sense, setting aside for now the question of the immortality of the soul.

case. This means that it is possible for a person to know if X has a need even if X does not realize it. A non-exhaustive list of what Zs qualify for this criteria can be found at the end of chapter 2 (i.e. survival, ideal formation/grasping, and ideal pursuit). I will suggest in the third section of this chapter how this criteria could be operationalized.

Defining legal needs in this way reminds us that legal needs, while being distinct, are always embedded within a wider set of interconnected non-legal needs to maintain the entity as a whole. By the same token, it would require a much wider study than this one to settle all the normative needs for which the legal system is required (indeed an a priori list may be impossible), however, in chapter 4, we did identify some of the conflicts that the legal system is uniquely capable of preventing and resolving, and how this kind of conflict resolution and prevention contributes to many of the normative needs of humans identified in chapter 2. Now that we have defined normative legal needs, we can move on to the question of positive legal needs and demands.

Normative positive legal needs are the requirements that arise necessarily as a result of the legal system. That is, a legal system, in order for it to meet normative needs, requires certain resources, ranging from agents capable of use force to a record keeping mechanism for the standing rules. The legal system also creates certain needs (e.g. the need to be present at a trial to satisfy habeas corpus) that are required for the system to be able to meet normative legal needs. At the same time, other requirements that the legal system creates are purely a result of how the legal system happens to be arranged, i.e. its incidental features, without any necessary connection to the ultimate meeting of normative needs. Indeed, these features of the legal system may even be obstacles to meeting normative needs.

Because these aspects of the legal system are necessary *only* by virtue of an artificial arrangement, they are not, strictly speaking, needs. I have therefore called this third class of requirements "demands". This is a crucial distinction because these demands are often taken by critics as representative of all legal needs and as a result discredit the concept of legal needs as a whole. Nonetheless, it is possible for positive legal demands to be justifiable for other reasons besides need. For instance, a requirement of the system could be a highly cost-saving measure that in no way compromises the quality of the process. As we will now see, taken together, these three definitions are capable of answering all the problems raised for current notions of legal need.

Solutions to Chapter 1's Problems

In the first place, there is the question of law's artificiality. Broadly speaking, this includes the criticisms that legal need fails to address how law: abstracts situations out of the broader network of problems and needs; individualizes problems; creates purely artificial "needs". The second group of

requirements draw their impetus in the danger of an assessment of legal need taking for granted the limits of the current legal system. Broadly speaking, this category includes the criticisms that: a finding of legal need reinforces the current system and its service providers; and fails to recognize the need for whatever the system cannot already deliver. The third group of requirements has to do with legal needs claims as political judgements. This group includes the criticisms that legal need: hides the underlying assumption of a publically relevant standard of living to be provided for; hides that it is making an argument for a particular (often less effective) response; and can be paternalistic.

To begin, the legal system's artificiality can be problematic in numerous ways. Firstly, it abstracts problems out of their context, isolating certain details as legally relevant and ignoring many others that may be deeply relevant from other points of view (e.g. politically, socially, personally, etc.). Consequently, calling something a legal need risks failing to address and even further depriving other needs. To use Max-Neef's (1991) terminology, the legal system is charged by critics as being at best a singular satisfier (i.e. only satisfying one kind of need and remaining neutral on all others) and at worst an inhibiting satisfier (i.e. satisfying one kind of need to the detriment of others) (31-34). This is an important practical caution, but in fact actually serves to demonstrate the value of having a robust conception of legal need. Recall that our new definition directly addresses the fact that legal needs are part of a broader network of intertwined needs for X to persist as X. A full engagement with this understanding of legal needs precisely means challenging the artificial barriers that currently separate the legal system from other aspects of life. On the other hand, it preserves the irreplaceable aspects of the legal system's contribution by isolating what only the legal system can do. Consequently, it does not lose the focus of a legal needs analysis, which is always a danger in a more holistic analysis.

Secondly, critics charge that the legal system has a tendency to individualize problems and in so doing can fail to recognize certain wider social problems and exacerbate them. The reader will recall from discussions in chapter 2 that our renewed notion of need is thoroughly relational. That is, we recognize from the beginning that needs are satisfied *through relationships*, and that people need many kinds of relationships in and of themselves (both intimate and political). Insofar as a legal need puts the legal system in conversation with these relationships it is unlikely to be individualizing. But this does not address the full criticism of "individualizing" problems, since it leaves open the possibility that the legal system reduces collective problems to interpersonal ones. It does, however, provide some of the conceptual tools to make the shift within the legal system. If our legal thinking is capable of seeing the satisfaction of needs not in terms of individual entitlements, but in terms of the vast networks of relationships required to fulfill those needs, we are much less likely to see a stark divide in legal and social thinking.

Thirdly, one of the sharpest aspects of criticism against legal need is the charge that it is a purely artificial kind of need. If legal services are required, it is only because the courts and the legal profession say so. This is compounded by the charge that the concept of legal need reflects the interests of the legal profession, and only works to grow the power of the legal system. From these criticisms we determined that a renewed conception of legal need would have to be capable of criticizing as well as recommending the legal system, and specially in ways that respond to apparent legal need by negation (i.e. by getting rid of unnecessary requirements). That is, if the cost of a lawyer was really prohibitive, and legal representation was not actually necessary, although it was formally required, then a legal need analysis should not take the requirement for granted and simply recommend funding it, it should be able to recommend getting rid of the requirement. Based on our new definitions, we can both sharpen this criticism and respond to it.

Critics who are wary of these unnecessary barriers are expressing the concern that all legal needs are positive legal demands. The aim of chapter 4 was to show that there are at least some circumstances, though those circumstances are far more limited than has been discussed in the literature to date, in which the legal system is genuinely needed in the normative sense. While the legal system will itself create many positive legal needs, and it is almost exclusively these that the legal needs literature has so far discussed (i.e. legal services), some of these will be rationally connected to legal need in the normative sense and others will not. The critics, therefore, are right to say that there are such "false" needs, but wrong to say that all legal needs are of this kind.

From this discussion, it should be clear how the renewed conception of legal need is capable of not only recommending but criticizing the legal system. Firstly, where positive legal demands (e.g. excessive paperwork) are either not rationally connected to or actively prevent the satisfaction of normative legal needs (e.g. through prohibitively high filing costs), they ought to be done away with on the grounds of normative legal need. These sorts of changes, i.e. response to non-normative positive legal demands by negation, will surely not always be in favour of the legal profession. For instance, it might be found that other professions could provide the same service for less (e.g. paralegals), so the requirement that a lawyer provide the service is a non-normative positive legal demand, not a legal need after all. Secondly, it can call for reform which raises another part to which we now turn.

The second category of criticisms all express in different ways the idea that legal need tacitly assumes the current limitations of the legal system, whatever those might be. In the first place, there is a question of whether there can be a legal need for something the legal system cannot currently deliver. It should be clear from the new definition of normative legal need that the answer is yes. That is, Y (such as the legal system) is needed if and only if it is the only means to achieve Z. If it is defective in some way with regard to its ability to achieve Z, so long as that defect is incidental to what Y is and there remain no

other means to achieve Z, Y remains needed. This is illustrated by the character of the "drunk coach" in sports films. The team has a crucial coach or player, who is either highly talented, highly experienced or both, but he is disaffected in some way. The team needs him in order to win, and indeed, his overcoming of his personal problems in order to be available for his team is usually a critical turning point in the plot. Similarly, the concept of normative legal need is in no way constrained by what the legal system is currently capable of achieving, only by what it could achieve.[52] When faced with such limitations, normative legal needs provide a strong grounds as well as sense of direction for overcoming limitations in the same way that the dependence of the team provides strong motivation for the coach/player to overcome his alcohol problem.

Secondly, legal need as a concept has been accused of ignoring the underlying political causes of the legal problems that give rise to legal needs, and consequently renders a political problem a legal one. The renewed definition is quite the opposite. Since the standard of admitting a problem as giving rise to a normative legal need is that the legal system must be practically necessary, there can be no competition with political action. If political action could resolve the situation, and especially if it is required to resolve the situation, at most the normative legal need will form a part of the broader network of normative needs involved--in which case it would be wrong to deny the existence of legal need simply because there are political needs for precisely the same reason that it would be wrong for a finding of normative legal need to ignore political dimensions. Otherwise, if there was a finding that other courses of action, political or otherwise, would be sufficient to resolve the problem, then there could be no finding of a normative legal need in the first place. Consequently, one must engage with the prospect of a political solution to even determine whether there's a legal need.

If the attentive critic insists that their objection is not against how legal need ignores possible solutions, but rather ignores the *origins* of problems, then our reply must be something very different. If a child is abused at home and gets injured badly, many kinds of normative needs become manifest: security, medical, legal, etc. However, if they are brought to a doctor, as a result of an injury caused by abuse, while it may be relevant for the doctor to know how the medical need arose, and indeed they may take action to involve others (e.g. lawyers and social workers), it would be wrong to expect the medical system to address all these needs at once. Similarly, like doctors, under certain circumstances it may be appropriate for the legal actors to recognize the underlying political causes of certain normative legal needs, as it has actually done on numerous occasions with, for example, aboriginal offenders (R v.

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[52] In another way, it is still tied to what the current legal system can do in that it takes for granted certain essential features that distinguish it from alternatives. To the level of analysis we have achieved here, there is nothing to suggest that these features are unchangeable. Consequently, the renewed notion of legal need is not entirely free of this criticism in its most revolutionary form. On the other hand, for all intents and purposes, it hugely expands what can be considered a legal need.

Gladue, 1999: par. 93). However, it remains appropriate for the legal system to address the normative legal needs as its main concern.

Lastly, I will address all the criticisms that relate to legal needs claims as political judgements. Firstly, critics charge that needs claims hide an appeal to a standard of living for which authors seek public funds to uphold. These critics demand that the standard of living be rendered explicit and shown to be publically relevant (Lewis, 1973: 75-6; Johnsen, 1999: 210).

We can immediately remark that a finding of legal need does not necessarily entail any particular policy action, e.g. increased legal aid funding, although it might form a compelling grounds for a range of such actions. This unfortunately limiting connection between legal need and legal aid funding in the literature stems from a tacit identification of need with an occurrent need for legal services. This new definition recognizes dispositional need for the legal system as the primary form of legal need, which includes within it all the occurrent needs that entail a normative positive legal need for legal services. That is to say, it might be that since many studies, and particularly early on in the history of legal needs literature, have largely focused on those facing acute deprivation of legal services, the concept of legal need as a whole has been skewed towards the responsive, rather than the preventative sense in which all people might need the law. The renewed definition of legal need explicitly makes the connection to this wider range of ways of needing the legal system, and it has already been explained above how a much wider array of policy responses become possible.

With the above being said, critics are right to say that there is an implicit standard of living in *any* needs claim. Chapter 2 showed that the standard is the avoidance of serious harm as defined, in the case of humans, by the requirements common to the range of possible conceptions of flourishing (i.e. survival, ideal-formation, and ideal-pursuit). Although I have not offered a defense for this standard as publically relevant, I believe enough has been said to at least see how a compelling case could be made.

Secondly, critics charge (perhaps in the most oft-repeated argument) that legal need is not a description of facts but a *judgement* of which course of action is the best. This criticism stems from a fundamentally mistaken understanding of need. As I have often noted, a normative legal need exists exclusively where the legal system is the *only* (by default the best) means of avoiding the deprivation of things that are themselves normatively needed. A legal needs claim, therefore, is a statement of fact: serious harm cannot be avoided without recourse to the legal system. It is falsified if we are able to avoid serious harm with the help of anything other than the legal system or no solution is found and serious harm does not result. At their most prescriptive, legal needs claims are prescriptive not because they recommend a particular solution, but because they demand that the only possible solution be pursued.

Thirdly, critics have challenged normative legal need on the grounds that it is paternalistic and open to abuse (e.g. lawyers can manipulate vulnerable clients to extract exorbitant fees). Indeed, this is

one of the biggest dangers with needs claims in general. On this account, legal needs claims are political judgements in the sense that they reflect the expert's power over the person with the alleged need. I have addressed this risk in chapter 3, but I will add that relationships of need are indeed relationships of dependence and so are of necessity open to abuse. The power to help is always also the power to hurt, if only by withholding. However, that these relationships require both trust and safeguards for when abuse does take place is not a reason to reject these relationships altogether. In fact, by their very nature, for the same reason that these relationships are so liable for abuse, they cannot be rejected without serious harm. Consequently, while it is an important caution, if there is such a thing as normative legal need, which the discussion of Chapter 4 seems to suggest there is, then more is required to show that the risk of abuse and paternalism is so great and unavoidable as to outweigh the harm that would result from ignoring legal needs.[53]

Finally, critics, more practically, have sought a sense of priority in legal need, since it must be able to grapple with limited resources for diverse courses of action, including self-help, and political action. We might reply to this that this is an essentially practical not conceptual challenge. This is the case particularly because by their nature types of needs are insubstitutable. That is, I cannot tell you whether a legal need is more or less important than a political or social need, only that they accomplish different things. Nonetheless, a needs analysis helps to prioritize resources what is needed over what is merely desired (What David Wiggins (2005) calls the principle of limitation (33)). Insofar as this is the choice, therefore, the renewed conception of legal need offers a much more stringent criteria to determine this kind of priority.

In sum, I believe it is clear that all criticisms of legal need are either attributable to some misunderstanding of need, or, while being relevant criticisms, are not criticisms of the concept of legal need as such. Those that do touch legal need directly ought to be treated more as necessary cautions than grounds for rejecting legal need. The renewed conception of legal need not only addresses these concerns, but in many ways helps to answer the underlying problems they identify.

Major Criticisms of the Renewed Conception

I would like to close by addressing two of the most pressing criticisms that are likely to be made against this new conception of legal needs: it is too normative and it is impractical. There are of course other objections that could be raised, but, due to limited time and space, I cannot address them all here.

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[53] The critic might respond that they do not propose ignoring legal needs but treating them as rights or some other more empowering term, but chapter 3 indicated why such a response is insufficient.

To begin, some critics may reject any openly normative conception of need so as to avoid the "bias" of the researcher's "values" in what should be purely neutral research or policy analysis. The reader may recall that this was the problem with the original legal needs research, and ideally we want to move past those early mistakes. There is a crucial difference between the bias of the early research and the normativity of this renewed conception. The early research was flawed because it tacitly universalized a certain lawyer-centric, middle class conception of what the law is supposed to do.

It is my hope that my conception of legal need provides a clear and publically verifiable standard to test whether one is correct about a need. That is, one does not have a normative legal need if: either harm does not result from the deprivation or the deprivation can be avoided without recourse to law. In this way, there is accountability for researchers and policymakers who can appeal to a potentially replicable method in defending their understanding of what the legal system is needed for and when it is needed. But this raises the question what constitutes harm.

The only normative questions this renewed conception of legal need leaves open are (1) the identity of X (which will determine what constitutes harm), and (2) what requirements of that identity are publically relevant. The first question could collapse back into subjectivity, but in order to be publically relevant in a pluralistic society, the philosophy of needs provides the pragmatic limit, that is, what the pursuit of any possible ideals of life would require. That is to say, as explained earlier in this chapter, I avoid the assertion of thick ontological claims (including the denial of thick ontological claims in favour of some post-modern malleability) by examining the prerequisites for endorsing a subjective ideal. If the critic remains skeptical that any a priori theorization to determine what this consensus would be is going to reflect the hidden biases of theorists (for instance in the range of ideals they choose to consider), then even this normative question could be empirically verified. For instance, one could engage in a one-on-one or group interview with people from wide ranging backgrounds, ask them to articulate their ideal selves in as much detail as possible, and by carefully working backwards from this ideal to their birth determine what would be necessary for the attainment of this ideal.[54] By working backwards, I mean asking "what would have to have already been true for that to be the case?" Once one has compiled a sufficient number of these sorts of conversations, one has only to figure out what (if any) patterns of things, activities, experiences, etc. emerge as necessary.

The skeptic might have two additional concerns. Firstly, it might be too difficult to capture with any certainty all the subtle contingencies actually needed to achieve any ideal. Secondly, such an experiment might yield such a diversity as to have no actual overlap. In the first case, I would remind the skeptic that while ideally one could generate a list of sufficient criteria for the attainment of some ideal,

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[54] Indeed, I can even see how such an experiment might perform a useful public service!

the project's aim is still in large part accomplished so long as a significant, if non-exhaustive, list of necessary conditions are found. In the second case, it could be that nothing is found—in which case ontological arguments of what it means to be human will have to be made. I do suspect though that certain consistencies, if thin, such as food, protection, health, education, respect, etc. will emerge. Ultimately, these concerns, as well as my own hypotheses would need to be put to an empirical test. In short, though, while the renewed conception might appear normatively loaded, it presents clear mechanisms of accountability for researchers and policymakers each step of the way.

Critics may also wonder about whether such a conception could be operationalized. Additionally, they may be anxious to know where exactly this leaves current methodologies and the decades of accompanying data. I can think of no better way to respond to this kind of concern than to suggest exactly how I think it could be operationalized. As I see it, once the range of publically-relevant normative needs has been determined (through a process articulated above as well as public deliberation), legal needs research would happen in a three step process.

The first step would involve something like what was done in chapter 4. That is, a function of the legal system would be selected (e.g. providing minimum standard for society, protecting rights, etc.) and the legal system would be compared against other institutions and strategies that also have that function, or could at least serve it. It is important to note that the institutions and strategies will not always be the same. For instance, law's function in providing a minimum standard to society would not be compared to ADR and self-help, but would surely be compared to custom, religion, and morality.[55] As was done in chapter 4, each would qualify when the legal system is uniquely necessary (if at all). Now, in chapter 4, this was done in a highly abstract way, but there are surely comparative methodologies to make these comparisons, and certainly empirical ways to verify findings. For instance, I could simulate or look for an actual case that exhibits all of the characteristics that are supposed to render the legal system necessary and look for alternate solutions or see if it was resolved in an alternate way. If this process is completed for all the legal system's functions, it would establish the scope of normative legal needs.

In the second step, the researcher would analyze what positive legal needs one or more normative legal needs give rise to in different types cases, deductively determined to be good candidates because they typically demonstrate all the features that render a legal system necessary (e.g. child abuse). In the case of occurrent needs (i.e. the responsive function of the legal system), this would work by starting from

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[55] To clarify, there is a great diversity within each of these things, but just as with law, ADR, and political action, there are certain common features that make the grouping possible. For an example of what this means for custom, see H. L. A. Hart's "The Concept of Law" (1961/1972: 13). Obviously such a research endeavour would be huge and start out as merely suggestive. This could either be corrected by finding more suitably specific comparison for the context the policy-makers are operating in, i.e. look at what the practical options actually are for a person in their region (i.e. not religion but Lutheran church, not custom but Northern German rural custom, not morality but…). This would be no simple task, but on some level it seems like something like it would be unavoidable.

an exemplary case of deprivation (e.g. a child abuse scenario that demonstrates statistically conventional features) which has no "complications" from the perspective of the law. From this, one would develop a linear model for what is required for the legal system to fulfill its function (e.g. appearance 1, travel to appearance, filing of motion to appear, appearance 2…). The result would be a single path or "trunk". The researcher could then factor in many potential variables and complications, and draw the branches that result. A process like this would never be exhaustive as there are simply too many variables to consider, but it could go a long way to highlighting many of the positive legal needs and their relations.

Once the tree is drawn, the researcher must analyze which of these positive legal needs are (and are not) rationally connected to the ultimate function. This is done in two ways. Firstly, it is done by observing which branches make it to the top (i.e. the function) forming a rounded tree, and which go off in another direction indicate a deviation. Secondly, it is done by identifying which points could be otherwise or removed entirely without compromising meeting the need (i.e. chopping at the tree and seeing if it falls). There will be room for debate here, of course, but the visual aid of the model should focus the criteria of inclusion and exclusion with reference to the legal need (or needs) at stake. This will separate the normative positive needs from the non-normative positive needs, and will therefore be able to provide recommendations to either remove certain requirements or make them more flexible.

Finally, the third step will be most like the current survey and/or qualitative interview methodologies,[56] however, two crucial changes would be made. Firstly, currently, respondents are often asked to rate the "seriousness" of their problems (Genn, 2001: 19-20). More guidance can now be given as to what "seriousness" means, i.e. compromising of normative needs[57], such as security, nutrition, shelter, sense of self, etc. Secondly, follow-up questions would not be about what strategies the respondent actually used, but about whether their problem exhibited the features that were found in step one to necessitate a legal remedy. If a researcher worries that this might be overly reliant on theorization, then a "safety question" could be included at the end of each section asking if the respondent managed to fix the problem (defined specifically, though in plain language, as restoring one's normative need) without recourse to the legal system, and if so, how. If empirical research consistently found that a problem exhibited all features supposedly necessitating the legal system, but respondents repeatedly answered yes to this question, that would offer reason to return to step one. Findings from this step in combination with step two will be able to offer some estimates for the funding required to meet legal need both in combination with substantive legal reform strategies and without them. In all likelihood, the very

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[56] Economic proxy models could only really be used after some robust empirical research and analysis determines patterns in the presence of certain groups found to have a high level of normative legal need according to this third step.

[57] One would have to find a plain language way to express this. Ironically, though the word need is common, it might be a poor candidate for this since it is so widely misunderstood.

comparison will add fiscal evidence to the case for substantive cost-saving financial legal reform that does not undermine people's legal needs.

Of course, this is only a sketch of how such research could proceed, and I will admit there are many puzzles and some potentially serious methodological obstacles. However, I believe these are more easily attributable to my lack of empirical research experience than any shortcoming in the renewed conception. But to be clear, I do not offer this sketch to end a conversation but to start one. What I believe this sketch shows is that it is quite possible to operationalize these new definitions while integrating the tools that have been developed to date. Furthermore, this expanded range of research techniques offers the promise of greater precision as well as empirical self-correcting mechanisms in the conception of legal need, as well as a wider array of potential policy recommendations. In brief, I have set out to offer a systematic theorization of legal needs based on what needs are and when the legal system in particular is needed. I believe this greater conceptual clarity offers compelling answers to all the criticisms currently standing against legal needs. The reader may worry that this theoretical strength comes at the expense of practical usefulness. I have tried to show that it remains possible to use these definitions in studies that do generate some level of direction and scope for legal needs, if not positivistic certainty.

I would caution the reader that it does not seem to me appropriate to compare the costs and benefits of the current and new definitions of legal needs. Returning to the older understanding does not seem possible in light of all that has been said. Rather, one ought to consider the promise of the new definition against the weight of the task it presents. If it is found that the task is too great, then we must find a way to live with legal need without addressing it directly, which I have said is a risky proposal.

Legal need is of course interesting in its own right, but the reader will recall that I have only theorized legal need in order to get a clearer idea of what it would mean to have a system that meets these needs in a caring way. It is to this question that we now turn.

Part 2

Chapter 6: Can Institutions Care?

Now that we have seen what legal needs are, we can turn to the questions of whether [1] it is possible for a legal system to meet such needs in a caring way and [2] if so how. This chapter will be dedicated to the first question, while the next two will be dedicated to the second. To answer our questions, we need to know what care is, and whether care can happen in institutions, or, more controversially, whether institutions can themselves care. Together, I will call the former "institutional care" and the latter "The stronger sense of institutional care". Towards this end, I will first offer a brief overview of some of the major conceptions of care offered by such leading theorists as Joan Tronto, Nel Noddings, Diemut Bubeck, Virginia Held, and others. I will then summarize some key points in the care and institutions literature by asking two questions: firstly, is institutional care possible; secondly, is institutional care desirable. This will help to determine which, if any, conception or conceptions of care are compatible with a caring legal system,

To settle these questions, I will introduce the notion of an institutional need, of which legal needs are an example. While these sorts of needs may be a counter-paradigm case of needs, they are needs nonetheless, so if the primary purpose of care is the answering of needs, any genuinely complete conception of care will have to be compatible with these needs. But not all conceptions of care are necessarily suited to address these kinds of needs. As we will see, Joan Tronto's account of care seems to be the best suited. At the same time, I will be able to introduce some important innovations in how we ought to understand Tronto's conception of care as it relates to institutions.

Conceptions of Care

While the ethics of care have now been debated and elaborated for more than 30 years, most definitions have been accused of being "imprecise" or too wide (Held, 2005: 29). Consequently, I speak of conceptions rather than definitions. Each conception has had to address some basic questions about care, including: what is its goal; what, if any, disposition does it involve; what relationships can care take place in; what activities does it involve; and is care a virtue, a disposition, a practice or all of these things at once? In this section, I will offer some of the major positions on each of these questions.

It is fitting to begin with the question of care's goal since there is wide agreement that the goal of care is to meet the needs of the particular other (Noddings, 1984: 26; Ruddick, 1990: 18-19; Sevenhuijsen, 1998: 19-20; Bubeck, 2002: 160; Held, 2005: 10). Joan Tronto (1993), for instance, views

care as a practice with the ultimate end of "Providing an integrated, holistic way to meet concrete needs..." (109) of *all*.[58] Some theorists add additional qualifications. For instance, Diemut Bubeck (2002) argues it must be needs they cannot meet the needs by themselves or else one is not providing care but a service (163, 165; Held, 2005: 32), and it cannot be "social" needs, i.e. needs one cannot answer oneself purely because of how society is organized (165). Other theorists build much greater detail into which needs are relevant. Daniel Engster (2007), for instance, writes that the goal of care is to meet "biological needs,... basic capabilities, … (and) unnecessary or unwanted pain and suffering" (28-29). "Biological needs" entail everything a person needs to survive, develop, and function according to their particular circumstances and tastes (Engster, 2007: 26). Basic capabilities entail what is "...necessary for social functioning, where social functioning means being able to work and obtain the resources necessary for survival, being able to care for oneself and others, and having the opportunity to pursue some conception of the good life." (Engster, 2007: 26-27). Finally, relieving harm means alleviating suffering in the psychological sense (Engster, 2007: 28).

Nevertheless, agreement is not universal. Selma Sevenhuijsen (1998) contends that it is not care itself which has a set goal (e.g. responding to needs), but the actor, who can have many "less noble" goals and still be engaged in care (20-21). Furthermore, there is some disagreement as to whom or what can be the particular other. Bubeck (2002: 165) and Michael Slote (2007: 12) frame care as happening between people, but Tronto (1993: 103-4) and Sevenhuijsen (1998: 25) argue that non-human entities like animals and the environment can also be the legitimate recipients of care. It is safe to say, though, that among those who take meeting needs as the object of care, they mean normative needs.[59] This is crucial to my argument, since it means that most care theorists would likely agree that there is a major problem if care is conceptualized in a way that excludes meeting certain normative needs.

What particular dispositions characterizes care and what importance do moral dispositions play in the provision of good care? Answers to this question range from assigning a central place to disposition (e.g. Noddings) to denying it any place at all (e.g. Bubeck). Nel Noddings, viewing care as subjective (1984: 12), is set apart from most care theorists with some notable exceptions (e.g. Michael Slote) by the central place she assigns to moral disposition[60] (Held, 2005: 31). She calls the characteristic disposition of

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[58] As opposed to just some people viewed as particularly dependent (Tronto & White, 2004). This is relevant because it mirrors the erroneous focus in the legal needs literature on those with unmet occurrent needs.

[59] The reader will recall that not all needs demand a moral response (e.g. I need to add sugar to make a cake). Need in this case is a purely descriptive concept. Normative needs, on the other hand, convey both the idea of necessity in the relation between the thing that needs to the thing needed, and the moral importance of preserving the thing with the need.

[60] It might be said that for others, such as Tronto, "quality" occupies a similar place to disposition. After all, as will be discussed, Tronto does expect good caregivers to be attentive. I believe, but do not have the space to argue here, that disposition, especially as Noddings uses it, suggests a certain phenomenological meaning, whereas Tronto's

care "engrossment". Engrossment has two parts, receptivity and motivational displacement. We are firstly receptive and attentive to the other's nature, way of life, needs, and desires to the point that, as Kierkegaard puts it, we experience the other's reality as a possibility for ourselves (Noddings, 1984, 2002: 14). At the same time, though separately[61], we leave behind our own interest and take on the protection and enhancement of their interest and welfare as the situation may dictate (Noddings, 2002: 20, 23). Their goals become our goals. Noddings (2002) calls this "motivational displacement" (17). When these feelings do not arise "naturally" they can be imitated and sustained by asking ourselves what we would do if we were at our best, which she calls "ethical caring" (Noddings, 2002: 29-30).

Slote qualifies care as empathic care. "...Empathy involves having the feelings of another (involuntarily) aroused in ourselves, as when we see another person in pain" and is a crucial source of altruistic care (Slote, 2007: 13, 15). Engster (2007) characterizes these positions and positions like it as "virtue-based" definitions, since they focus on the inner-state of the caregiver (21). Others, such as Sara Ruddick (1990: 69) and Sevenhuijsen (1998: 22), view the disposition of care as necessarily more ambivalent for the caregiver. Yet others, such as Tronto (1993), while admitting it is possible to speak of a caring disposition see it as dangerous and susceptible to romanticization, as well as overemphasizing the caregiver above the receiver (118). Still others, such as Bubeck, deny any place to disposition whatsoever (Held, 2005: 32). Virginia Held (2005) includes certain attitudes as being part of the practice of care, though she also echoes the view that the place of feelings in care has come to be doubted (30, 42). In sum, whether care requires a particular disposition and what disposition it requires are some of the most contested questions in the literature.

Views on what relationships care can take place in varies from a limited set of relationships characterized by intense emotional investment to any relationship in which a need is being met. For Noddings (2002) care is relational insofar as this state of engrossment characterizes the disposition of the one-caring for the one-cared-for, and the cared-for contributes "something essential" without it being exactly like the contribution of the carer (e.g.doctor and patient) (18). Obviously not every relationship meets this qualification, and arguably it is a very limited number of relationships that could meet this emotional demand. Held (2005) assigns a special expressive function to care as a practice that is not as clear in other interpretations: "Practices of care should express the caring relations that bring persons together" (42). Indeed, Held (2005) asserts, "It is the relatedness of human beings, built and rebuilt, that the ethics of care is being developed to try to understand, evaluate, and guide" (30). As we will see, this expressive function has special significance in the legal system.

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attentiveness is more behavioural. Obviously this kind of distinction is highly reductive and in need of much more defence than I can offer here, but as a hypothesis, it at least makes clear why I am inclined to keep them separate.

[61] It is important to separate the two since it is possible to see a person's project and be (rightly or wrongly) repulsed by it such that you do not or cannot displace your motivation to support it (Noddings, 2002: 18).

Furthermore, it is possible to maintain this view of care without limiting care to *immediate* relations. Slote and Held have argued that it is possible to maintain a caring disposition towards groups of people one has never met before (Slote, 2007: 11). This is a crucial point of contention to which we will return. Ruddick (1990) uses the special relationship of mother-child to model a wide array of caring relationships that do not necessarily have the same emotional features. For Bubeck (2002), on the other hand, while care is an irreducibly social action (i.e. it is necessarily between two or more people) there is no relational demand beyond face-to-face interaction (163, 167). Sevenhuijsen (1998) writes that there are a huge range of contexts (and therefore potential relationships) within which care takes place (e.g. social services, education, and political deliberation) (22).

What activity does "caring" consist in? It is basically universally accepted that caring activity begins with attentiveness to the needs/vulnerabilities of the other (Ruddick, 1990: 18-19; Tronto, 1993: 106, 128; Sevenhuijsen, 1998: 19-20; Engster, 2007: 30). Beyond this attentiveness, for those like Noddings who emphasize disposition, the answer is whatever activity that stems from a caring disposition (1984: 10; 2002: 29-30). Others, such as Ruddick (1990: 19-21), as has been mentioned, model caring activity or take inspiration from on the work of mothering (whether done by women or men). This practice consists in three things: preservative love, nurturing, and training (Ruddick, 1990: 19-21). Regarding the first, she writes, "Preserving the lives of children is the central, constitutive, invariant aim of maternal practice." (Ruddick, 1990: 19). The second involves supplementing the first with what is required for the emotional and intellectual growth of the child (Ruddick, 1990: 19). The last involves making the child acceptable to a relevant group standard (e.g. the cultural, national, or religious community) (Ruddick, 1990: 21). Engster (2007) calls this the maternalist position (23). The maternalist position has the effect of restricting care to activities we might typically think of care, however, one need not be a maternalist to do this. It is possible to restrict care to paradigm cases of care (e.g. feeding, cleaning, teaching, etc.) without taking mothering as the standard. For instance, Bubeck (2002: 164) and Engster (2007: 24) explicitly limit their definitions of care to what we typically think of as care, but explicitly reject mothering as the appropriate standard. Engster (2007), for example, rejects the maternalist conception in particular as too culturally-specific and inappropriate as a model for the wide range of our other relationships in favour of the "generalist" position held by such thinkers as Tronto, Bubeck, and Held (23).

The most thorough articulation of the generalist position is probably offered by Tronto. Quoting her work with Berenice Fisher, Tronto (1993) explains:

> "On the most general level, we suggest that caring be viewed as a species activity that
> includes everything that we do to maintain, continue, and repair our "world" so that we
> can live in it as well as possible. That world includes our bodies, our selves, and our

environment, all of which we seek to interweave in a complex, life-sustaining web."
(103).

Similarly, Sevenhuijsen (1998) concludes that far from being a limited set of activities with dependent people (such as children, the sick, and the elderly), "...practically all human behaviour carries aspects or dimensions of care…" (23). While there might be a wide breadth of activities, Tronto offers considerable specificity on the underlying process all these activities have in common if they are to be "good caring". Firstly, there is "caring about", as was previously mentioned, this involves attentiveness to (normative[62]) needs and to some extent assuming the other's point of view (Tronto, 1993: 106, 128). Secondly, there is "taking care of" which involves taking responsibility for responding to the needs identified and determining how best to respond to them (Tronto, 1993: 108). At the root of responsibility is "response" as opposed to, for example, obligation, which to some might imply that morality stems from allegiance to some predetermined, impersonal, and abstract code rather than the person in need. Consequently, care involves far more flexibility and variability than a pre-existing established set of rule-dictated activities would seem to allow (Tronto, 1993: 132). Thirdly, there is the actual care-giving which involves the physical and direct meeting of needs (Tronto, 1993: 107). This requires the competence to actually carry out the required action (Tronto, 1993: 133-34). Fourthly, there is the phase of care-receiving, which consists of some kind of positive effect that indicates that the needs assessment and the activity that followed was correct (Tronto, 1993: 108). Finally, more recently Tronto (2010) has added "caring with" to express the fact that genuine care is democratic (168). This fifth element is also important because it helps to address the potential for conflict Tronto sees as inherent in the various phases and between caregiver and recipient, particularly when there are multiple people involved in the care (e.g. a doctor and a nurse) (Tronto, 1993: 109). Additionally, it builds a resistance to the risk of paternalism and parochialism by insisting that genuine care is participatory, and self-critical, at least in the sense that there is a duty to reflect on the division of caring responsibility (Tronto, 2013: 140-141). Furthermore, democratic care must be inclusive and not merely in the formal sense (Tronto, 2013: 142).[63]

Lastly, underpinning all these questions (i.e. what is the place of disposition or relationships, what is the relevant standard, etc.) is the question of whether care is better understood as a virtue or practice. While some have said these two positions are not in principle opposed to one another (e.g. some view virtue as consisting in practice), when a theorist expresses that they take one position or another it is usually to place a certain emphasis either on or away from the actor (Engster, 2007: 21). In fact, both positions agree that care involves virtue, the difference is whether care itself is the virtue or requires

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[62] I say normative needs because she specifies that it is needs that call for a response, not because she offers the features of need I laid out in chapter 2.

[63] While I will engage with these concerns, for the most part my discussion of Tronto's conception of care will focus exclusively on the four phases of her earlier work.

certain virtues to practice well. The practice-based conception of care was introduced by Sara Ruddick (1990). Like any other practice (or discipline), care has its own set of virtues, criteria for success and failure, and methods, without all practitioners possessing these things (Ruddick, 1990: 26). Tronto (1993), Bubeck (2002), and Engster (2007) agree that it is a practice. Selma Sevenhuijsen (1998) echoes the designation of care as a practice, adding the qualifier "social" (19, 20). Quoting Frazer & Lacey, she emphasizes that a social practice is "'a human action which is socially based and organised, underpinned by formal or informal institutions, usually a combination of these', and directed by formal and informal rules, habits, interpretive conventions and by implicit or explicit normative frameworks subject to contest by various actors" (Sevenhuijsen, 1998: 20-21). These views of what practice means represent both an important continuation and shift from previous practice-based theories like those of Ruddick and Tronto. Virginia Held (2005) reiterates this view of care as practice, but with some more important differences, including building certain attitudes into practice (30, 42) One important difference among practice-based thinkers is that where Bubeck (2002) and Sevenhuijsen (1998: 22) try to make care primarily or exclusively a descriptive concept, Tronto (1993: 110) and Held (2005: 42) treat it as a normative standard or at least say it cannot be divorced from its prescriptive features. The virtues (or for some like Tronto the functionally close term "moral qualities") involved in the practice of care include attentiveness, responsibility, competence, plurality, and/or respect (Tronto, 1993: 104-106; sander-staudt, 2006: 23; Engster, 2007: 30-31; Tronto, 2010).

The view that care itself is a virtue has been around since the very beginning of the ethics of care (Sander-Staudt, 2006: 21). On Noddings' (2002) account, care as a virtue consists in a person regularly establishing caring relations and maintaining them over time (19). Other theorists who view care as a virtue do not emphasize the same things but emphasize "the goodness of care as a motive and end, and the importance of relationships to a virtuous and flourishing life" (Sander-Staudt, 2006: 22). In all cases, the focus is on the actor demonstrating certain qualities (e.g. certain motivations) (Slote, 1998: 172). Theorists who view care as a virtue differ on whether they take consequences into account; some exclusively look at care as a motivation, while others consider it a kind of competence (Sander-Staudt, 2006: 23). Slote and McLaren, for example, argue for the view that care ought to be extended to institutions through one's politics and principles, while others keep the virtue within the context of immediate relations (Sander-Staudt, 2006: 25).

In sum, on the question of goals, while most theorists agree that it is meeting normative needs, different theorists qualify normative needs in different ways, focusing on its non-contingent, capabilities, or other aspects, while others say the goal is entirely up to the actor. On the question of what dispositions is involved in care, theorists range from denying it any role, to claiming it can be or is necessarily ambivalent, to requiring a profound level of engrossment. On the question of what activities it consists in,

theorists range from setting out a limited set of paradigmatic activities, to requiring face-to-face interaction and the need for another, to arguing practically everything has a caring aspect. On the question of relationality, there seems to be universal agreement that care takes place within relationships (even if it is a relationship with oneself), but whereas some limit these relationships to a certain subset of "caring" relationships, characterized by a disposition, face-to-face interaction, or something else, others view the relevant relationships as broadly as possible, restricted not even to people. On the question of whether care is a practice or virtue, the practical difference seems to be an emphasis on whether one assesses care by looking at the activity or the actors. With these varied conceptions of care in mind, we can now consider the question of whether care is possible within or even by institutions.

Is Institutional Care Possible?

Early work, such as that of Noddings (although she later nuanced her position) suggested that good care was impossible in a large, institutional context. Although this view has now been roundly rejected by many care theorists (Held, 2005: 16-17), I believe it is important to revisit it to identify the barriers to care inherent in institutions. In order to emphasize how the obstacles to care are supposedly inherent in institutions, it will be useful to locate the various reasons given in the essential features of modern institutions. For purely heuristic purposes, I will do this by structuring the reasons according to Max Weber's (1922/1968) list of features of a bureaucracy. This is helpful because it locates an otherwise long list of institutional barriers to care in a short list of supposedly essential features of institutions. In this way, it builds in the view that the institutional barriers are inevitable into the very exposition of those barriers. They are (956-958):

- Bureaucracies operate according to official jurisdictions, in which each role is defined and limited precisely by rules…
- "The principles of office hierarchy and of channels of appeal stipulate a clearly established system of super- and sub-ordination…"
- ...The office resources are kept strictly separate from the personal resources of the managers and employees;
- Office management is a specialized role;
- The official activity of the organization takes the full working capacity of the employee and is the primary task;
- The management of the organization follows general, stable and exhaustive rules...

I will refer to these respectively as the features of: jurisdiction, hierarchy, office-personal split, specialized management, immersive task, and exhaustive rules. Each one of these features raises its own barriers, and taken together, the institution that emerges poses distinctive barriers to care.

The fact that bureaucrats must operate according to a predetermined jurisdiction (i.e. their job description) poses many problems for care according to this literature. Firstly, it risks transforming care

from contextual responsiveness to abstract problem-solving that aims for the rationally efficient attainment of predetermined goals (Noddings, 1984: 26; Walton, 1989: 133). That is, rather than trying to meet your need, I am simply trying to reach a certain target of which you form a part. While there might be some superficial similarity between that target and your need, a predetermined target is too inflexible to truly reflect the needs of so many diverse people. Furthermore, the respect and dignity involved in good care are "...too much a matter of human art to be made a consistent matter of administrative routine" (Ignatieff, 1985: 16). So not only could the administrative goal never truly reflect the need, the administrative procedure could never truly reflect the practice of care. On the one hand you cannot "force" workers to be caring. On the other hand, you could never officially specify all the little things that make care good care. Secondly, the bureaucrat must fulfill this mandate regardless of whatever other motivation, and so this work is seldom if ever motivated by personal relationships (Bubeck, 1995: 219). That is, I may help you a great deal, but I can never do that because you are important to me, only because it is my job.

Thirdly, hierarchy, according to some theorists, in itself poses a barrier to care (Walton, 1989: 134). Additionally, the spirit of the office-personal split[64] means that institutional workers are significantly restricted in personalizing their work, e.g. talking to a client about one's weekend. Of course, part of their "self-care" may be maintaining this split. The problem is not the split in and of itself but the way rigidly enforcing the split removes valuable discretion from the would-be caregiver to, for example, share things that might have no direct purpose but simply foster a better relationship with the client. Specialized management leads to a situation where those making decisions are not necessarily those with the direct experience of the dependents, consequently, they may totally miss what is needed (i.e. the caring about, caring for, and caregiving are all split up) or even cause great harm (Frost, 2003: 38; Tronto, 1993: 109). This is perhaps the most notorious element of bureaucracies.[65] The immersive nature of the bureaucratic task means that tasks are in principle never done within the context of a broader relationship, only the office work (Bubeck, 1995: 222). Finally, the very presence of exhaustive rules, and their correlative rights (taken in the broad sense as administratively governed entitlements), denote an absence of care. As Judges put it "Rights are thus care's substitute in impersonal relations, and reliance on rights evidences care's absence." (Judges, 1994-95: 1382). Furthermore, insofar as they are exhaustive they

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[64] The principle refers specifically to resources, but I believe it is fair to say that there is a broader underlying principle of separation between work and personal life. I believe this interpretive leniency is justified since I am only using this specific list for heuristic purposes.

[65] Indeed, in my casual conversation with care professionals of various kinds, from doctors to social workers, I have been struck by how consistently they identify the main problem in their field as "the people making the policy are not in the field." In my experience this reason will be given even before "There isn't enough funding".

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demand perfect impartiality, which leaves no room for the kind of partial treatment that care requires (Campbell-Brown, 1997: 279).

Taken as a whole, institutions present three more crucial barriers to care. Firstly, they are coercive (Held, 2005; 139). Secondly, it is not emotionally possible to care for as many people as the institutional caregiver would have to care for (Engster, 2004: 114). Finally, institutions themselves certainly cannot feel and so they cannot enter into relations of care (Noddings, 2015). In sum, although, as I have written, this position has been roundly rejected, it poses a set of important challenges to advocates of institutional care that would be dangerous to take for granted.

Perhaps the first and most standard element of the reply to this position has been to say that if care really was effectively confined to the private sphere by largely ruling out care within institutions it would be disastrous for the societal aspirations of the ethics of care as a feminist ethic (Campbell-Brown, 1997: 273; Engster, 2004: 116). This is an important consideration since it reminds us what is at stake in resisting this restrictive view of care, but we must be careful to remember that this is not a refutation in and of itself. The first and most important reply we can offer is that in order for all these barriers to be *categorical* barriers, the features of bureaucracy from which they derive must be necessary and absolute. But, of course, most bureaucracies are not Weber's ideal-type. Indeed, such an organization may never actually exist, though it is certainly possible to be closer or farther away from this standard. In fact, the limited empirical research that is out there suggests that there is an observable ethic of care in some large institutions like the Swedish Social Insurance Agency (Stensota, 2010). Accordingly, while all these barriers may be genuine problems, they are not categorical problems since they can be present in an organization to a greater or lesser extent.

In response to the view that care is rendered impossible by the coercive nature of institutions, we can point out that, according to Noddings, while ideal homes resist cruelty, they also use coercion (2002: 227). This use of coercion is, however, accompanied by explanation and negotiation that transfers power to the dependent one while always acknowledging interdependence (Noddings, 2002: 227-228). There is potentially even greater opportunity in institutions to have such open discussions since coercion must be planned for and dealt with explicitly (Tronto, 2010: 166), and there is the opportunity for administrative tools like review boards (Noddings, 2002: 232), which are functionally unavailable in the private sphere. Even if such best practices do not currently go on in most, or even many, institutions, we must remember that they do not go on in all homes either.

To respond to the arguments against institutional care on the grounds of the barriers it poses to emotional engagement, it will be useful to call attention to the underlying conceptions of care such arguments take for granted. In particular, these last arguments make plain a theme running throughout the view that institutional care is impossible, namely, care exclusively takes place within well-developed

personal relationships. This position has two parts: care is constituted by a certain disposition; and care requires personal knowledge only attainable through such relationships. Taken together these positions are more characteristic of Noddings, and the second position seems compatible with a view of care like Ruddick's. We will deal with the first view here, and the second in the next section. In response to the first view, Bubeck (1995) replies:

> The absence of relatedness, however, does not necessarily imply the absence of any impulse to act on behalf of others who are (more or less) unknown strangers. It seems to me that attentiveness and willingness to respond with care to those in need—the two main requirements in a carer—are dispositions which, if they are developed in a person, will make her care *generally*. (224)

Bubeck essentially severs the link between a particular kind of relational context for care and its dispositional demands. That is, someone who is caring is motivationally prepared to receive dependent people. This kind of disposition is not only compatible with a predetermined jurisdiction to receive dependent strangers, but we would expect someone with this kind of caring disposition to seek out this kind of jurisdiction. Imagine, if you will, the person who, upon hearing of a disaster, runs to the disaster site to hand out water and blankets. If that is caring, and, all else being equal, it certainly seems to be, what radically changes if instead she applies for a job at a disaster relief organization? One might say the motivation of payment, but there are two responses to this. Firstly, as long as the distinguishing feature is not the pre-existence of some emotionally thick relationship with the disaster victims, then the absence of such relationships is not a barrier for the possibility of institutional care. Secondly, we can ask why someone would choose to earn a living as a disaster worker as opposed to an investment broker. Of course, there may be *many* reasons, which correspond well to Sevenhuijsen's view that care can involve several more or less noble goals. Nonetheless, if one acknowledges that even a few of the possible motivations for taking such a job may be caring, then one must admit that institutions are not *per se* a barrier to care, even if one has thick dispositional requirements. Lastly, I will address the argument that institutions themselves cannot enter into relationships in the final section of this chapter.

Is Institutional Care Desirable?

Even if all the above refutations are accepted, all they show is that institutional care is possible but not that it is desirable. Those who previously insisted it was impossible can still argue that, for all the reasons stated above, institutional care is going to be, at best, a constrained and lesser version of private care. Or, said differently, that institutional care, at best, approximates (or enables others to undertake) private care (Noddings, 2002: 231). Beyond these arguments, there are yet more reasons to doubt the desirability of institutional care. Firstly, what will count as good care for one will not necessarily count as good care for another, therefore care cannot be generalized in a way that would make it susceptible to

articulation through formal policies and rules (Engster, 2005: 115). Because institutions are as large as they are, the kind of negotiation of needs that has to go on for good care is just not possible, and so needs *have to* be taken for granted on some level to the detriment of the care delivered (Tronto, 2010: 164). Furthermore, there is of necessity inadequate time and resources to form the kind of individualized knowledge of a person than comes with private relationships (Bubeck, 1995: 219).

The result is that, once one becomes aware of idiosyncracies, the institutional caregiver has to deviate from their original assignment. This may be why, traditionally, responsiveness has been thought to reflect a compromise in the public servant's work, because it involves moving away from what one was originally assigned to do, at best because of political interference and at worst corruption (Stivers, 1994: 364). This aversion to responsiveness consequently delegitimizes sensitivity to that which could not have been predicted or planned for at the outset. As such, the public servant is significantly undermined in his or her ability to take responsibility beyond simply adhering to, as has been mentioned, inflexible, formal obligation. This seriously inhibits the possibility of good care as conceptualized by those like Tronto who argue taking responsibility has a central importance.

Even where care is possible it will be in spite of the institutional structure, which is often experienced as a barrier by institutional care providers (Frost, 2003: 38; Nordhaug & Nordtvedt, 2011). This is not surprising since, at its best, the values central to public administration (like neutrality) are based on a liberal conception of adjudication between competing individuals rather than discovery of mutual needs (Stivers, 1991: 54). And "So long as impartiality is held as the ideal, we will continue to tinker with rules and penalties in the hope that reality can be made congruent with the theoretical ideal" (Noddings, 2002: 232). The result, among other things, is that institutional care providers are not given the discretion to balance the needs of their current patients against all the other potential demands on the resources they use (Nordhaug & Nortvedt, 2011: 5). All these problems are only compounded by chronic underfunding and undervaluing of institutional care providers (Bubeck, 1995: 227).

Whether true of every institution[66], these arguments reflect some of the most fundamental issues facing institutional care today. The question we must ask ourselves is what posture will we take towards them. Rather than argue that institutional care does in fact live up to the standard of private care, defenders of institutional care have argued that private care, which usually means familial care, does not offer the relevant standard by which to judge institutional care, but rather both ought to be judged against a common underlying standard (Tronto, 2010: 159). As in the previous section, the underlying conception of care expressed by the family, and particularly the maternal, relation is the one characterized by

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[66] Indeed, it is possible to challenge many of these arguments on empirical grounds. Given my limited space, and the level of generality at which this discussion is operating, I believe it would be more effective to argue for a way to approach any and all of these problems, then address them one at a time.

emotionally thick relationships with history in which the caregiver has special personal knowledge of the cared for. As we saw earlier, this conception of care is not shared by all care theorists. In order to determine then what underlying standard transcends the family context, it would be best to begin with the feature of care we saw was most consistently agreed on, namely, its goal being the meeting of needs. The question then becomes *whether needs are always best served in such emotionally-invested relationships with an intense level of personal knowledge*. If they are, then there is strong logical coherence in familial care as the ideal. If needs are *not best* served, but *still served*, by such relationships, there is a tension in the familial standard of care, in that sometimes it exemplifies the best kind of care and sometimes it does not. If certain needs categorically cannot be served by such relationships, then there is a contradiction in treating the familial standard of care as the universal standard of care.

Arguing there is a major tension, the defenders of institutional care have reminded the critics that families face the twin and widespread dangers of abuse and incompetence (Bubeck, 1995: 226). In the case of abusive relationships, the potentially deep-seated, emotional habits and patterns of the relationship are not only not conducive but an active barrier to care (Bubeck, 1995: 226). Indeed, one crucial move feminists have made to respond to domestic abuse has been to drag it out into public view. This strategy would only make sense if there were thought to be better accountability mechanisms in the public sphere. Because institutions have conflicting purposes, power arrangements, and strategies/policies on how to treat the particularity of users, they have to make explicit what families often take for granted in care, and this makes them particularly well suited to dealing with the problem of abuse in ways that relationships on their own clearly are not (Tronto, 2010: 160, 162). The result is that personal institutions may in an important subset of cases be better equipped to meet needs than private care.

But it could still be argued that while intimate relations are not sufficient for good care, the personalized knowledge that comes with them remains necessary. Regarding this point, it must be admitted that care, as a practice, involves both a mix of highly particular and very general knowledge (Tronto, 1993: 110). For instance, I may know which foods are hard for you to eat, but I also need to know what makes for nutritious food. Insofar as we trust the training of institutional care providers, there is every reason to think that in many important cases (e.g. medicine and nutrition) they will have an advantage over private caregivers (Bubeck, 1995: 227). We would therefore be mistaken in identifying the ideal of care with private care, rather the ideal is a combination. Furthermore, Tronto (2010) has argued that institutions have the advantage of having to explicitly question and address the background conditions of good familial care, which she argues are: the purpose of care, a recognition of power relations, and the need for pluralistic, particular tailoring of care to meet individuals' needs.

More fundamentally, the private care modelled on the family works to reproduce patriarchal structures of power (Tronto, 2010). The current way of organizing care, i.e. privatizing much of it, works

to perpetuate the myth of self-sufficiency of public men whose needs are really being taken care of at home (Tronto & White, 2004: 426). Care is rendered invisible and thus devalued. Furthermore, without institutional change that enables and strongly encourages men to take on caring responsibilities, it is difficult to see how men would take on the responsibilities for care and develop the capabilities to do so given the current slow pace of this redistribution (Folbre, 2001: 4, 21). Additionally, if we think of children as a public good, there is almost an imperative to make this kind of shift through or to institutions (Folbre, 2001: 109). Caring institutions are, therefore, a vital mechanism for ensuring genuinely democratic citizenship and counteracting deepening inequalities (Tronto, 2013).

Taken together, I believe these arguments are as strong as the tension strategy can be. Private care is not the most effective way of meeting all needs. One may think then that the second approach is sufficient to defend institutional care, but we can make the case even more forcefully by arguing that there are some needs private care categorically cannot address. This is an important question because the answer could dictate if and when public efforts should be directed towards more robust institutional care and/or reform and support of private care, in what combination and to what extent. A clear practical example of this sort of debate is approaching childcare through primarily daycare, homecare, flexible-work, work-leave policies, or some combination of all these policies (Bartlett et al., 2013: 541). I want to suggest that in many, if not most, cases the two are interchangeable, but there are certain needs that are categorically public (i.e. require institutions) and some that are categorically private (i.e. cannot be met by institutions). In the remainder of this chapter I will explain the features of categorically public needs (or institutional needs), and suggest what this means for how we conceptualize care.

When is Institutional Care Needed?

Since so many needs are met in institutions, it will be useful to think of institutional needs as existing on a spectrum from the categorically private to the categorically institutional. Categorically private needs are needs that cannot be satisfied by an institution (Gheaus, 2009). We already implicitly discussed such examples when we discussed the limits of rights in chapter 3. These needs include love and friendship. There are also needs that could be satisfied by (or through) an institution but are better satisfied privately. Because the distinction is not categorical, these needs will depend on context, but take for example someone who needs to talk to someone so they call a distress hotline. The conversation may in some sense satisfy their need, but many would agree that it would be better to have significant private relations of some kind who are adequately sensitive, trustworthy, supportive, and approachable enough to do this (assuming no special expertise is required). There are also needs that could be filled either publicly or privately and are sometimes served better by one or the other. The need for food is a good example of this. Under certain conditions the need for nutrition is better met at home, for example, if no accessible

institution meets your dietary restrictions. Under other conditions, it is better met by an institution, for example, if there is a population that lacks private resources or local food stocks. The need itself could be and is best satisfied either way given the right circumstances.

There are also needs that are consistently better served by an institution. This type of need can easily be confused with an institutional need, and, as it happens, it includes many of the focus areas of the ethics of care literature. Examples of this kind of need include education and medical care. Schools and hospitals can both deliver a quality of service that simply could not be achieved without the massive pooling of resources. However, these needs are not necessarily *categorically* institutional needs because it remains entirely possible in many cases to have these needs satisfied by a private individual (e.g. teaching your child to read). To highlight the difference between this kind of need and an institutional need, it may be helpful to contrast two medical problems: a broken bone and polio. It is quite likely that a medical professional supported by the infrastructure of the hospital will do a better job of fixing a broken bone than a private individual without such support, but it remains entirely possible for a competent private individual outside of an institutional context to address this need as well (e.g. Survivor Man). Polio, on the other hand, is a problem so complex that without the collective and systematic effort of the medical establishment it could not be cured. That is not to say that other aspects of caring for someone with polio could not be tended to privately. Many needs arise from the symptoms of such illnesses that can be alleviated, but the root need raised by the occurrence of polio *requires* an institutional response. That is, an institution was and continues to be necessary but not sufficient for addressing the complex of needs brought about by polio.

The reader will recall from Chapter 5 that one of the crucial transformations in defining legal need was shifting from requiring the services *of a lawyer* to needing the legal system *as a whole*. This characteristic of requiring a system rather than any particular individual, or even any particular individual in a system, is the defining feature of a categorically institutional need. This has a rather important implication for how we conceptualize care. When we ask the question "Who meets an institutional need?" (i.e. who is the caregiver), we cannot say an individual. Suppose, for example, that an unconstitutional law was passed that deprives a particularly vulnerable group of something vital to them (i.e. a normative need). This vulnerable group does not have the resources, social clout or support to get the law repealed through democratic processes. Consequently, they turn to the Court. The law is struck down and what was vital to them is restored to them. Who met their need? It might be tempting to say that the judge met their need, but this is theoretically, not to mention empirically, suspect, since the judge may have rendered a ruling, but then a Parliament must respect the ruling and rescind the law, and failing that a police force, a democratic population that respects the Court, or some other body must ensure there are significant deterrents to ignoring the judge's ruling, as well as many court staff to facilitate the process. Not to

mention that the judge's ruling is not merely supported by (as with the nurse fixing the broken bone) but constituted by the institutional environment in which it occurs. Such a ruling might make interesting and persuasive reading, but privately could not meet the need in the way it does publicly. We must conclude that it is no agent of the Court, but the Court itself that meets the institutional need.

Two things might be objected at this point: firstly, institutional needs, and legal needs in particular, are socially-specific artificial needs (and so not really needs at all); secondly, there is a logical difference between polio and legal needs that I did not account for, namely, that one requires an institution and the other is *constituted by* an institution. In the first case, it is important not to confuse institutions with the large bureaucratic organizations of today. Those are indeed historically particular, and there are other ways of life that can get along just fine without them. Although it is outside of the scope of this study to thoroughly argue for a definition of "institution", for now I believe it is sufficient to work with one recent plausible definition: "integrated systems of rules that structure social interactions" (Hodgson, 2006). What also needs to be pointed out is that whatever institutions are, they are surely not identical to an individual human being. With this definition, we can see contemporary legal institutions as a particular answer to needs for, say, safety, that could never be answered unilaterally, because such behaviour would simply be to initiate a war between unmediated parties. As such, there are corresponding institutions in vastly different societies over much of history that have performed this function. The reader will recall from chapter 2 that this is indicative of a need, i.e. it emerges in all circumstances, but must always emerge in some one set of circumstances.

This brings us to the second problem. There does seem to be something crucially different between law and polio vaccines. In the one case the answer is the institution, whereas in the other the institution produces materials (e.g. serums, syringes, etc.) that make action by a single medical professional possible. But recall that to need the end is to need the means (though technically it is a satisfier not a need). In this case, scientific knowledge is the means, and insofar as the scientific process is clearly an institution by the above definition, at that level polio raises an institutional need as well as more direct biological needs. In short, there is something different, but not crucially different. The difference shows the nuance and internal distinctions involved in the concept of legal needs. Indeed, it might be argued that there is an institutional aspect of most needs taken in the second sense (i.e. institution as a means), which may be part of the normative justification for comprehensive legal systems in the first place.

Conclusion

We may conclude, then, by considerably narrowing the field of potential conceptions of care. I will not proceed by including or ruling out whole conceptions, but rather particular positions taken on

certain aspects of care. Earlier we examined: the goals of care; what, if any, disposition care involves; in what relationships can care take place; what activities does it involve; is care a virtue, a practice or both?

On the question of the goal of care, while most theorists agree that the goal of care is the meeting of normative needs, this answer on its own is vague. I believe the work done in Chapter 2 goes a considerable way to clarifying what normative needs consist in (i.e. persistence, ideal formation, and ideal pursuit). This has the advantage of assigning a limited, but variable goal to care (i.e. it leaves open the possibility for multiple ideals), as opposed to allowing any goal to be compatible with care (i.e. as Sevenhuijsen does). On the question of what disposition is involved, the strong sense of institutional care reveals that no required disposition required or alternatively an ambivalence (i.e. different dispositions by different actors within the institution) is compatible with care. That is, in response to the argument that institutions cannot care because they cannot feel, we must respond that conceiving care in such a way excludes the meeting of institutional needs.[67] It might be argued that overemphasizing this point will too closely align the ethics of care with consequentialism as opposed to virtue ethics, but I do not think this is the case. Rather, in order to keep the various moral insights of the ethics of care in balance, one must recognize both the needs that do not require a feeling and those that do (i.e. the categorically private).

On the question of what activities it consists in, it is likely a mistake to restrict care to a traditional set of paradigmatic activities, since institutional needs have been rarely, if ever, considered. Furthermore, requiring face-to-face interaction would seem to exclude all the vital work done for others at a distance (e.g. the midnight janitor who is never seen by the building's occupants). The most compatible position seems to be that practically everything potentially has a caring aspect, but this position needs to be qualified by what activities are or can be put in the service of a normative needs.

The question of relationality is probably the most difficult to settle. Obviously, restricting care to traditional care-giving relationships is inadequate, but to what extent can we talk about relating to an entire institution? I leave this as a question, but will suggest that there are good precedents to suggest such a relationship is possible. Firstly, nationalism would seem to create a bond between an individual and an abstract community (above and beyond its concrete members). Secondly, Socrates, in The Symposium, describes a relationship of love between the philosopher and wisdom (Plato, 1989). Thirdly, I suspect anyone who has worked or volunteered, and especially founded an organization will feel a certain sense of care and responsibility towards the organization and/or the community, quite distinctly from the individuals within it. But these are simply suggestions.

It is clearly possible for virtues to manifest in activities within institutions, and furthermore, as Rawls (1971/1999) argues, there may be institutional virtues (e.g. justice). Finally, it seems fair to say that

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[67] Alternatively, it might say that meeting institutional needs is care, but without a caregiver. This position raises far more problems than it solves.

understanding care as a social practice with potentially very formal institutions underpinning it is most appropriate. For instance, the practices within the legal system are governed by various written and unwritten codes, professional associations, educational expectations, etc.

Given the positions above, the conceptions of Noddings, Ruddick, Slote, and Bubeck are probably disqualified outright due to their explicit requirement of the actor being a person. Insistence on a set goal is somewhat in tension with Sevenhuijsen's position. It is difficult to say how the strong sense of institutional care relates to Held's insight that care has an expressive function, or to her multi-faceted treatment of care as practice and virtue. Obviously, our treatment in the legal system is supposed to express a particular relation to it (e.g. equality before the law). I doubt, though, that this would satisfy what she means by a relationship. This leaves Engster and Tronto's conceptions. I believe Tronto's conception of care is most capable of taking on institutional needs. It is particularly useful because it is conceived of as a process, and she explicitly addresses the possibility of multiple actors implicated at various stages and the tragic aspects of the conflicts that result.

Such a brief argument is, of course, at most suggestive; but, at worst, the use of Tronto's conception of care is justified by its influence and detailed articulation. In the remaining chapters, I will turn to what suggestions have been made towards a more caring legal system and whether these suggestions live up to Tronto's standard. I will conclude with recommendations based on this standard for how we could begin to move towards a caring legal system.

Chapter 7: Care Ethics and the Law

There is already a considerable literature dating all the way back to the first publication of Carol Gilligan's *In a Different Voice*, on what the ethics of care might mean for the field of law. Since that time, the ethics of care has had a definitive impact on feminist jurisprudence. This influence comes primarily through the vital premises and inspiration that it has contributed to relational (sometimes called difference or cultural[68]) feminism (Bartlett et al., 2013: 517). This school of thought has in turn made explicit and implicit contributions to almost every area of law (Bartlett et al. 2013: 524). Many theses could be written on the intricacies of some of the most prominent discussion in this literature such as child custody, health care law, mediation, omissions liability, and much more. Unfortunately, I do not have the space to do that.

Instead, in order to determine how a caring legal system has been envisioned to date, in this chapter, I will: firstly, examine the basic premises of relational feminism; secondly, consider how this school has contributed to two illustrative sub-literatures (on lawyering and abortion); and thirdly, consider some objections relational feminism has faced from other feminist schools of thought. I will then be able to conclude with a brief suggestion of what a legal system might look like if the recommendations garnered from the ethics of care were integrated in full. It will be seen that while needs play a central role in this reimagined system, legal needs are not engaged with explicitly, and instead a mix of alternative dispute resolution and rights are used to address broader *non-legal* needs.

Relational Feminism

Although relational feminists begin in diverse ways, I find it helpful to think of their common starting point as the rejection the liberal image of the "self-made man" as the archetypal legal subject (Frug, 1992: 37; Fineman, 2000). Some relational feminists focus their rejection on the "self-made" part while others focus on the "man". Ultimately, these are differences of emphasis and focus, not starkly different positions. The former argue that the inevitability of human needs (discussed in chapter 2) means that humans are unavoidably dependent on others--particularly in infancy and old age, but also throughout our lives (Fineman, 2000: 18; McConnell, 1996: 301; Engster, 2004). The assumption of independence built into the "*self-made* man" is therefore profoundly illusory. The latter relational feminists argue that there is something essentially and irretrievably masculine in the "self-made" legal subject, wherein

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[68] I will, from this point on, use relational feminism to refer to difference, cultural, and relational feminism, since it emphasizes the point of most direct relevance to the question of a caring legal system. That is, whether care sets women apart or is culturally as opposed to biologically caused or manifested is of course relevant to what a caring legal system would have to look like but only in a derivative sense. Relationality, on the other hand, is at the very heart of what it means to care.

feminine (and possibly female) experience pertains to "making" another as opposed to oneself (i.e. motherhood), or more widely, caregiving of others (West, 1988: 2-3, 13-14).[69] Consequently, gender difference becomes a salient point of analysis for many (Bender, 1990: 3).

What is common to both contentions is that part of being human is needing others. This analysis leads one to see at least part of the source of women's oppression is not so much assuming difference as such, but the devaluation of needs and consequently the devaluation of the qualities and values associating women with needs, such as dependency and care, whether that association is caused by biological, cultural, or other reasons (Judges, 1994-95: 1326). To put it differently, if our assumption of what it means to be a person before the law entails independence, if you are a being associated with relationality, like women often are (or typically were), you are de facto seen and treated as a defective legal subject, or worse, not a legal subject at all. Nonetheless, since this standard of personhood is prefaced on a false image of independence, caring relations are by necessity allowed to continue, but they must be downplayed, denied, degraded, and devalued to the greatest extent possible, along with those who are associated with them. They become, in a sense, the law's dirty little secret. Once our needs are accepted as not just an unfortunate or humiliating condition of some but a necessary condition of all, those associated with tending to these needs would not only cease to be denigrated and separated out, but *appreciated* for the importance of their work. On this account, the image of the independent individual is replaced by the image of a network of vulnerable caregivers and recipients. While the caregivers might, for the most part, currently be women and disempowered minorities (Tronto, 1993), they could and should be all types of people (Becker, 1999:81).

Relational feminists therefore advocate for law that accommodates and appreciates at least some[70] of these gender differences typically (or traditionally) associated with women (Frug, 1992: 47; Bender, 1990: 3; Becker, 2002: 57), as well as the individuals and groups of people who enact these qualities (i.e. caregivers) (Nedelsky, 2011: 83; Barlett et al., 2013: 531). Ultimately, though, their goal is not simply accommodation within but *reconstruction* of the legal system in light of these previously suppressed qualities and in support of these suppressed individuals/groups (Bartlett et al., 2013: 517).

Let us now turn to two popular and central sub-literatures within relational feminism on lawyering and abortion, to see more concretely what difference this different voice might make. We will discuss relational lawyering largely because lawyers are key actors in the person-centric conception of

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[69] While this is certainly an oversimplification, the focus on caregiving in general reflects how this difference has been defined by Gilligan's work more than anyone else, for at least some influential relational feminists (West, 1988: 15). See also Neldelsky, 2011.

[70] I write "some" because there is a clear recognition among relational feminists that not all traits typically associated with women deserve celebration, or that even those that deserve celebration under certain circumstances are often tainted by the fact that they originate under oppressive conditions (e.g. through fear or the desire for approval) (West, 1998: 81-82).

care that feminist jurisprudence has assumed to date. And, as will be further explained later, abortion has been singled out because of its strategic importance to the feminist legal agenda and because of the use of an individualist logic in the most influential feminist arguments for abortion rights.

Caring Lawyering

Relational feminists, spurred by the huge increases of women in the legal profession through the 70s and 80s, have paid much attention to both descriptive and prescriptive elements of lawyering. By descriptive, I mean that a number of researchers have tested the hypostudy that female lawyers have a different, potentially more caring, lawyering style than their male peers. By prescriptive, I mean to note the number of scholars who have argued for a more caring approach to lawyering, also known as "relational lawyering" (independently of whether women as a group tend to be more 'caring').

Descriptively, the findings on whether women have a different lawyering style have been quite mixed (Menkel-Meadow, 1994: 87). Furthermore, there is no question that empirical generalizations are for the most part limited by the small-scale qualitative nature of many studies investigating this question, as well as the use of self-reporting of caring practices (Jack & Jack, 1989; Sommerland, 2003; Bartlett & Aitken, 2009).[71] Indeed, differences are more likely to be found in self-reporting than observational studies, suggesting lawyers may be more likely to use a gendered framework in self-reflecting (Bartlett, et al., 2013: 566). Putting these limitations aside for a moment, findings have still been diverse and sometimes conflicting.

Some studies have found women lawyers to be considerably more caring than their male peers (Cahn 1991-92; Bartlett & Aitken, 2009). Other studies have found no significant difference between male and female lawyers (Burton et al., 1991). More recent studies tend to find little or no difference, or differences that run contrary to the ethics of care (e.g. women reported as more aggressive) (Bartlett et al., 2013: 565). Indeed, Cynthia Epstein, a sociologist who has spent much of her career studying female lawyers, reached the conclusion that there may well be far more variety within gender groups than between them (Menkel-Meadow, 1994: 88). It is probably safest to conclude that gender is at most one among many variables affecting lawyering style (Bartlett, et al., 2013: 566). It is interesting to note, however, that though the gender difference study is deeply contested, the benefits of "relational" (or caring) lawyering, both to the client and lawyer, are empirically well-documented (Brooks & Madden, 2009: 24). It is to relational lawyering that we now turn.

Prescriptively, relational feminists challenge the current model of lawyer's ethics, which is overwhelmingly a rights/autonomy-based model within an adversarial framework (Ellman, 1992-93,

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[71] Interestingly, studies have consistently found differences in judges' voting patterns based on gender (Bartlett, et al., 2013: 573).

2667). On this model, each party's lawyer simply serves their client's interests, whoever they happen to be, to the greatest extent permissible under the law, without imposing their own idea of the best course of action or outcome, in a system where one party wins (Zwier & Hamric, 1996: 394-396). Quite modestly, relational feminists argue that while this is an important approach it is not the only or necessarily best approach in all situations, and alternatives should be available (Menkel-Meadow, 1985: 47; Zwier & Hamric, 1996: 426). Based on some of the most influential articulations of this approach, relational lawyers:

> [1] primarily, though not exclusively, take on clients with caring ends, seek [2] solutions that, to the greatest extent possible, satisfy all the needs involved in a situation, by [3] using *potentially* emotionally-involved, empathic, and careful listening to the person as a whole, and [4] recommending courses of action, so as to [5] preserve and strengthen relationships with the least hurt to anyone involved including her own personal relationships (Menkel-Meadow, 1985, 1994; Ellman, 1992-93; Zwier & Hamric, 1996).

Firstly, relational lawyers will not simply take on any client. "...the appropriateness of entering into lawyer-client relations rests on the consistency of those relations with the responsibilities of care…" (Ellman, 1992-93: 2682). Presumably, representing an unrepentant serial rapist who will demand that his lawyer cross-examine his victims ruthlessly does not embody an ethic of care. This is crucial, because, by default, the relational lawyer will seek an emotionally-engaged, if limited, relationship with the client, and such a relationship is difficult (to say the least) with an uncaring client (Zwier & Hamric, 1996: 421). There are, however, exceptions to this. A relational lawyer may take on an otherwise uncaring client in order to take care of herself, for instance if she needs the income or if failing to do so would cause serious problems between her and her employers (Ellman, 1992-93: 2682, 2690). Nevertheless, even when this exception is made, the caring lawyer still feels it as a conflict as opposed to an unproblematic entitlement--as the conventional lawyer might (Ellman, 1992-93: 2682). If the relational lawyer takes on such a client, she will try to reshape the situation so as to avoid taking an uncaring approach; for example, she may try to persuade the client to change their approach (Ellman, 1992-93: 2722).

Secondly, because relational lawyering seeks to satisfy all the needs involved instead of simply the client's rights, there is a much broader notion of who is implicated (i.e. not simply those with legal standing), and who the lawyer serves (Menkel-Meadow, 1985: 53; Zwier & Hamric, 1996: 402).[72] This does not mean, however, that the relational lawyer must care for everyone equally, only that their analytic scope (i.e. who they consider as relevant to the process and factor into any proposed solution) is much wider (Ellman, 1992-93: 2681). It does however make interpersonal and cooperative rather than

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[72] It may be useful to think of the difference as between shareholders and stakeholders. Shareholders are those entitled to make a decision, whereas stakeholders are those who will be affected by a decision. The rights-based model is only concerned with shareholders, whereas the care-based model is concerned with stakeholders.

competitive means of dispute resolution more likely to be used (Menkel-Meadow, 1985: 57; Burton et al., 1991: 215). Consequently, alternative dispute resolution is a primary strategy of the relational lawyer (Menkel-Meadow, 1994: 86; Zwier & Hamric, 1996: 402).

Thirdly, on the current model, the lawyer, above all, requires strong analytic and argumentative skills. Relational lawyers, on the other hand, begin by stressing the importance of listening skills above all else (Zwier & Hamric, 1996: 403-4). This listening is more to take in and understand the client's context and life in a holistic and personal way, rather than to weed out the irrelevant details and identify the facts of the case (Menkel-Meadow, 1985: 58; Zwier & Hamric, 1996: 400; Ellman, 1992-93: 2695). This results in the formation of a relationship of trust between lawyer and client (Ellman, 1992-93: 2703). It also makes the lawyer more cognitively and emotionally sensitive to the nuance and range of their client's problems/needs, and the impact potential courses of action might have (Menkel-Meadow, 1985: 57; Ellman, 1992-93: 2699-2700). Of course, there is a risk of becoming too involved and suffering from emotional exhaustion. This is a danger that must be considered by the relational lawyer. The point here is not that the relational lawyer is as emotionally involved as can be, but that the relational lawyer seeks emotional involvement where possible and constructive, whereas conventional lawyering leaves no place for such attachment.

Fourthly, the relational lawyer may recommend and encourage a wide range of actions far exceeding those available to the judge in narrow litigious and monetary terms. There are two aspects of this that are distinct from non-relational lawyering practices: one, the flexibility and diversity in potential solutions meant to answer needs; two, the extent to which the lawyer can encourage a particular course of action. In the first case, because the ethics of care does not prescribe any specific courses of action in advance, the one constant is the process rather than a predetermined award or penalty (Ellman, 1992-93: 2671-2, 2718). As a result, the significance of creating and reasoning in terms of universalizing precedents is far less important (Menkel-Meadow, 1985: 58). In the second case, current lawyering practices really only allow for informing clients of the various options available and remaining neutral between them, with some exceptions, so as to avoid impinging on client autonomy (Ellman, 1992-93: 2709). Relational lawyering on the other hand, both because of the power imbalance between the lawyer and client, and because of the trust formed in the relational lawyering process, is much more open to paternalism and manipulation (Ellman, 1992-93: 2703). I have already addressed how this danger could be handled in chapter 3 and will build on this proposal in chapter 8.

Finally, it should be noted that the goal of caring lawyering is not the same as more conventional lawyering. Whereas the more conventional lawyer seeks the enforcement of her client's rights, regardless of what impact it might have on relationships between parties, the caring lawyer seeks to maintain and strengthen relationships (Menkel-Meadow, 1985: 51; Zwier & Hamric, 1996: 402). This is not only true

for the client, but for the lawyer's own work-life balance (Menkel-Meadow, 1985: 57; Ellman, 1992-93: 2696; Menkel-Meadow, 1994: 103). The standard of success, therefore, will be what is "loving and just" for all people involved, including the lawyer, rather than ensuring given parties are given all that they are formally entitled to (Zwier & Hamric, 1996: 402).

There is no question that needs occupy a central place in the analysis and objectives of the relational lawyer; however, the status of legal needs seem to fall by the wayside. While it is acknowledged that some cases will need to go to court (e.g. when parties are strangers) (Zwier & Hamric, 1996: 432), and there is some idea of how the caring lawyer conducts herself in court (e.g. avoiding macho posturing) (Menkel-Meadow, 1994: 103), the relational lawyer's work seems to consist primarily in avoiding the legal system by offering alternatives (Zwier & Hamric, 1996: 426). To put it simply, relational lawyering aims as much as possible to meet needs without resorting to the legal system, when legal needs are by definition those needs that require the legal system. This will be a central point of discussion in the chapter to come.

Caring institutions, however, must enable caregivers to provide care effectively. Therefore, any analysis of a caring legal system would be incomplete without examining its most crucial means of structuring actors' abilities, i.e. laws. For now, I will turn to the question of abortion rights in the U.S.[73] as one possible illustration of what a care-based law might look like.

Abortion Rights

Relational feminists have made important contributions both theoretically and in court to the question of rights in many ways. Canadian legal scholar Jennifer Nedelsky (2011) argues that individualistic analyses of rights of any kind[74] simply do a worse job of revealing what is at stake in a particular judicial consideration (65, 73). She argues that law both shapes and is shaped by people's inevitable and constitutive relationships (Nedelsky, 2011: 3-4, 65). If all law was made (both legislatively and judicially) and enforced with greater attention to this fact we could do a better job of promoting relationships that further "core values", such as autonomy, equality, and dignity (Nedelsky, 2011: 5). Nedelsky (2011), however, distances herself from the ethics of care, while expressing respect for it; for her, care is simply one value among a constellation of other, some more fundamental, values (87). Furthermore, many relational feminists, including Nedelsky, reject the understanding of the law's role as the protection of "*individual* rights"... that "...maintain conditions in which independent and unconnected

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[73] Unfortunately, it proved difficult to find sufficient source material of this kind in the Canadian context.

[74] She explicitly goes far beyond the question of caregivers and even women's equality, although she does not deny their importance, to propose an approach that in her words goes beyond feminism but would be "impossible without" it (Nedelsky, 2011: 84). As such, it might be seen as unfair pigeon-holing to call her a relational feminist, but it seems to me that she can be this in addition to everything else she is.

human beings are protected against interdependency and connection where the latter might interfere with the former." (McConnell, 1996: 301). Some scholars have therefore set out their own conceptions of rights (Karst, 1894; Sherry, 1986).

It would not, however, be efficient in the limited space provided to tackle all rights at once. Furthermore, while discussing a theory driven by context, it seems more appropriate to focus on a concrete issue where possible. Consequently, the question of abortion rights has been selected as an area of focus for this section. Abortion has been singled out here for three reasons. Firstly, the traditional and liberal feminist jurisprudence on this issue is a striking example of taking the independent legal subject as the normative standard. Secondly, reproductive rights have been called a central plank of the feminist legal agenda, and so what care-inspired feminism has to say about it may be particularly revealing (Karlan & Ortiz, 1992-93: 861). Thirdly, some feminists have rejected relational feminism on the basis of its implications for abortion rights, thereby suggesting that this may be a key question for the political viability of relational feminism (Judges, 1994-95: 1361). In short, this case is well worth examining—despite the very thorny moral and political implications it raises.

Traditional and liberal feminist jurisprudence have cast abortion rights in starkly atomistic terms. For instance, in landmark cases like *Roe v. Wade* the judges justified their decisions in terms of privacy rights (Dresden, 1996: 110; Karlan & Ortiz, 1992-93: 871). The most influential feminist arguments for abortion rights, such as those of Judith Jarvis Thomson or Eileen McDonagh, treat the fetus as a stranger competing for the woman's bodily resources (West, 1998: 2118, 2125; McConnell, 1996-97: 308). Just as a man would not be required to let an intruder into his home, these feminists ask why a woman should be required to allow an intruder to stay in her body for an extended period of time without her full consent.

Relational feminists, as has been explained, reject this treatment of the Other, and fetuses in particular, as strangers (Karlan & Ortiz, 1992-93: 881). Rather than beginning by looking at the woman's individual rights, relational feminists begin by identifying *the network of relationships* at stake, assessing the particular circumstances that have created the "impasse". They then look at the communities of which these relationships are a part and also consider the potential harm that could be done to the participants and communities (i.e. the needs at stake) (Dresden, 1996: 112-113). This means that more than the woman's choice and well-being will be considered. Insofar as a woman has a relationship with her fetus, questions of its personhood are secondary to its needs and dependence,[75] which according to some must be morally salient to the caring individual (West, 1998: 2146; Judges, 1994-95: 1363). The moral thing to do in some circumstances, according to some relational feminists, may be not to get an abortion.

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[75] Alternatively, it might be argued that on the ethics of care account, it is precisely the dependence that marks it as human (Karlan & Ortiz, 1992-93: 882). In either case, the moral salience of the fetus and its interest are the same.

As a result, relational feminists have been seen as hostile to, or at least dangerous for, abortion rights (Karlan & Ortiz, 1992-93; McClain, 1992). Ironically, relational feminists have been accused of being in tension with women's felt needs (Karlan & Ortiz, 1992-93: 862).[76] The position that getting an abortion could be morally problematic, however, does not in itself mean that women should not have a categorical right to an abortion if they so choose. In fact, some of the most prominent relational feminists favour such a right (West, 1998; Judges, 1994-95: 1327). This is possible with a careful separation of two issues often conflated in this debate: "(1) the woman's decision to abort; and (2) the state's decision to interfere" (Judges, 1994-95: 1400).

Faced with this distinction, it may appear as if relational feminism asserts itself on the private moral question, but capitulates to the liberal argument on the legal question, thereby condemning itself to irrelevance (Judges, 1994-95: 1405). This reasoning, however, overlooks the possibility that there might be independent caring grounds for an abortion right. It is in this way that we return to the irony of the "felt needs" criticism. Being excluded or dominated in the abortion decision will make one feel like an outsider in the familial and broader community, which clearly does go against the woman's needs (Dresden, 1996: 114).[77] Yet this is what takes place if the state decides for the woman by rendering abortion illegal. To put it differently, "If care about individuals is regarded as worthy in itself and not necessarily as an exclusively or even predominantly female concern, then a robust ethic of care would insist not only on care by, but also care for, unwanting pregnant women as people intrinsically worthy of care" (Judges, 1994-95: 1327). Given the hardship of a coerced pregnancy (or abortion), it is clear to the difference or relational feminist that caring for the pregnant woman means leaving the choice with her. According to these relational feminists, this is not only better from a caring perspective for the (potential) mother, but for the (potential) child as well, since the love that it needs from the mother can only develop willingly and cannot be compelled by the state (as was discussed in chapter 3) (Judges, 1994-95:1412).

On this account, while the prerogative to make the ultimate decision is the woman's right, it is also a responsibility (McConnell, 1996-97: 304). Part of this responsibility seems to be considering not only the impact on the fetus, but the impact on others such as the father, family, and community, assuming these relationships are non-abusive of course (Dresden, 1996: 102, 112; Karlan & Ortiz, 1992-93: 885). This is quite a disturbing implication to many critics and proponents alike. After all, it would seem to accord rights to the father that not even the current patriarchal system affords (Dresden, 1996: 101). On this account, the caring legal system does not protect the woman from the potential reaction of others (barring violence), and therefore leaves her vulnerable to probably the most potent threats to deter

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[76] The irony of this criticism, as we will soon see, reveals the underlying relational feminist position.

[77] The reader will remember our discussion of the need for some minimal social participation (Doyal & Gough, 1991: 51).

and coerce her decision. The perhaps unsatisfactory response has been policy proposals that essentially call for a mediation process in which, if others are to be involved in the decision, they must ultimately respect the woman's final decision (Dresden, 1996: 118).

In brief, the relational feminist approach to abortion reveals that it is quite compatible with categorical rights, but in a way that refuses to construe enmeshed parties as *separate* competing agents. Rather, the law is meant to create flexible structures and conditions under which networks of relationships are both empowered and required to resolve their internal dilemmas in a way that allows the relationships to persist while meeting the needs of all involved to the greatest extent possible. This view is not incompatible with the view that the pregnant woman's needs are of primary or even determinative importance and so must be considered first. It is, however, incompatible with the view that the pregnant woman's needs are of sole importance and so consequently no other needs have to be considered in search of mutually satisfactory solutions.

It is important to remark that, understood in this way, abortion rights can be seen as representing one way of answering legal needs. The reader will recall that a person needs the legal system when: they have Authority but lack authority, there are intractable differences between conceptions of the good; a political decision is likely to be overturned. The right to an abortion meets all three of these criteria. Firstly, the pregnant woman has legal standing over her body, but may lack personal power (e.g. money, transportation, physical protection, etc.) sufficient to overcome potential opposition from her family and community (Authority without authority). Secondly, abortion is also an example of a decision where differing conceptions of the good might be intractable, or at least functionally intractable within the relatively narrow window of the time in which an abortion can be considered. Finally, because there is a considerable and organized pro-life movement, abortion rights are often contested through various political processes that are checked by judicial authority (risk of a political decision being reversed).

Furthermore, a potential abortion not only raises legal needs for the pregnant woman but potentially the fetus (if one is of the view that the fetus has normative status), as well as others, who are either completely or partially powerless to stop something that will profoundly affect them. Despite this nearly perfect example of a legal need, however, it is not discussed in such terms in the relational feminist literature, and what is lost is a sense of the distinctive role law plays in questions like abortion. This will be a topic of discussion in the next chapter. But for now let us turn to the question of what objections relational feminism has faced as a whole.

Objections to Relational Feminism

Relational feminism has faced a number of major challenges from other schools of feminist jurisprudence. The first challenge, coming from feminists of varying stripes, is the charge that the image

of women as caring in fact recreates and romanticizes the dangerous stereotypes about women that have been used to keep them in the home (Menkel-Meadow, 1994: 82; Bartlett et al. 2013: 517), and that to the extent that it is true it is only a reflection of women's oppression (Williams in Goldstein, 1992: 3). This has the practical disadvantage of: leaving feminism open to the cooptation of conservative forces, slowing the pace of women's economic emancipation, and risking returning women to the pedestal/cage feminists have so fervently tried to escape (Bender, 1990: 6-7; Goldstein, 1992: 2-3; Karlan & Ortiz, 1993; Bachiochi, 2011). The second challenge, coming from some postmodern feminists, is the charge of essentialism (Bender, 1990: 5; Cobb, 2008: 14). The hegemonic category of womanhood, it is argued, renders inaudible the voices of the many identities that are glossed over to make a unified whole, (e.g. race, class, etc.).[78] The third major challenge, coming from liberal feminist Linda McClain (1992), is that relational feminism is superfluous because there is room for care within liberalism as a humanist value (1171). The fourth major challenge opposes the assertion that women (including female lawyers and judges) exhibit a different ethical mindset than their male peers. Indeed, the empirical criticism has followed the ethics of care from the very beginning as respondents challenged Gilligan's original sample as failing to control for a number of variables such as education level, occupation, and ancestry (Held, 2005: 27).

The first two challenges are by no means unrecognized by those who advocate for the value of the ethics of care as a prescriptive and analytic tool, and many authors will openly state their unease with the prospects of cooptation and exclusion (Bender, 1990; Cobb, 2008). Nonetheless, relational feminists have offered some consistent and, in my view, compelling reasons for why the cooptation and essentialist criticisms are important cautions but not fatal refutations. One response involves pointing out that regardless of the ontological status of male-female differences, we operate within a society in which they remain influential standards, frames of reference, and ideals that powerfully shape the everyday experience of men and women, for better or for worse (Cobb, 2008: 14). Another strategy has been to show how women, despite their vast differences, have common causes that can be articulated intelligibly within the law through at least the instrumental use of the category "woman" (Bender, 1990: 8). It may seem like these responses depend on transforming relational feminism from an ontological claim to a pragmatic posture, and in so doing break with or significantly curtail relational feminism as such. This move, in fact, has more to do with a *moving on*[79] from the metaphysical or causal questions of women's difference, than a rejection of any answer to those questions in particular. At the same time, West (1998)

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[78] Ironically, some have posited that care ethics became prevalent in legal theory precisely as an attempt to respond to "the problem of subjectivity" or, said differently, the dismantling of universality that these critics stubbornly reassert (Drakopoulou, 2000).

[79] One could either regard the question as impossible to answer or simply not a productive use of time, because one does not need a concrete answer to know how to usefully proceed.

has challenged the view that a full societal appreciation of the moral value of care would retard women's economic development by arguing that if its moral value was genuinely appreciated this would be reflected in political and economic terms (37). Finally, in response to the charge of potential co-optation, relational feminists have responded that if gender differences exist, and indeed they do (at least in the historical transient sense just mentioned), they cannot simply be ignored (Menkel-Meadow, 1985: 42; Bender, 1990: 16).

To the challenge that relational feminism is superfluous because care is a humanist value (i.e. it is already presupposed in some larger liberal conception of basic values), Leslie Bender (1990) responds that there is a danger in removing women from centre-stage, and since women do in fact have special expertise with regard to care due to the fact that it has been women engaged in caretaking activities for millennia, with all the harm or difficulties this has caused for gender justice (8-9). Furthermore, Mary Becker (1999) argues that in comparison to liberal feminism, relational feminism offers the *only* substantive challenge to patriarchy, since, at best the liberal framework entitles women to the same patriarchal goods as men rather than transforming what those goods are (21). Relational feminism alone *stems* from values that are incompatible with patriarchy, care and relationality (Becker, 1999: 21).[80] This argument is likely an oversimplification and offers an exaggerated either/or choice between feminist approaches. Nonetheless, it makes one crucial point totally clear: if the implications of the ethics of care are to be fully and systematically implemented, it cannot be through an uncaring framework. That is, the ethics of care takes the current, albeit flawed starting point, but then offers a new lens through which to see them.

Relational feminists offer one of at least three basic responses to the fourth, empirical, challenge. The first, primarily descriptive, response is to point out that the empirical studies that have followed since Gilligan's work remain indeterminate (Menkel-Meadow, 1994: 88; Bartlett & Aitken, 2009). The second response, primarily prescriptive, moves away from the descriptive assertion that care ethics is a primarily feminine ethic and instead focuses on its value as a feminine ethics or simply as a "different" ethic (Zwier & Hamric: 1996; Bartlett, et al., 2013: 567). The third response is the continued assertion that care ethics is in fact a primarily female ethic (Kaposy & Downie, 2009).

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[80] There is a serious tension here between Becker and Nedelsky. Nedelsky (2011) claims care stems from the relational framework which is itself grounded in other values (87-88). This does not, however, detract from the rebuttal as such; it only narrows the scope of which relational feminist theories qualify as "relational feminism" on this account. That I cast a wider net at the same problem is not problematic as long as some of the theories I have included are shown not to be superfluous.

Each of the first two responses has its own advantages and disadvantages. The third simply does not engage with the criticism (and is usually more implicit than explicit). The advantage of the first is that it keeps the discussion on the empirical level, calling our attention to the general lack of descriptive study, relying on the ambiguity of what research has been done. Of course, this approach has the drawback of not settling the question definitively in favour of care ethics' descriptive power. Indeed, based on our discussion of descriptive studies above it is a very risky strategy. Additionally, it fails to address the implications of this descriptive criticism for the prescriptive force of relational feminism. The second strategy seems to be the more common and more reflective of the broader developments in the ethics of care towards viewing the caring ethos as one that has been systemically disadvantaged and tied to disempowered roles which women among others have been forced to occupy (Tronto, 1993; Held, 2005). It has the advantage of leaving the reader with a clear idea of the prescriptive power of the ethics of care and a more refined descriptive question far more plausibly resolved in favour of the ethics of care. When taken too far, however, it bears the risk, according to some, of distancing care ethics from women's experience in order to be more palatable to general audiences (Bender, 1990: 44-45).[81] As long as we take action to constantly defer to the experiences of actual caregivers (female or otherwise), this potential pitfall can be overcome. On the whole, this response seems to me to be the clearly more favourable one.

In sum, while relational feminism continues to be contentious within feminist jurisprudence, it has shown resilience to its most serious challenges. This is important because it means that in the next chapter I can situate my recommendations for a caring legal system within the broader project of relational feminism. This is significant because my discussion will be partial in character but offer a structure for relational feminists, among others to think through a more comprehensive and detailed jurisprudential, legislative, and policy agenda.

Conclusion

Before moving on to my recommendations (to be dealt with in the next chapter), it is worth painting a picture of what a caring legal system would be if all that was discussed in this chapter was systematically implemented. In the first place lawmaking would begin from the premise that people are vulnerable beings that need each other. This would be reflected in everything from how laws are written to how legal professionals are trained. It is clear that more time would be spent on equipping lawyers with

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[81] It should be noted that this does not mean that the ethics of care must be exclusively identified with women's experiences or that it is unproblematic to speak of women's experiences as if they were a unified whole. On the contrary, the risk of abstracting caregiving to a role rather than caregivers risks obscuring the experience of the men and others who deliver care every bit as much as the women. Furthermore, if women's experience should not be treated as a unified whole, the solution is not to stop talking about women's experiences, but to elaborate and distinguish.

interpersonal skills, and listening in particular, building attentiveness to people's needs. This would likely require more hands-on clinical training. Furthermore, lawyers' ethics codes would provide lawyers with more discretion to make decisions for caring reasons, sometimes in spite of the client's autonomy. The "community" in the eyes of the law would not be persons who are strangers in competition without a duty of care (or rescue) to one another, but mutually-implicated and interdependent beings with corresponding responsibilities to each other. The result would be a form of legal analysis that treats rights as a means to meet needs, maintaining and strengthening people in their (non-abusive) relationships, rather than protecting people from them or ends-in-themselves, such that if they have been formally secured no further steps needs be taken. Furthermore, mediation, rather than adjudication, would be the paradigm method of dispute settlement, with litigation reserved for cases exhibiting specific features. While this addresses the problem of deflecting away from the legal systems needs it is not suitable to meet, but only implicitly addresses the needs it is particularly suited to address.

The reader will likely have mixed thoughts and feelings about whether such a system could really be put in practice and whether it would be desirable (particularly for women) if it could. I readily acknowledge that these hesitancies are not aided by the essentially abstract nature of the discussion above. My question in the chapter to come, however, is not so much whether such a system would be desirable, but whether and how it could respond to legal needs in the most caring way possible. It is to that question that we now turn.

Chapter 8: Caring Legal System

We have now seen how some illustrative relational feminist sub-literatures have applied the insights of the ethics of care to the domain of law. This application of the ethics of care to law has been done largely without an explicit consideration of legal needs and based primarily on an interpersonal understanding of care, as opposed to one that is more sensitive to institutional needs. In this final chapter, I will first consider the contribution and limits of the recommendations made in the last chapter.

Once these limits are seen, I will then inquire into how we can begin to transition towards a more caring legal system. I frame the question this way to emphasize that my starting point will be the system's *current* tools, practices, and policies. I will go step by step through Tronto's phases of the caring process to suggest how with feasible, though sometimes sizable, modifications, our current system might be made more able to respond to legal needs in a caring way. In order to move towards a system capable of "caring about" I will suggest that a combination of public legal education, improved information management practices, as well as sensitivity to positive legal demands in policy could make the system more caring. In order to move towards a system capable of "taking care of", I will first address more fully the potential contradiction between a system characterized by obligation and an ethic based around responsibility. I will then suggest that training legal professionals to meet underlying legal needs does not have to betray a commitment to rules if we make our rules sufficiently flexible and mindful of the role they play in responding to needs. In order to move towards a system capable of "care-giving" I will address the problem of whether current punishments and remedies actually constitute care-giving. I will argue that while in many cases more creative solutions might be sought, there is a caring function for current remedies even in cases where what was lost can never be restored. Finally, I will discuss the importance of having more robust feedback systems in a caring legal system, suggesting which surveys we might be able to tweak, and what further research is necessary. I will conclude by considering why I think this policy program helps to satisfy the broad political aspirations of care theorists while remaining feasible and appealing and accessible to a much wider constituency.

Limits of the Relational Feminist Proposals

When assessing relational lawyering it is crucial to see that it self-consciously asserts itself as operating in an uncaring system. "While there are openings in the prevailing rights-based legal model for care-based deliberations, the cards are stacked against its use. The ethics of care must come into play earlier in order to work" (Zwier & Hamric, 1996: 418). Even within this far more limited role, relational lawyering is presented only as a potential alternative to business as usual for those clients who value a

caring approach more (Zwier & Hamric, 1996: 429). Such a pragmatic approach will naturally have limited transformative potential. But simply because advocates to date have been less insistent on institutionalizing relational lawyering as the norm for lawyer's ethics does not mean this is an inherent limitation of relational lawyering.

There is, however, an even more fundamental problem. Those advocating for relational lawyering would seem to want to make the legal system more caring by making it less legal. Zwier and Hamric (1996) make this underlying thrust most obvious when they note that the current legal counseling model was more suitable when other social institutions led people *away from the legal system* (387). Now that people enter the legal system prematurely, lawyers need to be able, essentially, to divert them away through mediation techniques (Zwier & Hamric,1996: 388). Indeed, what we earlier found to essentially distinguish the legal system from other modes of dispute resolution, compulsion and standing rules/precedent, are precisely those aspects of the legal system that Menkel-Meadow (1985) believes a caring approach would downplay (58). What some stipulate are the prerequisites for successful relational lawyering (e.g. not being strangers), are precisely the conditions that do not hold in the case of a legal need (Zwier & Hamric, 1996: 432).

To put it differently, if we want to ask whether this is sufficient for relational *lawyering* as opposed to just caring behaviour that a lawyer engages in, we should ask whether there is any reason why a lawyer needs to be the one to do it. The answer seems to be that it falls on the lawyer because they are the people disputants go to in the absence of other social institutions. Similarly, a therapist who guides her patients away from therapy towards some other sort of solution (e.g. daily exercise), may be engaged in caring behaviour but it is difficult to see how it is caring therapy. Furthermore, if exercise is a genuine solution then we cannot say the patient had a need for therapy. Here in lies the crux of relational lawyering's limit. The needs it seems best suited to solve are not legal needs.

This does not mean that relational lawyering is not valuable. Far from it, where someone does not have a legal need, it will likely be inefficient if not harmful to have to be put through the legal process (i.e. because of the financial and time costs, stress, etc.). Furthermore, the above understates the guidance relational lawyering provides during the legal process. Nevertheless, insofar as relational lawyering focuses on leveraging non-legal problem solving approaches to better address disputes that do not genuinely require the legal system, its contribution to a caring legal system will at best be indirect. That is, if all lawyers practiced relational lawyering at best it would *help*[82] to ensure only cases of genuine legal need make it to the legal system, and at worst it would direct even those away from the legal system.

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[82] I only say "help" because not all cases go through a lawyer first.

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Consequently, relational lawyering as it is currently understood, contributes first and foremost to a kind of reverse attentiveness to legal needs.

Legal policy recommendations inspired by an ethic of care, such as those we saw in the case of abortion, involve mandating interpersonal communication, e.g. mandatory counselling, where such communication would not endanger the health or well-being of the woman (Dresden, 1996: 118; Coley, 2007). Insofar as discussions are more effective than simple adjudicated decisions at meeting underlying needs, and where such discussion would or could not take place without the coercion, such policy proposals could genuinely address a legal need. However, where a policy is only successful assuming the relationships are already capable of discussion on their own, then at best such policies meet a legal need for coordination, but likely fall into the same trap as relational lawyering. The question we must ask is if the legal system is the only institution that could ensure discussion takes place within families about who will get what part of an estate, for instance. In many cases, I suspect, it likely is not. In the cases where it is, then the question for the caring legal system becomes: is a discussion needed? What I hope this discussion makes clear is that the function for a caring legal system is actually quite restricted and blanket policy proposals aimed at producing caring behaviour ought to be qualified by a legal need criteria to make the legal system truly caring.

But that still leaves my central question unanswered. What would a caring response to a legal need consist in? The reader will recall that Tronto's conception of care was found to be the most compatible with institutional needs in general and therefore legal needs in particular. I will therefore use her four earlier criteria of good care (attentiveness, responsibility, competence, and reciprocity) to determine what kinds of policy innovations would help to move us towards a caring system.

An Attentive Legal System

The first phase of care, according to Tronto (1993), is "caring about" (106). As has already been explained, care begins with attentiveness to needs. In the case of a caring legal system, my proposal is that care begins with attentiveness to legal needs. This attentiveness happens at three levels. Firstly, actors in the legal system involved in intake, i.e. first points of contact, must be sensitive to a person's legal need or lack thereof. Secondly, this awareness and sensitivity to the legal need must be maintained as more actors get involved, whether that be court staff, judges, additional lawyers, or others. Thirdly, legal policymakers must minimize the non-normative, positive demands that masquerade as needs to which particular policies give rise.

In the first case, we have already spoken about how relational lawyers can deflect inappropriate cases away from the legal system, and in so doing exercise a kind of reverse attentiveness to legal needs. There is no question that to advance a more caring legal system, the ability to identify legal needs must

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figure more explicitly in legal education, but lawyers are not the only first point of contact. Police officers, information clerks, legal helpline operators, doctors, nurses, social workers, and many others can also act as gateways to the legal system. In fact, insofar as anyone could theoretically initiate a legal action at any time, we are all first points of contact for the legal system.

This brings us back to the Hughes Commission proposal that at the heart of responding to legal needs is legal information, but we must revisit exactly what this means. In the context of the Hughes Commission, legal information, and consequently public legal education, simply meant knowing what one's rights were, i.e. what entitlements and courses of action were presently available (Genn, 2001: 5). In the context of a caring legal system, while that kind of information is valuable, it only forms a part of a broader awareness of how the legal system can potentially uphold one's normative needs and a sensitivity to what those needs are. Such an awareness does not require that the current laws or procedures actually be well-positioned to meet these needs, in which case this attentiveness might mobilize people politically around their legal needs.

Therefore, my first recommendation is to develop a discussion and activity based workshop suitable for a wide-range of audiences (including high schools, community centres, cultural groups, workplaces, etc.) on how to identify a legal need. Such a workshop could be maintained and delivered by organizations like the Ontario Justice Education Network. Educating the broader public in how to identify legal needs will also equip them with the conceptual tools to participate as more equal partners with legal professionals in the activity of legal needs interpretation. Indeed, as Tronto argues, there has to be an explicit place for the "needs-interpretation struggle" (Tronto, 2010: 168).[83]

The reader will likely be skeptical that a single workshop could do this. I agree, and therefore recommend that a purely optional component of the workshop be the formation of discussion groups that meet regularly afterwards. I suggest that they be modelled off of feminist consciousness-raising groups. Such discussion groups once formed could receive more or less logistical support and direction depending on the agency involved in delivering the initial workshop. Indeed, there is no reason that such groups could not form around specific kinds of legal needs, such as those that arise simply from being born female, being an immigrant or from having experienced sexual violence. In fact, these workshops could even be specifically delivered to caregivers and focus on the legal needs that arise out of caregiving. In this way, a more caring legal system could support broader efforts at achieving a more caring society.

Secondly, one of the most essential differences between an individual and institutional caregiver is that the crucial information built up in the private sphere through a shorter or longer-term relationship

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[83] Simply put, the struggle to define what exactly a person actually needs (Tronto's point of reference here is Nancy Fraser's work). The reader will recall this has already taken place within the legal needs literature as policymakers have struggled between using lawyer-driven and client-driven needs, but even more acute struggles happen on the ground in face-to-face encounters between clients and legal counsel.

not only has much less time to develop but must be shared or redeveloped with multiple people. Indeed, perhaps one of the more exhausting and tedious, if not retraumatizing, parts of the legal process is the need for someone to "retell their story" at every step of the process (Daylen, Von Tongeren Harvey, & O'Toole, 2006: 283). Consequently, in a caring legal system, maintaining a record of information that may be extraneous from a strictly legal point of view but is relevant from a caring point of view (e.g. how far they have to travel to get to court, competing caring obligations, etc.) should be maintained as part of a person's file. That is, understanding legal needs always goes beyond the facts of the case that are currently exclusively recorded, and legal record keeping practices should reflect this.

To implement this kind of change would require an alteration in lawyers' as well as front-line court staff procedures, as well as significant investment in court information infrastructure (e.g. changes to databases, forms, etc.). With that being said, for provinces like Ontario and other jurisdictions that maintain informational management systems that are, in some cases, decades out-of-date (Taylor, 2012), because they are looking to modernize, it is in some ways easier to lobby for the inclusion of new features. Of course, in other ways, it is far more difficult because there is limited capacity to deliver even the top priorities. Nonetheless, there seems to be interest in new ideas. Lobbying for the collaboration around and sharing of not traditionally important information may be able to find a home in forward-looking initiatives like the Ontario's Better Justice Together (2016).

Thirdly, legal policymakers must pay attention to the positive legal needs and demands their policies create. In a caring legal system, non-normative, positive demands would be minimized to the greatest extent possible. Indeed, a caregiver should always be cognizant of the potential burden her care might place on the care recipient. An analogy might be a teacher who assigns too much homework or requires that a particularly expensive textbook be purchased when an equally good but cheaper textbook is available. In this example the teacher imposes unnecessary costs and barriers to the care she is supposed to provide. The best teachers will be mindful of only requiring such time and money of their students as are required to learn as well as possible. In a sense, a caring legal system is a legal system without "red tape", and as such might be appealing to wide array of unexpected allies, but we must be very careful here.

Typical red tape rhetoric paints all regulations and requirements with a single brush. Legal needs provide a framework to distinguish between normative positive legal needs and non-normative demands. The legal system is not improved, and in fact is hurt, by eliminating normative, positive legal needs, since it undermines the legal system's capacity to meet normative needs. On the other hand, as I suggested earlier, there may be justifications besides normative needs for creating a particular positive need. My recommendation here is simply that as policies are made, from choices like how to schedule court dates to

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building a new courthouse, the policymakers' default position should be to understand and minimize the non-normative positive demands that could be created.

This position is already in principle supported by, for example, the Action Committee on Civil and Family Justice, which calls for a "user-centred" approach (Action Committee, 2013: 2). The user-centred approach calls for keeping in mind how legal policy will be experienced by the user. I am only adding a further level of clarification and qualification. The policymaker must not only consider the user's experience but their underlying needs. Indeed, a user may find a particular procedure frustrating and seemingly unnecessary, while this frustration should be minimized, if the procedure is a normative positive legal need, it must be maintained. Taken together, these three groups of recommendations would go a significant way to making our legal system far more attentive.

A Responsible Legal System

The second phase of care is "taking care of", which consists in taking responsibility for meeting the concrete other's needs (Tronto, 1993: 106). Before we can discuss how this responsibility might be institutionalized, however, we must consider a fundamental problem. The reader may recall that in the introduction of this study, I wrote that a system might be said to embody an ethic to the extent that adhering to a system's rules/principles consistently results in a pattern of activity that would be normatively justified by that ethic. Based on this, where the activity of an ethic must go beyond rule-following (as with the ethics of care), this would seem to either lead to the exclusion of that ethic from being institutionally embodied or to paradox (if not contradiction). This issue was implicitly raised again in chapter 6 when we considered how jurisdiction presented an obstacle to care.

While I argued that someone who is caring would seek out obligations to care, this does not address whether a caring system requires individually caring people to occupy all its roles, but more crucially it does not address a fundamental difference between the legal system and other institutions. With other institutions (e.g. a hospital), actors are obligated to do certain things as part of the general structure of the activities that take place within the institution, but obligation remains something extrinsic to the activity itself. For instance, it is possible to give somebody medicine without being required to. In the legal system, on the other hand, obligation is arguably a constitutive feature of the activity.

That is to say, pre-existing rules were identified as precisely one of features of the legal system that sets it apart from alternatives. This is not to say that judges, for example, do not have discretion. We might argue for the existence of greater or lesser amounts of discretion, attributable to one of three things: the absence of law in a certain area; the ambiguity/vagueness of law in a certain area; the plurality of

precedent in a certain area.[84] In all three cases, acting out of obligation to the law is taken for granted, what is asserted is that obligation is either incomplete, leaves room, or one could act in many ways and still be doing so "out of obligation". So if acting out of obligation precludes acting out of responsibility, and care requires acting out of responsibility, then there is no room for care in the law or it is limited to discretion which is to say beyond the limit of the system.

In fact, one of the crucial innovations in my renewed definition of legal need saves us here. Because legal needs can be for something that the legal system does not offer yet, the relationship of the system (e.g. the legislative, judicial, or other reformer) to that need is *necessarily* one of responsibility, since if it was obligation it would mean the system does in fact offer it (even if this offer had never been realized before). So, for example, a court could for the first time hold an employer accountable for firing a pregnant woman under pre-existing non-discrimination legislation. On the other hand, the moment that slavery is abolished in a system that previously regularly upheld it (whether or not it was ultimately philosophically compatible with other laws in the system), a legal need has been responded to. The lawmaker may present their motivation as a sense of obligation to some underlying principles of the system, but insofar as that same legal system is unlikely to lock up all the judges who upheld slavery prior to the amendment, there is clearly more at stake than fidelity to the system.

But this only shows that responsibility is relevant to the question of law-making but not in the upholding of the law. A further argument is needed to show that responsibility is regularly relevant beyond these exceptional cases. In fact, the above argument does suffice, since it shows that it is possible to satisfy someone's legal right without satisfying their legal need. But if this is possible in ways that require systemic reform, it may also be possible in ways that require individual behaviours. While it could be that satisfaction of a legal right is sufficient to satisfy the legal need, this is such a sensitive question that it seems dangerous to presume, and even more dangerous to build it as an assumption into the training and ethical codes of legal actors, as well as the laws themselves.

Rather, in a caring legal system, the disposition of a legal actor toward their obligation will be that, while they should not (under normal circumstances) contradict it, they may well have to go beyond it or deliver it creatively. This attitude should be encouraged in training and ethical codes. This may be difficult but it is not impossible even under the strictest legal determinacy. A brief, albeit unconfirmed, anecdote will serve to illustrate this point. Mayor La Guardia, the Mayor of New York during the depression, was once presiding over the night court. A shopkeeper was charging a poor old lady with theft of bread. The shopkeeper insisted she needed to be made an example of or else everyone would steal from

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[84] There are stronger defenses of legal realism that I am not well-positioned in the remaining space to contend with, but these also depend on a notion of obligation, simply to a wider set of possible rules (Schauer, 2013: 751). Consequently, such more nuanced arguments need not derail my analysis.

him. The Mayor charged her a $10 fine, for which he himself paid, after which he charged each person present a 50 cent fine for living in a city in which a poor old woman must steal bread to feed her grandchildren (Snopes, n.d.).[85] While this is a highly exceptional case, and may not even be true, as a parable it does a good job of demonstrating the sort of interplay between obligation and responsibility one might expect in a caring legal system, even where judicial actors hold to a strict theory of obligation.

What does this mean for law-making? According to Noddings (2002), a caring policy would "reject any principle or rule that makes it impossible for people in responsible positions to respond with care to those who plead for care or obviously need it" (231). It is telling that she gives the example of minimum sentences that strip the judge of discretion (Noddings, 2002: 231). There is a risk that we may look at such a recommendation and say that rules and care are antithetical, and so caring is necessarily not well-suited for the legal system. That is, a more caring system is simply one with more discretion. This view is regrettable as it considerably narrows the range of policy tools available to the caring policy maker. I would counter that when a care theorist recommends barring certain kinds of rules it should not necessarily mean having no rule at all. Rather, it is an invitation to seek more creative and more flexible rules capable of being applied in a way that responds sensitively to the needs of those involved.

Consider, for example, the by-laws and policies of a non-profit corporation. Maximizing discretion, e.g. by having no disciplinary policy, could easily frustrate and confuse volunteer Board members who may not know how to begin, and negatively affect employees who are consequently subject to an ad hoc, ineffective process. By the same token, a disciplinary procedure that is too time consuming will fail to meet the needs of those involved. As a matter of right, such a policy could be put in place, and, out of obligation, the board of directors or senior employees could implement it, but this would likely not be best practices. Here again we see the interplay between obligation and responsibility (e.g. in putting a better policy in place) and the insufficiency of obligation on its own. What should be clear though is that the solution from a caring perspective is emphatically not to have no human resources policy but to have a more sensitive and *flexible* human resources policy.

A Competent Legal System

According to Tronto (1993) the third phase of care is care-giving, this involves the direct, often physical, work required to meet a person's needs (107). One might think of this as the culmination of care, since it is in this phase that the needs are ultimately met or not. For the preventative function of the

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[85] This story could be used as much by the critics of the caring legal system as the proponents, because it illustrates the dangers of a caring legal system. I believe this underscores the greater amount of trust a caring legal system would call for. This is likely the most difficult part of the whole proposal since institutional accountability has been constructed in such a way as to minimize the need for trust (i.e. by minimizing discretion).

legal system there is no problem. Laws that meet needs that are appropriately upheld (e.g. without unnecessary violence, inequitable scrutiny of some, etc.) constitute a kind of work that directly meets latent needs. For an example of this, one may think of the food plant inspector.[86] Yet here we come to a possible problem for the reactive part of the legal system.

In criminal cases, the remedy is often some kind of punishment for the offender and possibly restitution. In civil cases, the remedy offered by the legal system is often but not exclusively "damages", i.e. a sum of money for someone harmed by wrongful action. This raises two problems for the possibility of a caring legal system. Firstly, according to Tronto (1993), giving money is not caregiving, as it in fact takes much work to convert a paycheque, for example, into needs met (e.g. cooking, cleaning, etc.) (107). Secondly, in both cases, the legal system comes up against the fact that normative needs are not substitutable. No amount of money or jail time, for example, will ever be able to replace what a person was actually deprived of, e.g. health, sense of security, a relative, etc. Even where what is lost seems to only be money, one inevitably also loses time, as well as trust and potentially mental health. From the perspective of needs, the remedial function of punishments or damages must therefore often, if not always, be fictitious. If this is true, than the core element of the legal system's reactive function (as opposed to preventative function) cannot be said to really meet needs. Is it possible to understand court remedies in a way that allows us to maintain the legal system's reactive function as caring?

Firstly, we could say that every response also serves a preventative purpose (i.e. to make an example of wrong-doers) and so is captured under the first kind of caring function. This may be true but is unsatisfactory if we believe the victim is or ought to be the primary care recipient and not some future community (which might also be a care recipient). We might simply call for more creative adjudication, perhaps modelled on restorative justice systems. This is important from the perspective of caring for the perpetrator as well. This reply seems appropriate in those cases where some non-monetary and non-jail remedy would come closer to meeting the need under question. Where this is not the case, the restorative system faces the same problem as the current system. In such cases where the need cannot be met (e.g. a lost relative), the legal system should be considered to be making the best of a bad situation. Is this enough to call what the legal system does care?

Tronto (1993) gives the example of a teacher in an underfunded school who tries but cannot really deliver a proper education (134). We may want to praise the teacher for her effort, but ultimately if the need was not met, it is not care. This may lead us to view the major remedies of the legal system as

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[86] I have no doubt some would baulk at calling this care. After all, this is not "direct" in the way that caregiving seems to call for. I agree it is an indirect way of meeting an acute need, e.g. food poisoning, but it directly meets the latent, dispositional need we have to avoid food poisoning. Would a society in which more people are poisoned and healed be ethically preferable from the point of view of the ethics of care to one with a robust food inspection system where no one got sick?

categorically incapable of being care-giving. This would be a serious blow to the caring legal system, but the analogy does not work. In the case of the teacher she is dealing with a need that could be met, but she does not have the resources to do so. In the case of the legal system, we are discussing needs that often can never be met. Consequently, it is inappropriate to hold legal remedies up to the standard of meeting those needs.

I believe in such cases the function of the system might be better understood like a friend who comforts a mourner. The friend cannot restore what was lost, but there is an important sense in which their simply being present at that moment is giving care. The way in which the legal system is present in this moment is to ensure to the best of its abilities that harm done to a person bears consequences. This is a way of insisting on the value of someone within the community and demonstrating that when they are mistreated they are not alone. Understood this way, the always-second-best[87] attempt to restore something lost is actually a potentially best attempt to engage in a different sort of action that the reader may recall reflects Virginia Held's (2005) understanding of the expressive dimension of care (42). Of course, if this is the case, it would require a major re-thinking of legal remedies which I cannot pursue here.

Responding to the Legal System

The final phase of care is care-receiving. That is, the care recipient responds in some way, if only by showing improvement. This response has many important aspects, but from an institutional perspective, probably its most important aspect is the feedback it provides. Good caring institutions would offer opportunity to express feedback (Tronto, 2010: 166-67). This feedback cycle is a means of constantly improving, not to mention legitimizing, an institution. Of course, feedback is a priority in many kinds of institutions (e.g. universities and hospitals), so it is hardly revolutionary to expect feedback play an important role in the legal system as well. Furthermore, that feedback must be immediate and clear (i.e. not simply mountains of data) (Thaler & Sunstein, 2009: 77). Efforts have already been undertaken to gather feedback. There are consultations as a matter of course in any policy or reform proposal. For instance, since 1983, the Canadian Bar Association (2016) has organized an annual Law Day to promote the Charter of Rights and Freedoms, sending lawyers into the community to host public workshops, offering an informal opportunity for feedback (Law Day aims at…, 1983, April 18). There is also a considerable amount of public opinion research out there on matters relating to the legal system (Roberts, 2004). These do not directly address legal needs in any systematic way, that is, they do not use the concept of legal needs in their questions or answers.

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[87] It is second best in the sense that the best case scenario is always that no crime was committed in the first place.

Closer to the mark are the internal "Client Feedback Surveys" that the Department of Justice has conducted on perceptions of how their legal services are delivered (Performance Management and Reporting Division, 2012). In fact, within the very first paragraph of the introduction, the Report describes the work of the Department of Justice as "respondi(ing) to the legal needs of federal departments and agencies" (Performance Management and Reporting Division, 2012: 1). The report concludes that by and large the Department is meeting these needs (Performance Management and Reporting Division, 2012: 1). This conclusion was reached based on clients' self-perception of needs, without having made much effort to define need (Performance Management and Reporting Division, 2012: 13, 15, 17).

Nonetheless, this survey shows there is both an interest and ability in seeking feedback around needs. More effort, however, needs to be put into scaling up such programs for courts as a whole. But, there are of course, always fiscal considerations, I would therefore recommend starting by tweaking current feedback tools to be more sensitive to legal needs by offering a definition--akin to the definition offered in this study though in plainer language--for questions that ask about legal need.

While all these feedback processes are important they are categorically insufficient because they are initiated by the caregiver and, however plentiful, they are essentially ad hoc, rather than built into the process. For a legal system to be caring, there must be a built-in opportunity for care recipients to express afterwards whether or not their legal needs have been met. Ombudspeople are one example of this, but obviously a single office that only looks at a narrow range of types of feedback will be limited.

Additionally, I mentioned that feedback must be immediate and clear in order for practitioners to have the best opportunity to change their course of action. Such standards are likely impossible in the realm of legal needs. After all, in the case of class action settlements, for example, it may take years to implement and in such complex cases it is not always clear what satisfied needs look like, although it is often clear what unmet needs look like. To help solve this problem, large-scale, longitudinal research might be conducted on early indicators of "successful" (from a legal needs perspective) legal outcomes. For instance, what are the signs that a defendant will comply with a restraining order, or a company pay a settlement in a timely fashion? This, of course, also runs into questions of funding, but it suggests what kind of research would be prioritized in a caring legal system. Whatever studies are done, it is crucial that the results be made available in accessible and usable ways to practitioners.

Conclusion

In sum, I have recommended that we: provide more professional and public training in the identification of legal needs; improve the court's ability to preserve and internally share care-relevant information; explicitly minimize non-normative, positive legal demands as part of our policymaking;

build the interplay of responsibility and obligation into ethical codes and education; craft laws that allow legal actors to respond to legal needs; seek more creative remedies; understand current remedies in terms of their expressive function; tweak institutionally ingrained avenues of feedback, such as surveys, to be more sensitive to legal needs and make the data immediately available and practical for practitioners. These recommendations may at first seem quite piecemeal, incapable of living up to kind of holistic standard care is supposed to represent (Tronto, 2010: 160).

Nevertheless, I believe that, taken together, these recommendations would create a virtuous cycle in which participants in the legal system, be they citizens, lawyers, judges, court staff, or others, become increasingly aware of legal needs, and consequently more able and more likely to prioritize meeting these needs. I am not sure if, on its own, this would be sufficient for a caring legal system, but it certainly seems to be necessary. Nonetheless, the reader may be taken aback by these proposals either because they are too moderate or (in a few cases) too cumbersome.

To the reader who sees a caring legal system as an inspiring, radical proposal, these recommendations may be disappointingly moderate. This may lead such a reader either to reject that these are in fact the implications of all that has been argued, or to retroactively look on past arguments with a degree of suspicion. Is this simply one of those conservative cooptation attempts against which we have been warned? Besides the common refrain that "we need to start somewhere", I would ask such a reader to firstly reconsider how difficult it would be to put some of these recommendations in place[88], and secondly notice how implementing these recommendations creates the opportunity for a systematic awareness of and commitment (both institutionally and personally) to legal needs to spark considerable substantive reform efforts by citizens, lawyers, and others.

Indeed, one thing I have not explored is to what degree the current legal system meets legal needs effectively. This is, of course, a complex empirical question. But to the degree that one believes the current system is not doing a particularly good job, implementing the above recommendations would make that abundantly clear in a detailed and focused way and offer people a clear caring language to express this frustration. As a framework to raise awareness and guide change the ideal of the caring legal system proposed is far more comprehensive, while including, the "access to justice" framework which seems to me to be the current language in which such dissatisfaction is expressed.

On the other hand, those wary of radical proposals should take heart. Most of the above proposals involve improving practices we are already engaged in, according to standards on which we already agree. The human resources policy mentioned above is probably the clearest expression of this. The caring policy is also simply the better policy by any conventional standard. As has been mentioned, the

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[88] This is of course not in itself an indication of anything except that the recommendations are not simply business as usual.

ethics of care takes people (and systems) as they are and works to improve them. If one believes only minor incremental tweaks are necessary to meet people's needs, then all I have articulated is a more holistic framework within which such otherwise disparate and multi-sectoral policy changes can be understood. If one believes more is needed, then I have suggested some initial recommendations that will build our collective knowledge, ability, and political will to get there, without devaluing or failing to take advantage of all the great work that has already been done.

Conclusion

I set out to determine what would be required for legal systems like Canada's to be caring. Given that care largely consists in meeting needs, I pursued this question by attempting to define legal needs and investigating whether and how they could be responded to in a caring way. In these final pages I will do four interrelated things. Firstly, I will take stock of what I believe I have done towards accomplishing the above task. Secondly, I will consider a few sweeping objections that could be raised against this work as a whole. At the same time, I will present some of the most serious limitations of my work in light of these objections. Thirdly, I will present some other important limitations. Finally, I will articulate what I consider to be the next steps both theoretically and practically. As with the rest of this study, I will not attempt to offer an exhaustive list, but only an illustrative one, focusing on those objections, limitations, and next steps that are most important.

Taking Stock

I began by summarizing the legal needs literature through a systematic definition of legal needs. The definition shows that up until now, "legal need" has roughly meant individuals (or occasionally groups) facing sufficiently serious legal (or justiciable) problems that could or might best be solved by the services of a legal professional. This understanding of legal needs, however, faces many devastating criticisms both for being depoliticizing in multiple ways and fostering an ineffective response.

To attempt overcoming these limitations while nevertheless preserving the essential insights of this literature, I situated legal needs within the philosophy of needs literature. To do this I sought to develop a unifying conceptual framework of normative needs out of the many of major conceptual frameworks in the philosophy of needs literature. In this framework, needs were found to be, among other things: objective, non-psychological, inescapable, and their satisfaction has both indivisibly universal and particular aspects. In its normative sense, something is needed if it is intrinsically linked to the avoidance of serious harm for the kind of thing that the entity with the need is. To avoid having to answer the highly controversial question of what a good human life consists in, the framework takes as the scope of normative needs what would be required to adopt and pursue any ideal of a human life. As such, people

have three mainly[89] non-hierarchical layers of normative needs: survival, ideal formation/grasping, and ideal pursuit.

Paying special attention to the problem of paternalism, I then considered the major objections against needs claims as a political language. I argued that these criticisms express real concerns, but can be answered in two ways. On the one hand, some of the criticisms are appropriate only for misunderstandings or misapplications of needs claims (such as humiliation and paternalism). On the other hand, some criticisms express real limitations of needs claims (such as producing unreliable response). These limitations call for correction by the languages of rights and preferences, but even in these cases, the corrective languages have their own limitations that call for the inclusion of needs-language. Additionally, I attempted to offer a novel argument for why the link between needs and paternalism relies on a tacit and erroneous identification of objective knowledge with "unilateral" knowledge.

Once I established a clear definition and defence of needs, I then sought to determine under what conditions contemporary common law systems are required to settle and prevent disputes as opposed to: alternative dispute resolution, self-help, and political action. Legal systems were found to be necessary when: a disputing party lacks power but has formal standing; differing conceptions of the good involved are intractable; and a political decision will likely be overturned. The legal system's dispute prevention and settlement function alone was found to support all three layers of needs in multiple ways. Given that the legal system has other functions, this investigation only yielded a part of the total possible range of normative legal needs.

I then investigated whether any current conceptualizations of care allow for the possibility of a caring institution, such as the legal system. I compared many of the major conceptualizations of care on some key points, including the role of disposition, the treatment of care as virtue and/or practice, and the goal of care, among other questions. I then examined the arguments for and against the possibility and desirability of institutional care. I concluded that these arguments against institutional care are better understood as cautions than fatal refutations. I then introduced the notion of an institutional need, i.e. needs that require an institution to be met, of which I contend legal needs are an example. I briefly argued that the existence of such needs show that institutions must be capable of care or else certain needs cannot be responded to caringly. This discussion made clear that Joan Tronto's conception of care is the most suitable to address institutional needs, including legal needs.

I then investigated how the ethics of care has been applied to the domain of law through relational feminism. In particular, I examined the sub-literatures on relational lawyering and abortion. I concluded that discussions to date have sought care outside of the legal system rather than transformed the law per

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[89] The one exception is where an ideal demands the sacrifice of one's persistence. In which case persistence yields to the ideal as the persistence is only justified by the same framework that justifies the pursuit.

se, and where legal transformation has been sought, it has presumed a caring network of relations, which cannot be taken for granted in the case of a legal need. I concluded with a range of recommendations for a more caring legal system, ranging from public legal education and improved records management to a renewed understanding of remedy and more sensitive feedback surveys.

On a theoretical level, this entire investigation was supposed to help determine how the ethics of care relates to the ethics of justice and, secondly, to institutions. The latter question was answered most explicitly in chapter 6. The answer to the former question has been somewhat more implicit, but I am now in a position to address it directly. I stated in chapter 8 that efforts to apply the ethics of care in the domain of law have sometimes sought to make the legal system more caring by making it less legal (i.e. avoiding litigation, weakening the role of precedent, etc.). I have argued that insofar as these proposals depend on the context of more or less caring relationships in which communication is possible, this position insufficiently appreciates the fact that legal needs often (if not always) arise in the absence of such relationships. I take for granted that a just system would do a better job of meeting such needs. This means that in the case of legal needs, an ethic of justice is, to put it succinctly, a form of care beyond care (i.e. care in uncaring situations). This answer should be understood as an addition to the other possible relations between care and justice, e.g. justice is required for good care, care is required for justice, etc.) rather than a replacement.

Objections to this Project as a Whole

With all the above being said, there are two kinds of objections that would be devastating for this study. In the first case, one could accept all these conclusions but argue that they ultimately offer no guidance or no novel guidance. In the second case, one could argue that the very method of this study renders these conclusions too general to be rigorous scholarship or applicable to real-life situations. I would now like to address what I consider to be the two most fundamental rebuttals within each of these types. The first rebuttal is that the scope of normative legal needs depends on two crucial premises that are not argued for. Firstly, there is the caveat that X must have "normative status" and, secondly, normative needs are circumscribed by a vague "overlap of ideal lives". Consequently, the normativity of my argument is either empty (because one could posit anything has normative status) or superfluous (because the range is offered by some other normative theory). The second rebuttal is that my entire discussion has been too imprecise in its historical and jurisdictional scope to offer meaningful practical insights.

Let us begin by considering the vague caveat that X must have "normative status". When I first introduced the caveat, my explanation was simply that normative status is just anything that must be normatively important to preserve. But if that is the case, then all I am really arguing is that if the end is

normatively important then it follows that the required means are normatively important, and sometimes the legal systems are the required means. That is a fairly uninteresting argument and does nothing to answer the most crucial question of which are the relevant ends. Indeed, in chapter 2, I pointed out that the edges of normative need are "fuzzy" precisely because it is not clear which ways of life are relevant for the public to preserve. I suggested some kind of common ground across the many possible conceptions of the best human life, but this answer is unsatisfactory for many reasons.

Firstly, it could be argued that the actual list of needs I have presented ultimately resembles something like Nussbaum's capabilities approach, therefore this whole study has just been a roundabout way of repeating what we've already heard. Indeed, the exact relationship of a needs approach to a capabilities approach has long been under dispute (Alkire, 2005; Rauschmayer et al., 2011). I would respond that even if all I have done is present the exact same framework with different terminology, that would remain valuable. This is not to say that this is what I have done, only to suggest that even in the worst case scenario for the redundancy of this work something valuable has still been accomplished. That is, since the concept of needs the natural meeting point for the ethics of care and legal policy in a way "capability" simply is not. Even if this response is found to be satisfactory, though, there are more troubling issues.

Secondly, such underlying commonality between diverse human ideals is something of a gambit empirically. Indeed, I suggested how I think it could be verified or falsified, but this leaves the possibility that no overlap is found. Thirdly, it could be argued that this is just another way of smuggling in the universal ethical subject from which the ethics of care is trying to move away. Fourthly, and most importantly, asserting a common ground between ideal lives simply pushes off the normative debate to the question of common to *which* potential ideals? Is white supremacism really something we are called to preserve? Really then, invoking a common ground is circular. Of course, this difficulty would disappear if one or more ideals of human life were found to be true or at least more legitimate than others and widely accepted as such. In the absence of such agreement, however, it seems more plausible, as some theorists have suggested (Braybrooke, 2005: 210), to say that the range of relevant needs will have to be negotiated by the concerned public to set more or less explicitly the range of relevant Xs whose needs the legal system will meet. But if this discussion must go on, what have I contributed to it?

I suspect the only answer I can offer is that my definition of legal needs, and the corresponding discussion of institutional need, offers considerable clarity of what to look for when the community has determined what Xs are worth preserving. Consider some alternatives to the needs-approach that I have articulated. For instance, it is possible that some X is worth preserving and then the community could provide that X with: whatever it demands, within reason, on the assumption that it knows best (preferences); or a certain pre-determined list of entitlements seen as sufficient for the preservation of X

(rights). There are interesting and important arguments for both these alternatives, and indeed, I have argued that a combination of all three is best. My point here is that it is not automatic that normative need will guide the discussion of preserving X, once the relevant Xs have been decided. Nonetheless, once normative needs, including legal needs, have been clarified, there are some impressive reasons to preferring it as an approach to maintain those Xs we agree are normatively important, some of which I offered in chapter 3.

In brief, I do believe this study offers normative direction to decision makers once the work of determining which Xs have normative status has been done. This sort of direction is every bit as important as that initial direction and I do not believe it dooms this project that it does not answer that more foundational question.

This brings us to the second objection. It might be contended that I ought to have paid far more attention to historical, cultural, geographical, and institutional particularities. After all, I have identified precedent as a fundamental feature of legal systems, when this is really particular to common law legal systems. What then does legal need mean in civil legal systems? Furthermore, I have identified normative pluralism as a crucial condition necessitating legal systems. What does this mean in a non-pluralistic context? This is particularly important where the dominant culture has long and well-developed non-judicial dispute resolution traditions. Finally, the alternatives to the legal system that I considered, such as dispute resolution, are particular historical phenomenon. What would legal needs in North America be like 60 or 70 years ago before the rise of modern ADR? These are just a few counterexamples to the features of legal need identified in chapter 4.

These are important questions, and they reveal that there is an ill-defined context behind the particular features of legal need argued for in chapter 4. This is a real limitation of my work, but it is not an objection as such. After all, there are answers to all of the questions asked above. Yes, the legal system would be needed for different reasons and under different circumstances in different places and times. Nonetheless, the basic definition offered in chapter 5 holds across all of them, and if generalization and theory-building is possible at all, the very structure or "need" (X needs Y for Z only if Z cannot be achieved without Y), suggests theory-building would probably have to be conducted somewhat along the lines I have proposed if with greater contextual specificity. Of course, the chapter could have benefitted from far more contextual specificity, but at this nascent stage of development (and within the limited space at my disposal), I believe the more general comparison offered served its purpose of illustrating that such an analysis could be done and what features would emerge as important.

Nevertheless, the prospect of greater contextual specificity raises several interesting and potentially troubling possibilities. For instance, differing alternatives available to different groups might result in multiple conditions for legal need within one jurisdiction, or it might be possible to track the

transformation of legal need over a given period of time. It might be argued that these possibilities call into question the feasibility of actually measuring legal need, especially over time, which is indicative of the broader problem of the feasibility of operationalizing this conception of legal need. The question of operationalization is a crucial one, but it should be kept in mind that legal needs has had a history in which theoretical rigour and coherence have too often been subsumed under logistical concerns. If I pull too far in the other direction I hope it is seen as a balancing effort more than anything else.

Of course, I am also of the view that, whether or not my own methodological proposals are sound, with a little creativity, genuine solutions can be found to the barriers to operationalization raised above. I believe the definitions presented in chapter 5 and the recommendations they ultimately give rise to have enough virtues, including clarity, and systemic applicability, that if they are indeed difficult to put in place at first they are at least worth a bit of effort and patience. Furthermore, I have tried to think through the problem of legal need in a way that is continuous with past work and data. It is by no means my intention to "wipe the slate clean". I do believe adjustments to present practices could vastly improve their sensitivity to the nuances presented by these new definitions.

I hope that what this discussion has shown is that the most fundamental objections to this work serve to illustrate the political and scholarly work that remains to be done. Besides the limitations mentioned above (i.e. leaving open central normative questions and failing to do enough to define the historical and jurisdictional scope of this work), there are a few other limitations of note.

Other Limitations

In chapter 6, I attempted to answer the question whether institutions can care. I did not have the space to consider every prominent definition of care in all its depth and fullness, and I certainly did not answer some of the most central questions in the literature, such as whether or not care is a virtue. In general, this chapter reveals something true throughout the study. Namely, I have tried as much as possible to only argue those points absolutely necessary for my purposes. There is no question that much of the nuance lost in this chapter, as in other chapters, would be helpful to the articulation of the conditions of a caring legal system, but since at this initial stage I have been mainly concerned with showing its possibility, I believe it remains possible to do this without an exhaustive consideration of all the possible definitions and their various nuances.

Additionally, the reader may be concerned that in presenting institutional needs, I glossed over what are probably some of the most difficult and controversial theoretical debates taken for granted in this study. For instance, what is an institution really? How do we separate the institutions from actors within it, or the creators of the institutions? To these questions, I have no satisfactory answers. There are

foundational concerns here that I simply did not have the space to adequately address and they deserve a detailed discussion.

In chapter 7, I gave a cursory discussion of how the ethics of care have been applied in jurisprudence to date. The literature is in fact quite large, and so I, at best, gave a few key examples and focussed only on a few key texts within each. I would have very much liked to consider the question of care in judgement and family law, where there are rich discussions. A much wider and more in-depth literature review would be required to properly situate my own recommendations within this literature and substantiate my claims about the limits of current approaches. Nevertheless, based on my readings in the above mentioned areas as well as others, I remain confident that my conclusions are novel and challenging, as this wider work remains inattentive to the distinction between legal and non-legal needs and usually does not work with Tronto's conceptualization of care.

Next Steps

With these objections and limitations in mind, there is still, obviously, much work to be done. For those who want to further develop this conception of legal needs, the most important next step is to identify their scope by examining key functions of historically and jurisdictionally specific legal systems and comparing these systems to their alternatives for particular populations in accomplishing these ends. Examples of key functions include: the distribution of public resources, penalization, and facilitating/effectuating private arrangements (Summers & Howard, 1972: 119, 275, 365).[90] Alternatives of particular interest include particular customs, moral and ethical systems, and religions. There are surely many others. Only with a significant number of such comparisons can a truly robust set of conditions under which legal needs emerge be determined.

Furthermore, as I have mentioned, there are profoundly complex theoretical questions lurking beneath the notion of an institutional need that could be addressed. I believe it is a fruitful opportunity for care theorists to work with institutional theorists and needs theorist on a relatively novel question at the heart of so many of the political aspirations of the ethics of care. That is, what does it mean for *institutions* to be caregivers? In particular, readers will surely want to know whether treating the institution as a caregiver (and therefore an actor) is merely a convenient way of speaking or some kind of ontological assertion. That is, it could simply be that we should say the institution is the actor because it is simpler than listing all the relevant people whose coordinated actions effectuate the institution. It could also be that the institution "has a life of its own" over and above all its constituent parts. I am agnostic on

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[90] How one divides the functions is essentially artificial and should not ultimately change when the legal system is required for ensuring one's normative needs are met.

this question but lean towards the latter answer. Clarifying this question will go some way to nuancing institutional care and embedding it within broader political and social theories.

Additionally, while there is wide agreement that private and institutional care are not interchangeable, I believe care ethicists interested in institutional care will have to pay more attention to when and why public care cannot be replaced, and how private and public dimensions interact in care we view as neither categorically private nor categorically public. That is, just as there are institutional needs, there are institutional dimensions to non-institutional needs, as well as private dimensions, such as compassion, to institutional needs. I believe that getting clearer on this point would serve to considerably improve the ethics of care as a framework for policy action that can still make sense of intuitions about the nature of care based on our private experiences.

Empirically speaking, the most important next step is to develop the methodologies that would actually enable us to observe normative and positive legal needs in the world. Adjusting survey and interview questions in current tools from inquiring into the occurrence of certain situations towards inquiring into whether certain features occur in any situation occur holds the greatest promise in maintaining some level of continuity with current data and methods.

With regard to policy, it is clear that next steps will likely include, but go well beyond, the traditional legal aid recommendations that have been made in response to a finding of legal need. In chapter 8, I suggested many steps that could be taken immediately, such as workshop development and delivery and changing how we think about "red tape". Some actions, however, are considerably more long-term, such as improving information management systems and improving opportunities for feedback. Whatever steps are taken, coalitions will certainly have to be built across various kinds of lawyers, policymakers, and citizens. Indeed, it is difficult to see how moving towards a system that consciously focuses on meeting legal needs, or at least crafting a system that does not present significant barriers to meeting legal needs, would not require broad-based support for systemic reform. The task is great, but I believe there is a clear path forward.

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