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How Broad Modal Fictionalism Can Survive Rosen’s Challenge

Keywords: fictionalism, fiction, modal irrealism, possible worlds

Słowa kluczowe: fikcjonalizm, fikcja, modalny irrealizm, światy możliwe

Abstract

Gideon Rosen described the difficulties faced by those who claim that statements about possible worlds cannot be literally true. According to his argument, if the truth of modal sentences could be explained by referring to the hypothesis of the plurality of possible worlds, which is a sort of fiction for modal irrealists, the position would have antinomic consequence. I argue that the advocate of broad modal fictionalism can avoid such a devastating conclusion. To that end, her position should be given in meta-language describing the necessary and sufficient conditions of accepting modal sentences as true in terms of fiction of possible worlds. I show that there is a coherent way of reading ‘it is accepted as true’ that allows one to maintain that the disjunction of two mutually contradictory propositions can be accepted without accepting either of them.

Introduction

Do possible worlds exist? Those who answer affirmatively are modal realists; those who disagree can be called modal agnostics, sceptics or, in general, modal irrealists. The latter face the problem of how to understand modal statements such that a state of affairs is contingent, necessary, or possible. Modal realists are in a comfortable position for they can refer to possible worlds semantics to explain the truth of sentences of that sort; thus, they can adopt precise and extensional semantics for these kinds of claims. But this maneuver is not available for irrealists, as it would commit them to the existence of entities they reject. However, they can discard the assumption of the meaningfulness of modal discourse and yet propose an explanation of its apparent intelligibility by referring to possible worlds semantics and its ontology treated as merely a sort of fiction. Let us call those who see possible worlds theory as a kind of useful fiction *modal fictionalists* (MF). Is their position coherent and reasonable? In his paper, Gideon Rosen (1990) brilliantly described a serious challenge to such a stance. I will argue that Rosen's objections do not pose a serious obstacle that cannot be overcome by at least some modal fictionalists—there is a coherent and convincing way out of his trap.

Modal Fictionalism

According to Rosen, the modal fictionalist endorses the following biconditional (formulated in an object language, hence the prefix “o”):

(o-M) M iff according to PW, M*,

where the variable M ranges over a set of modal statements (such as “It is possible that Berlin is the capital of Lithuania,” or “It is necessary that if cows are mammals, then mammals are cows.”): in general, simple or compound sentences, seemingly true or false, which contain, in one way or another, at least one modal expression (such as “it is possible that,” “it is necessary that,” etc.); M* ranges over their appropriate translations into the language of possible worlds semantics in line with the modal realist approach, that is, they explicitly refer to objects, real or abstract, or perhaps mental constructs that possible worlds are meant to be. The phrase “according to

the hypothesis of a plurality of worlds,” “according to the hypothesis PW,” or, alternatively, “according to possible-world fiction,” is the operator used by the modal fictionalist to express and stress her distance towards the existence of possible worlds and an inventive way to avoid ontological commitment to them. MF can in that way exploit the benefits of the language of the possible worlds of Realists without ontological commitment to possible worlds other than the actual one. In other words, the equivalence (o-M) expresses how the modal sentences stated in an object language are to be comprehended in a language ontologically acceptable to the modal fictionalist, that is, in a way which enables her to explain certain modal facts without seriously or literally appealing to possible worlds and their ontology. The appropriate application of the phrase “according to (the fiction) PW” to a sentence referring to possible worlds results in a meta-fictional sentence—a statement that says something about a sentence that says something about how things are according to possible worlds theory, which is nothing more than a convenient fiction.

The biconditional (o-M) can be viewed as a consequence of two principles: one is endorsed by the modal realist, while the other is a general prescription proposed by MF as to how to interpret sentences about possible worlds (Rosen, 1990, p. 335). The first mentioned equivalence states

(MR) $M \text{ iff } M^*$,

while the second states

(MF) Interpret a sentence $\lceil M^* \rceil$ as: according to MR, M^* .

The adoption of the method in (o-M) clearly shows that Rosen assumes that the modal fictionalist regards modal sentences (those over which the variable on the right-hand side of (o-M) ranges over) as meaningful and having exactly one of two logical values.

However, this is not an entirely legitimate assumption: modal fictionalism can also embrace a position that regards modal sentences as deprived of any truth value. A fictionalist of this kind assesses modal statements just as an irrealist with respect to literary discourse (hereinafter, a literary fictionalist) judges fictional sentences, that is, she rejects their being meaningful; perhaps, Quine may be thought of as a prominent exponent of this stance (Føllesdal, 1968; Quine, 1947). Such a modal fictionalist will not only fail

to recognize modal claims (such as \lceil It is necessary that if P, then P \rceil) as meaningful, but will also refrain from judging (MR) as such. However, a modal fictionalist of this type may accept modal discourse in the same way, and as much as literary fictionalists accept all sorts of interfictional statements about, say, Sherlock Holmes, not by evaluating them as meaningful and even true in appropriate circumstances, but as somehow comprehensible and important for some other reasons even if literally meaningless at the same time. Some may explain this phenomenon by pointing out that by uttering some fictional sentences, one can pragmatically implicate something true or false, thus giving an impression of making a true statement (Adams and Dietrich, 2004; Adams and Fuller, 2007; Puczyłowski, 2021), others may explain the apparent meaningfulness of simple fictional statements by insisting that their logical form contains the operator “in the fiction F,” usually omitted in everyday usage (Currie, 1990). Similar strategies are viable for modal fictionalists.

Daniel Nolan (1997) calls modal fictionalism that denies simple modal sentences truth as *broad modal fictionalism*. Within this kind, two types can be distinguished further: one that assesses all simple modal claims as false, and one which denies such sentences any truth value. I will focus on the second one. Each variant of modal fictionalism meets problems of its own; however, as I will show, the second can avoid the conclusion which Rosen arrives at in his ingenious argument against fictionalism. Nevertheless, a modal fictionalist of the second kind faces a challenge specific to her approach: how to explain that some modal statements are accepted as true by modal realists or others that are not so scrupulous about philosophical subtleties. After all, they seem not only rational but also coherent and consequent in their judgements about modalities of various kinds, albeit they believe in creatures of fiction: possible worlds, necessity, possibility, and the like.

Literary Fictionalism

The observation that MF can go wild and radical is important for two main reasons. First, it will become apparent that Rosen’s argument against such radical or broad fictionalism is not sound. Thus, it could encourage more moderate supporters of modal fictionalism to take up this more radical position.

Second, Rosen (1990, p. 331) explicitly invokes the position of fictionalism on the example of literary fiction but does not exploit the analogy between modal and literary fictionalisms to its full extent. According to some researchers, the sentence "Sherlock Holmes was a detective" is not true, although it clearly seems to be. How can a literary fictionalist explain this phenomenon? She may respond to the problem by arguing that the widespread acceptance of the truthfulness of "Sherlock Holmes was a detective" (at least among people familiar with Conan Doyle's prose) has its source in the fact that the sentence "According to Doyle, Sherlock Holmes was a detective" is true (at least in its *de dicto* reading). It should also be noted that, according to this kind of literary fictionalist, a simple sentence containing a fictional name is not false either—for instance, if it were false, the referent of the grammatical subject would not belong to the extension of the predicate "was a detective," which is not the case, since the subject has no referent. The literary fictionalist denies fictional sentences their truth value, although of course she is aware that it is her burden to explain their apparent truth or falsehood. This is the reason the literary fictionalist may propose the following

(m-L) The sentence L' is accepted (as apparently true) iff the sentence [According to literary fiction F , L] is true,

where L ranges over sentences of literary fiction (i.e., containing fictional names or predicates), and L' is the name of the sentence that is represented by the variable L on the right-hand side of the equivalence. Alternatively, the principle of translating meaningless sentences into meaningful ones could be formulated as follows

The sentence L' is accepted iff according to literary fiction F , L .

However, let us remain with (m-L) as better reflecting the metalinguistic status of the principle adopted by the literary fictionalist.

Let us note and stress that she does not propose her principle in an object-language form

(o-L) L iff According to literary fiction F , L ,

nor does she use

L iff the sentence [According to literary fiction F , L] is true,

because on the left-hand side, after appropriate substitution for the variable L, we would have a sentence that the literary fictionalist does not consider meaningful. And, in consequence, since the left-hand of the equivalence would be nonsensical, (o-L) stated in an object language would be (in a Literary Fictionist's view) nonsense and hence unacceptable to her.

Rosen's Argument and the Modal Fictionalist

So let us return to the modal fictionalist and her (o-M), which is supposed, in Rosen's view, to express the position of fictionalism in a simple and understandable way. Even if it does, it does not capture these positions adequately. For a broad modal fictionalist, to continue the analogy begun by Rosen, considers modal sentences—taken in their most literal sense—as devoid of precise semantic meaning. Or, if not meaningless, then not precise enough to have a clear logical status. This is why she appeals to “fictions of possible worlds,” because by referring to what they are according to the modal realist, she seeks a way to explain apparently widely accepted modal discourse. Such a fictionalist could not, of course, accept (o-M) as presented by Rosen. For she would recognize that its left-hand side may produce nonsense as a direct result of appropriate substitution for the variable. Hence, she should, like her counterpart on the question of the meaningfulness of literary fiction, give the principle for the reduction of modal claims an appropriate metalinguistic form

(m-M) A modal statement M' is accepted (as true) iff according to PW, M^*

(M^* is the translation of the modal statement M' , which is formulated in terms of possible worlds semantics just as the modal realist would put it; M' is the name of the modal sentence whose translation is represented by M^*).

Now, let us turn to Rosen's argument against fictionalism. In the main part of his argument, Rosen points out a difficulty for a modal fictionalist accepting (o-M). However, I will show that a fictionalist who prefers to express her position with (m-M) rather than (o-M) should not be troubled. Rosen constructs a modal sentence, let us represent it as Q, which

appears true or false; however, as he shows, this sentence is not decidable on the grounds of MR theory: it cannot be decided whether it is true or false according to this conception. Thus, we have the following situation

(1*) The sentence "According to PW, Q*" is false.

Or, in the object language

It is not the case that, according to PW, Q*.

In that case, applying (o-M), we obtain

(E) It is not true that Q.

Then, Rosen notes, at the same time we obtain (since Q* is not decidable) the following on the grounds of PW

(2*) The sentence "According to PW, it is not true that Q*" is false.

And then, by virtue of (o-M)

(2) It is not true that not-Q.

We obtain a contradiction between (1) and (2) (on the assumption that exactly one of the two, Q or not-Q, is true). Thus, in the end, one can conclude that the modal fictionalist's analysis of modal discourse captured in (o-M) is wrong and antinomial.

However, Rosen's proposed reduction of modal discourse into a language free of ontological commitment to possible worlds, as already pointed out, should rather take the metalinguistic form (m-M), not only to convey the position of broad fictionalism, not only for the sake of making the analogy with literary accurate, complete and not merely superficial, but also to convey the essential difference that (o-M) fails to capture. For it is useful to distinguish between two situations. The first indicates that according to some theory, conception, fiction or similar, call it X, it is not the case that P* (P* ranges over sentences of the language of the theory, conception, or fiction X). The second is when it is not the case that, according to X, P* (though it is also not necessarily the case that according to X it is not the case that P*).

The two situations are clearly different. It is not the same as saying

(E) It is not the case that, according to X, P*

and

(B) According to X, it is not the case that P*.

However, by applying a schema formulated in an object language to (A) and (B), one would arrive at the same conclusion

Not-P.

The equivalence given in an object language cannot yield the difference between (A) and (B), and that is another important reason why the object language formulation should be abandoned. The metalinguistic form, on the other hand, allows us to neatly differentiate between these situations. The first, (A), gives us the following

The sentence P is not accepted (as true),

the second (B) leads to

The sentence “not P” is accepted (as true),

So, if we adopt not (o-M) but its metalinguistic counterpart, (m-M), then, having (1*) and (2*), in consequence we get

(m-1) The sentence Q is not accepted (as true);

(m-2) The sentence “it is not true that Q” is not accepted (as true).

Now, note that sentences (m-1) and (m-2) are not contradictory. To see the difference between (A) and (B), the metalinguistic form is necessary.

Acceptance and Modal Statements

However, one can also legitimately ask about the meaning of the predicate “is accepted (as true).” Although this question confronts us with a difficult task, especially since the phrase seems to be modal in some sense, it is not

impossible to stipulate some principles that govern it. We are in a position to put forward a certain list of meaning postulates that intelligible usage of the phrase should satisfy (proposed perhaps for the first time by Marciszewski, 1972, 1973). Let AxP be an abbreviation for "The sentence P is accepted (as true) by x ." We then have

- (A1) If AxP , then $\sim Ax\sim P$;
- (A2) If Ax (if P , Q), then if AxP , then AxQ ;
- (A3) If P is a classical logic theorem, then AxP ;¹
- (A4) $\sim \forall x \forall P$ (if AxP , then P is true);
- (A5) $\sim \forall x \forall P$ (if $\sim AxP$, then $Ax\sim P$).

Arguably, the list is not exhaustive and could be refined further. For example, it seems possible and reasonable to augment it with, for example,

- $\sim \forall x \forall P$ (if P is true, then AxP)
- $\forall x \exists P \sim Ax(P \wedge \sim P)$

It is worth noting here that the notion of acceptance does not apply exclusively to sentences in the sense adopted in classical logic—one can accept (as true) sentences which are only apparently such, that is, which are declarative sentences but at the same time lack truth values. However, as indicated above, according to the proposed analysis of Rosen's case (and to Rosen himself), the modal fictionalist is forced to endorse

- (m-3) The sentence "Q or it is not the case that Q" is accepted (symbolically: $Ax(Q \vee \sim Q)$)

since according to PW, Q or it is not the case that Q.

¹ Adopting (A3) results in a form of logical omniscience. Therefore, in a refined version of the "logic of acceptance," it should be restricted to basic theorems of classical logic. Here, "basic theorem" can be defined as, for example, "a theorem inferable from classical logic axioms in a few steps."

At the same time, by taking into account (m-M), (1*) and (2*), the following hold as well:

(m-1) The sentence Q is not accepted (symbolically: $\sim AxQ$);

(m-2) The sentence “it is not the case that Q” is not accepted (symbolically: $\sim Ax\sim Q$).

Therefore, one may legitimately ask if the conjunction of (m-1)-(m-3) is consistent with (A1)-(A5).

In general, and informally speaking, such a scenario is easy enough to imagine—I can accept (as true) that John is bigger than Mary or he is not without accepting either that he is bigger than her or that it is she who is not smaller than he is—but the point is that the Fictionalist can maintain, in general, that a sentence that appears to be an instantiation of the law of the excluded middle should be accepted even if neither of its subordinate clauses is. It should be accepted (as true), for according to PW and the semantics it imposes, the law of excluded middle holds there.

The fact that, for a given P and x, $\sim AxP$, $\sim Ax\sim P$ and $Ax(P \vee \sim P)$ are not collectively exclusive with the list introduced as (A1)-(A5) can be shown by indicating a model in which all of them are jointly satisfied. To provide such a model, let X be the deductively closed subset of the set S of sentences that an agent x accepts. Let us assume that a model *m* is a function that assigns T or F to an element of the set S that follows a truth schema; also,

if and only if $P \in X$, then $m(AxP) = T$.

Now assume that the deductively closed set of sentences accepted by x is defined by the coherent set

$\{P \vee \sim P, Q\}$.

Combining this assumption with any function *m* such as $m(Q) = F$ results in the model sought. Since

$P \notin \{P \vee \sim P, Q\}$,

then it is not the case that AxP at *m*; it is not the case that $Ax\sim P$ either, for

$\sim P \notin \{P \vee \sim P, Q\}$.

Since

$$Q \in \{P \vee \sim P, Q\},$$

then in m it is true that AxQ but Q is false in the model; therefore, (A4) holds. (A1)-(A3) are satisfied in m , for X is deductively closed. (A5) is true in m , because $\sim AxP$ and $\sim Ax\sim P$ are clearly jointly true in model m .

One may note, however, that the clause on the left-hand side of (m-M) says categorically that a statement is accepted (as true). Thus, the phrase "is accepted" seems to be an absolute term here; however, the proposed meaning postulates are designed for the binary (or relative) term "is accepted by." Therefore, this analysis misses the mark unless something is done. Either on the left-hand side of the equivalence (m-M) there is a sort of noun ellipsis (that is, "by x " is elided), so the omitted phrase needs to be recovered in (m-M), or the logic for "is accepted (as true)" is the same as before, except for the variable " x ." I suppose both solutions are viable, though the first seems more natural for a fictionalist distancing herself from possible-worlds parlance and trying to explain why her opponent, a Modal Realist, accepts modal discourse. To that end, she refers to the fiction the realist created, that is, possible worlds. Therefore, it seems quite straightforward for the fictionalist to adopt a more precise variant of (m-M):

(m-M*) A modal sentence M' is accepted (as true) by MR iff, according to PW, M^* ,

or, to be more precise,

(m-M*) A modal sentence M' is accepted (as true) by MR iff [according to PW, M^* | is true.

Needless to say that "something is accepted (as true) by MR" means here that it is accepted by those who consider modal sentences meaningful and truth-evaluable.²

² Here, 'MR' refers not only to modal realists but to a broader group whose members share an intuition that modal sentences are meaningful and true. For the sake of simplicity, let us assume that they agree on some modal claims as analytically true, such as, it is necessary that, if P , then P .

To illustrate the merits of (m-M*), let us assume that the phrase \lceil according to X, P \rceil means that sentence \lceil P \rceil is a consequence of the sentences and inference rules adopted in X (where \lceil P \rceil is a name for \lceil P \rceil).

On such a reading, isn't the principle (m-M*) trivial? Certainly, its practical and ontological consequences are not. Note that, from the perspective of the broad modal fictionalist, it only needs to serve as an explanation for the indisputable fact that modal sentences are used in modal discourse without assuming the existence of possible worlds. And (m-M*) actually avoids an ontological commitment to the existence of possible worlds—at best, it only commits to the existence of a certain theory, PW, and certain sentences accepted on its grounds (which the fictionalist does not have to consider true or meaningful). In addition, adopting (m-M*) allows one to explain analytic relationships between modal sentences (e.g., that \lceil It is necessary that P and Q \rceil entails \lceil It is necessary that P \rceil) without necessitating the existence of possible worlds.

Let us examine the following example to illustrate the advantages of (m-M*) from the broad fictionalism perspective. The following biconditional is a substitution of (m-M*):

(E) \lceil Necessarily that if P and Q, then P \rceil is accepted (as true) by MR if and only if \lceil According to PW, in any possible world, if P and Q, then P \rceil is true.³

It is not a challenging task to validate that the sentence \lceil in any possible world, if P and Q, then P \rceil is derived from the axioms, definitions and rules of inference constitute PW-theory. Similarly, a broad modal fictionalist can explain why \lceil Necessary, P and not-P \rceil is not true (that is, not accepted as such). It only requires showing that \lceil According to PW, in all possible worlds, P and not-P \rceil is not true. And it is not true because \lceil In all possible worlds, P and not-P \rceil is not a consequence of PW-theory. Furthermore, she has all that is necessary to explain why proponents of MR who accept both \lceil It is necessary that if P, Q \rceil and \lceil It is possible that P \rceil are to accept \lceil It is possible that Q \rceil ; all without endorsing the existence of possible worlds.

³ To be precise, the right-side of (E) should be the following: \lceil According to PW, in any possible world w , "if P, P" is true at w \rceil is true. However, for the sake of clarity and simplicity, (E) is given in a simplified version.

Note that the right-hand side (E) does not imply the existence of any possible world. Thus, it maintains an ontologically neutral position concerning the existence of such abstract objects. A broad modal fictionalist can effectively communicate in object modal language with those who find modal discourse meaningful by interpreting their statements, like \lceil It is necessary that if P, P \rceil , as a convenient shorthand for their metalinguistic counterparts, " \lceil It is necessary that if P, P \rceil is accepted by MR." Then, by employing (m-M*) and utilizing her knowledge of PW-theory, the fictionalist can draw similar conclusions from such a statement as modal realists would. Notably, however, this approach eliminates the necessity of committing to the ontology of possible worlds and simultaneously allows to refrain from taking modal discourse semantically meaningful.

Similarly, a literary fictionalist might argue that the sentence "Sherlock Holmes was a detective" is true based on Conan Doyle's stories. She could reach this conclusion if the sentence can be derived from the sentences comprising those stories, along with possibly some other sentences and rules of inference accepted by those familiar with those literary works. Consequently, she avoids endorsing the statement "There exists such an x , $x =$ Sherlock Holmes" as true and thus refrains from committing to the existence of Sherlock Holmes. She only acts as if she is referring to a fictional character when she accepts fictional sentences such as "Sherlock Holmes was a detective."

Finally, it should be noted that (m-M*) can be employed even by the modal fictionalist who endorses modal discourse as meaningful. It may not express her position narrowly enough to differentiate her from a broad modal fictionalist, but accepting (m-M*) has evident advantages. It seems more precise and yet general, that is, it better expresses the point of the modal fictionalist; moreover, and finally, it is more cautious and avoids Rosen's critique.

Conclusion

To sum up, Rosen's argument does not hold for a modal fictionalist who does not find modal discourse meaningful. And what is more, she can provide an intelligible answer to the question of why some modal sentences are apparently acceptable/accepted; her explanation appeals to the relevant paraphrase

captured in (m-M*). This means that she can follow the steps of her counterpart in the problem of the logical status of fictional discourse—one who rejects fictional sentences as truth evaluable and puts forward an explanation as per why some of them are widely accepted by postulating some principles of translation into a semantically intelligible language.

By adopting the specific metalinguistic paraphrase presented in (m-M*) for statements belonging to modal discourse, it is not necessary to abandon the principle of bivalence, which, as Rosen suggests, would be a possible yet costly response for the modal fictionalist to the objection in question. Thus, fictionalism should be expressed in meta-language and appeal to the notion of acceptance rather than to the truth of modal claims in order to avoid the challenges Rosen has brilliantly depicted. Of course, while it is possible for MF to avoid the conclusion of Rosen's argument, they still have to offer an explanation of what "according to PW," or more precisely "according to," means in terms free of commitment to possible worlds. Even if it is difficult to come across a full-blooded and overt advocate of broad fictionalism these days (Nolan, 2020), the above discussion may embolden some to come out of the philosophical closet, since this cautious position enjoys important advantages over that of its narrower version.

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ARTYKUŁY

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Memory Traces, Phenomenology and the Simulationist vs Causal Theory Dispute

Keywords: memory traces, familiarity, causal connection

Słowa kluczowe: ślady pamięciowe, swojskość, związek przyczynowy

Abstract

Philosophy of memory is a hot topic in the cognitive sciences and philosophy of mind. This work examines the dispute between simulations and causal theories of memory by means of an examination of the feeling of familiarity and its relation to memory traces, more specifically how they increase the fluency of reconstruction of past episodes. Understanding the relationship between familiarity and memory traces and, furthermore, the relation between a fully-fledged phenomenology of memory and a sense of subjective certainty of the episode has occurred in the past, lead to a different interpretation of the rivalry between the CTM and the simulationist account.

Introduction

Our tendency is to believe that everything we remember has actually been experienced by us and that our remembering of this event, through a faculty that came to be known as Episodic Memory (Tulving, 1972), is possible given the fact that we have experienced this episode. Whenever we remember

an episode that, in fact, has not occurred in our personal past, it is intuitive to call it an error—confabulation, misremembering, etc.

In order to address to what extent these errors should be considered a failure of the memory system, how they are produced, and how they relate to the nature of memory in general, philosophers have increasingly concerned themselves with understanding this pervasive cognitive capacity. Philosophy of memory, therefore, has become one of the hot topics in the cognitive sciences and the philosophy of mind (Bernecker & Michaelian, 2017).

Most of the contemporary discussion on the philosophy of memory has as its starting point Martin and Deutscher's (1966) theory of memory. This essay is no different. Their Causal Theory of Memory (CTM) has for decades been considered as the canon for thinking and discussing the nature of memory. However, recent empirical research¹ on the constructive character of memory has served as the basis for challenges to the CTM, and given space for the proposal of new approaches toward studying and defining such capacity (Michaelian, 2011).

One of the most prominent theories of memory proposed in recent years is Michaelian's (2016) simulationist theory, which completely challenges the CTM's main tenet that remembering a past episode requires a causal connection between that event and the act of remembering and that this connection is sustained by a memory trace (Robins, 2016). For the simulationist, given the constructive nature of memory, i.e., the fact that the content stored between an episode and the act of remembering can change to varying degrees, remembering an episode does not necessarily involve a causal connection to this episode and, furthermore, memory and imagination are

¹ The connection between empirical research and philosophical theorizing is *per se* problematic. Hereon, all theories and problems are to be taken as philosophical in nature, problems to be discussed and reflected with the goal of presenting an interpretation of the relation between the entities under discussion that can be taken up for further deliberation, or perhaps for informing scientific practice. Results from empirical research are important starting points for the formulation of arguments in favor of a certain position; however, they are one of many different illustrative methods to strengthen a philosophical argument. In this sense, the present approach to philosophical research aligns to Chalmers', who asserts that even though science is a terrific way for expanding one's imagination while doing philosophy, enduring questions cannot be definitively resolved by relying solely on empirical findings (Grim, 2009). For further discussion on the issues related to an empirically informed philosophy of mind, see Irvine (2014).

not to be strictly distinguished as they would be two sides of the same capacity—an episode construction system.

With these two ways of conceiving episodic memory in mind, this essay sets out to present a critique of Michaelian's simulationist theory. In this essay, I advance the position that the CTM and the simulationist theory are not mutually exclusive theories of memory and that they can be understood as being part of a spectrum of memory phenomena in relation to involving memory traces during the act of remembering (recall).

Furthermore, this difference between the involvement of memory trace is reflected in the phenomenology of memory, more specifically in the feeling of familiarity. I argue that Michaelian's theory cannot fully account for the phenomenological aspects, as it leaves familiarity out of the picture and conflates the meaning of auto-noesis. Nevertheless, it looks like his version of an episodic construction system sketches important aspects of memory. Considering the activity of such a system to produce representations of the past to be an instance of episodic memory thus depends on which aspects one holds fundamental in defining the latter capacity.

From the Causal to the Simulation Theory

As mentioned in the introduction, the investigation begins with an exploration of the classical causal theory of memory, then explore some findings about the constructive aspect of memory and how they can be accommodated by a causal theory, culminating in the formulation of the simulationist theory. The exploration is based on the content of Kourken Michaelian's *Mental Time Travel*.

The causal theory of memory, as originally formulated by Martin and Deutscher (1966), is based on the presupposition that for remembering there must necessarily exist a causal connection between a subject's previous representation R' and the current representation R brought about by the act of remembering. However, to exclude some cases of forgetting and thereafter reacquiring such representation, more must be added to the theory in relation to this causal connection.

In order to rule out such cases, the notion of a memory trace is introduced. Despite the divergent ways of conceiving memory traces (for a further discussion of this topic, see e.g., Robins, 2016 and de Brigard, 2014),

in the classical formulation of the CTM it should be understood as an exact copy of R' . Furthermore, another necessary condition for remembering, according to the CTM, is that the memory trace has been continuously stored between the episode and the time of recall.

The condition that the memory trace must be an unaltered copy of the initial representation, however, is intrinsically problematic, as minor transformations naturally occur between R' and R that we do not rule out as cases of remembering, such as generalizations and deletions of aspects of the representations. An example of research on constructive memory is that of Alba and Hasher (1983), who suggest four possible dimensions in which memory can be constructive: *selection* of details at the encoding of R' , *abstraction* from certain features, *interpretation* given prior knowledge, and *integration* of the former modifications in a coherent whole. Moreover, they suggest that during the retrieval of R , a process of reconstruction can be at play in which information from other sources, such as semantic memory or contextual information, can be included in the representation.

Employing such empirical illustrations of more extensive possibilities for variations in the memory trace, CTM, as a philosophy of memory, departs from the classical version into a constructive version that accepts that the memory trace and the representation R must not be exactly the same as R' but can vary—increase, decrease or even merge the content of different experiences—to a certain extent. The extrapolation of how much R can differ from R' and therefore the need and the place of memory traces if this divergence can be extrapolated leads to the possibility and the suggestion of the simulation theory of memory.

Drawing on Tulving's (2001) developments on the definition of episodic memory towards interpreting it as a function of a “mental time travel” system responsible for both re-experiencing past episodes, as well as “pre-experiencing” or simulating future episodes, Michaelian starts proposing his own version of episodic memory as one part of a more general episodic construction system.

According to Michaelian, we possess an episodic construction system that has as its proper function drawing on acquired information to construct or simulate novel representations, either of past or future episodes. This system, therefore, is essentially constructive, drawing not only on experiential information to construct such representations but also on non-experiential information possessed by the subject, for example, semantic memory.

The schism between the simulation theory and the constructive CTM lies in their treatment of the necessity of memory traces, as the former does not share the assumption that at least some information originating in the experience of the remembered episode must be used in constructing the representation of the episode. Summing up, according to the simulation theory we are endowed with an episodic construction system that has different functions, including simulating the past. Remembering, thus, can be defined as when a representation R:

is produced by a properly functioning episodic construction system which aims to produce a representation of an episode belonging to [a subject] S's personal past. (Michaelian, 2016, p. 105)

Taking into consideration Michaelian's analysis of the conditions for remembering that are postulated by the CTM and the simulationist theory, it looks like these theories are markedly different and completely incompatible. On the one hand, according to Michaelian's reconstruction of the CTM, remembering depends on acquiring some representation R', maintaining it continuously stored in the form of a memory trace that serves as a copy of it (allowing minor transformations), and retrieving a representation R through this trace that must be similar to R' to a certain extent. On the other hand, for the simulationist theory, remembering only consists of constructing a representation R of a past episode through a functioning episodic construction system.

Presented in this way, they do indeed look like two opposing theories. However, if the presentation changes from the conditions for remembering to the dispositions involved in remembering, the differences between these theories start to diminish. Reconstructing the classical CTM in terms of dispositions to remember, it can be understood that remembering only happens when recall prompts (voluntarily or involuntarily) activate a system responsible for retrieving the representation R of a past episode exclusively through the dispositional character of memory traces.

Furthermore, according to the constructivist CTM, remembering happens when recall prompts activate a system aiming to reconstruct a representation R drawing on contextual and stored information—necessarily including information stored via memory traces. Finally, for the simulationist theory, the dispositions that lead the episode construction system to produce

a representation R depend on stored information, as well as contextual information, not necessarily needing memory traces of past episodic experiences.

Accepting the fact that representations of past episodes are produced by an episodic construction system and that memory traces might not even be involved in such a construction, however, does not mean that talking about memory traces and both the classic and constructivist CTM should be dropped. Moreover, the mere possibility of producing a representation R with the content of a past episode does not entail that this is a case of episodic memory, as the act of remembering does not involve only the generation of content, but also a range of phenomenological qualities. More must be said about the phenomenology of memory and how it is related to this episodic construction system and, in the end, to memory traces in general.

Memory Traces, Auto-noesis and Familiarity

There is a characteristic phenomenology of remembering episodes, i.e., it feels like something to be engaged with episodic memory. Tulving (1985) was the first to divide different memory systems according to their phenomenology. Procedural memory was supposedly *anoetic*, i.e., its performance did not require consciousness. Semantic memory was considered *noetic*, i.e., it is brought to consciousness, but the circumstances of the acquisition of such knowledge are lost. Episodic memory is supposed to be *auto-noetic*, which means that the episode is brought into consciousness together with information about its original experience.

Invoking the concept of auto-noesis to explain the phenomenology of episodic memory is controversial, as the very definition and use of such a term have been widely divergent among authors. On the one hand, Klein (2015) focuses on auto-noetic awareness as some kind of feeling of warmth and intimacy, as illustrated by this passage, “[The patient R.B.] lacked the warmth, intimacy, and feeling of reliving associated with auto-noetic experience” (p. 18), while Michaelian (2016) highlights auto-noesis as “[enabling] the agent to discriminate between self- and other-oriented forms of episodic imagination” (p. 232). On the other hand, Tulving’s (1993) original formulation focused on auto-noesis as “a unique awareness of re-experiencing here and now something that happened before, at another time and in another place” (p. 68).

Generalizing auto-noesis does not do justice to a more nuanced investigation of the phenomenology of memory. A more thorough investigation of the experiential states associated with the act of remembering must be performed, and that indeed is attempted by Michaelian, who divides the phenomenology of memory into a feeling of pastness and a feeling of self-presence (what he calls auto-noesis).

The first feeling indeed can differentiate between how past and future-oriented forms of episodic construction are presented to consciousness, while the second discriminates how episodic construction from the subject's self-point of view can be different from others-based episodes. However, as Michaelian himself admits, these inner feelings alone cannot account for the different ways that the construction of episodes belonging to the personal past and the counterfactual past are presented and, therefore, do not exhaust the distinctiveness of the phenomenology of episodic memory.

Further philosophical research on identifying the distinctive phenomenology involved in remembering particular events as past experiences suggests that there is another feeling characteristic to such capacity, i.e., a feeling of familiarity (Teroni, 2017). Even though a thorough definition of such a quality is not yet sketched, it can be understood as a feeling of fluency in the construction of a representation stemming from the fact that it has been already encountered in past experiences.

Michaelian (2016) lays out some concerns on the usefulness of talking about familiarity. When distinguishing the possible phenomenology that could be the source of monitoring for the subject's awareness of which function the episodic construction system is performing, Michaelian rejects the idea that familiarity might play a role in bringing about a feeling of pastness and therefore distinguishing memory and imagination. He concludes that familiarity may have limited validity in distinguishing remembering from other forms of construction.

However, I consider Michaelian's dismissal of the usefulness and of a deeper discussion of familiarity to be too forward and precocious. Given the pervasiveness of this feeling when we indeed remember an episode, more attention must be given to it as a distinctive aspect of remembering episodes, as discussed by Teroni (2017), especially when working together with the two feelings mentioned above: pastness and self-presence.

As discussed by Michaelian, familiarity is neither necessary nor sufficient for pastness; however, it serves as a cue that the constructed episode has been

previously experienced, so that it is a product of remembering. This familiarity can be related to the fluency of construction, as remembering should be less effortful than other forms of construction, given that the produced representations are more similar to the stored information.

As discussed above, episodic memory and episodic counterfactual thinking cannot be distinguished solely by differences in phenomenology if only pastness and self-presence are considered. The feeling of fluency of construction related to familiarity can serve to distinguish these two capacities, as the construction of episodic counterfactual representation is indeed more effortful as it cannot be helped by any kind of similarly stored representation—i.e., memory traces—while episodic memory possesses this kind of familiarity, that together with the feeling of pastness and self-presence sum up to the feeling of “warmth and intimacy” long presented by authors such as Russell (1921) and James (1890) as the distinctive character of episodic memory.

The fact that memory traces and familiarity are intertwined is not something novel. Tulving (1985) proposed evidence for a relation between the strength of memory traces and his conception of auto-noetic consciousness, which also involves a sense of familiarity. Furthermore, the very definition of the feeling of familiarity as a measure of the fluency of recollection favors a positive correlation between the presence and strength of memory traces and the intensity of this feeling.

Considering two cases of episodic reconstruction, case 1 where there are a number n of dispositions to bring about the reconstruction of an episode into a representation, and case 2 where there are the same n dispositions plus the dispositions that form the memory trace, it is obvious that in the second case, the fluency of recollection will be higher. Not only that but considering memory traces as structural analogs of the original representation—to some extent allowing transformations of them—even if the dispositions n in case 2 are to a certain degree weaker, the fluency of recollection is still higher than in case 1, given the fact that the representation to be reconstructed is already partially present as a memory trace.

Evidence for this can be found in one’s own reflection of familiarity given a range of cases of remembering. Comparing an important and detailed event seems more familiar when remembered than a temporally more distant episode. Moreover, considering the case of everyday activities, such as walking home from work, the act of remembering them involves multiple

merged memory traces from every time such an event happens and hence has the most feeling of familiarity.

Going back to Michaelian's framework, it is possible to sketch the importance of familiarity to episodic memory, and therefore the consequences of the lack of it. He draws two roles for phenomenology in his account of the episodic construction system. The first one, as already discussed, is to distinguish what kind of episodic construction the subject is involved in, whether it is imagination, past counterfactual thinking, episodic memory, etc. They feel different, and these different feelings serve as indicators for the subject that he is engaged in one, and not in the other type of thinking. However, without including familiarity as one of these feelings, the problem of distinguishing between episodic memory and episodic counterfactual thinking solely on the basis of feelings of pastness and self-presence appears.

Not only does the experience of remembering play a role in the episodic construction system in general, but it has an important place in episodic memory as such. Drawing on Klein (2013) and Tulving (1985), Michaelian summarizes their ideas in the following passage:

Autonoesis, on this view, functions as a means of reducing uncertainty about whether or not an apparently remembered event actually occurred: by providing the agent with a sense that the remembered event belongs to his personal past, it provides him with a reason for accepting, and acting on, the retrieved content. (p. 228)

Even though Michaelian considers the truth of Klein's and Tulving's approach to autonoesis, Michaelian rejects it on the basis that autonoesis alone cannot account for this subjective certainty and argues that it is the full phenomenology that plays a role in bringing about this certainty. Nevertheless, he is not able to sketch a full picture of how phenomenology alone brings about subjective certainty and appeals that the content of the constructed representation also plays a complementary role.

Defining memory, though, on the basis of the content of the remembered representation is problematic, as argued by Klein (2015). Memory should be understood on the basis of the manner in which this content is experienced. Michaelian, however, is unable to give a satisfying account of the subjective certainty characteristic of memory in terms of the way the content presents itself to awareness.

Klein's (2015) discussion on memory provides one way to evaluate whether or not the CTM, Michaelian's simulationist theory, or any kind of theory of memory involving an episodic construction system really is able to tackle the problem of memory presented in this article. Taking as a starting point the existence of an episodic construction system, and from there evaluating the role and necessity of memory traces, it is possible to give a conclusive assessment of Michaelian's simulation theory.

The episodic construction system presented by Michaelian is capable of producing representations of episodes in a range of different ways, and the constructed representations are accompanied by a different phenomenality depending if they are instances of imagination, episodic memory, episodic counterfactual thinking, etc. The construction of such representations is brought about by the interaction of cue triggers from the environment and internal dispositions to produce these representations.

Among these dispositions, some are formed from non-experiential information, such as semantic memory, but also from experiential information. Pieces of experiential information might or might not be memory traces—stored representations of an episode that can be slightly transformed but not to the point of rendering the initial episode unrecognizable. Remembering an episode, according to Michaelian, consists in the production of a representation of a past episode by a properly functioning episodic construction system. The dispositions involved in producing such a representation can, but do not necessarily, involve memory traces. However, such a way of understanding episodic memory is problematic as Michaelian's account does not take into consideration an important part of “what it feels like” to remember an episode, i.e., the sense of familiarity. The absence of familiarity is connected to the dispensability of the inclusion of memory traces in his philosophy of memory.

This disregard for familiarity, thus, has some consequences in his account of a part of episodic memory that is considered by some authors as of extreme importance, i.e., a fully-fledged subjective certainty that the remembered event indeed has occurred in a person's past, giving this person full acceptance on the content of such representation and enough reason to act according to it. Even though some sense of certainty can be produced together with the feelings of self-presence and pastness discussed by Michaelian, they are of a much lesser degree than what is described to accompany the sense of familiarity.

The notion of degree in discussing the difference between episodes reconstructed on the basis of dispositions involving memory traces and dispositions not involving them is the last theme of this paper. It looks like the classical CTM, constructivist CTM and simulationist theory are not different theories in kind, but only in degree. Each theory elucidates a different aspect of episodic memory, and to consider the case elucidated by each one as paradigmatic of remembering depends on which goals and which aspects of episodic remembering an author has in mind as the most important.

While accepting some kind of classical CTM rules out instances of reconstruction of episodes as cases of memory that the simulationist may account for, the adherents of the CTM maintain subjective certainty and epistemic authority as well as a fully-fledged phenomenology of the retrieved representations. On the other hand, the description of representations that the simulationist may accept as cases of episodic memory may not necessarily be accompanied by such a subjective experience, but surely many more cases of remembering are incorporated into this theory.

Lastly, I am not claiming some kind of relativism towards theories of memory, and that no theory will ever be able to account for the whole nuances of episodic memory and memory experience, just that adhering to either the CTM or simulationism depends on what aspect of remembering one hold to be more important. In the case of the CTM, this aspect is the subjective certainty and epistemic authority accompanied by episodic memory, while for the simulationist theory, it is the inclusion of a larger number of cases of reconstruction of past episodes.

Conclusion

A closer look at the phenomenological discussion presented in Michaelian's *Mental Time Travel* shows a conflation between auto-noetic awareness and the feeling of self-memory. Further investigation into this confusion elucidates a pervading theme in the philosophy of memory, i.e., a lack of agreement on the notion of auto-noesis and therefore a range of different usages for such a term.

From this starting point, the solution for investigating the phenomenology of memory has been to divide the different ways in which authors refer

to such terms as different aspects of the phenomenology of memory, which were considered to be a feeling of pastness, self-presence and familiarity. While Michaelian's simulationist theory accounts for the first two, it dismisses and fails to include familiarity in its phenomenological picture.

A further examination of the feeling of familiarity indicates a close relation to memory traces, as the presence of such an experience is accompanied by fluency in the reconstruction of past episodes. This investigation leads the way to understanding the controversies between a CTM and the simulationist theory, as their main difference is in how they consider the involvement of memory traces.

Understanding the relationship between familiarity and memory traces and, furthermore, the relation between a fully-fledged phenomenology of memory and a sense of subjective certainty of past episodes leads to a different interpretation of the rivalry between the CTM and the simulationist account. It looks like they are elucidating different aspects of memory, and that, therefore, one's adherence to each of the theories is connected to what they hold as canonical and what they want to explain with such a conception of episodic memory.

Finally, this is not to say that a theory that encompasses all the nuances of episodic memory is unachievable, but more as a warning not to treat the causal theory and the simulationist theory as two antagonists in the study of memory. Hopefully, this warning is able to influence how philosophy of memory treats cases of successfully remembering and how it differs from memory errors.

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The Ambiguous Beginning of Life and the Binary Pattern: A Phenomenological Analysis of Intersexual Experience

Keywords: indeterminacy, horizon, homeworld, lifeworld, binary pattern, intersexuality, lived body

Słowa kluczowe: nieokreśloność, horyzont, własny świat życia, świat życia, binarność, interplciowość, ciało żywe

Abstract

In the paper, I offer a phenomenological analysis of the lived experience of intersexuality, which I view from the perspective of indeterminacy concerning the horizon of the givenness of the homeworld founded on the broader basis of the pre-givenness of the lifeworld. These horizons define the structure of the sedimentation of subjective experience, as well as the layers of cultural meanings sedimented in the lifeworld. The sedimented layers of self-experience and of the shared lifeworld function as a sphere of indeterminacy, that is, the horizons of constituted phenomena. In this sense, all intentional acts have the nature of horizontal indeterminacy, the layers of which are revealed in the genetic question (Rückfrage) directed toward them. Horizontal indeterminacy also accounts for the distinction between the homeworld and the alienworld, which appears as something unobvious and unexpected against the obviousness of the homeworld, at the same time thematizing the latter. The notion of human corporeality as given in the sex/gender binary is one element of the sedimented conceptual system, which operates as the horizon of indeterminacy of both self-experience and the pre-reflective life-world. A unique opportunity

for phenomenological insight into the constitution of the phenomenon of sex/gender is provided by Hida Viloría's account of her lived experience of intersexuality. Her lived body, first experienced pre-reflectively as a transparent medium and a perfectly handy tool of undisturbed intentionality and unproblematic in sexual activities, gradually underwent alienation under the objectifying gaze determined by the binary pattern of sex/gender. Becoming an alienated object, Viloría's body lost its transparency. She began to experience her corporeality and identity in a way determined by the sedimented "ideology" of sex and gender. Having "tried on" the constructs of masculine and feminine identities, Viloría eventually overcame alienation and, in the process of secondary self-identification, reclaimed her lived body in its intersexuality and her identity in its non-binary gender fluidity.

Introduction¹

The phenomenological tenet of principles demands, "back to the things themselves," but the ideal of unambiguous cognition, that is, the congruity of intentions (noetic intentionality, which gives meaning to sense data)² and intuition³ proves unrealizable, as pure intuition remains a regulative idea and the object is never given with all its qualities available to perception. This problem is addressed by the notion of the horizon. In this sense, "horizon" was brought in by Husserl in his *Ideas*, but it acquired a special significance in his *Crisis of European Sciences and Transcendental Phenomenology*, along with the introduction of the concept of the lifeworld.

The problem of indeterminacy I explore concerns both the internal and external horizons, to use Janet Donohoe's terms (Donohoe, 2019, pp. 170–171). The internal horizon, that is, the horizon of perception, refers to the generic form of an object which is always given in its completeness as the object that it is, although not all of its parts are sensorily perceived.

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² Husserl stipulates that "Under intentionality we understand the own peculiarity of mental processes 'to be consciousness of something'" (Husserl, 1982, p. 200, author's italics).

³ Husserl's notion of intuition refers to the immediate givenness of self-presenting objects: "every originary presentive intuition is a legitimizing source of cognition, (...) everything originarily (...) offered to us in 'intuition' is to be accepted simply as what it is presented as being" (Husserl, 1982, p. 44, author's italics). See also Hintikka, 2003.

The external horizon can be understood as the horizon of the homeworld, that is, a perceptual field which is grounded on a broader foundation of a pre-given lifeworld. These horizons determine the structure of sedimentation of both individual experiences and cultural meanings ingrained in the lifeworld. The sedimented layers of one's own experiences, as well as those of the shared lifeworld, function as an indeterminate perspective of the constituted phenomena. Thus, every conscious act is experienced against the background of the lifeworld-based homeworld, and in this sense indeterminacy is intrinsic to all intentional acts. The levels of indeterminacy can be revealed by the method of *Rückfrage* developed in genetic phenomenology.

Our experience of what is perceived as “normal” is shaped by the sedimented givenness of the homeworld founded on the pre-reflective and taken-for-granted pre-givenness of the lifeworld. Since the “normality” of everyday experience is not thematized and as such remains tacit, both the homeworld and the lifeworld operate as indeterminate horizons of the constitution of everyday phenomena. If something unexpected is encountered against that indeterminate background, it is experienced as an alienworld, which prompts the recognition of the indeterminacy of the homeworld and helps make it more, though never completely, determinate (Donohoe, 2019, pp. 170–176).

The Binary Pattern

The normative concept of the human body as given in the sex/gender binary is an important part of the sedimented meanings of the homeworld, which functions as the indeterminate horizon of everyday experience. As ingrained in the lifeworld, sex/gender has always been conceived of in binary terms, even if initially it was not conceptualized as male and female, but rather as male and the other, following Aristotle's influential account of sex. Exploring the ways in which an encounter with “non-normative” (intersex, transgender, non-binary, or gender-fluid) bodies experienced as an alienworld can help reveal the layers of sedimented meanings that have become indeterminate horizons in the constitution of the phenomena of sex and gender appears a promising venture.

As explained above, the binary pattern of organizing phenomena, such as in the male-female/man-woman binary, forms an important part of the sedimented meanings of the homeworld and the lifeworld, which operate as the indeterminate horizons of everyday experience. The question is whether this holds for scientific rationality as well. Analyzing the problem from a phenomenological point of view, we can helpfully rely on Merleau-Ponty's claim that the scientific view is derived from the direct perception of the world and that the perceptual world is prior to and a precondition for any scientific conceptualization and articulation. In his *Phenomenology of Perception* Merleau-Ponty states, "The whole universe of science is built upon the world as directly experienced, and if we want to subject science itself to rigorous scrutiny and arrive at a precise assessment of its meaning and scope, we must begin by reawakening the basic experience of the world of which science is the second-order expression" (Merleau-Ponty, 2002, p. IX).

Shaun Gallagher and Dan Zahavi also observe in *The Phenomenological Mind* that "our knowledge of the world, including our scientific knowledge, arises primarily from a first- and second-person perspective, and science would be impossible without the experiential dimension" (Gallagher, Zahavi, 2012, pp. 99–100). This indicates that scientific discourse is embedded in the world of experience as its higher-order articulation. From there, the authors go on to reiterate Husserl's claim that "[e]ven the most exact and abstract scientific results presuppose the intuitively given subject-relative evidence of the lifeworld" (Husserl, 1970, p. 139).

If this pertains to strictly defined, abstract scientific objects, it is all the truer for things such as sex and gender. Biological sex, let alone gender and sexual identity, is a highly complex and nuanced phenomenon. Variety has been recognized by philosophers as a fundamental characteristic of nature since the pre-Socratics, and since that time attempts have also been made to arrange this array of diverse phenomena into one or another conceptual framework. Interpreting biological sex in line with the binary pattern marks an effort to impose, as Thomas Laqueur puts it, "the sense of opposition onto a world of continuous shades of difference and similarity" (Laqueur, 1992, p. 19). In his *Making Sex*, Laqueur traces the evolution of beliefs about the differences between, initially, male and the other and, then, male and female anatomies. In doing this, he examines the way they were represented in anatomical atlases and highlights that their illustrations were deeply

influenced by ideas, or rather biases and prejudices, concerning the respective feminine and masculine social positions and cultural roles.

The difficulty of telling the sex of a newborn was depicted in medical treatises written in the 18th and 19th centuries (Laqueur, 1992, p. 169). New anatomical findings and discoveries did not necessarily contribute to a more insightful approach to the problem of sex, because they were interpreted selectively, in conformity with the sedimented pattern of binary categorization. Some findings were given centrality, whereas others—those not fitting the male–female opposition—were neglected, and in this way the binarity of the phenomenon of sex remained unchallenged, furnishing the sedimented cultural narrative with an anatomical camouflage. Laqueur elucidates how “powerfully culture operates on the body” (Laqueur, 1992, p. 241) by suppressing natural similarities to maintain the purported opposition of the female and the male. Thus, although intersexuality has aroused interest among medics since Hippocrates, and multiple physicians have been known for their attempts to study intersexuality,⁴ their interpretive efforts have remained enclosed in the binary paradigm.

Notably, the primacy of the binary pattern was not undermined even by disagreements over the distinctive features of sex (Dreger, 1998, pp. 20–23). This means that not only gender, but also sex is constructed, which is emphatically pointed out by researchers of intersexuality, formerly known as hermaphroditism, because intersexuality reveals that sex, just like gender, falls outside the binary system (Dreger, 1998, pp. 15–16; Viloría, Nieto, 2020, pp. 115–119; Ziemińska, 2018a, 2018b, 2022).

It is obvious that the binary pattern has had an enormous impact on people who belong to the intersex community—individuals born with what are medically referred to as ambiguous genitalia, but what intersex people prefer to call an androgynous or a genital variant (Viloría, Nieto, 2020, p. 78). As the website of one of their organizations explains:

⁴ This group includes, for example, the Renaissance physician Paolo Zacchia, who wrote on hermaphroditism in his book *Questionum medico-legalium* (Laqueur, 1992, pp. 140–141), the Polish physician Franciszek Neugebauer (1856–1914), and the French surgeon Samuel Jean Pozzi (1846–1918), to whom Julian Barnes devoted his book *The Man in the Red Coat*. Neugebauer and Pozzi were the heads of the first chairs of gynecology. They not only documented the cases of intersexuality, but also extensively published and lectured on the subject.

“Intersex” is an umbrella term used to describe a wide range of natural variations in sex characteristics that do not seem to fit typical binary notions of male or female bodies. Between 0.05 percent and 1.7 percent of the population is born with intersex traits. These traits may be visible at birth, at puberty, or, in the case of some variations, not at all. Intersex is considered a sex and gender minority (SGM) by the National Institutes of Health (NIH) and was formally designated as a health disparity population by the NIH in 2016. (<https://interactadvocates.org/wp-content/uploads/2018/09/interACT-Lambda-Legal-intersex-hospital-policies.pdf>)

The Intersex Society of North America (ISNA) has argued that it is not the bodies of intersexual people that make their lives difficult, but the cultural demands forced upon their bodies.⁵

It seems interesting to look into the lived experience of intersexual individuals. Regrettably, first-person narratives of the lived experience of intersexuality are scarce. One of the very few personal accounts of alleged hermaphroditism is to be found in Barbin’s memoir written in the 19th century. Barbin, whose sex was erroneously identified at birth as female, had a specific anatomical structure of the genitalia, known as hypospadias (Dreger, 1998, pp. 51–52). While there have been several first-person reports of the experience of transitioning,⁶ accounts of the lived experience of intersexuality are unique.

Drawing on Miranda Fricker’s concept of the hermeneutical form of epistemic injustice, Renata Ziemińska has observed that “[p]eople with intersex traits or nonbinary identities are not properly understood and cannot understand their own experience because there is no hermeneutical resource” (Ziemińska, 2022, p. 409). Against this background, Hida Viloria’s report of the lived experience of true intersexuality, which fills in the hermeneutical gap, seems particularly interesting and valuable.

⁵ ISNA was active from 1993 to 2008. Its work is continued by interACT: Advocates for Intersex Youth (which has preserved the ISNA website as a historical archive). The interACT–Accord Alliance, the Organization Intersex International (OII), and many other organizations collaborate on the International Intersex Forum.

⁶ Notable examples include Jan Morris, *Conundrum*; P. Carl, *Becoming a Man: The Story of a Transition*; Meredith Talusan, *Fairest: A Memoir*; Jennifer Finney Boylan, *She’s Not There: A Life in Two Genders*, and *Good Boy: My Life in Seven Dogs*; Anna Grodzka, *Mam na imię Ania*; and Julia Serano, *Whipping Girl*.

Lived Experience of Intersexuality

Comparing Viloría's story with the autobiographical narratives of transsexual people, one can notice a remarkable difference. Transsexual authors tend to report their uneasiness with their bodies dating back to early childhood. From the very beginning of their conscious life, their bodies felt odd to them and with time, as their bodies were undergoing puberty-related changes, their sense of alienation gave way to aversion and disgust, although they usually did not even know the concept of transsexuality.⁷ Nothing vaguely similar happened to Viloría. Initially, she experienced her body pre-reflectively as a lived body—she did not distance herself from her body; she *was* her body. She experienced her body as a transparent medium, meaning that she did not reflect on it as an explicitly thematized object. In the fundamental identification with her body she surpassed it, focusing on her projects in the world, with her body serving as a perfect instrument for accomplishing them, not only in her everyday activities but also in her bisexual intimate experiences. Moreover, she felt that the particularity of her genital anatomy—clitoromegaly—was a source of great sexual satisfaction, so if there was any perceived separation between her body and the self, it was an enjoyable objectivization of the kind “I and my pleasure-giving body.” Thus, her lived body did not fail her as a perfect instrument of her engagement in the world (Sartre, 1956, pp. 401–430; Toombs, 1992, pp. 51–58). This pre-reflective unity with her body was not compromised when she noticed at one point in her childhood that her clitoris was enlarged (although she did not know the word “clitoris” at the time). Even if she objectified her body at that moment, making a part of it an object of inspection, this specific experience did not disturb her basic lived body experience (Viloría, 2017, pp. 14–15).

Viloría's first experiences of bodily uneasiness were induced by the binary-determined objectifying gaze and comments of others (a doctor, a sexual partner) who questioned the way her genitalia looked, saying, “It just isn't normal” (Viloría, 2017, p. 15) and, “You sure it's not a penis?” (Viloría, 2017, p. 48). In the wake of such remarks, her body became a problem to her and her previous pre-reflective experience of her lived body all

⁷ At first glance, their experience may seem to contradict the observations on sex and gender above, but this is an issue of remarkable complexity and falls beyond the focus of this article. I will devote a separate study to it.

but disappeared, replaced by the perception of her body as a problematic object that required clarification and adjustment of her identity. It was then that Viloría's frustration with gender binarity and its accompanying sexism and misogyny intensified, and that she learned that hermaphroditism, which had once fascinated her as personified by the Sleeping Hermaphroditos in the Louvre,⁸ was not a mythological theme but a reality by the name of intersexuality. Raised as a girl and self-identifying as a woman for a long time, she decided to adopt a masculine identity: "I want to stop looking like a girl. (...) It's hard to say exactly what has made this desire so strong and this decision so clear. I guess it's the combination of recently learning that I might be a hermaphrodite and being really, really fed up with being devalued as a woman" (Viloría, 2017, p. 60).

Consequently, she stopped "wearing and doing all the things that [she had] been taught to as a woman" (Viloría, 2017, p. 60); she stopped wearing makeup and exchanged feminine outfits and shoes for "comfy clothes and sneakers" (Viloría, 2017, p. 61). She also noticed that she was no longer expected to behave in an amiable way or to keep a pleasant expression on her face: "I quickly realize that I am expected to act, in a lot of ways, just the opposite of how I had as a girl. (...) In fact, it isn't cool to be *too* polite or nice as a guy. It comes off as weak" (Viloría, 2017, p. 62; author's italics). The most surprising part of Viloría's experience was that she did not have to do anything with her body. On the contrary, she just gave up working on her appearance: "I didn't need to put on a costume to become this new person. In fact, I'd taken one off, one I hadn't even realized I was wearing. It turns out once the girl costume came off, there was a boy underneath" (Viloría, 2017, p. 62). Having been called a beautiful woman not so long ago, Viloría was now taken for a man everywhere, despite the timbre of her voice and her short stature.

Interestingly, although she had had heterosexual experiences, Viloría was mainly a lesbian, and her female partners also began to perceive her differently. Before, she had heard that she was "such a girl" (Viloría, 2017, p. 58),

⁸ The recognition of androgynous people in Asian and American cultures (e.g., Hijra in India or Muxes in Mexico or Navajo; see Viloría, Nieto, 2020, pp. 32–40) is well known. Remarkably, in Western culture, the dominant binary pattern has consistently been accompanied by the enticing shadow of the androgyne as an alienworld, from Plato's *Symposium* to a range of representations in even very prudish times (for example, the Victorian paintings of Simeon Solomon).

and when she started wearing men's clothes, she heard that she was "such a boy" (Viloria, 2017, p. 70), even though nothing had changed either in her body or in her behavior. From the phenomenological point of view, this experience can be said to have revealed to her the arbitrariness of the gender binary and the significance of the sedimented gendered costume for the experience of femininity and masculinity: "My change in wardrobe reminds me of how some parents dress their babies in gender-specific clothing because, if they don't, people might not know what sex they are. *Oftentimes, parents need clothing to define their children as boys or girls*" (Viloria, 2017, p. 63; emphasis added).

Our experience of what is perceived as "normal femininity" and "normal masculinity" is shaped by taken-for-granted meanings of womanhood/manhood as the sedimented givenness of the homeworld founded on the pre-givenness of the lifeworld. Encountering something non-typical is experienced as an alienworld. This experience makes it possible to expose the sedimented structures of the homeworld and to detect the horizontal indeterminacy of the lifeworld. From this perspective, it is rather significant that Viloria would first correct people who addressed her with masculine pronouns because she tried "to broaden their idea of what women can look like" (Viloria, 2017, p. 73), but then she stopped doing so. She began to realize that her case was more complicated and that she "might not be a regular woman anyway" (Viloria, 2017, p. 73). The problem was that there was no way to communicate to people what she really was (Viloria, 2017, p. 76).

In order to resolve difficulties with her corporeality and identity, Viloria decided to contact the ISNA. In meetings with the members of the organization, she discovered the stunning fact that she was one of the few people whose genitals had not been subjected to so-called corrective surgery immediately after birth. For the majority of intersexual people, "scars cover the most sensitive of all human flesh, carved by hands seeking to correct things they saw as mistakes" (Viloria, 2017, p. 92). Viloria found non-consensual surgeries, or the operationalization of "a narrative of culture in anatomical disguise" (Laqueur, 1992, p. 236), a particularly troubling issue that called for a solution. These treatments were based on the psychosocial gender-identity theory developed by John Money in the 1950s. According to Money's theory, it was indispensable for children to have their gender identity established very early and their genital anatomy had to conform to

the gender standard from the beginning of their lives. This requirement was combined with a strict division into the male and female sexual and social roles and a homophobic emphasis on heterosexuality as the only acceptable pattern of sexuality (Dreger, 1998, pp. 181–182; Roen, 2005, pp. 260–261; Viloría, 2017, p. 108). Katrina Roen observes that one result of the overbearing “imperative to regulate and categorize” has been that “medical science attempts to bend bodies and minds to fit into a simplistic grid of male or female, man or woman, where these concepts are necessarily defined in heterosexist terms” (Roen, 2005, p. 270). Viloría’s view on the issue is similar, and she notes that the nonconsensual surgeries prevent intersexual people from growing up “with their own unobstructed experience of their gender” (Viloría, 2017, p. 126).

Following her discovery of her⁹ intersexuality, Viloría accepted her gender fluidity and realized that she did not “want to live out the rest of [her] days as solely a man or solely a woman” (Viloría, 2017, p. 148). However, very quickly it became obvious how difficult it was to be a non-binary person in a society ruled by the concepts and views constituted according to the sedimented binary categorization of gender, operating as the horizons of both individual homeworlds and the pre-given lifeworld. When trying to find out what type of intersexuality she represented, time and again Viloría faced people refusing to accept her identity as intersex and, instead, obtrusively asking her with which gender she identified more (Viloría, 2017, p. 131). During her public appearances, Viloría was queried about the medications she was taking. Such questions were prompted by the presumption that she had congenital adrenal hyperplasia (CAH), or the so-called salt-wasting syndrome, even though she repeatedly asserted that having a benign intersex trait (clitoromegaly), she had never undergone any treatment related to genital anatomy, either surgical or hormonal (Viloría, 2017, p. 128).

Viloría has found herself in many situations bespeaking the ubiquity and power of the binary pattern as the horizon of the world of experience,

⁹ Before she discovered her intersexuality, Viloría had identified as a girl/woman. Non-binary and gender-fluid people usually prefer the pronouns they/their. Having recognized her intersexuality, Viloría likewise tried using the gender-neutral pronoun “ze,” at least in her private life (Viloría, 2017, p. 149), but later on, even though she espoused a non-binary, gender-fluid identity, she returned to feminine pronouns. Viloría stated in a TV interview: “I really want to embrace who I am, which is an intersex woman” (Viloría, 2017, p. 193). I abide by this choice and refer to Viloría as she/her.

not only in society at large and in medical circles, but also in the intersexual community. A complete self-identification with the non-binary corporeality and the acceptance of it, such as hers, to the point of being proud of one's bodily uniqueness are something of a rarity even among the intersexual community. Vioria likes the moniker "hermaphrodite" and is eager to use it for herself. She presents herself as "basically a hermaphrodite, on the female side" (Vioria, 2017, p. 117) or "a hermaphrodyke to be exact: a herm who was raised as a woman and loves women" (Vioria, 2017, p. 303; author's italics), but at the same time she admits that a lot of intersex people find the term "hermaphrodite" abhorrent: "They don't want to be identified as this third-gender *thing*, a hermaphrodite. They are reluctant to adopt the third or neutral gender identity as they prefer to be seen as normal men or women with certain medical conditions or physical differences" (Vioria, 2017, p. 195; author's italics). Vioria also relates that intersex activism has been dominated by members who identify themselves as men or women and argue that they represent the identity claimed by the majority of intersexual people, which indeed seems to be the case.

Conclusion

Vioria's lived experience of intersexuality caused her to firmly reject the Chicago Consensus Statement adopted by the medical and intersexual communities in 2006 (Vioria, 2017, pp. 201–205). At the Chicago Consensus meeting in 2005, Disorders of Sex Development (DSD) was proposed as the umbrella term for "congenital conditions in which development of chromosomal, gonadal, or anatomical sex is atypical" (Grover, Hanna & O'Connell, 2020, p. 2). While medical experts insist that the term is purely descriptive, rather than normative (Grover, Hanna & O'Connell, 2020, p. 3), this stance comes across as epistemological naiveté, given the evaluative load of the word "disorder." In Vioria's view, DSD as an umbrella term is not only derogatory but also unnecessary, since people who prefer to identify themselves as women/men can avail themselves of the specific medical names of their respective conditions (Vioria, 2017, p. 264), such as congenital adrenal hyperplasia (CAH), complete androgen insensitivity syndrome (CAIS), partial androgen insensitivity syndrome (PAIS), or 5 α -Reductase-2 deficiency (5-ARD). Besides, Vioria

resents the detrimental medical implications of the denigrating language “officially labeling us as a disorder” (Viloria, 2017, p. 209).

Viloria was relieved to find out that the Organization Intersex International (OII) shared both her negative assessment of the stigmatizing nature of the term “disorders” and her feelings of disappointment and betrayal (Viloria, 2017, p. 205). Nonetheless, she is aware of the fact that the binary pattern is so overwhelming that a considerable proportion of intersexual people cannot overcome it and thus do not accept being an intersex person as their identity. Embracing a non-binary identity is so challenging that they prefer calling themselves a man/woman with some DSD to considering themselves a distinct third gender. Importantly, although “normalizing” surgical procedures on the genitals of very young children continue to be carried out in many countries, the Chicago Consensus of 2006 should be regarded as outdated. The medical community has since developed new standards, based on the notion that irreversible or particularly sensitive treatments should be postponed until an intersex person can participate in the relevant medical decision-making. This change of position is reflected in the modified title of the fundamental medical manual: its first edition of 2012 was titled *Disorders of Sex Development*, whereas its second edition, which was published in 2020, was titled *Disorders/Differences of Sex Development* (Hutson et al., 2020). Progress in approaches to intersexuality can be observed in multiple countries (Flor, García Dauder & Hurtado García, 2018). However, based on her lived experience of being intersex, Viloria is reluctant to use the term “differences,” considering it another manifestation of the ongoing medicalization of intersexuality (Viloria, 2017, pp. 313–314), and strongly opposes any medical interference except when variations in the body’s appearance are accompanied by symptoms that may put the intersex person’s health at risk. As an intact intersex person, fully accepting her androgynous identity, Viloria regards “normalizing surgery” as a genital mutilation.

Grappling with her sexuality became a *Rückfrage*-like experience for Viloria, in which she peeled off the layers of sedimented sex/gender binary. It can be argued that she experienced the recognition of her intersexuality as an encounter with an alienworld enabling her to identify the sex/gender binary category as the horizon of her homeworld grounded on the sedimented pattern of the sex/gender binary pre-given in the lifeworld. Her lived experience of intersexuality and acceptance of being intersex/

hermaphrodite encouraged her to play with her non-binary, gender-fluid identity, and with time she was able to fully embrace her “real self” and to reply “I am both” or, alternatively, “I am neither” when asked whether she was male or female.

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Emotional Experiences in the Context of Religion and Sport

Keywords: religion, sport, emotions, experience, modernity

Słowa kluczowe: religia, sport, emocje, doświadczenie, nowoczesność

Abstract

The subject of this paper is the relationship between religion and sport. The aim of my considerations is to criticize the position presented by the American philosopher Eric Bain-Selbo, according to which sporting experiences may quite rightly be described as religious experiences. In the first part of the article, I reconstruct Wayne Proudfoot's concept of religious experience that underlies Bain-Selbo's analysis. I then discuss the research conducted by Bain-Selbo and the conclusions he draws from it. In the next part of the article, referring to Charles Taylor's hermeneutical approach, I show that Proudfoot's and Bain-Selbo's methodology leads to a theoretically unjustified reductionism. I argue that an in-depth articulation of individual self-interpretation allows for an insight into the dynamics of sporting and religious experiences, and thus to see the differences that separate them. In the last part of the article, I invoke the considerations of William James, John Hick and Robert Roberts and try to show that, given the moral consequences of our experiences and their phenomenological description (intentionality), the experiences evoked by sport and religion can by no means be identified with each other.

Introduction

The subject matter of this article concerns the relationship between sport and religion. In particular, I focus on the subjective dimension of these phenomena, i.e., on religious experiences and on the experiences of participants in sporting events. The issues concerning similarities and differences between sport and religion are the focus of interdisciplinary research. This is dealt with by both theoreticians of sport and physical culture and researchers into the condition of religion in modern society (Bromberger, 1995; Davie, 1993; Edwards, 1973; Hervieu-Léger, 2000; Jirásek, 2015; Kosiewicz, 2000; Machoń, 2021; Novak, 1994; Parry, 2007; Pasek, 2012; Prebish, 1984; Twietmeyer, 2015; Zowisło, 2001; 2020). The functional approach to religion, present in Émile Durkheim's (1995) deliberations, is a very important point of reference in this context. Pointing to the communal dimension of sport, some claim that it has a quasi-religious character (Edwards, 1973). Others, however, go a step further and put forward the thesis of the identity of sport and religion (Prebish, 1984). Some also see sport as an example of a "civic religion" (see Kossakowski, 2017). There are also approaches that reject the religious view of sport while stressing its spiritual nature (Jirásek, 2015; Novak, 1994; Parry, 2007, Zowisło, 2001).

The proponents of the functional analysis focus mainly on the external, institutional-ritual aspect of sport and religion which, in their view, makes the subjective dimension related to these phenomena secondary or neglected. In this light, an examination of the similarities and differences between religious and sporting *experiences* seems particularly relevant. The question can then be asked whether the emotions and experiences generated by sport (euphoria, awe, wonder) do not unequivocally prove their religious character? Does religious language, which is often used to describe the specificity of sports experiences, not lead us to the same conclusion? This article attempts to answer these questions.

The American philosopher Eric Bain-Selbo (2008, 2019) observes that religion and sport are multifaceted and intrinsically complex cultural phenomena. In his view, in the case of sport, as in the case of religion, one may speak of "myths and legends, heroes and saints, rituals and sacrifice, sacred sites and community" (2008, p. 1). Thus, sport, like religion, is characterized by doctrinal, institutional-organizational, ritual-symbolic

and existential dimensions. It is this last element concerning our experiences that is the focus of Bain-Selbo's research. The aim of his considerations is therefore to examine the relationship between the experiences of religious adherents and the experiences of participants in sporting events.

Bain-Selbo's analyses include a theoretical and an empirical component. The first is the concept of religious experience proposed by a representative of the pragmatist current in the philosophy of religion, Wayne Proudfoot (1985). As for the second element, this is the research that Bain-Selbo conducted among Southern college football fans. On the basis of it, Bain-Selbo concludes that sporting experiences can quite legitimately be regarded as religious experiences. In his view, what is decisive here is the language we use to describe the emotions that arise in connection with these experiences. Thus, if we can describe two seemingly different phenomena in the same way, it means that they are similar or even identical to each other. As he writes, "I will defend the claim that there are good reasons to believe that the experience of the Southern college football fan is similar to many experiences that people generally would describe as religious" (2008, p. 1).

Wayne Proudfoot's Conception of Religious Experience

I will begin by discussing the theoretical background to Bain-Selbo's considerations, Wayne Proudfoot's theory of religious experience. Proudfoot formulated his concept in a 1985 book entitled *Religious Experience*. Stephen Bush (2012, p. 101) notes that this work significantly influenced the debate between perennialists and constructivists, tipping the scales in favor of the latter. Perennialists argue that religious experience, especially mystical, relates to supernatural reality and as such cannot be reduced to cultural and social conditions. In this view, religious experience is *sui generis*, i.e., it forms a special class which—compared to other types of experience—is characterized by its own specificity. On the other hand, proponents of constructivism deny the transcultural character of religious experience and claim that its content is entirely derivative from the contingent factors that condition it (pp. 101–102).

The starting point of Proudfoot's analysis is the "emotional turn" in the consideration of religion, initiated by Friedrich Schleiermacher

and continued by such thinkers as William James, Rudolph Otto, Joachim Wach, and Mircea Eliade. This turn, especially in Schleiermacher's and Otto's approach, consisted in identifying the essence of religious experience with inner mental states, i.e., emotions, feelings, or intuitions, which, in contrast to the sphere of language and thought, are immediate and non-representational (Proudfoot, 1985, pp. 22, 37, 40–41, 76–79). In Proudfoot's view, there is no such thing as a specifically religious emotion or feeling that is immediate and marks the essence of religious experience. Rejecting perennialism, Proudfoot believes that all experience, including religious experience, is necessarily conceptual and therefore culturally mediated (pp. 67, 71–72, 100). It is the concepts and beliefs we draw from cultural resources that form the entire content of religious experience.

One of the pillars of the constructivism adopted by Proudfoot is the “two-factor theory of emotion” proposed by the American psychologist Stanley Schachter. In their article *Cognitive, Social, and Physiological Determinants of Emotional State*, Schachter and Jerome Singer (1962) described the results of a famous experiment which, in the authors' view, confirm the validity of the two-factor theory of emotions. According to this conception, our emotions are the result of the interaction between two constitutive elements: first, the “physiological state of arousal” and second, the “cognitive label” we assign to these states (p. 380). Schachter and Singer argue that arousal states (e.g., an accelerated heartbeat) are emotionally neutral. This means that these states only account for the strength or intensity of the emotion but do not determine what emotion we are experiencing at any given moment. The type of emotion we experience is determined by cognitive factors. The main conclusion of the research conducted by Schachter and Singer is that people who are in a state of sudden unexplained arousal will try to make sense of this state using the cognitive factors available to them. This means that, depending on the context, the same state of physiological arousal can be interpreted as anger, sadness, joy, or rage (pp. 381–382).

Citing Schachter's conception, Proudfoot (1985, p. 100) argued that there are no inherent characteristics of emotions that determine their nature. Consequently, there are also no specifically religious emotions that define the essence of religious experience. It is the conceptual framework that we impose on a shapeless set of physiological sensations that determines that we label certain emotions and experiences as religious. Everything is a matter of interpretation by the experiencing subject. Religious experience

is therefore mainly characterized not by emotions, but by concepts and beliefs that the subject draws from the situational context. In this account, the belief that I have a religious experience is derived from other beliefs, such as my belief that engaging in religious practices can lead to an encounter with a supernatural entity. As Proudfoot (1985) noted, “a person identifies an experience as religious when [they come] to believe that the best explanation of what has happened to [them] is a religious one” (p. 101).

Invoking Charles Peirce, Proudfoot argued that all knowledge is inferential. This led him to reject introspection as the privileged method that gives insight into our inner states (pp. 66–67, 89). According to Proudfoot, there is no essential difference between self-consciousness, or first-person knowledge, and third-person knowledge. This is because the process of recognizing one’s own emotional states is the same as attributing emotions to other people and involves inference, underlying our behavior and the circumstances in which we find ourselves. The experiencing subject is therefore not the “final authority” on the states they experience. It is the external observer who is often in a more privileged position to ascertain the nature of our experience (p. 107).

In this connection, Proudfoot made an important distinction between “descriptive reduction” and “explanatory reduction” (pp. 170–172). The first type of reduction consists in omitting, in the identification of a given experience, the language in which the individual defines it. According to Proudfoot, such a procedure is unacceptable. If we want to analyze certain experiences of an individual, we cannot abstract from the language in which they are expressed. The second kind of reduction is that in formulating explanatory sentences we abstract from the sentences that form the *explanandum*. Moreover, the *explanans* need not be accepted by the subject whose experiences are the object of study. In Proudfoot’s view, explanatory reduction is perfectly acceptable and constitutes a normal research procedure.

Eric Bain-Selbo’s Thesis of Sports Experiences as Religious Experiences

I now turn to a discussion of Bain-Selbo’s (2008; 2019) findings and the conclusions he draws from them regarding religious experiences and sporting experiences. The empirical basis for Bain-Selbo’s inquiry is a survey

he conducted of Southern college football fans. Respondents were asked to provide words that they felt adequately described the experience of attending a sporting event. Bain-Selbo divided the responses obtained into two groups. The first group consisted of “potential religious descriptors,” i.e., words that, depending on the specific religion, may have religious connotations. Terms such as “fun,” “great,” “entertaining,” “utter chaos,” and “better than sex” appear here. The second group consisted of “religious descriptors,” words that we often use to describe experiences related to the personal and institutional dimensions of religion. These include terms such as “fellowship,” “community,” “tradition,” “awe-inspiring,” “passion,” “intensity,” and even “ineffability,” a word that often appears in the context of mystical experiences (Bain-Selbo, 2008, pp. 1–2). As for the percentage spread of responses, as Bain-Selbo notes, “More than half of the respondents used at least one religious or possibly religious descriptor to explain the game day experience”(p. 2).

On the basis of his results, Bain-Selbo notes that sporting experiences trigger positive and intense emotions that allow us to transcend everyday routines, have a sense of participating in something important, and be part of a meaningful whole. Consequently, he argues that the emotions that accompany sports fans on game day are similar or the same as what we usually refer to as “religious emotions” (p. 3).

The question, then, is how does Bain-Selbo ultimately interpret the results of his research? Do the answers of the interviewees unambiguously indicate the religious character of sports experiences? This might seem to be his standpoint. However, his reflections led him to a startling conclusion. As Bain-Selbo (2008) writes:

My point is not that the survey data *proves* that Southern college football fans have religious experiences. My point also is not that they describe the experience as religious (they frequently do not) and thus it is religious. My point is that the survey data and the way they describe the experience are such that *one might assume* [emphasis—D. B.] that they are having religious experiences as a consequence of their participation in Southern college football rituals. (p. 4)

So although the respondents do not explicitly describe their experiences as religious (they only use religious descriptors), we can, as Bain-Selbo argues, assume that their experiences of participating in sporting events do indeed

merit the term religious experiences. Thus, they are not merely quasi-religious experiences but authentic religious experiences.

On what grounds does Bain-Selbo arrive at this conclusion? At the core of his reasoning is Proudfoot's idea that, as I have already written, the key factor determining the nature of experience is the interpretation offered by the subject. According to Proudfoot's model of emotion, the same state of physiological arousal can be interpreted differently depending on the context and the concepts we usually associate with it. Bain-Selbo (2019) notes that an obstacle to treating sporting experiences as religious is the perennialistic vision of religious experience functioning on a popular level, which assumes that the sphere of the sacred is separate from the sphere of the profane (p. 11). Thus, if we were to convince participants in sporting events of the validity of the constructivist concept and of the fact that there are in fact no specifically religious emotions, they would describe their experiences as religious, and this would make them *de facto* religious experiences. As Bain-Selbo (2008) writes:

In the case of experiences surrounding the participation (either as an athlete or spectator) in sporting events, it very well could be the case that the participants have similar physiological and psychological experiences as religious practitioners have—but the former are not having “religious” experiences because they simply do not label them that way as do the latter. If, for example, the participants in the sporting event had a different understanding of what religion is or what a religious experience is, perhaps they more likely would use the term “religious” to describe their experiences and, thus, those experiences legitimately could be considered religious. (pp. 7–8)

Bain-Selbo's reasoning can be presented as follows: 1. There are no specifically religious emotions; 2. Sports experiences and religious experiences evoke the same emotions; 3. Religious experience is determined by the interpretation made by the experiencing subject; 4. If sports participants had the correct (Proudfoot's proposed) conception of religious experience, they would refer to sports experiences as religious experiences; 5. There are good reasons to conclude that sporting experiences constitute religious experiences. Before pointing out the shortcomings of Bain-Selbo's reasoning, I will address a critique of Proudfoot's conception.

Critique of Proudfoot's Conception

Although the results of Schachter and Singer's experiment are highly questionable, as William Barnard (1992) notes, Proudfoot presents them as if they were a matter of fundamental acceptance within the psychological community (p. 234). This is all the more surprising given that in 1985, at the time of the publication of Proudfoot's book, there was already a substantial literature questioning both the two-factor theory of emotion itself and the results of the experiment that was to confirm it.

In a 1981 article, John Cotton reviews the critical literature on Schachter's concept. According to Cotton, "While Schachter's theory has sparked enormous interest and research, it has often been controversial, and many have questioned the empirical evidence upon which it stands" (p. 366). One of the main objections to Schachter relates to his thesis of the completely emotionally undetermined nature of bodily arousal. As Cotton (1981, p. 366) notes, other researchers take the position that physiological changes not only determine the intensity of emotions, but are also partly responsible for their quality.¹

According to Bush (2011), Proudfoot, relying on Schachter's conception, fails to recognize the importance of non-conceptual causal factors in determining the nature of experience (p. 112). Proudfoot, like Schachter, refers to examples where the nature of physiological arousal is sufficiently general to allow for relatively different interpretations. Bush gives examples of situations in which it is the physiological factors induced for instance by the effects of various substances that are the main determinant of the emotions experienced (pp.112–113). Accordingly, as Bush (2011) writes, "the causal processes themselves are indispensable (...) to the determination of the nature of the experience (...) If this is so, then beliefs and concepts do not play as much of a role in determining the nature of experiences as Proudfoot indicates" (p.114).

The presence of non-discursive elements in religious experience can be read as an argument that weakens the validity of constructivism. After all,

¹ Cotton mentions here such researchers as Magda Arnold, Carroll Izard, Robert Plutchik, and Silvan Tomkins.

it cannot be excluded *a priori* that it is the nonconceptual elements of religious experience that constitute the loci of the transcultural.

Empirical and conceptual objections to the two-factor theory of emotion call into question many of the theses propounded by Proudfoot. If emotion and experience cannot be reduced solely to the conceptual, then Proudfoot's position that they are devoid of intrinsic qualities that give them identity seems highly questionable. I am inclined to the position that the subjective side of emotions, connected with the feeling experienced by the subject, plays an important role in the process of their recognition. One cannot therefore, as Proudfoot does, discredit introspection and privilege the external observer in the process of attributing emotions. For the first-person perspective gives us insight into that information which is not intrinsically directly given to the observer. And although the external observer can often help us to recognize our emotions, this is possible on the assumption that he or she has been initiated into the world of our inner experiences.

With regard to religious experience, it should be noted that in many spiritual traditions, a careful examination of one's inner self, a skillful recognition of one's own experiences, is not only a necessary element of spiritual development, but is also an important ability which makes it possible to distinguish between what is genuinely religious and what is illusory. This is one of the purposes of meditation practices. It is precisely the capacity for introspection, acquired through long and arduous exercises, which lies at the basis of mystical experiences (Barnard, 1992, p. 245).

One cannot therefore agree with Proudfoot that every religious experience is an arbitrary imposition of the external, of concepts and beliefs drawn from cultural resources on amorphous mental states. If we were to equate the content of every religious experience with what is given through cultural resources, it would be difficult to explain those experiences that become the basis for reformist actions that radically challenge a given tradition (pp. 243–244; King, 1988, p. 267). Of course it is true that every experience is conditioned by its socio-cultural context. However, we make a mistake when we claim on this basis that no experience can transcend the matrices that condition it.

Importance of the Self-Interpretation in the Study of Religious and Sports Experiences

Proudfoot's conception favors the third-person perspective of the analyst over the first-person perspective. This kind of privileging is also evident in Bain-Selbo's reflections, for the validity of his thesis on the religious nature of sports experiences requires that the individual ignores their own language of self-interpretation in favor of the language used by the researcher. As I have already written, according to Bain-Selbo, what prevents participants in sporting events from describing their experiences as religious is their beliefs about religion. If they had the concept of religious experience propounded by Proudfoot, they would recognize the religious nature of sporting experiences.

Such a position raises a number of doubts and is open to the charge of illegitimate reductionism. I shall address this issue critically, referring to the views of the Canadian philosopher Charles Taylor. He famously claimed that humans are "self-interpreting animal[s]" (Taylor, 1985, pp. 45–76). This means that the concepts in which we conceive our lives constitute our experience. Thus, if we want to explain subjective reality, we cannot overlook the concepts that individuals use to characterize their life practices.

Taylor's hermeneutics of the subject is based on the distinction proposed by Clifford Geertz (1983) between "experience-near concepts" and "experience-distant concepts" (p. 57). According to Taylor, an understanding of a subject requires a prior identification of its relevant experience-near concepts. This does not mean, however, that we should stop at these concepts. For Taylor's method contains a critical element and strives for an in-depth analysis of the language of self-interpretation of the individual. This means that Taylor allows for the use of experience-distant concepts, provided that continuity is maintained between the self-interpretation of the individual and its critical apprehension. In his view, only in this way can we understand the essence of the individual's experience and avoid reductionism.

The procedure of explanatory reduction applied by Proudfoot (1985) and Bain-Selbo (2008, 2019) is completely different. This method not only allows, but even recommends, a break in continuity between the language of individual self-interpretation and the language used by the analyst. This means that in explaining the subject's experience, we ignore

the language of his self-interpretation. According to Proudfoot and Bain-Selbo, limiting oneself to the language of subject's self-interpretation leaves no room for further analysis. This positioning, however, is wrong and is based on a false alternative, i.e., either we include the language of the individual and our analysis suffers, or we ignore this language in favor of analysis. This overlooks the third possibility that Taylor presented.

The use of explanatory reduction seems particularly illegitimate in the case of religious experience. Consider an example. If John claims to have experienced an action of sanctifying grace, then, according to Proudfoot, this event has an entirely naturalistic basis and can be explained by a two-factor theory of emotion. As Bush (2011) writes, "In Proudfoot's view, the heightened state is in actuality produced through thoroughly naturalistic means by the emotional and physiological stimulation that results from engaging in spiritual practices" (p. 112). There is here a radical and, I think, unwarranted break between the language of John's self-interpretation, which contains religious concepts, and the language of the researcher, which is based on naturalistic concepts. However, if we consider that questions of religious faith remain epistemologically undefined (there are no conclusive arguments for either theism or atheism), this procedure is theoretically unjustified. This is because it excludes *a priori* the adequacy of John's interpretation.

Let us now return to Bain-Selbo. In the course of his survey, he explained his thesis on the religious nature of sporting experiences to the participants. He noted that they "expressed their agreement with the hypothesis 'in theory,' but refused to really embrace it. They seemed to understand the argument, but psychologically could not assent to it" (Bain-Selbo, 2008, p. 2). Thus, we can see that the validity of Bain-Selbo's theory requires the individual to abandon their language of self-interpretation and suppress their intuitions. Then, when attending sporting events, they will be able to describe their experiences as religious. The problem, however, is that it is the self-interpretations and intuitions of the individual that are relevant here and that cannot be ignored in formulating theoretical conclusions about their experiences.

Taylor's hermeneutics sheds a completely different light on this issue. Adopting its assumptions, the primary focus should be on articulating the reasons why Bain-Selbo's interviewed individuals feel reluctant to label sporting experiences as religious. It seems very likely that, as believers, they associate religious experience with concepts of a religious nature,

referring to the supernatural. Then, with a more in-depth articulation, it is necessary to point to the intentionality of religious experiences, which consists in the fact that these experiences have as their correlate what religious persons consider to be the object of their faith. If so, then we may venture the thesis that the source of religious people's reluctance to equate religious experiences with sporting experiences is that the latter are directed towards a sporting spectacle, i.e., an intrinsically secular object. In this approach, we go beyond the practical articulations of the subjects (feelings of reluctance) and give them a more concrete theoretical sense by pointing to an essential feature of our experiences, namely their intentionality. However, unlike the Bain-Selbo approach, we do not lose sight of individual self-interpretation and do not fall into reductionism.

Both Proudfoot and Bain-Selbo, in applying the method of "explanatory reduction," attempt to replace the concepts used by the individual to explain the way they leads their life with concepts external and revisionary to the language of their self-interpretation. In this way, Proudfoot and Bain-Selbo place themselves in the morally dubious role of an expert in relation to the individual, who knows better what the content of their experiences really is.

Bain-Selbo's perspective as a disengaged observer makes him focus only on the external similarities between sporting and religious experiences. Consequently, he claims—as I have already written—that in both cases we are dealing with the same experiences, e.g., euphoria or "flow." The problem is that underneath the layer of similarities there are significant differences. In order to grasp these differences, it is necessary to go deeper into the nature and dynamics of the experiences discussed here.

In the study of religion, it has been common to distinguish between two main approaches to the definition of religion.² On the one hand, we have advocates of the functional approach and, on the other, proponents of the substantial approach to religion (Davie, 2007). The functional approach, represented by Émile Durkheim among others, focuses on what functions religion performs. In this view, it is not the object of our beliefs that is important, but the degree of commitment they engender in us (Twietmeyer, 2015). By treating certain areas of life and activities as the most important

² I refer here to my article on the critique of functional analyses of sport and religion (Barnat, 2019a).

we thereby attribute to them, as functionalists claim, a religious or sacred character. It is the functionalist view of the phenomena under analysis that underpins Bain-Selbo's position. He writes that sport "functions religiously to the extent that it provides opportunities for fans to have religious experiences" (Bain-Selbo, 2008, p. 1).

The disadvantage of functional definitions of religion is their over-inclusiveness. From the point of view of a functional understanding of religion, in addition to sport, the following can also be considered as religion: nationalism, humanism, capitalism, scientism, etc. Thus, if what we expect from definitions is that they demarcate certain spheres of reality or explain the conventional understanding of certain phenomena, then the functional account of religion turns out to be too broad.

In this aspect, substantial definitions of religion are much better. According to this approach, represented among others by Max Weber, understanding religion requires an answer to the question of what religion is. In other words, the object of belief is taken as decisive in defining religion here. What marks the identity of religion and at the same time distinguishes it from other spheres of culture is the belief in the existence of supernatural entities. Compared to the functional view of religion, the substantial approach is more exclusive, as it limits the field of analysis to those belief systems that have a concept of the supernatural realm. The price for the exclusive nature of these definitions is the threat of ethnocentrism (Davie, 2007). However, bearing in mind the scope of my considerations, i.e., the culture of the Western world, where the dominant forms of religion refer to the supernatural realm, this definition fulfils its purpose.

In my reflections, I take a substantial-functional approach to religion. I agree that a constitutive feature of religion is belief in a supernatural reality. From this belief, however, there follow important socio-cultural consequences that translate into how religion functions. The personal dimension of religion, based on experience, is tightly linked to its doctrinal, organizational-institutional, and symbolic-practical dimensions.

For my considerations on sport, I draw on the view of it proposed by Jay Coakley (2003). On the one hand, he takes into account the cultural and social meanings associated with sport and its functional aspect. On the other, he attempts to articulate the constitutive elements of sport. In this regard, Coakley offers the following definition: "Sports are institutionalized competitive

activities that involve (...) the use of relatively complex physical skills by participants motivated by internal and external rewards” (2003, p. 21). From the point of view of my analysis, it is important that this definition emphasizes the competitive dimension of sport and captures the phenomenon of sport from the organizational side. Indeed, these two elements are at the heart of the sporting experience of both athletes and spectators. It is true that sport, like religion, enables a certain kind of extraordinary, unique experience of an emotional nature. However, these general similarities cannot obscure from us the important differences that occur between religion and sport.

Moral Consequences of Religious Experience and Its Intentionality

The contemporary “multicomponent conception of emotions” emphasizes the irreducible complexity of our experiences. In this view, as Andrzej Dąbrowski (2014) writes, emotions constitute “multicomponent intentional states: (1) cognitive-evaluative; (2) correlated with physiological and bodily changes; (3) closely related to neurological events; (4) with an emotional tinge (subjective feeling); (5) with a tendency to action and/or (6) expression” (p. 130). I would now like to draw attention to the fifth element of the definition of emotional states cited here. The motivational dimension of our experiences is an integral part of religious experience and, I believe, also accounts for an important difference between religion and sport.

Theorists of religious experience often draw attention to its practical consequences, in that it leads the individual to a profound moral and spiritual transformation, involving the whole of their subjective powers. This issue was an important aspect of the classical analyses of William James (1978). Nowadays it appears in the reflections of, among others, John Hick (2006) or, the previously mentioned Charles Taylor (2007).³ As Hick (2007) writes, “the universal criterion of the authenticity of religious experience consists in its moral and spiritual fruits in human life” (p. 51). Religious experience is thus supposed to release motivation for universal love, solidarity,

³ For a detailed analysis of the concept of spiritual transformation in the secular culture of the Western world, see my book on Charles Taylor (Barnat, 2019b).

compassion, to cause a shift from one's own self to an attitude of selflessness and sensitivity to the needs of other beings.

In Bain-Selbo's approach, the issue of moral conversion is absent. It seems, however, that if we want to compare sports experiences and religious experiences or to equate them, this issue becomes particularly important and cannot be ignored. A proponent of equating religious and sporting experiences would therefore have to show either that the thesis of the transformative character of religion is false or that sporting experiences are also characterized by this feature. Of course, it must be kept in mind that sporting experiences can have positive moral consequences: the ability to accept defeat, respect for rivals, self-discipline, self-sacrifice (Machoń, 2021, p. 203). While these are important, and by no means to be disparaged, they cannot be equated with the consequences of a genuinely religious overall transformation of the individual, involving a new way of seeing reality and releasing the motivation for selfless universal love. Here I agree with Henryk Machoń (2021), who argues that religion, unlike sport, "calls (...) its followers to important and lasting sacrifices, renunciations and even sacrifices, which is difficult to see (...) in the case of sport" (p. 202).

The difference in the transformative potential of sport and religion outlined here is due to the fact that sport does not offer a conception of human nature and its condition in the world, and therefore the conceptual resources that enable a narrative understanding of our lives. To put it differently, sport does not provide a moral diagnosis of the fall of man and, therefore, ways to overcome it through spiritual development. Christian Bromberger (1995, p. 311) points to this difference between sport and religion in a very suggestive way. A similar view is also expressed by Machoń. He notes that the main difference between sport and religion are the "cognitive contents" contained in religious doctrines concerning a comprehensive vision of reality (Machoń, 2021). These contents constitute a condition of the possibility of religious experience and as such determine its character.

Should we therefore conclude that there is an irreducible essence of religious emotions? I am adopting here the position advocated by William James (1978), who rejects the essentialism of religious emotions postulated by Schleiermacher and Otto. According to James, it is not the case that there is a specifically religious feeling or a group of such feelings that would only arise when we come into contact with the sacred. As James (1978) writes:

There is religious fear, religious love, religious joy, and so forth. But religious love is only man's natural emotion of love directed to a religious object; (...) there is no ground of assuming a simply abstract 'religious emotion' to exist as a distinct elementary mental affection by itself, present in every religious experience without exception. (p. 46)

Repudiating essentialism about religious feelings does not mean, as Bain-Selbo suggests, that they can be equated with feelings evoked by a sports spectacle. The difference between the two is, as James shows, due to their intentionality, that is, the fact that they are directed towards different objects. Taking into account the object of our experiences allows us to go beyond Bain-Selbo's general description of religious emotions.

Before exploring this issue, however, I would like to address the question of the importance of emotions in religious life. For one could accuse my considerations of making a precipitous assumption about the important role of the emotional factor in religious life. Are emotions therefore important in being a deeply religious person? Any religion that calls its adherents to a profound transformation of life must consider the emotional dimension of our existence. The ability to name and articulate emotions is a necessary condition for spiritual growth, for conversion. If religious faith is to be alive and is to shape the daily lives of followers, it cannot ignore the emotional factor. The importance of emotions in the religious life of human beings is the subject of analysis by Robert Roberts (2021) in his entry *Emotions in the Christian Tradition* in the *Stanford Encyclopedia of Philosophy*. As he claims "Emotions are important to adherents of a religion because, like the actions that they sometimes motivate, they are expressions of the moral and spiritual life enjoined by the religion. They constitute an important part of the substance of the religious life. For this reason, teachers of the religion, as guardians and regulators of the life in question, sometimes formulate criteria of genuineness of religious emotions."

Roberts relies on the assumption that the analysis of religious emotions must refer to a specific religion. Therefore he characterizes the emotions presented in the New Testament (joy, gratitude, remorse, repentance, compassion, fear, sorrow, pride, contempt, envy) and the behavior of individuals related to them. According to Roberts (2021), the criterion for the religiosity of these emotions is that they are *theology-laden*, i.e., based on a particular conception of the divine.

The various Christian emotions reflect ideas about God, the features attributed to Him, and the human condition. Reflecting on the Christian meaning of gratitude, Roberts (2021) argues that “The grateful person willingly, even gladly, acknowledges his indebtedness to—dependence on—a benefactor. (...) The attributes of God that especially come into play in the emotion of gratitude are God’s creation and providence for our present life and God’s work of redeeming us from sin in the life, death, and resurrection of Jesus Christ.”

Unlike sports experiences, religious emotions do not focus on what is happening “here and now,” but capture the dynamics of our life attitude in a narrative way. Danièle Hervieu-Léger draws attention to this difference between sport and religion. She notes that both phenomena have meaning-making character. However, whereas religion as “ritualized anamnesis” is firmly rooted in the past and refers to the eternal, sport privileges what happens in the moment, i.e., during a sporting event. In this way, the quintessence of sport is relegated to the present. As Hervieu-Léger writes, “The particular nature of this mode of producing meaning, which operates in high-level competitive sport, is that it functions *in the moment*, in the immediacy of the gathering in a kind of corporate emotional awareness” (p. 103).

The intrinsic characteristics of sporting events (one-off, unpredictable, competitive, ludic, periodic) are closely linked to the nature of the experiences they involve. Sporting events are therefore unpredictable—their outcome and course are essentially open to question. They are also characterized by a one-off nature that makes each event different, unique, and unrepeatable. The rivalries that constitute them give rise to strong loyalties on the one hand and divisions and hostilities on the other. While some people take sport deadly seriously, this must not blind us to its essentially ludic character. While the anticipation of a sporting event (periodization) is an important part of the experience for fans and athletes alike, the right moment for the culmination of sporting emotions is when the games are being played. All this makes sport emotions strong and intense, but short-lasting. They are accompanied by a sense of drama, in which seriousness is mixed with a desire for entertainment, and the euphoria of victory is interchangeable with the bitterness of defeat (Bromberger, 1995, Machoń, 2021).

The picture is different with religious experiences. The emotions they evoke tend to be less intense and more long-lasting. Here I agree with John Hick (2007), who notes that “the greater part of religious experience

occurs below the level of the dramatic or highly charged” (p. 28). Religious experiences are also associated with solemnity and reflection, and the ludic element, if even present, cannot be considered dominant. For the overriding purpose of religious experience is contact with the deity; contact that is supposed to lead to spiritual transformation.

Conclusion

In conclusion, it must be said that—contrary to Bain-Selbo’s position—we have no good reasons to claim that sports experiences and religious experiences can be equated. The difference between sports experiences and religious experiences is mainly determined by the fact that they are directed towards fundamentally different objects. A necessary condition for talking about religious emotions is to capture them by means of—to use another term taken from Geertz—“thick description” (Geertz, 1973, pp. 3–32). This allows us to penetrate their specificity and thus see that they cannot be identified with sporting experiences. The fundamental flaw in Bain-Selbo’s approach is that in his analyses he limits himself to depicting both religious emotions and sporting experiences by means of a “thin description.” However, the fact that sporting experiences are sometimes described using concepts drawn from the language of religious experience does not in any way imply a thesis of the identity of these experiences. Religious language presupposes a certain ontology that is absent in non-religious contexts.

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Aestheticism and the Others: The Social Dimension of Nietzsche’s Views on Self-Fashioning

Keywords: Friedrich Nietzsche, Alexander Nehamas, self-fashioning, audience, influence, contest

Słowa kluczowe: Friedrich Nietzsche, Alexander Nehamas, samokształcenie, publiczność, wpływ, konkurs

Abstract

In this article, I shall explore the social dimension of Friedrich Nietzsche’s views on self-fashioning, focusing on the interpretation offered by Alexander Nehamas. First, I shall briefly present Nehamas’s understanding of Nietzsche’s views on self-fashioning and the overall significance of their social aspects. Then I shall investigate the need for the audience to assess one’s attempt at self-fashioning. Furthermore, I shall analyze how one’s pursuit of self-fashioning is influenced by and influences other similar efforts. Subsequently, the article will reveal the role of contest in the phenomenon of influence. Finally, I shall point out some limitations of Nehamas’s interpretation.

Introducing Nehamas's Interpretation of Nietzsche's Views on Self-Fashioning

In what is now regarded as a modern classic, namely his book *Nietzsche: Life as Literature*, Nehamas puts forward a prominent aestheticist interpretation of Nietzsche. According to this interpretation, Nietzsche regards the world and the self from an artistic—or more precisely literary—point of view, evaluating them correspondingly (Nehamas, 1985, pp. 3, 39, 165). As Nehamas understands Nietzsche, the latter argues that the self, as a substantial, already unified whole, cannot be assumed as given and always present, but it can figure as a potential goal. In other words, it is possible to achieve selfhood, at least to a certain extent (Nehamas, 1985, pp. 177–178). The more numerous, vigorous, and mutually contrasting drives a self possesses, while holding sway over them through a particular style and fitting them into a single coherent whole, the more worthy of admiration it is (Nehamas, 1985, pp. 7, 187–188). Nehamas claims that Nietzsche thinks of the exemplary person as comparable to the exemplary literary character, with the exemplary life being comparable to the exemplary story. To alter a part of one's life, no matter how minor it may seem, means to alter the whole of one's life. In that case, this life would not belong to the given person anymore (Nehamas, 1985, pp. 154–157, 165, 194). The test provided by the idea of the eternal return illustrates the previous point aptly, i.e., if one was to pursue the project of self-fashioning, then one should live their life in such a manner that one would be willing to live it again, in its entirety (Nehamas, 1985, p. 136).¹

In a sense, this conception of the project of self-fashioning is essentially individualistic; it is focused on cultivating the individual, not on reimagining society in its totality. Nehamas claims that Nietzsche, while having grander ambitions in his earlier period, including the reinvigoration of entire (German) culture, discarded these aspirations later on. Instead, mature Nietzsche believed that the goal of philosophy is to assist in bringing about one's self-fashioning and thus forming the individual, not the wholesale cultural reformation (Nehamas, 1998, p. 141).

¹ I have dealt with Nehamas's interpretation of Nietzsche, focusing on the project of self-fashioning, much more extensively in Čukljević, 2023.

This attitude, perhaps, might be taken to imply that Nehamas does not think that there exists a significant social dimension to one's self-fashioning. Richard Schacht, for example, argues that "Nehamas does not take sufficiently into account" Nietzsche's emphasis on the significance of "social relations" for the formation of the self, as well as the fact "that, at a rather fundamental level, the self is a social phenomenon" (Schacht, 1992, pp. 270–271). While it is true that Nehamas does not, in a systematic manner, enumerate and scrutinize the various social aspects of Nietzsche's proposals for the project of self-fashioning as understood by Nehamas, there are numerous comments about this topic scattered throughout his writings.

For a start, when discussing Nietzsche's rejection of the idea of a (substantial) subject, Nehamas remarks that "Nietzsche correctly believes that consciousness has a social origin and a social function: it is inherently connected with the need to communicate with others (GS [Nietzsche, 2001], 354)"² (Nehamas, 1985, p. 85). This represents, in a manner, a restatement of the previously cited Schacht's claim that, according to Nietzsche, the self is essentially a social phenomenon—a point that Schacht feels Nehamas does not fully recognize. Therefore, Nehamas cannot be accused of simply ignoring this fact.

Furthermore, on the same page where he states that mature Nietzsche concentrates on cultivating the individual, rather than reforming the broader culture, Nehamas points out that this distinction does not mean that the two projects are completely unrelated. As he explains, true individuals exemplify novel ways of living which, as a consequence, can lead to the introduction of new standards of evaluating possibilities of life. This can have significant results on society as a whole (Nehamas, 1998, p. 141; Nehamas, 1996a, p. 238).³ Elsewhere, Nehamas adds that it is not only that self-fashioning individuals can affect larger society, but also that social factors, in turn, can affect these individuals. Hence, there is a mutual impact between the two (Nehamas, 1996a, p. 238). Such reciprocity is consistent with the view of personal identity propounded by Nehamas's Nietzsche, according to which a person does not have an inner essence removed from their interactions (deeds, experiences, thoughts, etc.) with the world, including the other persons;

² Nietzsche's works are cited by section number.

³ See Came, 2014, p. 137.

a person is nothing more than the sum of these interactions, each one's identity being connected to the identities of other persons (Nehamas, 1985, p. 7; Nehamas, 1996a, pp. 237–238).⁴

In the remainder of this paper, I shall single out and analyze three social aspects of the project of self-fashioning, as conceived by Nehamas's Nietzsche. In doing this, I shall attempt to accomplish, at least to a certain extent, what is lacking in Nehamas—an incisive and methodical account of the social dimension of self-fashioning. Briefly stated, these social aspects include the need for an audience, the phenomenon of influence, and its manifestation as contest. I do not claim that these are the only ones; on the contrary, there are others, as shall be evident at the end of this paper. Still, these social aspects are the most prominent, and importantly related to each other. Accounting for them ought to provide a solid basis for further investigation into the social dimension of self-fashioning, as understood by Nehamas's Nietzsche.

Audience as Necessary for Assessing One's Project of Self-Fashioning

If we are to conceptualize life as a work of art, which is what Nehamas's Nietzsche urges us to do (Nehamas, 1985, p. 253), we are naturally led to the question concerning the audience of such a work (Nehamas, 1985, p. 186). Being that reception is a significant aspect of every form of artwork, what is the relationship between one's life, fashioned and appreciated as a work of art, and its audience? Who counts as a member of this audience? Is there a single privileged, "correct" audience, or can there be many different, equally legitimate, audiences? In this section, I shall try to provide answers to these questions.

First off, Nehamas is well aware that, according to Nietzsche, interpretation is an inventive and idiosyncratic process (Nehamas, 1985, p. 38).⁵ Furthermore, one's reception of a person's attempt at self-fashioning, like pretty much any other judgement, is bound to be an interpretative act (Nehamas, 1996b, p. 29). Thus, it is inevitable that one's attempt at self-fashioning

⁴ See Čukljević, 2023, pp. 8–10, 18.

⁵ See Nietzsche, 2017, 767.

might be understood and judged quite differently than how the self-fashioning individual has originally conceived or intended it (Nehamas, 1985, p. 38).⁶

This does not present an intrinsically negative situation for one's project of self-fashioning. As a matter of fact, Nietzsche even celebrates what he regards as the creative potential of the audience. An ultimate interpreter should be "a monster of courage and curiosity" and "a born adventurer and discoverer" (Nietzsche, 2005a, III, 3). This is the audience that Nietzsche himself, self-admittedly, addresses.

Nehamas puts great emphasis on the significance of the audience for one's project of self-fashioning. If a person is to pursue the path of self-fashioning, they should do it in a way that is personal and unique to themselves. Yet, whether and to what extent one has achieved this goal is not up to that person to decide. One can always delude oneself that they have stylized their life in a manner worthy of (aesthetic) admiration. This is, Nehamas observes, in accordance with Nietzsche's insistence that a person does not have knowledge of themselves that is necessarily superior to the knowledge that others have of that person. Therefore, as Nehamas concludes, "the notions of style and character are essentially public" (Nehamas, 1985, p. 186).⁷

Furthermore, Nehamas points out that in Nietzsche's *Thus Spoke Zarathustra*, its eponymous protagonist expresses doubt that the sun's happiness would not be complete—if present at all—if there were not those who can observe and appreciate its beauty (Nehamas, 1985, p. 186).⁸ From this example, Nehamas infers that for the aesthetic quality of one's life—the organization of all its particularities into a single coherent narrative, informed by a distinct style—"to be made manifest and therefore for it to be there," there has to be an audience (Nehamas, 1985, p. 186). Henceforth, one's project of self-fashioning depends, for its full realization, on the existence of an audience to observe and evaluate it. This audience need not include just about everyone, but could be composed of only chosen individuals, who, as Nehamas remarks, need not be contemporaries of the person whose life's

⁶ See Nietzsche, 2017, 767; Conway, 1997, p. 95.

⁷ See Čukljević, 2023, p. 16.

⁸ See Nietzsche, 2006b, Preface, 1; Nietzsche, 2006b, IV, 20.

(aesthetic) merit they have to appraise. They could be awaiting in the future (Nehamas, 1985, p. 186).⁹

Robert B. Pippin raises certain concerns regarding Nehamas's claims about the significance of the audience. For starters, he wonders how Nehamas could account for such a dependence of one's success at self-fashioning on the relevant audience, given Nietzsche's incessant warnings against conformism and herd morality? Does this dependence not, at least potentially, lead to a kind of conformity? Moreover, as Pippin observes, Nietzsche does not present an example of someone pursuing self-fashioning who ends up finding an adequate audience. Nietzsche's Zarathustra, for instance, never succeeds in discovering his proper audience (Pippin, 2015, p. 149).

Second, Pippin wonders: If a person's self-knowledge is essentially no better than others' knowledge about that person—meaning that one's knowledge of themselves, or others, will never be certain—how can one know for sure who their proper audience is? Could a person not deceive oneself into thinking they had found their appropriate audience? Furthermore, the way in which this audience would assess a person's attempt at self-fashioning would unavoidably be socially and historically relative. Who could we hope to find as an adequate audience in, for example, today's consumer mass culture (Pippin, 2015, pp. 149–150)?

Answers to these questions are scattered throughout Nehamas's writings. First, regarding the potential for conformism due to the success of one's effort at self-fashioning being dependent on a certain audience, it is important to acknowledge that Nehamas, while encouraging self-fashioning individuals to be creative and audacious in their pursuits, recognizes that this experimentation can go too far. If no one can make anything out of a person's attempt at self-fashioning, it might not count as an attempt at self-fashioning at all, not even as an exceptionally bold one (Nehamas, 1996b, p. 51).¹⁰ As already stated, according to Nehamas, individuality is not insulated from society; it is possible only against the background of society.

Yet, considering the possible lapse into conformism, two of Nehamas's claims must be reiterated: 1. The relevant audience can include only the select few, excluding the broader masses, thus avoiding conforming

⁹ See Conway, 1997, p. 8.

¹⁰ See Čukljević, 2023, p. 20.

to their mediocre standards;¹¹ 2. This select few need not even be alive at the time a given individual is trying to fashion themselves—hence the self-fashioning individual can, by virtue of their (future) audience, transcend the culture of their time, at least to a certain extent.

To these two claims, a third might be added, which Nehamas does not emphasize sufficiently enough, although he mentions it (Nehamas, 1985, pp. 227–228),¹² but which is emphatically propounded by Daniel W. Conway. According to the latter, the self-fashioning individual does not pursue their project with a certain audience in mind. Such an individual will inevitably expose their life for a reception by some audience, but this is not something that the self-fashioning individual intends to do and is not what motivates them. Instead, it simply happens (Conway, 1997, pp. 9, 76–77, 81–83). Hence, conformity, at least when done on purpose, is out of the question. Conway draws upon Nietzsche’s distinction between “monologue art” and “art before witnesses” (Nietzsche, 2001, 367). The first presupposes the artist altogether forgetting about their audience, while the second presupposes the artist viewing themselves from the perspective of the audience. Nietzsche lauds the first type of art, which Conway relates to the art of self-fashioning (Conway, 1997, pp. 82, 92, 95).

In this way, Pippin’s concerns about Nietzsche not presenting us with a case of self-fashioning individuals finding their proper audience, with Zarathustra failing to accomplish this task, are rendered irrelevant. A person does not need to find a proper audience for their endeavor of self-fashioning themselves—they may be simply physically unable to do so. Consequently, one does not need to, and indeed cannot, know that one has found one’s proper audience.

However, Nehamas goes a step further in this direction and notices a related problem. Even if a self-fashioning individual does not bear

¹¹ See Conway, 1997, p. 9. Nehamas makes a distinction between being famous and being admired (in the sense in which it is required for being successful in one’s attempt at self-fashioning), relying upon Nietzsche’s disparaging comments regarding fame. Being famous is often associated with being praised and celebrated by “the herd” and “the masses,” although it can also be the result of having some particularly bad quality (being infamous). A self-fashioning individual can, as a matter of fact, sometimes raise mistrust and unease in broader society, or they can, as it happens, be received with utter disregard (Nehamas, 1999, p. 7).

¹² See Nietzsche, 2005b, IX, 50.

the burden of finding their proper audience themselves, a question still remains: how can anyone, in principle, know who constitutes someone's proper audience and who does not, if we do not assume a set ahistorical standard that allows us to discern the proper audience from the improper (Nehamas, 1999, p. 7)?

Nehamas does not give an explicit answer to this question. It is safe to say that he would reject the possibility of any transcendent criteria that may distinguish the proper audience from the improper. Besides the possibility of such criteria going against the Nietzschean ethos, Nehamas is quite clear that the great works of art—including life seen as a work of art—do not share any inherent, substantial properties. These properties vary with the context, and whether they are organized in an aesthetically admirable way will be up to a certain audience to judge. The audience's judgement will, inevitably, depend upon contingent factors (Nehamas, 1996b, p. 51).¹³ Hence, the proper audience cannot be defined as "those who are, in some way, able to detect whether one's life possesses certain inherent and substantial aesthetically relevant properties," or as something along these lines.

Nehamas, however, claims that there is a characteristic that everything (aesthetically) admirable shares—namely, its influence lingers on for a long time, potentially never-ending, persisting beyond its creator's (physical) death (Nehamas, 1985, pp. 28, 228; Nehamas, 1996b, p. 51). In the case of one's project of self-fashioning, if this individual's life inspired others to live their lives as if they were works of art (Conway, 1997, p. 8), living them in their peculiar ways, and if this influence lasted through time, that would be an unmistakable sign that this person's attempt at self-fashioning had been a success. Elsewhere, Nehamas suggests that it is those who also pursue a similar project of self-fashioning, and thus are capable of appreciating such attempts at self-fashioning, who constitute the proper audience for one's attempt at self-fashioning (Nehamas, 1999, p. 7).

This is the closest that Nehamas comes to providing an answer to the question of what is the proper audience for one's project of self-fashioning. It follows that the proper audience consists of those who are not mere spectators and interpreters of one's attempt at self-fashioning, but those

¹³ See Schoeman, 2008, p. 432.

who are also more actively engaged with it, being influenced by it in their own pursuits of self-fashioning. Thus, the nature of this influence becomes another important social aspect of one's project of self-fashioning, to which we turn in the next section.

To Be Influenced By and to Influence Others' Attempts at Self-Fashioning

As Nehamas notes, there is no such thing as an absolutely new way of fashioning oneself—one's project of self-fashioning is always dependent upon other similar projects.¹⁴ Hence we should strive to be influenced by the best examples known to us (Nehamas, 1996a, p. 247; Nehamas, 1996b, p. 51). This should be kept in mind when reading some of Nehamas's statements, such as the following: "Nietzsche's self-fashioning [...] is an essentially individual project. It does not allow you to follow, in any straightforward sense, the example set by someone else; for instead of creating yourself you would then be imitating that other person. Individuality, however, is threatened not only if you imitate someone else but also [...] if others imitate you" (Nehamas, 1998, p. 143).¹⁵ At first glance, it might appear as if self-fashioning requires coming up with a completely original way of living, with any significant role that an external influence may have in such a project being rejected (Nehamas, 1998, p. 142). Yet, what Nehamas actually claims here is that one's way of life cannot be a simple copy of another's if one is pursuing self-fashioning. That would prevent a person from developing their own individuality and a particular style through which it is expressed, which is the goal of self-fashioning. If a style were to become shared by all,

¹⁴ The material present in this section is, to a large extent, taken from my paper (Čukljević, 2023, pp. 16–17, 19–20). Here it is restated and extended to some degree, as well as reconfigured in a different context which is provided by the aim of this paper to analyze and mutually relate prominent social aspects of self-fashioning, as envisioned by Nehamas's Nietzsche.

¹⁵ See Nietzsche, 1997, II, 10. Nehamas's claim that there is no absolute originality and that one is always influenced by someone else should also be remembered when Nehamas claims, for example, that the mature Nietzsche believed that "interpretations can [...] be genuinely new" and that "new interpreters [...] introduce genuinely new modes of understanding and life" (Nehamas, 1996b, p. 29).

it would no longer be a style—a style is necessarily related to individuality (Nehamas, 1998, pp. 142–143).

Therefore, being influenced by another's self-fashioning is the *sine qua non* of any effort to fashion oneself. In the arts in general, stylistic influence is as natural and productive as it is inevitable (Nehamas, 1996b, pp. 30, 51). It might be said that it can be expressed in a certain kind of imitation, but the “imitated” style is always reworked in some significant way, thus retaining both its integrity and the integrity of the style that influenced it.

There is a further analogy between self-fashioning and arts in general that Nehamas observes. We cannot create a noteworthy work of art by following some accepted blueprint. It is precisely these sorts of rules that we need to break, in a creative manner, to make a distinguished work of art. This also holds true when pursuing self-fashioning (Nehamas, 1985, pp. 225–226, 228–230; Nehamas, 1998, pp. 142–143).

Yet, breaking the rules does not mean completely forgetting about them. If a work of art, or a self-fashioning individual, strays too far from the established rules, they risk not being recognized as something, or someone, capable and worthy of being interacted with. On the other hand, they also need to pose a certain challenge to these rules, thus inviting others to notice and more deeply engage with them, potentially inspiring those others to pursue (self-)creative activity of their own (Nehamas, 1996b, pp. 30, 51). After all, as we have seen, to influence someone's attempt at self-fashioning is the ultimate validation of one's own such project.¹⁶ It is those others who will, eventually, decide whether one's attempt at self-fashioning has become simply egregious, or whether and to what extent, it has successfully defied the status quo while still being comprehensible and enticing, at least to some people.

The previously described influence that one's attempt at self-fashioning has on another's, be it the inevitable influence that certain others have on one's project of self-fashioning, or, if one is truly successful, one's influence on someone else, is aptly characterized by Marinus Schoeman as “‘emulation in a non-imitative fashion’.” He further claims that “[f]or [...] Nietzsche [...] this relation is an *agonistic* [...] relation” (Schoeman, 2008, p. 434). That is, individuals who are, in the pursuit of self-fashioning, influenced by others,

¹⁶ See also Nehamas, 1985, p. 28; Nehamas, 1996b, pp. 29–30; Conway, 1997, pp. 81, 84; Schoeman, 2008, p. 445.

contest with them to outdo those who inspired them and become recognizably different than their models, maybe even becoming more influential than those who influenced them. It is to this competitive character of influence that we turn in the next section.

The Productive Contest

As many commentators agree, Nietzsche regards competition as highly significant to one's cultivation of the self, as well as to the prosperity of society—and humanity—as a whole.¹⁷ It is therefore all the more curious that Nehamas does not, at least not clearly and distinctly, thematize this as an important social aspect of self-fashioning in general. He does, indeed, discuss at some length the competitive character of influence that Socrates had on Nietzsche's own self-fashioning, which Nehamas deems quite consequential, but does not generalize it to other cases (Nehamas, 1985, pp. 4, 24–30, 34–37, 232; Nehamas, 1998, pp. 137–138).¹⁸ Be that as it may, there is no denying that Nietzsche thought highly of the role that competition has, or at least should have, in individual formation, society's well-being, and humanity's advance.

It is probably in “Homer's Contest,” his early writing which was initially conceived as a preface to a planned but never written book, that Nietzsche most directly and attentively expressed his praise for competition (Conway, 1997, p. 67; Acampora, 2013, pp. 5, 18).¹⁹ Here he claims, approvingly, that ancient Greeks viewed strife that did not result in “hostile struggle-to-the-death,” but rather “as jealousy, grudge and envy, goads men to action [...] of the *contest*,” as “good” (Nietzsche, 2006a).²⁰

¹⁷ See Conway, 1997; Schoeman, 2008; Acampora, 2013; Hatab, 2014; Higgins, 2015.

¹⁸ In her study *Contesting Nietzsche*, to which I shall refer to throughout this section, Christa Davis Acampora could be said to pursue an investigation complementary to that of Nehamas, by focusing on Nietzsche's views on “agonism” that is “affirmative and creative” (Acampora, 2013, p. 2). The competitive relation that Nietzsche had to Socrates and which is the topic that Nehamas deals with, Acampora would characterize as belonging to “Nietzsche's own *agonistic practice*” (Acampora, 2013, pp. 7–8).

¹⁹ As Acampora and Lawrence J. Hatab observe, the views expounded in “Homer's Contest” are the precursor to Nietzsche's teachings on the will to power (Acampora, 2013, pp. 2, 80, 98; Hatab, 2014, p. 115).

²⁰ See Acampora, 2013, p. 18.

The greater a person is, the stronger this kind of strife will be expressed through them (Nietzsche, 2006a). Moreover, as some commentators point out, Nietzsche recognized competition in all forms of cultural activity that the ancient Greeks engaged in (Acampora, 2013, pp. 5–6, 18–19; Hatab, 2014, p. 115),²¹ which could be viewed as a manifestation of the widespread ancient Greek belief that—in the words of Hatab—“the world [i]s an arena for the struggle of opposing (but related) forces” (Hatab, 2014, p. 115).²²

Nietzsche especially emphasizes that such competition should not lead to the dominance of a sole winner, but to a constant struggle between a number of contestants (Nietzsche, 2006a).²³ As some commentators point out, the aim of a contest is not primarily to defeat an opponent at any cost, but to continually test one’s limits, thereby honing one’s abilities and striving for excellence;²⁴ therefore, it is counterproductive to achieve victory over (at least all of) one’s adversaries in a manner that utterly eliminates them, since the competition would cease (Conway, 1997, p. 67; Acampora, 2013, pp. 19, 22–23; Hatab, 2014, p. 115).²⁵ As Nietzsche says, “every talent must develop through a struggle,” an outlook which he ascribes to the ancient Greeks and he himself embraces (Nietzsche, 2006a).²⁶

²¹ Acampora notes that it ought to be kept in mind that in his claims concerning the ancient Greeks, Nietzsche’s primary goal was not to provide an exhaustive and completely historically accurate presentation of their culture, but to highlight—and in this process at least somewhat idealize—certain aspects of that culture that he regarded as useful for the advancement of contemporary culture (Acampora, 2013, p. 70).

²² See Acampora, 2013, pp. 11, 98.

²³ See Hatab, 2014, pp. 115–116. It should be noted that Nietzsche holds that a striving individual does not need to compete only with living persons, but can also contest with a long dead one (Nietzsche, 2006a). This is in accordance with what was previously said—a self-fashioning individual’s audience need not be contemporary with them.

²⁴ It would seem, however, that Conway at least does not conceive this as individuals developing their full potential, but as “transform[ing] themselves momentarily into *signs* of the superfluous vitality that courses through them” (Conway, 1997, p. 67).

²⁵ This does not mean that the contestants cannot be primarily motivated by the desire to defeat their opponents. As Acampora notes, the structure of contest is not reducible to individuals and their desires—the contest is socially instituted and by the methods of honouring, condemning, etc., the audience can shape the way in which participants have to compete in order to achieve victory (Acampora, 2013, pp. 20, 23).

²⁶ See Higgins, 2015, p. 86.

Furthermore, Nietzsche points out that to this outlook also belongs that “the aim of agonistic education was the well-being of the whole, of state society” (Nietzsche, 2006a). He states that one “was to develop” oneself, “through competition,” in such a way as to be of service to society (Nietzsche, 2006a). The contest keeps human (natural) aggressiveness under control and directs it in a socially acceptable fashion, thus generating social cohesion while averting social stagnation and furthering human potential in general, besides stimulating the individual to flourish (Higgins, 2015, p. 86; Acampora, 2013, pp. 6, 8, 22; Hatab, 2014, p. 115). After all, as already remarked, this contest occurs in the public sphere—it is not simply an affair between the competing individuals.²⁷ Acampora expresses this most clearly when she states that “it is the *community* and not any great individual competitor that founds” this sort of contest (Acampora, 2013, p. 17).²⁸

Some may raise the question as to the exact relationship between the aforementioned influence and competition as important social elements of self-fashioning. Namely, does one necessarily imply the other? More precisely, we can ask two separate questions: 1. If a self-fashioning individual competes with another such individual, be they dead or alive, is the first one necessarily influenced by the second one, or is it simply something that normally, but not necessarily, happens in these situations?; 2. If a self-fashioning individual is influenced by another such individual, be they dead or alive, does the first one necessarily compete with the second one, or is it simply something that normally, but not necessarily, happens in these situations? The authors mentioned in this section, at least to my knowledge, do not entertain these questions. Still, they ought to be briefly addressed.

Regarding the first question, if a self-fashioning individual competes with another such individual, can it be imagined that the first person’s attempt at self-fashioning is not somehow influenced by their opponent? If one’s attempt at self-fashioning is not in any way influenced by that other individual, why was that individual chosen to be overcome in the first place? By selecting that particular individual as one worthy of competing with, the self-fashioning individual indicates that their opponent’s self-fashioning holds a certain significance for their own self-fashioning. In this case, can we still refuse to

²⁷ See Conway, 1997, p. 67.

²⁸ See Higgins, 2015, p. 86.

refer to this as “being influenced?” I do not see why we should not declare this a case of influence. Therefore, I believe that competing with someone does entail being influenced by them when it comes to self-fashioning.

Concerning the second question, if a self-fashioning individual is influenced by another such individual, can it be said that the given individual does not, in a way, compete with the one who influenced them? To fashion oneself means to give one’s life a unique style that differs significantly from other individuals’ styles, even—or especially—from those who one counts among one’s influences. Hence one probably needs to work particularly hard to distinguish their style from those of the self-fashioning individuals one admires the most. Does this not mean that one must compete with those individuals? I do not see how one could give a negative answer to this question. Thus, I would say that, when it comes to self-fashioning, being influenced by someone does entail competing with them.

Schoeman appropriately and conveniently brings together some of the main arguments regarding the social aspects of an individual’s self-fashioning examined in this paper—the relationship that such a project has to one’s audience, influence, and contest—when he states, “An action is virtuous if it is performed in a *virtuosic* fashion, hence it can manifest itself only in the *public sphere*, i.e., where others are present as spectators, as an audience, or as co-actors, and where a spirit of *agonism* prevails—in other words where there is mutual contest, a struggle to become the best” (Schoeman, 2008, p. 432).

Friendship and Beyond

Finally, one more social aspect of self-fashioning ought to be briefly mentioned, besides the previous three that were discussed in some detail. Conway argues that Nietzsche believed that self-fashioning individuals eventually “create a community of friends in the peculiarly Nietzschean sense, of fellow travelers who share a common aesthetic sensibility, who mutually elevate one another through conflict and contest” (Conway, 1997, p. 22). Others have also noted that, according to Nietzsche, there is an agonistic character to friendship, on the basis of claims such as the following: “In one’s friend one should have one’s best enemy. You should be closest to him in heart when you

resist him” (Nietzsche, 2006b, I, 14).²⁹ I do not think that Nietzsche should be understood as claiming that contest always and necessary entails friendship, but that a fully developed contest takes the form of a friendship. Similarly, not all friendships need to involve contest, but the exemplary ones do. Even our colloquial use of phrases such as “friendly competition,” which has a meaning akin to the one the word “contest” has in Nietzsche’s use, attests to the importance of the relation between competition and friendship.³⁰ Hence the question of the role of friendship in the project of self-fashioning emerges as a further exploration of the productive contest.

And indeed, Nehamas has devoted a whole book, aptly entitled *On Friendship*, to a philosophical investigation of this phenomenon and how it relates to one’s cultivation of the self. Yet, he touches upon Nietzsche’s views on friendship only in passing, in a sole footnote (Nehamas, 2016, fn. 47). Furthermore, Nehamas alludes to the prominence of contest in friendship only once, again in a footnote (Nehamas, 2016, fn. 3). This should come as no surprise by now; we have seen that he deals with the significance of contest for self-fashioning in a similar way. I believe that this is an indication of a fault which mars Nehamas’s interpretation of Nietzsche. Nehamas is focused on the individualistic facet of self-fashioning, and while he, almost incidentally, recognizes few of its social aspects, he does not genuinely regard the self-fashioning individuals as forming a kind of community. This raises the following questions: how does this community relate to broader society? What should society be like for this community to thrive? Nehamas does not pose such questions. Perhaps this communal facet of self-fashioning could be ignored when dealing solely with audience and influence as social aspects of self-fashioning, which Nehamas does. One’s audience, who one influences, may, in principle, be both temporally and spatially distant from the self-fashioning individual. On the other hand, when dealing with contest and friendship, it becomes almost impossible not to notice that the self-fashioning individuals form a community, as contest, and especially friendship, normally require parties that know each other and that, in pursuing their common interest, form a specific community. After all, and contrary to what Nehamas claims,

²⁹ See Conway, 1997, p. 54; Higgins, 2015, p. 85.

³⁰ Neil Durrant has recently published a book on Nietzsche’s agonistic ideal of friendship (Durrant, 2023).

Julian Young makes the convincing case that Nietzsche retained his early communitarian views throughout his career (Young, 2015, pp. 7, 15–21, 23–28). Thus, in order to further explore social aspects of self-fashioning, one should go beyond Nehamas's interpretation and take into account Nietzsche's social and political philosophy. However, this will have to be the subject of another paper.

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A Duty to Rescue and Its Cost⁴

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Słowa kluczowe: obowiązek ratowania, konflikt praw, zasada środka zaradczego, służebności, uprawnienia absolutne

¹ Stanisław Wójtowicz's contribution to the paper amounts to 33% and consists mainly in posing the research question, doing the conceptual work and writing section 2 and part of section 3.

² Łukasz Dominiak's contribution to the paper amounts to 34% and consists mainly in conceptual work, writing section 1, section 5 and co-writing sections 3 and 4.

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Abstract

The purpose of the present paper is to analyse the problem of cost generated by the performance of a duty to rescue. The authors consider three distinct views of this problem by confronting a scenario in which one party decides to rescue another, where providing such assistance seems to involve an infringement upon the property rights of the third party. For example, *A* rescues drowning *B* but in the process of doing so *A* apparently trespasses upon *C*'s land. The question that the authors pose is: Assuming that there is a duty to rescue, who should be charged with the cost of what seems to be an infringement upon the third party's property rights? The paper analyses the following possibilities: the cost should be borne by (a) the victim of the emergency, (b) the rescuer, (c) the third party whose rights seem to have been encroached upon. Even though the authors begin with a pronouncedly libertarian assumption about the third party's absolute property rights, in the course of the discussion they come to the conclusion that it is exactly this assumption that should be further probed and ultimately relaxed in order to reach the most plausible solution to the present dilemma.

Introduction

In the present paper we take up the question of who should cover the cost of discharging a duty to rescue. More specifically, if discharging a duty to rescue results in what seems to be an infringement upon the third party's private property rights, who should compensate the third party for the encroachment upon his rights. Should it be the rescuer, the rescued or the third party himself? For example, *A* rescues drowning *B* but in the process of doing so *A* apparently trespasses upon *C*'s land. Who should cover the cost—say, compensate for the apparent property rights infringement—of the rescue? As it seems, the answer to this vexing question, far from being obvious, depends not only on our straightforward moral intuitions or considered moral judgements but also on our beliefs about the nature of rights and remedies.

After some preliminary analysis, we pinpoint three valid solutions to the question of who should cover the cost of discharging a duty to rescue. First, we identify and discuss a solution which can be associated with rights absolutism or some branches of radical libertarianism and which in turn posits that the property rights of the third party should take precedence over the duty to rescue. Second, we consider a solution which takes the opposite stance, that is, gives precedence to the duty to rescue over property rights of the third

party. However, despite prioritizing the duty to rescue, the solution in question does not submit that the said duty overrides or extinguishes the property rights. Rather, the duty to rescue only overtops them. This solution is often associated with the seminal ruling in *Vincent v. Lake Erie Transportation Co.* as well as with a family of views prevalent amongst some prominent contemporary Anglophone philosophers (for example, Bernard Williams or Judith Jarvis Thomson). While they are opposites of each other on one plane, these two solutions are nevertheless in agreement (at least by assumption made *arguendo* in the present paper) insofar as they both acknowledge that there is a real conflict of rights between the third party's property rights and the emergency victim's right to be rescued. Thus, in contradistinction to these two solutions stands the third one, which denies that there is any conflict of rights and which in turn subscribes to the view that the duty to rescue overrides the property rights of the third party.

Upon distinguishing and characterizing these three solutions, we embark on making an argument that it is the second one that is superior to the others. In order to substantiate our point, we resort to the whole gamut of reasons, from moral intuitions, through inference to the best explanation, to the conceptual features of rights, and submit that where the first solution runs against our considered judgements, the third one does not take property rights seriously enough to be considered victorious. Thus, the verdict that we reach as a result of our investigations ultimately points to the rescuer as the best candidate for the bearer of the remedial duty to compensate the third party for the property rights infringement. At the same time, our inquiry prompts us to believe that despite the verdict just mentioned, the beneficiary of the rescue also incurs some residual duties to the rescuer as well as to the third party, a fact that additionally problematizes the picture that emerges from our disquisition.

Our paper is organized in the following way. Section 2 introduces the problem and makes necessary assumptions about the duty to rescue for the subsequent discussion to follow. Section 3 probes the problematic contours of the third party's property rights, arguing that the assumption about the existence of those rights is underdetermined and requires more careful treatment and specification. Thus, looking closer at the exact features of those rights allows us to distinguish three main solutions to the problem of who should cover the cost of discharging the duty to rescue. Section 4 plays these three solutions against one another and makes a case

for the superiority of the one which recognizes the precedence of the duty to rescue over the third party's property rights, without yet interpreting these rights as being overridden or extinguished by the said duty. Section 5 concludes.

Setting the Stage: The Contours of a Duty to Rescue and Its Cost

In his paper aimed at changing our attitudes towards helping those in need, Peter Singer (1972, p. 231) presented the famous example of a drowning child, which can be paraphrased as follows:

Drowning Child

A man is strolling in a park on a hot day. At one point he notices that a child is drowning in a shallow pond. He can easily run up and pull the child out of the pond, saving his life.

The first question is whether the passer-by has a moral duty to save the drowning child. The second question is whether this moral obligation can somehow be enforced, for example, in the form of direct coercion or punishment that would fall on a person who failed to engage in such a rescue. Note that this thought experiment is designed in such a way that the duty to rescue imposes virtually no cost on the passer-by.⁵

Most of us seem to have a very strong moral intuition that the passer-by has a moral duty to save the child, and that this duty could somehow be enforced by law (it is worth noting, however, that even if the latter intuition is strong, it is inevitably weaker than the former: the intuition indicating that we have a right to use force to compel someone to do x is almost always weaker than the intuition that we have a duty to do x). This intuition can be reinforced by various forms of ethical reflection. For example, a utilitarian would point out that the passer-by should save the child because the cost of assistance would be close to zero, and the loss of social utility prevented by saving the child would be enormous. Such reasoning stood behind Singer's original example. Singer (1972, p. 231) argued that

⁵ This is slightly different from Singer's original example, where the man "muddies his clothes," which constitutes a small cost.

“if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.” A contractualist would hold that the passer-by should save the child, since individuals in the original position (or in any other type of contractual situation) would certainly agree to such an obligation (or at least to an institutional framework that entails such an obligation somewhere down the line).⁶ In fact, it is hard to think of any arguments that could be put forth in such an original position against the duty to rescue. Moreover, both the utilitarian and the contractualist could also insist that such a duty to rescue should be enforced by law in one way or another.

Now absolutist libertarians would disagree with the claim that there is a duty to rescue in such a situation (Rothbard, 1974, p. 106). The foundation of libertarianism is the belief that each person owns his or her body and may use it as he or she wishes (as long as he or she does not infringe on the symmetrical rights of other individuals). This claim is known as self-ownership.⁷ Forcing someone to help another means using him merely as a tool to achieve goals which are not his own, which involves taking away his dignity. An individual who is treated as a tool can no longer shape or author his own life, but is used to realize someone else’s goals or values. Libertarians sometimes compare a person forced to help another to a slave: they argue that the coerced person becomes a temporary slave of the coercer (Nozick, 1974, p. 199).

However, the position of absolutist libertarians is rejected by most philosophers, including non-absolutist libertarians. The latter, while disagreeing with the claim that people have a general duty to rescue, are nonetheless willing to concede that an individual has such a duty in a specific type of boundary situations (“life-boat situations”) if it involves a negligibly small cost for him or her to save the needy person from great suffering (Huemer, 2013, p. 83). You do not lose your dignity if you are forced to waste five minutes of your life to help a drowning child. Note that most people

⁶ Compare Rawls, 1999, pp. 98–99.

⁷ A very good characterization of self-ownership has been offered by Gerald Alan Cohen (1995, p. 67). He maintains that “the thesis of self-ownership ... says that each person is the morally rightful owner of his own person and powers, and, consequently, that each is free (morally speaking) to use those powers as he wishes, provided that he does not deploy them aggressively against others.”

would gladly help the child even in the absence of a law requiring them to act in such a manner, which means that such a law would have a bearing only on people unwilling to help, and so one can speculate that such people are acting in bad faith, acting on their own egoism, while not being interested in the question of their own dignity.

Hence, it seems that there is a general consensus—supported by both our moral intuitions and theoretical considerations—that we have a duty (and that it can be enforced by law, although the exact shape of this enforcement is another matter) to rescue a person in a life-threatening situation. However, this consensus can be further probed by modifying Singer’s thought experiment so as to introduce an element of a third party’s rights:

Flower Bed

On a hot day, a man is drowning in a shallow pond. A passer-by strolling through the park can easily run up and rescue the man. However, there is someone’s flower bed between him and the pond, which the rescuer, if he tries to save the drowning man, will trample.

Flower Bed is different from *Drowning Child* in two respects. First, while in the latter case the cost on the part of the rescuer was negligibly small, in the former case the cost is not completely insignificant. To the negligibly small cost in the form of lost time and slightly wet shoes, one should add the cost of damaging the flower bed. If this cost were to be borne by the rescuer, this could theoretically be a rationale for denying that the rescuer has a duty to rescue.⁸ However, we will not address this problem here. We assume that although in our case this cost is not completely negligible, it is nevertheless small enough for a duty to rescue to be still in place.

Second, it is important to note that there is a crucial moral aspect to the cost of rescue in *Flower Bed*. After all, we assume that the flower bed is owned by someone. Thus, the question of who should cover the cost of rescue or the cost of trampling the flower bed, if you will, boils down to the question of what sort of moral protection is afforded by property rights

⁸ See, for example, Lord Macauley’s assertion that “[i]t will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die” (Macauley, 1880, p. 109).

to the flower bed owner. Since there is no right without a remedy,⁹ the question of who should cover the cost of rescue seems to ultimately reduce to the question of who should bear the cost of rectifying—probably in the form of compensatory damages—the infringement upon the flower bed owner’s property rights. Assuming for the sake of discussion that there is a duty to rescue, it is to this last question that we will now turn.

Probing the Question: The Problematic Nature of the Flower Bed Owner’s Rights

Having set the stage for our discussion, the problem situation that we now seem to be facing is the following. The passer-by has a duty to rescue the drowning man (we take it for granted). Yet doing so would apparently infringe upon the flower bed owner’s property rights due to trespassing on his land and damaging his flower bed. Thus, as it seems, the question is who should pay compensatory damages to the flower bed owner. Should it be the rescuer or perhaps the drowning man, the only beneficiary of the rescue? However, a moment of deeper reflection suffices to realize that our question is either underspecified or it takes too much for granted or both.

First of all, even if we assume, as we did, that the flower bed owner has private property rights in the flower bed, it is not yet clear what this alleged fact consists in, for it might come to him having a right that is either more stringent than the duty to rescue or less stringent than the said duty. In other words, when combined with the assumption that there is a duty to rescue, the fact of the flower bed owner having property rights to the flower bed can reduce to the conflict of duties¹⁰ having two different distributions of stringency. First, it may be the passer-by’s duty—correlative with the flower bed owner’s property rights—not to trample the flower bed that is more stringent than the passer-by’s duty to rescue (correlative with the drowning man’s right to be rescued).¹¹ Alternatively, it might be the latter duty

⁹ On the remedy principle see Kramer, 2005, pp. 312–326.

¹⁰ For an excellent elaboration on conflicting and contrary duties see, for example, Kramer, 2009, pp. 203–206.

¹¹ On the concept of rights-duties correlativity see Hohfeld, 1913, Kramer, 2002. For a contrasting view *pace* Hohfeld, see, following Kramer, 2002: Raz, 1986, pp. 166, 171, MacCormick, 1982, pp. 154, 161–162.

(that is, to rescue) that is more stringent than the former (that is, not to trample the flower bed), with both duties still being in force, as assumed.¹²

Let us now elaborate on what would follow if the duty against trampling the flower bed had higher stringency than the duty to rescue. We know otherwise that some absolutist libertarians would be ready to embrace the view that private property rights, and thus duties correlative thereto, are always stronger than any other countervailing moral considerations, that is, that the interloper may be not only duly punished for infringing on another's property rights but he may also be prevented from doing so by violent means.¹³ For example, considering an age-old dilemma of a father stealing a loaf of bread to feed his starving children, Walter Block (2021, p. 14) opts for the following solution: "Should a man be punished for stealing a loaf of bread to feed his starving child? My heart would go out to him, as a fellow parent, but insofar as libertarianism is concerned, from a deontological point of view, this parent committed a crime and should be duly punished for it." By the same token, even though on a more general note, writes Murray Rothbard (1998, p. 88):

If every man has the absolute right to his justly-held property, it then follows that he has the right to *keep* that property—to defend it by violence against violent invasion ... To say that someone has the absolute right to a certain property but lacks the right to defend it against attack or invasion is also to say that he does not have total right to that property.

¹² Compare Kramer, 2014, pp. 2–11.

¹³ It is important to remember though that libertarians in question would, with all probability, deny that there is any duty to rescue to begin with; or, what comes to a similar thing, they would argue that any existing duty to rescue is only moral (in contradistinction to juridical, that is, backed up with physical force) or that it is extinguished or overridden in a conflict situation. However, as we argue later in this paper as well as some of us point out in other papers (Dominiak, 2017, pp. 114–128, Dominiak, 2019, pp. 34–51, Dominiak, 2021, pp. 27–35, Dominiak & Wysocki, 2023, pp. 5–26), this position is untenable. Besides, we assumed the duty to rescue for the sake of discussion in order to elucidate some important aspects of the structure of morality and since this is after all our own assumption, we have a right to stick to it regardless. So, why do we even reference any libertarians at all in this place? Well, we believe that they are paragons of the view that property rights are strongly absolute and trump, one way or the other, all other moral considerations and thus are very clear, even if exaggerated, illustrations of the solution discussed herein.

To the same effect argues Stephan Kinsella (1996a, p. 317):

What would it mean to have a right? Whatever else rights might be, certainly it is the case that rights are legitimately enforceable; that is, one who is physically able to enforce his right may not be prevented from doing so. In short, having a right allows one to legitimately punish the violator of the right, or to legitimately use force to prevent another from violating the right.

To be sure, not only libertarians would embrace this seemingly cruel solution about the father and starving children. For example, Lord Matthew Hale (Hale 1736, p. 54) believed—taking into consideration the precedent nature of English common law, presumably not only as far as *de lege lata* postulates were concerned¹⁴—that “here in *England*..., if a person, being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man’s goods, it is felony, and a crime by the laws of *England* punishable with death.”¹⁵

Thus, once the duty not to trample the garden is taken to be more stringent than the duty to rescue, it follows that the passer-by ought to forbear from trampling the garden even if he would thereby breach his less stringent duty to rescue. Moreover, were the passer-by to embark on rescuing the drowning person, the flower bed owner may then legitimately and even violently prevent him from doing so. Finally, were the passer-by to choose to discharge the less stringent duty (to rescue the drowning man) by trampling the flower bed, he should be punished accordingly. The reason why the passer-by should be punished is that, after all, by discharging his less stringent duty he did what he ought not to have done. In other words, since the passer-by did what he ought not to have done, he is to be blamed for

¹⁴ Lord Hale believed that the rule that under necessity “theft is no theft” can bring about very bad consequences. As he put it (1736, p. 54), “very bad use hath been made of this concession by some of the Jesuitical casuists in *France*, who have thereupon advised apprentices, and servants to rob their masters, when they have judged themselves in want of necessaries, of clothes, or victuals; whereof, they tell them, they themselves are the competent judges; and by this means let loose, as much as they can, by their doctrine of probability, all the ligaments of property and civil society.”

¹⁵ Compare also a broader discussion of Hale’s position and the problem of necessity in the seminal case *Regina v. Dudley and Stephens* 1884, 14 Q.B.D. 273; for an even broader discussion of necessity and balance of evils, see Kadish, Schulhofer and Steiker, 2007, pp. 73–78, 798–821.

his action, providing that other conditions pertaining to *mens rea* are met.¹⁶ And since the role of punishment is to express blame in a profound, acute and socially consequential way, the passer-by is to be punished.¹⁷

It is also worth considering what should befall the passer-by if he decides to discharge his more pressing duty. Specifically, what is here under consideration is the situation wherein the passer-by refrains from trampling the flower bed and thus fails to save the person from drowning. Since the course of action in question is what the passer-by, by assumption, ought to do, then, *a contrario* to the above reasoning, the passer-by should not be punished or compelled to discharge his less pressing duty, that is, to rescue the drowning person. Now on this occasion it is important to note that punishing the passer-by would be not only morally grotesque (after all, he does what he ought to do) but also conceptually confused. As mentioned above, punishment is about blaming people, not praising them. And since the passer-by did what he ought to have done and thus what was praiseworthy, punishment would be out of place. However, since we assume that the duty to rescue is not overridden or extinguished and therefore it still exerts its normative force, some sort of remedy must be owed to the drowning person or his heirs or agents. Although it might be an interesting problem what particular form of remedy the passer-by owes to the drowning person (or to his heirs) on this view, a solution thereto would be inconsequential for the purposes of the present paper, so we abstract from considering it herein.

¹⁶ But mind that as far as some libertarians are concerned, there is no *mens rea* requirement for placing blame. See, for example, Rothbard, 2011.

¹⁷ Most tellingly, Moore (2010, p. 21) takes criminal law to be “marked by the punitive sanction,” with the punitive sanction differing from, say, contractual penalties in that the former are inflicted with a punitive intention. Later on, Moore (2010, p. 25) explicates that sanctions normally constituting punishments “are severely unpleasant to endure like death, confinement, the ducking stool” etc. However, as this author perspicuously notes, even these sanctions would not constitute punishments unless the purpose of inflicting them is punitive, that is such that it is aimed at giving the criminal his just due or, in other words, aimed at making the criminal deservedly suffer for his or her culpable wrongdoing (Moore, 2010, p. 25). Moreover, on the libertarian theory of punishment and self-defense see, for example, Rothbard, 1988, Block, 2009, 2019, Kinsella, 1996a, Kinsella, 1996b, Nozick, 1981, Barnett & Hagel, 1977, Dominiak, 2023, Dominiak & Wysocki, 2023, Dominiak, Wysocki & Wójtowicz, 2023, Wójtowicz, 2021.

Since in the next section we are going to argue about the substantive merits of this and the alternative solutions to the problem considered here, it would be convenient to label the solution just presented (and later to do the same for other solutions). So, what we dealt with above was the situation of a conflict of duties (hereinafter labelled “CD”), in which property rights (hereinafter labelled “PR”) are more stringent than the duty to rescue (hereinafter labelled “DR”) and in which the agent can behave morally optimally (hereinafter labelled “O”), that is, in accordance with a more stringent duty, or morally sub-optimally (hereinafter labelled “S”), that is, in accordance with a less stringent duty. Thus, the solution characterized above is to be labelled {CD, PR, O} or {CD, PR, S}, depending on the course of action taken by the passer-by. The first series, that is, {CD, PR, O}, should be understood as expressing the solution which acknowledges that there is a conflict of duties (CD) in which property rights are more stringent (PR) than the duty to rescue and in which the passer-by behaves morally optimally (O), whereas the second series should be read as expressing essentially the same solution but differing from the previous one, in that the passer-by behaves morally sub-optimally (S). Note also that if, for example, PR is more stringent than DR, instead of representing this relation as “PR>DR” we opt for putting “PR” in the second position in the series, mainly for the sake of simplicity of notation. Accordingly, if DR proved to be more stringent than PR, we would not represent it as “DR>PR” but would instead put “DR” in the second position in the series.

After elaborating on the solution {CD, PR, O} and {CD, PR, S}, we are going to do a similar thing to the solution {CD, DR, O}, that is, to the solution which recognizes a conflict of duties but deems the duty to rescue more stringent than the property rights and in which the passer-by behaves in accordance with the more stringent duty.¹⁸ Now if there is indeed a conflict of duties, while the duty to rescue is more stringent than the flower bed owner’s property rights and the passer-by behaves morally optimally ({CD, DR, O}),

¹⁸ Of course, it is possible to behave sub-optimally on the grounds of all the solutions considered in the present paper, which is why we introduced the notation expressing this fact (S), and discussed such an option in the case of the first (“libertarian”) solution. However, the truth is that we did this mainly for the sake of completeness of our framework and hence in what follows we are going to focus only on the most relevant courses of behavior within each solution, that is, on the actor doing what he ought to do according to the respective solutions.

then we know for certain that the passer-by does not thereby render himself liable to punishment. Nor should he be forcefully prevented from traversing the owner's land. After all, by assumption, he has behaved morally optimally by discharging a more pressing duty and thus, as observed above, punishing him or forcefully preventing him from doing so would be both morally grotesque if not conceptually misguided as well. At the same time, there is a real conflict of duties assumed here, which implies that property rights are not overridden or extinguished. This, in turn, entails that once the property rights in question are infringed upon, an appropriate remedy is due to the right-holder.

Indeed, such a solution is embraced by many prominent jurists and philosophers. For example, as far as law is concerned, the landmark case in this regard is *Vincent v. Lake Erie Transportation Co.* (1910, 109 Minn. 456). To avoid a steamship being lost to a tempest, those in charge of her decided to keep the vessel moored to the plaintiff's dock, the effect being that the storm threw the ship against the dock, thereby causing damage to the latter. The court opined that "in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship" (*Vincent*, 1910, 458). However, since those in charge of the steamship deliberately decided to keep her "in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted" (*Vincent*, 1910, 459). This in turn can be understood as admitting that those in charge of the vessel acted as they ought to have acted, that is, with "good judgment and prudent seamanship" (*Vincent*, 1910, 458), in other words, in accordance with a more stringent duty to preserve the vessel. Nevertheless, the court decided that the remedy is still due to the dock owner for the infringement upon his less pressing property rights. Adjudicating thus, the court opposed those theologians (proponents of the solution which in our nomenclature we are going to abbreviate below as $\{-CD, DR, O\}$) "who hold that a starving man may, without moral guilt, take what is necessary to sustain life" (*Vincent*, 1910, 460) by pointing out that "it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so" (*Vincent*, 1910, 460).

By the same token, in another consequential case, *Ploof v. Putnam*, the plaintiff moored his sloop, on which there were his wife and two minor children, to the defendant's dock in order to avoid the danger of a sudden and

violent storm. Writing the opinion for the court, Loveland Munson, J. argued that although interference with the private property of the defendant, that is, with his dock, would normally count as trespass, the necessity to escape the immediate danger of the violent tempest rendered the unmooring of the sloop a tortious act on the part of the defendant. More specifically, the court pointed out, *inter alia*, that “it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest” (Epstein, 1995, p. 54). Thus, even though the defendant had property rights to the dock, in the face of necessity he was not permitted to prevent the plaintiff’s interference therewith. Now if juxtaposed with *Vincent* and considered counterfactually, *Ploof* can support the conclusion that the defendant should have allowed the plaintiff to moor his sloop and only then sue, arguably successfully as per *Vincent*, for damages.¹⁹

There are also many prominent philosophers who are clearly friendly, one way or the other, towards this solution (that is, {CD, DR, O}). For example, Joel Feinberg (1978, p. 102) claims that it is permissible to break into another’s cabin in order to escape a ferocious blizzard, even though by doing so one would be infringing upon another’s property rights and thus owe the owner proper compensation later on. By the same token, Bernard Williams (1973, p. 172) argues that unlike in the conflict of beliefs, in morality the agent who faces two conflicting moral considerations does not “think in terms of banishing error” but rather “in terms of acting for the best, and this is a frame of mind that *acknowledges* the presence of both the two *ought*’s” (Williams, 1973, p. 172). Now the presence of the *ought* not acted upon is driven home to the agent by the regret he feels despite acting for the best or morally optimally, if you will. Thus, for Williams (1973, p. 175) it is “a fundamental criticism of many ethical theories that their accounts of moral conflict and its resolution do not do justice to the facts of regret and related considerations: basically, because they eliminate from the scene the *ought* that is not acted upon.” In turn, Judith Jarvis Thomson (1990), although critical of Williams linking regret specifically with moral *ought*, also believes that the moral residue left after our acting for the best in conflict situations is explained by the presence of a claim, “for a claim is equivalent to a constraint

¹⁹ Again, what we are considering here is a counterfactual question. Thus, it is no obstacle for our analysis that *Vincent* actually came after *Ploof*.

on the claim-giver's behavior that includes such things as that the claim-giver may have to make amends later if he or she does not accord the claim" (Thomson, 1990, p. 85) in order to do what he or she ought to have done or what was, in the vernacular assumed in the present paper, the morally optimal course of action. Hence, as pointed out by Thomson (1980, p. 6), "[w]e Feinberg-friends ... are committed, not merely to there being cases in which A has a right against B which B may permissibly infringe, but also to there being cases in which A has a right against B that B not do a thing, though it is not permissible for A to prevent him from doing it."

Now we believe that both solutions analyzed above, that is, {CD, PR, O} and {CD, DR, O}, albeit yielding substantively different conclusions, are nonetheless well captured by the conceptual framework introduced by Matthew Kramer (2014). Since presenting this framework will prove useful in the later discussion, it is laying it down that we are turning to now. Thus, Kramer (2014, p. 9) distinguishes between rights that are *strongly* and *weakly* absolute. The former are such that they count as moral absolutes. That is to say, there are no possible worlds in which the said rights are of lesser moral importance than any other merely possible ones. In other words, once we identify a strongly absolute right, this implies that the right in question is "always of greater normative importance" (Kramer, 2014, p. 9) than any other right, whether the latter is actual or merely possible. Or more technically, a strongly absolute right is always *overtopping*, which is another way of saying that it is always normatively more significant than any other actual or (merely) possible rights. By contrast an *overtopped* right (and its correlative duty) is such that it exerts a weaker normative force than some other right that is in conflict with it. It can be seen then that it is a *weakly* rather than *strongly* absolute right that is vulnerable to being overtopped. Remember, a strongly absolute right cannot be overtopped by definition. However, a weakly absolute right, Kramer emphasizes, also binds "everywhere and always in all possible worlds" (Kramer, 2014, p. 9) (that is why it is still absolute, even if only weakly absolute). Namely, the fact that there is a moral consideration of greater significance does not imply that the weakly absolute right in question is overridden or extinguished. Far from it, as Kramer (2005, p. 348) insists, infringing upon an overtopped moral prohibition still calls for appropriate remedial actions. After all, since the overtopped duty (and its correlative right) is *not* overridden in the face of a more

stringent and conflicting consideration, if an actor breaches an overtopped duty, he still behaves *weakly* impermissibly, although morally optimally.

As the Kramerian framework shows, in all of the above solutions there are real conflicts of duties, that is, neither duty overrides nor extinguishes the other. Instead, one only overtops the other. However, there is a great tradition of moral thinking, already mentioned *in passim* in this section (for example, while quoting the court's remarks about some theologians in *Ploof*), which submits that even though property rights should be respected in normal circumstances or if opposed by considerations of comparable weight, they should entirely give way in cases of necessity when, for example, a grave duty is calling. In such circumstances there are no real conflicts of duties, for the less pressing requirements are suspended or revoked for as long as the higher necessity or a graver duty exerts its moral force.²⁰ Thus, using our notation introduced above, we can represent the present view as the following series: $\{-CD, DR, O\}$ or $\{-CD, DR, S\}$. Note that our notation exhibits consistency throughout the paper. The above series communicates the fact that there is no conflict of duties ($\neg CD$), for the duty to rescue (DR) takes

²⁰ At this stage it might be elucidating to point out that when necessity (duress of nature) or compulsion as such (that is, also duress proper or coercion, if you will) is in the offing, it can exert its moral power and thus excuse the actor in two different, although often operating together, ways. Following Herbert Hart (1968, p. 152), we can say that, on the one hand, compulsion can *incapacitate* the actor's will or ability to make choices or his process of practical reasoning as in the cases of inducing in him an extreme fear or overwhelmingly strong desire. On the other hand, it can present him with a situation in which although he has full capacity to make choices, his *opportunities* to use this capacity are very *limited* as in the cases in which he has a choice only between two evils, for example, to either drive the hitmen to the victim's place or to have them kill his family (compare *Director of Public Prosecutions for Northern Ireland v. Lynch* 1975). If, however, the evil chosen by the actor is greater than the one avoided, then, following Michael S. Moore (2020, pp. 317–322), we can say that his limited opportunities cannot excuse his committing the net wrong. Needed is some—accordingly smaller—amount of incapacitation. Now the crucial point that we would like to drive home at this stage is, again following Michael S. Moore (2020, pp. 317–322), that if, on the other hand, in the face of compulsion, the evil chosen by the actor is smaller than the one avoided, then instead of excusing the actor via affecting his choice situation either via incapacitation or diminished opportunities, compulsion *justifies* (via the balance of evils justification) or renders permissible (if not obligatory) his actions so that there is no net evil left to be excused. In a word, compulsion either excuses or justifies. It is this latter mode of compelling that we are focusing on in the present paper.

precedence over property rights *via* the relation of overriding rather than overtopping, as in the previously considered series, and the actor behaves morally optimally (O) by discharging the duty to rescue or morally sub-optimally (S) by failing to do so.

Indeed, various versions of the {¬CD, DR, O} solution have been supported by philosophers throughout history. For example, Socrates in Plato's *The Republic* (I, 331C) argued that if "you borrowed some weapons from a friend ... [and] he later went mad, and then asked for them back again. Everyone would agree, I imagine, that you shouldn't give them back to him, and that anyone who did give them back... would not be doing the right thing." Similarly, Saint Thomas Aquinas in his *Summa Theologica* (II-II, q. 66, a. 7) expressed a belief that "[i]n cases of need all things are common property, so that there would seem to be no sin in taking another's property, for need has made it common." Moreover, he commented therein (II-II, q. 66, a. 7) that

while it is impossible for all to be succored by means of the same thing, each one is entrusted with the stewardship of his own things... Nevertheless, if the need be so manifest and urgent, that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly: nor is this properly speaking theft or robbery.

And Saint Bonaventure (1999, p. 317) concurred, for he also submitted that the "first kind of community [of goods] is derived from the right of *natural necessity*: anything capable of sustaining natural existence, though it be somebody's private property, may belong to someone who is in the most urgent need of it. This kind of community of goods cannot be renounced."

In a somehow similar vein, the Moderns also believed that in cases of extreme necessity property rights are extinguished vis-à-vis the person in dire straits. Thus, Francis Bacon (1630, p. 29) contended that "[n]ecessity carrieth a privilege in itself... First of conservation of life: if a man steals viands to satisfy his present hunger, this is no felony or larceny."²¹ Hugo Grotius (2005, p. 434) also subscribed to the view under consideration,

²¹ Again, compare a broader discussion of Bacon's and other Moderns' positions re necessity in *Regina v. Dudley and Stephens* 1884, 14 Q.B.D. 273; and for even broader discussion go to Kadish, Schulhofer and Steiker, 2007, pp. 73–78, 798–821.

as he held that “whoever shall take from another what is absolutely necessary for the Preservation of his own Life, is not from thence to be accounted guilty of Theft.” Or more specifically, as further explained by Salter (2005, p. 285), Grotius clearly recognized private property rights but still maintained that “[n]ecessity...was a reason for making an *exception* to the law of private ownership, or in other words, for suspending the law.” Or, to put it in Grotius’ (2005, p. 434) own words, when in dire straits, “that antient Right of using Things, as if they still remained common, must revive, and be in full Force.” Likewise, John Locke in his *First Treatise on Government* (1988, §42, p. 170) argued that “[a]s *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another’s Plenty, as will keep him from extreme want, where he has no means to subsist otherwise.” And Samuel von Pufendorf was another prominent figure to acknowledge the right of necessity. In his *Of the Law of Nature and Nations*, he considers a person in necessity trying to persuade a person of ample means, with the former eventually taking possession of a much needed resource “either secretly, or by open Force” (Pufendorf, 1729, p. 206). In this situation Pufendorf feels “that such a Person doth not contract the Guilt of Theft” (Pufendorf, 1729, p. 207).²²

As pertaining specifically to our flower bed situation, the solution under consideration, that is, $\{-CD, DR, O\}$, can be portrayed as recognizing

²² It is important to note, as perceptively pointed out by John Salter (2005, p. 289), that Grotius parted ways with those thinkers who insisted that “a man who has availed himself of his own right is not bound to make restitution” and argued that, in terms of the right of necessity, “this Right is not absolute, but limited to this, that Restitution shall be made when that Necessity’s over” (Grotius, 2005, p. 437). This would suggest that Grotius’s position is closer to *Vincent* or has a structure similar to the solution we called $\{CD, DR, O\}$. However, as brilliantly spotted by none other than Pufendorf, (1729, p. 208): “*Grotius* requires *Restitution* to be made in these Cases: But I am oblig’d to no such Duty, when I take a thing by Virtue of my Right.” As in turn put by Salter (2005, p. 295), “according to Pufendorf, if the goods were taken as of right there could be no grounds for insisting on restitution.” Now we believe that Pufendorf’s criticism applies to all thinkers, not only Grotius, who would like to contend that one can have a liberty to take or use another’s property and yet be obligated to pay compensation for it later on. We believe, following Kramer’s (2005, pp. 312–326) remedy principle, that it is conceptually confused to take such a position, for either one has a liberty and then no rectification of injustice is due (although some other kind of payment might be perfectly in order) or one has a duty not to and then should rectify his breach thereof.

a necessity easement²³ on the flower bed owner's land. Thus, even though in normal circumstances the flower bed owner has full ownership over his land, in cases of necessity his rights are temporarily suspended vis-à-vis whoever is involved in relieving the necessity. Which is not to say, of course, that these rights are compromised vis-à-vis anyone else. In comparison with the view {CD, DR, O} discussed earlier in which the person coming to another's aid was bound by a duty not to trample the flower bed and so faced a conflict with his stronger duty to rescue (after all, it was, by assumption, not possible for this person to rescue the drowning man otherwise than by traversing the land in question), in the present case (that is, {¬CD, DR, O}) there is the opposite of the duty not to traverse the land, that is, a vested liberty²⁴ to do so. Accordingly, there is no conflict of duties. More specifically, a duty to rescue does not compete with a duty requiring an impossible forbearance, that is, abstaining from trampling the flower bed, but is instead accompanied by a liberty to perform a perfectly compossible action of traversing the land.²⁵

Now note that since the flower bed owner's rights are suspended only in the case of coming to conflict with a duty to rescue, it makes sense to say that counterfactually, that is, in comparison with a possible world wherein there is no emergency, he suffers a loss, even if it is only *damnum absque injuria*. That is to say, were there no emergency in the first place, he would enjoy full ownership vis-à-vis all people at all times. Thus, the question arises: Who, if anyone, and for what reason, should bear the said cost? Should it be the owner himself, the rescuer or the drowning person? Clearly, whoever covers the cost, this coverage cannot be considered a remedy, for there was no right against crossing the land that could possibly have been infringed upon. Again, as pointed out by Pufendorf (1729, p. 208), "I am oblig'd to no such Duty, when I take a thing by Virtue of my Right." Thus, especially the rescuer, who enjoys a liberty towards the flower bed owner, appears to fall outside the remit of any obligation to make up for the flower bed owner's loss. And as it seems, the drowning man, who is not an actor at all,

²³ On the problem of necessity easements under the libertarian construal of strongly absolute property rights see, *inter alia*, Block, 2004, Block, 2010, Block, 2016, Block, 2021, Dominiak, 2017, Dominiak, 2019, Dominiak, 2021.

²⁴ The fact that the liberty in question is vested by a perimeter of rights testifies to, *inter alia*, the impermissibility of the flower bed owner preventing the crossing.

²⁵ On the compossibility of rights, see Steiner, 1977, whereas on conflicting and contrary duties, see Kramer, 2009.

is not a good candidate for any remedial duty either. Still, the coverage might assume a different form than a remedy for rights infringement, or so it seems. Consider the following reasoning.

Clearly, the drowning man is the sole beneficiary of the rescue. Equally clearly, the flower bed owner is the main loser in the entire situation, even if his loss is without injury. The rescuer, in turn, bears, by assumption, only some negligible cost. Now a suggestion can be made that if we consult our moral intuitions, it seems to be the case that the rescued man owes something to the owner of the flower bed who suffered a loss, though without injury, in order for the drowning man to be benefited, that is, rescued.²⁶ Since the rescued man was not an actor in the entire situation—and even if he were an actor, he would still have a necessity easement on the flower bed owner's land—he cannot owe the flower bed owner anything as a matter of (or stemming from) a duty correlative with the latter's (suspended by way of easement) property rights. However, as evidenced by our moral intuition, it would be independently appropriate for the rescued man to at least express sorrow for the owner's loss. This fact of moral residue²⁷ persisting after the successful rescue could in turn testify to the fact of the rescued man having an independent duty to the flower bed owner—a duty springing from his status as the sole beneficiary of the flower bed owner's loss and thus correlative with an independent, that is, different than any property right, claim or right of the flower bed owner. The same rationale applies, *mutatis mutandis*, to the rescuer as well, for the rescued man owes him at least an expression of gratitude which in turn testifies to the rescued man having an independent duty to the rescuer.

Now compare this analysis with a scenario in which the flower bed belonged to the drowning man himself. Would he have any grounds for complaining about the rescuer inevitably trampling it in the process of coming to his aid? It does not seem so. And what about the situation in which the flower bed belonged to the rescuer? In such a case, as it seems, it would

²⁶ Note that there seems to be no such intuition in the case of the rescuer, that is, if we ask ourselves whether the rescuer, who on the grounds of the solution under consideration enjoys an easement over the flower bed owner's land, owes anything to the flower bed owner for his loss, the answer seems to be in the negative. It is pronouncedly different in the case of the drowning man, the sole beneficiary of the rescue.

²⁷ On the notion of moral residue see, for example, Thomson, 1990, pp. 84–96, Sinnott-Armstrong, 1988, pp. 44–53.

also be appropriate for the rescued man to at least express his gratitude for being rescued and sorrow for the rescuer's loss. If so, then it turns out that moral residue is a function of who gets benefited and who suffers a loss. And the only situation in which moral residue is absent is the situation in which the beneficiary is the same person as the one who suffers the loss, that is, the rescued, provided that he owns the flower bed. Thus, the principle which seems to be controlling the case under consideration is that becoming a beneficiary by means of somebody else's loss—even if not by the beneficiary's own actions—gives grounds, *via* moral residue, to the beneficiary's duty to appropriately make up for the loss in question. However, as we are going to argue below, from the fact of the drowning man having a duty to make up for the flower bed owner's loss, it does not necessarily follow that it is the drowning man who should cover the cost of the flower bed destruction, for the remedy due might fall short of any material contribution and instead consists in, say, an expression of sorrow alone.

Playing the Solutions against One Another

Having presented the space of possible solutions to *Flower Bed* depending on the exact nature of the flower bed owner's property rights, we are now in a position to discuss the merits of the respective views and thus to finally answer the question of who should cover the cost of the rescue. Let us begin with the solution that we labelled {CD, PR, O} and that is embraced, for example, by these libertarians who believe in strongly absolute property rights. This solution is well illustrated by the above quoted passage from Block (2021, p. 14): "Should a man be punished for stealing a loaf of bread to feed his starving child? My heart would go out to him, as a fellow parent, but insofar as libertarianism is concerned, from a deontological point of view, this parent committed a crime and should be duly punished for it."

There are many problems with this solution. For example, and as some of us argued elsewhere,²⁸ when applied to protection of property, it suffers from what we called the Property Defense Dilemma. For if having an absolute property right amounts to having a right to defend the property in question and if, in turn, the only way to defend it is disproportionate, then the property

²⁸ Dominiak, Wysocki, 2023.

owner does not have an absolute right, for by virtue of the proportionality principle, he has no right to disproportionate means of protection. Furthermore, and as one of us has argued elsewhere,²⁹ the solution in question is entirely unsustainable in cases in which these are property rights themselves that come into conflict with each other. For example, when one real estate is landlocked by the property of another, the ownership rights of the latter must partially give way or contradiction will ensue in the system of rights as the owner of the landlocked property will at the same time have a right to access his land and lack this very right.

However, here we would like to focus on a different argument. When we consult our moral intuitions as to questions like Block's (2021, p. 14), "Should a man be punished for stealing a loaf of bread to feed his starving child?" or "What ought he to do in such a predicament?" etc., it is clear what the answers are. Even Block himself is uneasy about his consistent libertarianism when he (Block, 2021, p. 14) adds that his "heart would go out to him, as a fellow parent." Similarly, when we consult sages, both philosophers and jurists, dealing with such problems or when we open Jeremy Bentham's "great book of laws,"³⁰ we see what ought to be done in cases of necessity, fathers of starving children or where a duty to rescue is calling. Property rights should, one way or the other, give in to the requirement of emergency. Compare in this regard all other views discussed above. Both the solution {CD, DR, O} as evidenced by the opinions expressed in *Vincent*, *Plouf*, *Feinberg*, *Williams*, *Thomson*, *Kramer*, etc. and the solution {¬CD, DR, O} supported by *Plato*, *Aquinas*, *Bonaventure*, *Bacon*, *Grotius*, *Locke*, *Pufendorf*, etc. point to this direction.

²⁹ Dominiak, 2017, Dominiak, 2019, Dominiak, 2021.

³⁰ The quoted phrase, exquisite as it is, "[the] great book of laws," is after Michael S. Moore (2020, p. 109) where Moore quotes Bentham's *The Limits of Jurisprudence Defined* (1945, p. 343). Bentham (1945, p. 343) believed that once enlightened by his utilitarianism, the science of legislation will reach such a level of perfection that "a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency." We cannot recall (or find the place) where we read it, although if we read it at all, it must have been somewhere in Moore, that Bentham believed, somehow amusingly, that his great book of laws will fit into two volumes. Now if we have anything even remotely resembling such a book, it has at least two thousand volumes. But Bentham's idea is moving nonetheless and we actually look things up in some thick volumes, don't we?

Now it is crucial not to mistake the argument being made herein for the argument from authority. We are not arguing that the solution {CD, PR, O} is morally mistaken because the aforementioned authorities (and our moral intuitions) say so. Quite the contrary, we are arguing that those authorities (and our intuitions) say so because it is the case. In other words, we are submitting that the hypothesis that the solution {CD, PR, O} is morally mistaken is the best explanation of the fact that all these sages (as well as ourselves via intuitions) believe that it is morally mistaken. Or still differently, to say that the solution {CD, PR, O} is morally mistaken, is, to use Charles Sanders Peirce's (1994, p. 100) nomenclature, to reason by abduction or, to employ Gilbert Harman's (1965) phrase, to provide an inference to the best explanation.

It is worth noting that the inference to the best explanation is a tool which is frequently applied in ethics, be it normative or indeed in meta-ethics. For example, Moore (1992, p. 2532–2533) argues that “[t]he best explanation of our particular moral beliefs is that they are caused by moral qualities, and this fact gives us good reason to believe in the existence of such qualities.” Then again, what does the explaining (i.e., independently existing moral qualities) is inferred from what is explained (i.e., “our particular moral beliefs”). A similar realist meta-ethical conclusion is reached by David Brink (1989, p. 169), who posits that “the moral fact that torturing kittens is wrong may provide the best explanation of the nonmoral fact that appraisers unanimously agree that pouring gasoline over a kitten and igniting it is wrong.” By the same token, the fact that the duty to rescue overtops the property rights provides the best explanation of the nonmoral fact that these authorities almost “unanimously agree” that the solution {CD, PR, O} is morally mistaken. Hence, the inference to the best explanation enables us to infer the solution {CD, PR, O} as flawed from the sagacity of the above-mentioned thinkers.

At this point, our critic might object that our employment of the inference to the best explanation achieves nothing, for the sagacity of the said authors from which we infer the solution {CD, PR, O} as mistaken cannot be taken for granted unless we first establish that the solution {CD, PR, O} is indeed mistaken. However, this objection can be easily obviated as those philosophers' sagacity can be justified independently, that is, without resorting to any belief vis-à-vis the solution {CD, PR, O}. If so, then no questions are begged when we appeal to the said philosophers'

sagacity to infer the truth of their belief that the solution $\{CD, PR, O\}$ is flawed.³¹

Thus, we are left only with two solutions: $\{CD, DR, O\}$ and $\{-CD, DR, O\}$. Alternatively, we are left only with the question of whether it is the rescuer (as predicted by the former solution) or the rescued or the flower bed owner (as predicted by the latter solution) who should incur the cost of the rescue.³² Let us begin with the latter solution, that is, $\{-CD, DR, O\}$. As we pointed out above, many philosophers believe that in cases of necessity, taking another's

³¹ However, it must be conceded that this coherentist stance whereby one set of beliefs justifies another, with the latter justifying still another one is ultimately circular, for—at the end of the day—one would reach such a pair of beliefs (Belief1 and Belief2) that Belief1 derives its plausibility partly from Belief2 (coupled with many other beliefs on the way), whereas Belief2 is partly justified by Belief1. And yet, this (innocuous) circularity is a mark of coherentism. Unless one is committed to foundationalism—quite a problematic position itself—in epistemology, one cannot avoid the ultimately circular justification for any given belief in a coherent set. For an excellent overview of epistemological positions, see Dancy, 1985. Finally, it should be borne in mind that the inference to the best explanation tallies well with Bayesianism, an undoubtedly burgeoning field in epistemology. For note that, the Bayesian formula—although operating with the language of probability—indeed predicts that, everything else equal, the fact that some piece of evidence is well explained under a certain hypothesis counts in favor of that very hypothesis. Let E denote the evidence (what gets explained) and H a hypothesis doing the explaining. The Bayesian formula goes as follows: $P(H|E) = P(E|H) P(H) / P(E)$. Now note that, *ceteris paribus*, the higher the factor $P(E|H)$ is, the higher $P(H|E)$ becomes. That is to say, everything else equal, the higher the probability of given evidence is under a certain hypothesis, the more probable the hypothesis, given the evidence in question, is itself. This in turn predicts that the fact that a certain hypothesis best explains certain facts (i.e., the facts in question are to be strongly expected were the hypothesis to turn out to be true) counts in favor of the hypothesis itself or, still in other words, gives us good reason to believe the hypothesis.

³² Remember that in the case of the latter solution we submitted that our moral intuitions do not point to any moral residue as pertaining to the rescuer's actions vis-à-vis the flower bed owner (and certainly not to any moral residue that could trump the one present in the case of the drowning man, the sole beneficiary of the rescue). We hold tight to these intuitions and as the rescuer enjoys an easement over the flower bed owner's land, we do not think that there is even a *prima facie* case to be made for the rescuer bearing the cost of rescue as far as the solution $\{-CD, DR, O\}$ is concerned. However, even if we were mistaken about it, that is, even if it were the rescuer who should bear the cost of the rescue under the solution $\{-CD, DR, O\}$, this mistake would result in a distinction without a difference, for as we are going to argue below, it is indeed the rescuer who should cover the cost, but on the grounds of the winning solution $\{CD, DR, O\}$.

property is not “properly speaking theft or robbery” (Aquinas, II-II, q. 66, a. 7) and that someone who does so, “is not from thence to be accounted guilty of Theft,” (Grotius, 2005, p. 434) “felony or larceny” (Bacon, 1630, p. 29). This fact can in turn induce someone to try to argue from the inference to the best explanation for the superiority of the solution $\{-CD, DR, O\}$ over the solution $\{CD, DR, O\}$, quite in the same way as we argued against the solution $\{CD, PR, O\}$ in the previous three paragraphs. However, this time such an argument would not go through.

First of all, where almost all of the quoted sources (representative of both solutions, that is, $\{-CD, DR, O\}$ and $\{CD, DR, O\}$) agree that necessity requirements take precedence over property rights, they are divided about the scope of this precedence, that is, whether it is a full precedence (and thus extinguishes the rights in question) or a partial one (and thus calls for *ex post* redress). Second of all, even amongst those authorities (representative only of the solution $\{-CD, DR, O\}$) who do believe that in cases of necessity “all things are common property” Aquinas (II-II, q. 66, a. 7) or “that ancient Right of using Things, as if they still remained common, must revive, and be in full Force,” (Grotius 2005, p. 434) there is a hesitation as to the question of restitution—as best illustrated by Grotius’ position and Pufendorf’s later criticism thereof. Third, although many of the quoted friends of the solution $\{-CD, DR, O\}$ are clear about the fact that taking another’s property in cases of necessity is not “properly speaking theft or robbery,” (Aquinas, II-II, q. 66, a. 7) “felony or larceny,” (Bacon 1630, p. 29) they are silent about whether it is not a tort (conversion or trespass to land, respectively) either. Now from the fact that a given act is not a crime it does not follow it is not a tort. Accordingly, we are left with some degree of vagueness regarding the question of whether those authorities also believe that taking or destroying another’s property in cases of emergency is a tort. Hence, it seems that no inference to the best explanation argument can be easily deployed in support of the solution $\{-CD, DR, O\}$ vis-à-vis the solution $\{CD, DR, O\}$. Thus, we have to consider respective merits of both solutions in some other way.

Let us therefore begin with the question of who should really bear the cost of the destroyed flower bed under the solution $\{-CD, DR, O\}$. As we suggested above, there is moral residue left after the rescue on the part of the rescued towards both the rescuer and the flower bed owner. The first one seems to be exhausted by an expression (and possibly

some token) of gratitude. However, whatever the exact contours of this moral residue, it is less important for our purposes. For the crucial question is whether the residual duty of the rescued towards the flower bed owner is such that it requires the former to pay for the destroyed flower bed. If not, then under the solution $\{-CD, DR, O\}$ it is the owner himself who should bear the cost of the rescue. Thus, what is the exact content of moral residue left after the rescue on the part of the rescued towards the flower bed owner?

Clearly, it would be appropriate, as we argued above, to express sorrow for the flower bed owner's loss. Perhaps, it would also be in order to be thankful for the owner's sacrifice. Would it be appropriate to offer assistance, even financial, in restoring the flower bed? It seems so. But we should be careful here. For it would decidedly be inappropriate for the owner, upon receiving the offer (let alone without receiving it), to send the bill to the rescued, requiring him to pay for the restoration of the flower bed or even suggesting that he should do so. Thus, as it seems, the owner has a moral right against the rescued that the latter express sorrow for the owner's loss, maybe also gratitude for his sacrifice, and perhaps that he even offer his help in restoration of the flower bed. However, the owner decidedly does not have a right to the actual assistance. Requiring it as of a right would be clearly inappropriate for the owner. Hence, if any help is actually performed by the rescued, it should be looked at as a gift (as it would not be over the top for the rescued to send the owner some other gift either) or token of supererogation rather than something that can be demanded of him as a duty correlative with the owner's rights. Accordingly, it seems that under the solution $\{-CD, DR, O\}$, despite the residual obligation incumbent on the rescued towards the flower bed owner, it is the owner himself who should bear the actual cost of the destroyed flower bed.

Now the final question is how this solution fares in comparison with the solution $\{CD, DR, O\}$ in which it is the rescuer who should bear the cost of the rescue. First of all, note that taking or destroying another's property out of necessity unquestionably creates a loss. Even if it were a loss without injury, *damnum absque injuria*, it would be a loss, nonetheless. Now the solution $\{-CD, DR, O\}$ seems to be rather weak at dealing with this loss, for it allows it to fall where it does (that is, on the flower bed owner), regardless of who brought it about—a verdict which seems unfair and morally arbitrary. Thus, although it was the rescuer whose intentional

action caused the loss, under the solution $\{\neg CD, DR, O\}$ the loss should be suffered by the flower bed owner. Yet, if the flower bed belonged to the rescuer himself, he would have to suffer the loss himself. Why then is he allowed to shift the loss to another party *only because the flower bed did not belong to him*? This seems morally arbitrary or unfair as the authorship of the loss is the same in both cases. Consider in this regard Epstein's exquisite (1973, p. 158) analysis of *Vincent*:

Had the Lake Erie Transportation Company owned both the dock and the ship, there could have been no lawsuit as a result of the incident. The Transportation Company, now the sole party involved, would, when faced with the storm, apply some form of cost-benefit analysis in order to decide whether to sacrifice its ship or its dock to the elements. Regardless of the choice made, it would bear the consequences and would have no recourse against anyone else. There is no reason why the company as a defendant in a lawsuit should be able to shift the loss in question because the dock belonged to someone else. The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all the costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another. The necessity may justify the decision to cause the damage, but it cannot justify a refusal to make compensation for the damage so caused.

Surely, the dock in *Vincent* belonged to the plaintiff whereas the solution $\{\neg CD, DR, O\}$ assumes that the rescuer had an easement over the flower bed owner's property. Nevertheless, the flower bed owner suffers a loss and the question of who should pay for it remains valid. What the solution $\{\neg CD, DR, O\}$ has to offer is arbitrariness of the let-it-fall-where-it-does rule. This is weak, for an action and causation of damage seem to be, as they almost always are,³³ morally relevant features of the event in question whereas the person of the sufferer seems to be, at best, of secondary importance. After all, does it really matter whether *A* inflicts a loss on *B* or *C* when all other things are equal between the two parties? Why should it be

³³ On action and causation as well as other supervenience bases of moral responsibility see Moore, 2009, pp. 34–77.

any different whether *A* inflicts a loss on *B* or himself? As it seems, it should not. The identity of the party concerned is morally irrelevant.

Another grounds for preferring the solution {CD, DR, O} over the solution {¬CD, DR, O} is that it is only the former that gives proper weight to the flower bed owner's property rights. Note that the solution {¬CD, DR, O} does not really negate the fact that the flower bed owner has property rights to the garden. Rather, it submits that under the extraordinary condition of necessity these otherwise properly acquired ownership rights are temporarily suspended vis-à-vis the rescuer. If the emergency did not occur in the first place—a very likely scenario indeed—the flower bed owner's rights would be intact and exerting their full normative force *erga omnes*. Thus, it is strange to say that justly acquired (for instance, by mixing one's labor with an unowned resource or taking first possession thereof or obtaining it via a voluntary transfer from someone who originally appropriated the said resource in one of the first two ways) property rights simply disappear—however temporarily—as the said conditions, that is, necessity or other emergency, arise and then reappear when those conditions cease to operate. This additionally and problematically suggests that whereas in the case of acquiring a right there must be an investitive fact, that is, a certain human action (such as labor-mixing or performing a speech act amounting to a waiver), in the case of rights reappearing, no such facts are required. Certainly, it is much more natural to say that once justly acquired, these rights remain in place even if the said circumstances (that is, necessity or other emergency) arise. Hence, what the occurrence of the emergency compromises is only the strength of the property rights in question. And since these rights are in place all the time and there is no right without a remedy, the trespasser, that is the rescuer, ought to remedy his infringement.

Now friends of the solution {¬CD, DR, O} might respond with a charge that our last argument begs the question because it assumes that the property rights of the flower bed owner disappear in the case of emergency. This, however, is not the only possible way of interpreting the solution {¬CD, DR, O}. What they might have in mind is the so-called rights specificity,³⁴ that is, a claim that it is the *content* of the flower bed owner's property rights that

³⁴ On rights specificity see, for example, Oberdiek, 2004, pp. 325–346; Oberdiek, 2008, pp. 29–307.

does not protect him against having his garden trampled in cases of emergency, not the fact that his property rights are temporarily suspended. In other words, what the flower bed owner acquires by, say, mixing his labor with an unowned resource is a specific right not-to-have-his-garden-trampled-but-under-necessity rather than a general right against any interference whatsoever which might yet get suspended in cases of emergency. Making this maneuver would in turn inoculate the friends of the solution $\{-CD, DR, O\}$ against our objection to the effect that rights disappear and reappear together with ebbs and flows of emergency. So, what are we to say against this stratagem?

Besides that the rights specificity charge does not work against our employment of Epstein's point related to the distribution of actual loss (for whatever is the specific content of rights involved, causation of damage is a matter of fact and cannot be affected by this content), it fares rather poorly when confronted with other moral intuitions. To see that, let us introduce a case which is more emotionally charged, and therefore pumping our intuitions better, than our rather mundane *Flower Bed*. Consider a variation on *Tactical Bomber*.

Tactical Bomber

A pilot drops a bomb on a munition factory in order to secure his side, waging a just war, a significant military advantage over the enemy. The pilot knows that sixty non-combatants in a nearby hospital will be killed as a side-effect of the blast.³⁵

This is the *locus classicus* of the Doctrine of Double Effect (DDE). The standard DDE solution is that the tactical bomber is permitted, if not obligated, to kill the non-combatants. Now, as it seems, rights specificity would predict that this is so because non-combatants do not have a general right not to be killed. Rather, what they have is a content-specific right not-to-be-killed-but-in-accordance-with-DDE. Now ask yourself: even assuming that DDE is correct in predicting that the non-combatants might be permissibly killed, should their heirs nonetheless have a right to compensation for the death of their loved one? Our moral intuition clearly yields the answer in the affirmative and if so, then rights specificity seems to be a suboptimal account of rights because there would be no room for compensatory remedy if non-combatants

³⁵ Based on Frowe, 2011, p. 141.

had a right only not-to-be-killed-but-in-accordance-with-DDE. Since their heirs do have a right to compensation, then the right in question must have been, by virtue of the remedy principle, non-specific, that is, held against being killed, period.

We conclude that in light of the above considerations it is the solution {CD, DR, O} that proves to be superior and thus even though the rescued has a residual duty to express sorrow or offer his assistance to the flower bed owner, it is the rescuer who has a second order, remedial duty to the flower bed owner to compensate him for the trespass and destruction of the flower bed. At the same time, it seems that the rescued might have a somehow augmented residual duty to the rescuer, for the latter not only saved his life, but also incurred the cost of the destroyed flower bed while discharging his overtopping duty to rescue.

Conclusions

In the present paper we considered the question of who should cover the cost of discharging a duty to rescue. If rescuing a drowning person requires trespassing on another's property, who should pay damages for trespass to land, for example? In the paper we offered three distinct solutions to this quandary and supported each of them with sundry arguments. Besides making clear that the answer to the above question is in no way obvious, we elucidated various philosophical and economic underpinnings of each solution, showing thereby how alternative answers to the puzzle at hand can be dependent on otherwise contentious issues in moral philosophy, metaethics and jurisprudence. Upon all the analysis conducted above, we arrived at the conclusion that it is the rescuer who should cover the cost of the flower bed destroyed in the process of discharging his duty to rescue. However, the inquiry into the specific aspects of the problem situation revealed that it is also the rescued who has an independent, residual duty to both the rescuer and the flower bed owner consisting, respectively, in showing gratitude and expressing sorrow accompanied by an offer of assistance in the restoration of the sacrificed property.

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