

Diving in the deep end of casuistry;

An inquiry into assumptions and consistency
in classical and contemporary forms of casuistry.

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ABSTRACT

In this Master's Thesis the applied ethical method of casuistry will be investigated and discussed. I will first investigate casuistry as Albert Jonson and Stephen Toulmin advocate in their book *The Abuse of Casuistry*, followed by a brief overview of some contemporary uses of the method. Then I will discuss problems concerning casuistry, by looking at two criteria; consistency and moral justification.

It turns out there are some significant problems that may render this method unusable, and that may be impossible to solve within casuistry. Among other things, casuistry is lacking in specification and justification, the concept of practical wisdom is problematic, and there seems to be a clash of two core assumptions of the method. It seems at least some of these problems are unsolvable, but the insights this discussion provides may help develop an applied ethical method that will be consistent and morally justified.

However, the discussed problems may also indicate a problem within the entire field of applied ethics, namely a lack of explanation/specification and justification. This may pose a threat to any practice within this field, and should be investigated further, or at least kept in mind when doing 'applied ethics'.

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1. Introduction

During the course of my study of Applied Ethics I noticed that it was often unclear or kept unspoken how applied ethics and deeper meta-ethical issues are related or how they should be related. It especially astonished me that there seemed to be little room or interest in deeper questions such as what morality really is, and at times even abstract (counter)examples – often used in normative ethics – seemed to be deemed 'out of place'. Also, in the discussions about applied ethical methods, it mostly remained unclear what exactly the methods – such as casuistry, moral case deliberation, and reflective equilibrium – purport to be, what their assumptions are, and how exactly they function.

This astonishment led me to this master's thesis, as an investigation of the deeper assumptions of applied ethics. However, because the field of applied ethics as a whole is far too much to cover in one thesis, I had to limit myself. For this I decided on the applied ethical method of casuistry. During one of the courses earlier in the year we had discussed this (and other) methods and then already I had wondered about the assumptions and functioning of this method. Now, I am looking forward to learning more about it and in the process perhaps also get a better grasp on the field of applied ethics in general and its relation to meta-ethics.

As just mentioned my goal in this these will be to investigate the deeper assumptions of the applied ethical method of casuistry, linked with a discussion on the legitimacy of the method as it is presented. In this first chapter I will, therefore, give a brief introduction into the method of casuistry (1.1).

Subsequently, because there are no standards or tools for assessing ethical methods,¹ I will have to find my own way of discussion casuistry critically. For this I will use two criteria – consistency and moral justification – which will be explained further in 1.2.

After this I will also provide a brief description of the field of applied ethics and meta-ethics (1.3). This is because in this thesis I am ultimately also interested in the relationship (or lack thereof) between these two forms of categories of ethics. I will return to this broader question in the conclusion.

Finally, I will end this chapter with an overview of the rest of the thesis.

1 Payam Moula and Per Sadin, "Evaluating Ethical Tools," *Metaphilosophy* 46, no. 2 (April 2015): 264.

1.1 Introduction into casuistry

Casuistry, sometimes also called 'case based reasoning'² or 'case method'³, can be formulated in divers ways. It is a method in which past moral issues/cases that have already been decided on are used to find a solution to a current moral dilemma,⁴ whereby intuitive responses to cases are considered of essential importance.⁵

It is important to note that casuistry as a moral method has to be distinguished from casuistry as referring to a simple 'discussion of cases' (especially present in Dutch language)⁶. Herein cases are simply used as examples for or elaborations on whatever is discussed, rather than to reach (new) moral judgements or solutions.

The ways in which casuistry (as a moral method) uses past cases to decide on current cases can be divers, resulting in a wide range of possible forms of casuistry.

Two ways in which casuistical methods can differ are in respect to their use of theory and their allowance of exceptions. Concerning the first, casuistry is usually theory modest or anti-theory.⁷ In theory modest casuistry some use is made of (higher) moral principles or theory, which can range from 'a little' to 'a lot', thus creating a wide category. An anti-theory form of casuistry, on the other hand, claims to ignore all forms of theory.

Then there is a scale from laxity to rigorism; if exceptions to principles are abundant and easily provided then the casuistry is 'lax', and if principles are strictly followed and exception are very limited then it is 'rigorist'. According to Albert Jonsen and Stephen Toulmin, whose form of casuistry I will here follow, both these extremes are misuses of the method.⁸ The scale, however, is more than its extremes, it is an indication of how a casuistry sees the relation between principles or past judgements and new judgements. It thus leaves many possibilities open for filling in a casuistry.

2 Carson Strong, "Justification in Ethics," in *Moral Theory and Moral Judgement in Medical Ethics*, ed. Baruch Brody (Dordrecht: Kluwer Academic Publishers, 1988), 193.

3 Loretta Kopelman, "Case Method and Casuistry: The Problem of Bias," *Theoretical Medicine* 15 (1994): 22.

4 S. S. Hanson, "Casuistry in a Pluralistic Society," *Philosophy and Medicine*, Moral Acquaintances and Moral Decisions, 103 (2009): 101, doi:10.1007/978-90-481-2508-1_4; John Arras, "Getting down to Cases: The Revival of Casuistry in Bioethics," *The Journal of Medicine and Philosophy* 16 (1991): 36.

5 John Arras, "Common Law Morality," *Hastings Center Report* 20, no. 4 (August 1990); Arras, "Getting down to Cases," 42.

6 For example: "Archief Casuïstiek," *VUmc - Regionaal Onderwijs Interne Geneeskunde*, accessed June 10, 2015, <http://www.vumc.nl/afdelingen/interne-geneeskunde1/2496975/1607514/ROIG/1608396/>.

7 John Arras, "Theory and Bioethics," ed. Edward Zalta, *Stanford Encyclopedia of Philosophy*, Summer 2013, <http://plato.stanford.edu/archives/sum2013/entries/theory-bioethics/>.

8 Albert Jonsen and Stephen Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning*. (Berkeley: University of California Press, 1988), 332.

In modern times casuistry can be used in the fields of bioethics (or medical ethics) and business ethics,⁹ such as in hospital ethics commissions, research ethics commissions (for animal or human experimentation), and ethics commissions in banks. Important for the use of casuistry is that there is a large enough database available to draw cases from for comparison, and perhaps also that it has an appropriate distance and closeness to practice; close enough to be practically useful, but with enough distance to have the time and perspective to deliberate other cases (for example not be emotionally involved).

1.2 Approach of analysis; Consistency and moral justification

In order to assess anything, some form of criteria or rules are necessary in order to know how to assess or what is important in the assessment. As already noted, such criteria do not exist for applied ethical method¹⁰, so I will construct my own limited 'list', consisting of two criteria.

The first criteria that I will use is 'consistency'. Under this criteria I will investigate whether assumptions, processes and outcome of casuistry are coherent and do not contradict each other. This partly depends on the aims of the method,¹¹ because a different aim will be consistent with different assumptions and processes. In applied ethics for example, the goal is always in the direction of reaching a solution (because it is a practical field) and this puts a limit on what casuistry can aim for; its aim cannot be just to gather all relevant (also conflicting) judgements because that does not yield a solution.

Consistency can then be subdivided into two areas. The first is the area of assumptions (which can be explicit, implicit, or even hidden)¹², implications, and the outcome of the method. In this area, a method with an assumption of universality paired with an implication of relativity is for example inconsistent. Also relevant for this kind of consistency is influence of bias (which can be in the method itself or its user) or other morally irrelevant influences.¹³

The second area is the treatment of cases overall; whether all cases are treated the same and what factors determine outcome. For example, a method that includes four relevant factors, but two similar cases are treated differently based on another, fifth, factor. In this case the conclusion is

9 New World Encyclopedia contributors, "Casuistry," *New World Encyclopedia*, April 23, 2013, <http://www.newworldencyclopedia.org/entry/Casuistry>.

10 Moula and Sadin, "Evaluating Ethical Tools," 264.

11 *Ibid.*, 272.

12 *Ibid.*, 270–271.

13 *Ibid.*, 266–267, 270.

reached based on a factor which is actually not deemed relevant in this method, therefore the method is inconsistent in the area.

However, this criteria of consistency is not enough to assess a moral method like casuistry because something can be 'consistently wrong'.¹⁴ Therefore we need another criteria to determine whether the method is right, or adequate. Concerning moral methods, this surely has to be morality itself, or moral justification.

For a method to be morally justified means that its starting position (assumptions), and the steps it takes (process of reasoning) are morally justified,¹⁵ which will then also lead to a morally justified product (solution).¹⁶

This is also related to consistency because inconsistencies are incompatibilities or contradictions which are by definition not morally justified. For, if some action or assumption in a method is morally justified that means it is explained by or accounted for in the method's justification, inconsistencies, as contradictions, are by definition not explained.¹⁷ Therefore a method that is inconsistent can also not be morally justified.

Additionally, besides being morally justified, for an actual moral method it is important that it indeed functions 'within the moral domain'; that it solves morally relevant problems, uses morally relevant (and justified) factors, and yields morally relevant (and justified) outcomes. This, however is a very difficult question, for it is quite unclear what the moral domain is. Even after three years of philosophy and one intense year of ethics at the university, I still don't have a formulated answer to this. I believe that this question deserves much more discussion than I can provide within this thesis, but I will nonetheless briefly return to it in the discussion.

1.3 Applied ethics and meta-ethics

Usually three branches of ethics are distinguished, applied ethics, normative ethics, and meta-ethics. Between these there is a rough order from practical and solution-oriented to theoretical and abstract,¹⁸ and adjacent categories partly overlap or interact with each other which can make them

14 Kopelman, "Case Method and Casuistry," 29.

15 Moula and Sadin, "Evaluating Ethical Tools," 274.

16 Strong, "Justification in Ethics," 193.

17 See for example: Bo Bennett, "Inconsistency," *Logically Fallacious*, accessed June 10, 2015, <http://www.logicallyfallacious.com/index.php/logical-fallacies/113-inconsistency>.

18 Joel Dittmer, "Applied Ethics," *Internet Encyclopedia of Philosophy*, accessed June 10, 2015, <http://www.iep.utm.edu/ap-ethic/>; New World Encyclopedia contributors, "Ethics," *New World Encyclopedia*, January 8, 2013, <http://www.newworldencyclopedia.org/p/index.php?title=Ethics&oldid=966137>.

difficult to distinguish at times.

What is most distinct about applied ethics in contrast with the other two branches is that it concerns itself with actual, real-life cases that demand an action or solution (in some limited time-frame).¹⁹ The ways applied ethics deals with these morally complex real-life situations can be diverse. In order to structure moral deliberation, highlight relevant factors, and thus reach a sound conclusion, methods of reasoning (also called frameworks, instruments, or tools)²⁰ are often used in this field. Methods, however, are also diverse, ranging on for example how much (or how little) they rely on theory. As already introduced, casuistry is one such method.

The ways in which applied ethics could overlap with normative ethics is because applied ethics can also be seen as normative (norm-giving), and because (normative) theory is sometimes also actually used in applied ethics, such as in theory-modest forms of casuistry.

Meta-ethics, on the other hand, deals with deeper and (in some sense) more abstract questions.²¹ It is not necessarily about answers or solutions, rather, the discussion itself is considered helpful because of insights it can give into the meaning of concepts in ethics.²² Subjects of meta-ethical questions can be metaphysical (is morality about facts, tastes, means, ect.?), epistemological (what is moral knowledge and how do we get it?), or semantic (what do moral concepts mean?).²³ Besides these categories of questions, there is also a relation with our (human) psychological make-up, resulting in questions into the relation between morality and psychology and how we reason about morality.²⁴

Meta-ethics overlaps with normative ethics because normative ethical theories often also incorporate meta-ethical considerations.

Between applied ethics and meta-ethics, however, there seems to be little (assumed) overlap. Even though it is difficult to find literature on this relation (or absence thereof), it is present in practice. In the first stage of writing this thesis, for example, I was guided by someone who expressed that he thought that applied ethics is able to function perfectly without meta-ethics.

One reason for this apparent lack of overlap could be related to the mode of justification; meta-ethics aims for foundational or theoretical justification, while applied ethics is considered to require only practical justification.²⁵ Whether this is the right way to look at these categories of

19 Dittmer, "Applied Ethics"; Arras, "Theory and Bioethics."

20 Moula and Sadin, "Evaluating Ethical Tools," 263.

21 Geoff Sayre-McCord, "Metaethics," ed. Edward Zalta, *Stanford Encyclopedia of Philosophy*, Summer 2014, <http://plato.stanford.edu/archives/sum2014/entries/metaethics/>.

22 New World Encyclopedia contributors, "Ethics."

23 Sayre-McCord, "Metaethics."

24 Ibid.

25 For example: Fritz Allhoff, "What Are Applied Ethics?," *Sci Eng Ethics* 17 (2011): 16, doi:10.1007/s11948-010-

ethics and their relation remains to be seen.

1.4 Thesis layout

In this thesis I will first discuss the casuistry defended by Albert Jonson and Stephen Toulmin, which I will call 'classical casuistry. I will mainly follow their book *The Abuse of Casuistry*, but will also refer to some of their other sources, as well as some (critical) reactions. Additionally I will note assumptions, implications or points of discussion as they come along in the exposition.

After this I will look at the contemporary uses of casuistry, by investigating the field of healthcare, the financial sector, and animal testing committees. Even though I have to be cautious with claiming assumptions or implications here (because the information is limited), I will try to note some of them along the way.

At the end of both chapters I will provide an itemized summary of these assumptions and points of discussion I noted. Then, in chapter four I will discuss these further, using the two criteria I have already explained in 1.2.

In the conclusion, finally, I will briefly summarize this discussion and its conclusions. I will also try to extrapolate this to the broader discussion on applied ethics and its relation to meta-ethics, hopefully with some ideas for further investigation and philosophical contemplation.

2. Classical casuistry; Jonson & Toulmin

In their book *The Abuse of Casuistry* Albert Jonson and Stephen Toulmin stress on several occasions that casuistry is essentially embedded in its context.²⁶ This means that both the method itself and its solutions to moral problems can only be understood in light of that context; “only a study of the casuists' actual practice reveals the steps they consistently took but seldom reflected on,”²⁷ and without this context solutions may indeed seem ridiculous,²⁸ Therefore I will follow Jonson and Toulmin's exploration of casuistry and what they conclude from that.

The method of casuistry (following Jonson and Toulmin) springs from a problem of high theory in applied ethics. This (alleged) problem is that high theory, with universal and eternal principles, will only end in a moral deadlock in practice, because it will not be possible to unify opposing (universal) principles.²⁹ Jonson and Toulmin formulate this as “the problems of linking a faith that includes moral imperatives of paradoxical sublimity with the incessant demands of a rough and mean world.”³⁰ This problem is, on the one hand, that general/universal principles will always need interpretation (and their application can therefore never be more than probable), and on the other hand that “the situations under which actual moral problems have to be decided must still be defined in terms of their 'circumstances'.”³¹

In contrast with, and in response to, this kind of (high) theory, casuistry is built upon a 'general human activity' of “thinking and talking about how the circumstances of this or that case of moral perplexity fit in general norms, rules, standards, and principles of morality.”³² This lays an essential focus on cases and circumstances, to such an extent that cases can be seen as 'the furniture of the conceptual room of morality'.³³ In casuistry it is assumed that principles, or rules, can only take us so far towards a practical moral solution; there is a point at which adding more rules will not help solve a difficult case, there is a need for 'wisdom, discretion and discernment' in interpreting

26 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 244–245, 251, 261, 264.

27 Ibid., 251.

28 Ibid., 244–245.

29 Ibid., 4, 6; Tom Tomlinson, “Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?,” *Theoretical Medicine* 15 (1994): 6.

30 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 239.

31 Ibid., 247; Tomlinson, “Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?,” 6.

32 Albert Jonsen, “Casuistry: An Alternative or Complement to Principles?,” *Kennedy Institute of Ethics Journal* 5, no. 3 (1995): 237.

33 Ibid., 238; Arras, “Getting down to Cases,” 36.

and enforcing rules;³⁴

Philosophical concepts may be of help in clarifying the manner and terms in which these problems are stated. But in the end the debate will always return to the particular situation [...] and the discernment that is needed to reach any wise (or even prudent) decision in such case goes beyond the explanatory or clarifying insights of even the best theories.³⁵

This brings us to the first assumption of classical casuistry, namely that principles or theories by themselves are necessarily inconclusive and that a form of practical interpretation, or (practical) wisdom, is always needed.

In the casuistry of Jonson and Toulmin there does remain an important role for principles, it is thus not an anti-theory form of casuistry. They speak of a dualism between general principles and a kind of wisdom in applying them.³⁶

In the following paragraphs I will first outline the process of casuistry (still following Jonson and Toulmin), from dilemma to solution, followed by more detailed explanations of the core elements in the method.

2.1 The process of casuistry

Jonson and Toulmin distinguish six elements, or steps, in casuistry.³⁷ I will first walk through them and then give more detailed explanations.

Casuistry starts with a reliance on paradigms and analogies (step one). This step includes describing the instant case, setting up related 'moral taxonomies' and defining key terms featured in them.³⁸ A moral taxonomy is a continuum or 'lining up' of cases concerning a principle.³⁹ The line-up starts with a paradigm case, a case that is clear in light of the concerned principle (usually it is a clear violation of a principle).⁴⁰ A paradigm case is considered to be a case on which 'almost any observer'

34 Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 9, 251.

35 Ibid., 305.

36 Ibid., 10.

37 Ibid., 251.

38 Ibid., 251–252; John Arras, "A Case Approach," in *A Companion to Bioethics*, ed. Helga Kuhse and Peter Singer, 2nd ed. (West Sussex: Wiley-Blackwell, 2009), 118–119.

39 Arras, "A Case Approach," 119.

40 Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 251–252, 254; Albert Jonson, "Casuistry as Methodology in Clinical Ethics," *Theoretical Medicine* 12 (1991): 301.

agrees, which is hard to argue against, and which (thus) has little need for arguments.⁴¹ Paradigm cases have clear circumstances, unambiguous relevance of maxims (see step two), and weak rebuttals.⁴²

From these paradigm cases, taxonomies move to more difficult cases with circumstances that make the case more difficult to fit with the principle, these are the analogical cases.⁴³ Because of the multiplicity of possible circumstances, each case is unique, but each case is also similar in type to other cases and can thus be compared (similarities) and contrasted (differences).⁴⁴ Both similarities and differences are important in drawing analogies between cases (analogical reasoning).⁴⁵

For example, concerning 'killing' the paradigm case could be formulated as 'a direct unprovoked attack resulting in the death of another', while more difficult, but analogical, cases include imposing the death penalty, killing a tyrant, and forms of self-defence (life, family, property, honour).⁴⁶

This forming of taxonomies of cases is an essential part of casuistry because it formulates the contexts in which the instant case could be placed (in which taxonomy and where in the taxonomy) and thereby reveals arguments and their weight.⁴⁷

The second step is about maxims or principles. Maxims are general, but brief, rule-like sayings or apparent truths (also called 'wise sayings'), drawn from traditional discussion, that 'give moral identity to cases'.⁴⁸ Maxims draw attention to the important features of the case, and also their 'relative comparative importance'.⁴⁹ Maxims can have a place in law, but also in everyday life for "they are also the kinds of phrases typically invoked by ordinary people when arguing a moral issue."⁵⁰ In short, maxims are the intuitive moral rules of everyday-life.

A possible example of a current (or future) Dutch maxim would be that injury or even death is the risk of being a burglar or a criminal (allowing lenience towards people who attack burglars).⁵¹

41 Jonsen, "Casuistry as Methodology in Clinical Ethics," 301; Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 7.

42 Jonsen, "Casuistry as Methodology in Clinical Ethics," 301.

43 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 251–252; Jonsen, "Casuistry as Methodology in Clinical Ethics," 301; Arras, "Getting down to Cases," 32.

44 Jonsen, "Casuistry," 241.

45 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 14.

46 *Ibid.*, 252.

47 Jonsen, "Casuistry as Methodology in Clinical Ethics," 302.

48 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 252–253; Jonsen, "Casuistry as Methodology in Clinical Ethics," 298.

49 Hanson, "Casuistry in a Pluralistic Society," 107.

50 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 253.

51 NOS, "Teeven: Dood Is Inbrekersrisico," news, NOS, (September 26, 2012), <http://nos.nl/artikel/422798-teeven-dood-is-inbrekersrisico.html>.

However, even though maxims “play an important role in the development of a moral argument”⁵² in everyday life and casuistry, they “are seldom further proved; their relevance is seldom explicitly demonstrated.”⁵³ This will be discussed in more detail later.

The third step concerns circumstances, also called the 'morphology' of the case. These are basically answers to the questions who, what, when, where, why, how, by what means, with whom, ect.⁵⁴

Within casuistry 'circumstances make the case', which means that the details of a case determine its outcome and that judgement (wisdom) plays a crucial role in weighing factors and applying principles.⁵⁵ In the first two steps the instant case has been provided with possible contexts, and relevant maxims and principles have been gathered. Now, in this third step an assessment has to be made of how and where the case under discussion exactly fits.⁵⁶ In this step, circumstances and the interpretation of them determine (through differences and similarities) where a case is placed in a taxonomy and thus what maxims or exceptions will be more or less important in formulating a solution.⁵⁷ This 'reasoning by analogy' is one of the core features of casuistry.⁵⁸

The fourth step/element is 'probability'. This means that all solutions in casuistry have a degree of probability, or are arguable, they are never certain or (logically) necessary.⁵⁹ The work of the casuists is to analyse and interpret complex cases that lay far away from the paradigm cases, and the difficulty of this process makes that its results can never be fully certain.⁶⁰ The probability of a solution is determined by “the strength of the arguments and the authorities advocating the opinion in question.”⁶¹ The status of past solutions is thus conveyed to the current case; the more probable the analogies used, the more probable the solution to the current case. This implies that there are no 'essences' in the domain of ethics, or at least that they cannot be discovered.⁶²

The fifth element is 'cumulative arguments', which means that solutions in casuistry are usually not supported by one lengthy, worked-out, and coherent argument, but by a cumulation of short, small arguments of different sorts. Casuists thus “make relatively short arguments, usually offering

52 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 253.

53 Ibid.

54 Jonsen, “Casuistry as Methodology in Clinical Ethics,” 298; Jonsen, “Casuistry,” 243.

55 Arras, “A Case Approach,” 120.

56 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 254.

57 Arras, “A Case Approach,” 119; Jonsen, “Casuistry,” 244.

58 Tomlinson, “Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?,” 8.

59 Jonsen, “Casuistry,” 245–246.

60 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 255.

61 Ibid., 254.

62 Arras, “Getting down to Cases,” 32.

several distinct kinds of reasons to support their conclusions: a scriptural text, a citation from canon law, an appeal to the virtue of charity or justice, and a prudential point might be set beside each other, with little effort to integrate them into a single coherent argument.”⁶³

Casuistical arguments, even in their cumulative form, still have a common structure; they consists of a judgement (do ...) followed by the ground for that judgement (because ...), then warrants and backings for that ground in the form of maxims and more elaborate theoretical arguments, and the final part are possible quantifiers (unless ..., provided that ..., ect.).⁶⁴

With this point some questions can be raised concerning how the separate arguments are put together, whether the cumulative arguments are actually coherent, and also whether the separate arguments (and the cumulative argument as a whole) are indeed morally justified. This, however, is too far away from the core of casuistry for the purpose of this thesis, so I will not go any deeper into this discussion of what makes cumulative arguments legitimate.

The final step is forming a resolution to the case under discussion. These are – as already mentioned under 'probability' – not theoretical answers, with certainty or necessity, but practical solutions. In the casuist's eyes not making any decision is itself immoral and thus a compromise is made for a solution with a degree of probability;

The casuists' intend was to come as close as possible to decision and action. They were obliged to resolve the case because in their view, acting 'from a doubtful conscience' (that is, without reaching any conclusions about the morality of the act) was itself immoral [...] They would say, for example, 'in these circumstances, given these conditions, you can with reasonable assurance act in such-and-such a way. By so doing, you will not act rashly or impudently, but can be of good conscience.'⁶⁵

The assumption in this standpoint is obvious; acting without forethought or not deciding on any action, is by definition immoral, and therefore anything you may decide and do after (appropriate) consideration is always more moral, even if decisions are never 'good' with certainty.

In the remainder of this chapter I will explain some of the features in this process in more detail, but before that I will make a brief clarification concerning principles.

2.1.1 The relation between principles and maxims

63 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 255.

64 Jonsen, "Casuistry as Methodology in Clinical Ethics," 299.

65 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 256.

Because, from now on, I will mostly be talking about principles (rather than maxims), I thought it useful to say a few words on how maxims and principles are related. According to the literature principles are “inductive generalisations based upon our intuitive responses to cases”⁶⁶ and their meaning is build up over time,⁶⁷ and maxims were defined as general, rule-like sayings or apparent truths, drawn from traditional discussion (see 2.1).

It this seems like maxims and principles are closely related; when we look at a case, the first judgement we (intuitive) make will, at least partly, consist of maxims, and if we make these maxims more general (or perhaps add a few similar maxims together) we arrive at principles. This is generally how I will interpret this relation when I talk of principles (or maxims).

What Jonson and Toulmin themselves think about this is confusing. Jonson for example writes that principles are “invoked necessarily and spontaneously in any serious moral discourse,”⁶⁸ which seems to blur the line I just drew between intuitive maxims and more generalized principles. This issue will return in 2.3.2.

2.2 Paradigm cases and consensus

As already mentioned paradigm cases are those cases where the application of principles (usually only one) is clear and unquestioned.⁶⁹ In the words of Jonson and Toulmin: “all authors would concur that there is no reason not to consider the act an offence,”⁷⁰ for example “no complex moral argument is needed to show that child abuse is wrong.”⁷¹ It are cases “whose merits and shortcomings even a small child 'knows at a glance'.”⁷² Jonson formulates it as that it is “almost impossible to imagine anyone approving.”⁷³

The assumption of classical casuistry here is that such cases exist; that there are moral cases in which there is consensus concerning the rightness or wrongness of the action.⁷⁴ Hereby Jonson and Toulmin aim not at deep theoretical consensus, but at practical consensus; the agreement is on

66 Arras, “A Case Approach,” 120.

67 Ibid.

68 Jonsen, “Casuistry,” 246.

69 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 7, 322–323; Strong, “Justification in Ethics,” 206; Arras, “A Case Approach,” 120.

70 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 252.

71 Ibid., 308.

72 Ibid., 330.

73 Jonsen, “Casuistry as Methodology in Clinical Ethics,” 302.

74 Kopelman, “Case Methos and Casuistry,” 22.

whether 'this action in these circumstances' is right (or wrong), not on the reasons why or the deeper (theoretical) argumentation.⁷⁵

There are a few issues here however. First, it could be contested that this kind of superficial consensus – about the judgement itself, not the reasons that support it – is consensus at all. To consider this, imagine a specific case of questionable abortion where two people both argue in favour of the abortion. However, the first person argues from the (unborn) child's point of view; that every child has a right to a potentially good life and good parents and in this specific case that is lacking, for example because the mother is poor, sick, or too young to be a good mother. The other person argues from the point of view of the (future) mother, who in this specific case does not want the child, whatever reason she may have for that. Can we really say that these two people, who are both in favour of the abortion in this specific case, agree with each other?

However, even more concerning for casuistry is what this superficial (practical) consensus means for the casuistical process of reasoning. For, if we assume that the two people just discussed do indeed have a consensus about the abortion in this specific case, there seems to be a potential problem for casuistry's analogy-based reasoning. If for example, after the abortion case just discussed another abortion case emerges. In this new case there is an under aged pregnant girl and the circumstances are as follows: the girl is clearly unfit to be a mother at her age both because of mental and physical development; because she is under aged her parents have a large say in any medical choices and treatments including abortion; and the girl is determined to keep the baby (thereby excluding adoption as a possible outcome). Of the judges discussed in the first case, the one arguing from the (unborn) child's perspective would argue in favour of the abortion because letting the child be born would be unfair to the child. The other person, however, arguing from the (future) mother's point of view, would be against the abortion because the mother doesn't want it.

The point here is that the superficial nature of the agreement in one case may cause a diverging analogical reasoning concerning subsequent cases.⁷⁶ Thus, the superficial nature of the agreement seems to undermine the method of casuistry as far as it is based in analogical reasoning. Reasoning by analogy seems to be guided more by underlying reasons and arguments than the actual judgement itself.⁷⁷ This issue will return in chapter four.

A final issue is with whom the consensus is actually concerned; who needs to agree and who's opinion perhaps doesn't matter? Jonson and Toulmin, and others, speak of a 'moral community',

75 Arras, "A Case Approach," 121.

76 Hanson, "Casuistry in a Pluralistic Society," 111; Arras, "A Case Approach," 121; Tomlinson, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?," 18, 33.

77 Arras, "A Case Approach," 123; Kopelman, "Case Method and Casuistry," 23.

which seems to be related to cultural communities, as in being 'a group of people who share some range of common values or ideas'.⁷⁸ Although it would seem logical that the moral community is at least one's country (including different cultures in a multi-cultural society). Determining who is part of this moral community is very important for assessing the method because if the group is very limited (for example a religious group) then the reasoning might already starts with a consensus, and thus casuistry might not actually have anything to add. Of, on the other hand the group is very wide, the any consensus may be impossible.

2.3 Maxims and choices

At some point in the process of casuistry choices may have to be made. First with respect to the taxonomy the instant case has to be placed in, because some cases can reasonably be fit into more than one.⁷⁹ For example, a case of euthanasia may be seen as falling under the principle of 'killing' or of 'helping'.⁸⁰ Related to this is a choice with respect to which paradigm case(s) or analogous cases carry the most weight in the circumstances of the instant case.⁸¹ For example whether a case of euthanasia (under the principle of killing) has more in common with a defensive attack (defending a loved one), natural death, foreseeable consequence of (reckless) action, or perhaps imposing the death-penalty. This choice may partly depend on how the circumstances of the case are interpreted.⁸²

Here then, a possibly neglected moment of choice shows itself, namely in the description of the case. There seem to be almost an infinite amount of features of a case that could be mentioned in its description, and what features are included and how they are presented (or even in what order) may change the impression of, and hence the reasoning about, the case.⁸³ This choosing between descriptions of the case may also influence the possible solutions that are seen for it; skipping one feature in a case, may for example remove a solution from the table.⁸⁴ However, I is unclear how we are supposed to know what the adequate description of the case is.⁸⁵ Most likely this will be related to practical wisdom, which is discussed in 2.5.

78 Moula and Sadin, "Evaluating Ethical Tools," 271, 275; Hanson, "Casuistry in a Pluralistic Society," 106–107, 122.

79 Jonsen, "Casuistry as Methodology in Clinical Ethics," 304.

80 Tomlinson, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?," 15.

81 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 309; Tomlinson, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?," 13, 18.

82 Hanson, "Casuistry in a Pluralistic Society," 109–110.

83 Kopelman, "Case Methos and Casuistry," 25, 28–29.

84 Arras, "Getting down to Cases," 39.

85 Ibid.

Additionally, even before their description, cases have to be selected for (casuistical) analysis in the first place. This selection may be influenced by who chooses them, more than how morally important or conflicted they really are.⁸⁶ This is an issue of bias, which will also be discussed in 2.5

Finally, a third choice lies in circumstances of quantity (how much pain someone is in, how much money is at stake), at what point on the scale will a judgement shift?⁸⁷

All these choices have to be made based on (practical) wisdom and experience (see 2.5).

However, there are also moments in time when the interpretation of a principle or paradigm case itself changes, because these interpretations are subject to revision (or changes of articulation) in light of new cases.⁸⁸ A given example by Jonson and Toulmin is that of interest on loans. This was first considered stealing, but the change in interpretation was that this judgement lay in the fact of extortion and thus a new distinction was made between fair loans with interest (equal risks for both parties and reasonable profits involved) and extorting loans.⁸⁹ The point that Jonson and Toulmin make is that general principles that lay at the root of casuistic reasoning are not changed themselves, but that their interpretations and the exceptions that apply to them are continually refined and adjusted in light of new cases and circumstances (for example new technical developments).⁹⁰ Also, the weight given to different aspects of a case can change through time; in modern western societies for example greater weight is given to autonomy (than in other societies or in the past).⁹¹

There remains an important question in this context, which pertains to what this change of interpretation means; is it a reflection of the norms and values in the culture at the time (making casuistry relativistic), or is it a revelation of moral truth in the sense that a changing interpretation is not just different but actually morally better; we have discovered some new detail of morality. Either one will have implications for the process and solutions casuistry entails. Besides that, casuistry will have to explain how judgement can change, while the principles stay the same.⁹²

Which way Jonson and Toulmin go is not completely clear, but their explanations seem to

86 Ibid., 38; Kopelman, "Case Method and Casuistry," 25.

87 Jonsen, "Casuistry as Methodology in Clinical Ethics," 304; Strong, "Justification in Ethics," 205.

88 Arras, "Getting down to Cases," 35.

89 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 309–310.

90 Ibid., 316, 317–318.

91 Jonsen, "Casuistry as Methodology in Clinical Ethics," 305.

92 Hanson, "Casuistry in a Pluralistic Society," 108.

point to the latter, for they say it is a progressive process, that brings us closer to the basic core of the principle, instead of changing it or moving away from it.⁹³

2.3.1 The use of theory

The process of changing interpretations may require the use of more theoretical or speculative moral philosophy, but this is an exceptional situation that only happens with 'novel or 'unprecedented' cases.⁹⁴ Theory is thus not used in the normal (everyday) casuistry, of solving particular cases.⁹⁵ Jonson and Toulmin add that even when casuistry needs theory, it is still theory-neutral, in the sense that it has 'no special theoretical allegiances'.⁹⁶ Instead it claims that some theories are better suited for some situations, and other theories for others, and that theories are 'limited and complimentary perspectives'.⁹⁷

The question is whether this is possible. Casuists can be interpreted to claim that 'cases just speak for themselves' as some kind of "epistemological 'immaculate perception'," but is that possible?⁹⁸ For it could also be argued that any standpoint, even in casuistical case analysis, is sufficiently theory-laden to doubt the claim that casuistry can be theory-neutral.⁹⁹

2.3.2 The origin of principles

It is clear that Jonson and Toulmin think casuistry, or any moral reasoning, cannot do without principles,¹⁰⁰ but where these come from is unclear. One interpretation is that principles are derived from everyday life, in the sense that they are like 'summaries' of a form of common morality (the ideas, norms, values, and opinions pervading one's culture or society).¹⁰¹ This would make it relatively easy for casuists to formulate principles for they would only have to look at everyday life choices and judgements. However, this would also make casuistry quite relativistic, in the sense that a) solutions from casuistry could then only be used in that culture at that time, and b) if a culture

93 Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 322, 325.

94 Jonsen, "Casuistry," 245.

95 Ibid., 246.

96 Ibid.; Jonsen, "Casuistry as Methodology in Clinical Ethics," 297.

97 Jonsen, "Casuistry," 246; Arras, "Getting down to Cases," 41.

98 Arras, "Getting down to Cases," 39.

99 Ibid., 41.

100 Jonsen, "Casuistry," 246, 248.

101 Arras, "Getting down to Cases," 33.

changes over time then casuistry could not object (on moral ground) to any of the changes. This would also mean casuistry has weaknesses in its possibilities for being critical on societies norms and values.¹⁰²

A second interpretation is that principles are drawn from ethical theory. For example principles based on the ethics of Kant or utilitarianism. This would make casuistry a simply method of application; the principles are provided by theory and casuistry offers a guided way of interpreting and applying them more practically. In this formulation of the method any guiding rules – such as what are the relevant factors in the application process, or what factors decide between competing principles – will have to be derived from the used theory (or theories) as well. Casuistry itself, then, has little to add.

A third and final way of interpretation, is somewhat of an intermediate between the other two. This is that principles are indeed drawn from everyday life practices (or cases), but that casuistry offers some justified way of turning mundane ideas into moral principles, namely in the way of some form of reflection.¹⁰³ This we could look for in phronesis (see 2.5); through focussing our practical wisdom on mundane norms and values we can distil moral principles from them. This seems to imply that there is some moral truth that we can bit-by-bit discover by combining our everyday intuitions with our (trained) practical wisdom. Under this interpretation, casuistry is a moral theory of its own and thus also requires the justification for it.

Which one of these ways of deriving at principles Jonson and Toulmin hold is unclear. It could be argued that they lean to the third, intermediate, interpretation. Earlier I pointed out that Jonson and Toulmin think there is a progression in building interpretations of principles (that brings us closer to the core of the principle, see 2.3), this implies there is some end-point to improve towards. If principles were summaries of a culture's values, then there could be no such 'progression' in interpretation of them, because re-interpretation would just be a sign of change in cultural values, not improvement on moral ground. However, in some of their writing Jonson and Toulmin also seem to refer to the first or second interpretation, in the sense that they claim that casuistry is not itself an ethical theory with its own justifications for the used principles. This will be discussed more fully in chapter four.

2.4 Marginal and other difficult cases

102Ibid., 34, 45–46; Arras, “A Case Approach,” 120, 122.

103Jonsen, “Casuistry,” 250; Arras, “Getting down to Cases,” 33.

After the paradigm case(s) in a taxonomy, there is a range of cases in which the application of the principle is less clear. These more difficult cases can be arranged in several categories.

The first type of difficult cases are called marginal cases, because in these cases a principle seems to apply only marginally (not as clearly as in the paradigm case).¹⁰⁴ One example is the difference between doing something and letting something happen.¹⁰⁵ A paradigm case could again be 'the killing of an innocent person', with a marginal case being 'a failure to prevent an innocent from being killed'. Another example is the Principle of Double Effect, in which a distinction is made between the goal of an action and a (foreseen) consequence of it.¹⁰⁶ The classical example of this is about the termination of a pregnancy because of uterus-cancer whereby the unborn baby is killed in order to save the mother (otherwise both will die). The death of the child could here be seen as a foreseen consequence where the principle of killing only applies marginally. With marginal cases it is the task of the casuist to determine to what extent the principle does or does not apply in these specific circumstances, including whether to refer to a difference of the two kinds mentioned (difference of doing and letting happen and of intending and foreseeing). These differences indicate marginal cases because (merely) 'letting' and (merely) 'foreseeing' are considered 'in line with' but substantially different from actually 'doing' something.

These distinctions are also part of the assumptions of classical casuistry. The assumption being that there is indeed a morally relevant difference between 'doing something' and 'letting something happen' and between 'intending a consequence' and 'foreseeing a consequence'. These are contested assumptions, but I don't think they need to be essential for casuistry. Even though Jonson and Toulmin refer to them, their form of casuistry would most likely still be essentially quit the same if these distinctions would be rejected. Therefore I will leave this for discussion elsewhere.

The second type of difficult case is when more than one principle applies. An example given by Jonson and Toulmin is the case of someone borrowing a gun from his neighbour, who subsequently threatens to shoot someone the moment he gets the gun back.¹⁰⁷ On the one hand you have to return something you borrowed (first principle), on the other hand you should not be part of harming (possible killing) another person (second principle). With these kinds of cases it is the task of the casuist to assess the weight of each of the involved principles and whether there are exceptional circumstances for each.¹⁰⁸

104Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 7–8.

105Jonson, "Casuistry as Methodology in Clinical Ethics," 300.

106Ibid.

107Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 7.

108Ibid., 8, 9.

Then there is a third type of difficult case, which may lead to a paradigm shift as discussed in the previous paragraph. In these cases no principle can clearly be applied because the circumstances are in some way novel. The novel circumstances make principles inapplicable, because the interpretation or formulation of the principles do not yet account for these circumstance. Here an example is given by Jonson and Toulmin of a marriage between a man and a woman where the man wants to undergo a sex-change; their main question is whether these two people are still married.¹⁰⁹ In the time of this example same-sexed marriages were not accepted at all and thus this example could lead to a re-interpretation of what marriage and family life entail: for example towards a stronger focus on love than on the (physical) man-woman relation. Something similar could perhaps be said of the current discussion in Ireland about gay marriage, where part of the opposition hold to a definition of marriage as essentially a union between a man and a woman.¹¹⁰ The legal acceptance of gay marriage may entail a re-interpretation of what marriage constitutes.

An important question concerning these difficult cases is how one can distinguish between normal circumstances (in which paradigm cases rule) and exceptional circumstances.¹¹¹ This also has to do with how paradigm cases are determined and what factors play a role in drawing analogies (similarities and distinctions) between cases. This will come down to the capacity for this form of casuistical reasoning, a form of practical wisdom, which I will turn to next.

2.5 Good judgement and moral knowledge

To explain what 'good judgement' is, Jonson and Toulmin refer to Aristotle's term 'phronesis', or practical wisdom. Good judgement in this sense “requires one to understand not only the general rules, maxims, and principles of morality, but – even more importantly – to understand in what kinds of circumstances and to what types of cases they do or do not apply.”¹¹² Johnson describes it as a sort of reasoning that is “cultivated by critical reflection upon human experience and upon the human condition [and] in casuistry, the reflection bears upon the relation between maxims and circumstances.”¹¹³

109Ibid., 318–322.

110For example: RTE News, “Kenny: Marriage Will Not Be Diminished by Yes Vote,” *RTE News*, April 27, 2015, <http://www.rte.ie/news/2015/0427/697066-same-sex-marriage-referendum/>.

111Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 311–312.

112Ibid., 258–259.

113Jonson, “Casuistry as Methodology in Clinical Ethics,” 303.

This reference to phronesis could take away criticism that good judgement would be some simple sense of intuition (what 'feels' right), because it adds an essential element of reflection/critique and experience.¹¹⁴ However, phronesis still seems to be a highly intuitionist concept,¹¹⁵ and an important assumption of casuistry because practical wisdom is central in all stages of the method; from picking cases, to determining and weighing relevant factors and maxims, and even reaching a final solution.

Following this conception of practical wisdom, moral understanding or moral knowledge is thus a certain intuition, or insight into, and experience with, the practical effects and applications of general principles; to see relevant resemblances and differences.¹¹⁶ Following from this, moral arguments are then also essentially practical in nature, not theoretical.¹¹⁷

Moral knowledge consists in the ability to put our moral discernment to work, cultivate an eye for subtle and far from obvious considerations, which may be morally crucial in difficult situations. The ability is not the 'cognitive skill' of learning to make ever-more-powerful 'ethical deductions.' Instead, it is a matter of our affective sensibility: learning what novel factors and circumstances we should look out for, and be responsive to, as the range of our moral experience extends.¹¹⁸

The use of phronesis, however, is not as logical or unquestioned as Jonson and Toulmin may make it seem. Even in the time of Aristotle himself there was opposition.¹¹⁹ This is rooted in what view you have of ethics; whether it is a field of science or a part of (practical) experience.¹²⁰ Again showing that 'phronesis', and its functioning, is an important assumptions of classical casuistry, which is still in need of more explanation and justification.

There are thus several questions that arise with this use of phronesis. The first question is whether ethics should actually be considered as concerning experience and wisdom rather than science and (objective) knowledge (note that this is a specifically meta-ethical question).

Another concern is whether practical wisdom functions as well as casuistry seems to assume (and needs). There are, for example, critics who argue that our practical experiences and wisdom are influenced by our (cultural) background to such an extent that casuistry becomes relative for relying on it.¹²¹ Jonson and Toulmin seem to accept this, at least the first half, for example when

114Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 260, 313; Tomlinson, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?," 8; Kopelman, "Case Method and Casuistry," 33.

115Arras, "A Case Approach," 120.

116Kopelman, "Case Method and Casuistry," 22.

117Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 327, 329, 330, 331.

118Ibid., 331.

119Ibid., 263.

120Ibid., 19, 263.

121Ibid., 177; Arras, "Common Law Morality"; Hanson, "Casuistry in a Pluralistic Society," 115–116.

they say that our ways of dealing with moral problems are not reinvented or mulled over by every individual, but that we grow up with a long history of moral argumentation.¹²² However, they seem to think that the (debatable) critical nature of casuistry helps prevent relativism.¹²³

Another critique points out that our thinking and with it also our practical reasoning and wisdom – besides being build upon the past – is significantly vulnerable or even prone to biases and other distortions.¹²⁴ To such an extend that for example less weight is given to certain factors or factors or alternative solutions are overlooked altogether.¹²⁵

A last critique is that even those judges we would consider to be prudent, or to posses phronesis, could disagree.¹²⁶ This is because different people can just have different interpretation of a case, its circumstances, or the content or scope of a principle or maxim.¹²⁷ We may, for example, agree on general rules such as 'help others' or 'do no harm', but this could be interpreted in different ways; what constitutes 'helping', and when is something called 'harm'.¹²⁸

These critiques should make us wonder whether practical wisdom would even be a good tool for reasoning in ethics at all. Whether it is even adequate, but also whether it is sufficiently objective or universal, and sufficiently resistant to immoral or amoral bias and other influences.

2.6 The intention of classical casuistry

Jonson and Toulmin seem to be quit clear about the goal or intention of casuistry, as can be read in the following quote:

Casuistry had never been intended as a substitute for ethical theory or moral theology. It was not, in itself, a doctrine about what is the best life for man, what virtues characterize the good person, or what ideals humans should strive for. It did not even offer a general or fully elaborated doctrine about what sorts of acts are right, or about how principles and rules are to be justified, It was a simple practical exercise directed at attempting a satisfactory resolution of particular moral problems.¹²⁹

122Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 314–316.

123Ibid., 178.

124Hanson, “Casuistry in a Pluralistic Society,” 113–116; Arras, “Common Law Morality”; Arras, “A Case Approach,” 122; Kopelman, “Case Methos and Casuistry,” 21.

125Hanson, “Casuistry in a Pluralistic Society,” 113–116; Arras, “Common Law Morality”; Arras, “A Case Approach,” 122; Kopelman, “Case Methos and Casuistry,” 21.

126Hanson, “Casuistry in a Pluralistic Society,” 109; Kopelman, “Case Methos and Casuistry,” 27, 29.

127Hanson, “Casuistry in a Pluralistic Society,” 104.

128Ibid., 121.

129Jonsen and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 242.

Additionally, Jonson and Toulmin make it clear that they consider it not a task of casuistry to justify its input about what is morally right. This does not mean these things do not need justification, it just means that casuistry builds upon presupposed doctrines of the good, the right and the ideal.¹³⁰

Jonson and Toulmin write that casuists “were not the designers of the moral life; they were its mechanics.”¹³¹ In real life, it is sometimes easy to lose track of ideals and principles because of life's 'messy' situations, and that it is the task of the casuist to examine just such situations.¹³²

However, there remains the question of how this corresponds to what was discussed earlier concerning the origin of principles (2.3.2). There it seemed that casuistry has its own way of deriving principles – namely from practice and cases – which would make it an ethical theory. Now, however, it seems that Johnson and Toulmin reject that, and claim that theories are needed to provide casuistry with (justified) principles. This would make casuistry nothing more than a method to apply something (in this case principles derived from ethical theory) to 'messy' and difficult-to-interpret actual cases. On the other hand (as in the last quote) Jonson and Toulmin refer to the importance of the deeper questions in practical ethics. For example, Jonson writes that there are three types of important questions in ethics - psychological, metaphysical, and particular - and that it is “possible, even desirable, that all ethicists ponder the first two questions with intensity.”¹³³ In this way “all honest casuists must be competent moral philosophers or theologians, else they are nothing more than sophists.”¹³⁴ And in *The Abuse of Casuistry* they even say that, “casuistry was in danger of degenerating into moral quackery,”¹³⁵ without any theory or 'science' to support it. This seems to conflict with their apparent claim that casuistry is just a mode of application.

Concerning these different interpretations of the method of casuistry, John Arras implies that casuistry does indeed aim to be a moral theory on its own, for he writes that “what differentiates the new casuistry from [theoretical] applied ethics, then, is not the mere recognition that principles must eventually be applied, but rather a particular account of the logic and derivation of the principles that we deploy in moral discourse.”¹³⁶

As said, Jonson and Toulmin are not clear on this. However, whichever casuistry is supposed to be – a theory neutral application tool, or a moral theory of its own – has implications for its functioning. This will be discussed further in chapter four.

130Jonson, “Casuistry,” 246.

131Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 242.

132Ibid.

133Jonson, “Casuistry,” 247.

134Ibid.

135Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 251.

136Arras, “Getting down to Cases,” 31.

2.7 Itemized summary

Here, I will give a brief, itemized, summary of the assumptions and points of discussion concerning classical casuistry. Most of these will return in chapter four.

Assumption 1: Theories are inconclusive.

Jonson and Toulmin are clear that they think any principle or theory necessarily needs interpretation (besides clarification through rules of application). A form of practical reasoning is thus always needed, even for high theorists.

Assumption 2: Inaction or acting without forethought is immoral.

Jonson and Toulmin are also clear about this and because of the immorality of 'acting rashly' and 'being undecided,' practical reasoning becomes a necessary element of moral action.

Assumption 3: There are paradigm cases.

Jonson and Toulmin assume that there are cases where there is consensus concerning the rightness or wrongness of the action. This consensus is practical in nature (not theoretical); it is not consensus about the reasons for the judgement but only about the judgement itself ('right' / 'wrong').

Assumption 4: There are morally relevant distinctions between 'doing' and 'letting happen' and between 'intending' and 'foreseeing.'

These are assumptions Jonson and Toulmin seem to use in their mentioning of cases. However, since I do not think these assumptions are essential to their form of casuistry I will not discuss them any further.

Assumption 5: (Applied) Ethics is about phronesis

The casuistry of Jonson and Toulmin is heavily build upon the assumption that ethics (all ethics, but especially applied ethics) is based in experience – as opposed to scientific observation – and that its basic method of reasoning is practical wisdom (as opposed to factual knowledge). This is an especially important assumption because it is at the core of what morality is and how to reason morally. Also part of this assumption is that answers in ethics are never certain: because solutions are the product of experience and wisdom, there is always the possibility that they turn out to be

mistaken after further experience.

Discussion-point 1: Is ethics about phronesis (or practical wisdom)?

Phronesis, what it is, and how it functions, is probably the most important assumption in casuistry for assessing the functioning of the method. As mentioned before, it is the assumption that ethics is a field of experience (rather than knowledge) that steers it towards the value and use of practical wisdom in casuistical reasoning. Because this assumption is neither necessary nor uncontested, it on the one hand requires further justification or argumentation, and on the other hand makes the method not universally applicable; only those who support the assumption will be able to use it, consistent with their own beliefs.

Discussion-point 2: Can 'practical wisdom' function as is needed in casuistry?

Even if we would assume for a moment that ethics is indeed about practical wisdom, a worry still remains: can our practical wisdom live up to that challenge? Can it accomplish what casuistry supposes it does? The main question is whether our practical wisdom is sufficiently guarded against cultural influences and biases that are not morally relevant so that it can guide us to actual moral outcomes, rather than outcomes guided by our culture and biases.

Discussion-point 3: Is 'practical consensus' really consensus, can practical consensus 'function' in casuistry, and who has to consent?

The first question here is whether practical consensus can really be called 'consensus'. The second, more important question, however, is whether practical consensus can function in the analogical reasoning of casuistry. Does the superficial nature of practical consensus cause divergence in analogical reasoning? A final question is who needs to be part of a consensus, or what the extend or scope of the 'moral community' is.

Discussion-point 4: What is the origin of principles? Is it objective or subjective?

This question is about where principles come from and thus also what kind of justification they require. In this respect I discussed three ways of interpreting the origin of principles in casuistry; summaries of everyday-life, provided by theory, and extracted from everyday-life (as justified principles, not summaries). Each interpretation has implications and a need for justification.

Which one Jonson and Toulmin claim or support with their casuistry is unclear, they could be interpreted to refer to any of the three.

3. Contemporary (Dutch) uses of casuistry.

After the explanation and discussion of classical casuistry in the previous chapter, I will now take a look at contemporary uses of this method. Although this has turned out to be a difficult and elusive investigation, I will here outline what I found out about the work of ethics committees in the areas of hospitals, banks, and animal testing.

3.1 Ethics committees in healthcare

Ethics committees in hospitals or other healthcare facilities can be of two types. The first type concerns itself with research, the second type is more healthcare related, dealing with medical cases.¹³⁷ Because I will later discuss animal research I will not discuss the first type any further (although sometimes one committee will fulfil both of these tasks).

Ethics committees of the second type can operate both at the level of individuals and individual cases as well as on policy level, or – more likely – they will concern themselves with both levels at the same time (asking how to solve this case, as well as how that could reflect in policy).¹³⁸

These ethics committees, however, seem to use some form of moral case deliberation, rather than casuistry.¹³⁹ The general process of moral case deliberation – although there are many different versions of it – is to talk about a case, to investigate its aspects, look from different perspectives, and thereby find a solution to the case in its structural deliberation. In this deliberation cases can be used – or they can be used in training committee members – but cases do not have the central position they do in casuistry. This can for example be seen in the cases presented on *ZorgEthiek.nu* and *Mijn Vakbond*, which are provided with some response or exposition of ways to look at the featuring issue, but no final judgement.¹⁴⁰ The intended role of these cases is unclear, but their presentation seem to be more suited for moral case deliberation than for casuistry because they are

137Centrum voor ethiek en gezondheid, “Ethiek in commissies,” *CEG*, accessed June 16, 2015, <http://ceg.nl/themas/bekijk/ethiek-in-commissies>.

138See for example: Ziekenhuis Oost-Limburg, “3. De rol van de Commissie Medische Ethiek,” *Ziekenhuis Oost-Limburg*, accessed June 16, 2015, <http://www.zol.be/internet/zorgverleners/zorgverleners.aspx?id=2460>.

139 See for example: Ibid.; AriënsZorgpalet, “Ethische Commissie,” *Ariëns Zorgpalet*, accessed June 16, 2015, <http://www.arienszorgpalet.nl/over-ons/organen-en-commissies/ethische-commissie/>.

140ZorgEthiek.nu, “Casus,” *ZorgEthiek.nu*, accessed June 16, 2015, <http://zorgethiek.nu/categorie/casus/>; Mijn Vakbond, “Eerdere dilemma’s,” *Mijn Vakbond*, accessed June 16, 2015, <https://www.mijnvakbond.nl/Eerdere-dilemmas>.

provided with ideas about the context rather than a judgement suitable for analogical reasoning.

Based on the information I found so far it seems this is thus a different discussion, namely on moral case deliberation and not on casuistry. Perhaps it could also be argued that committees like these use a mix of several methods; they use the deliberation of moral case deliberation, with some of the importance of cases and analogous reasoning of casuistry. The first question is of course whether this is indeed what these committees do. Since I could not find enough information within the time and scope of this thesis, a more thorough investigation may be able to answer this question.

Subsequently, other questions can be raised. One is whether a mixed method like this is even possible, how can two methods with significantly distinct foundations and assumptions be used together? Would it even be possible to reach consistent and moral solutions based on such a mix of methods?

This investigation has pointed out that it is very important to know what exactly a committee does, before it can be judged on anything. This, however, has proven a challenging expedition.

3.2 Ethics committees in banks

Ethics committees as part of banks seem to be even more elusive than in healthcare. One example I found is the *Rabobank*. On their website they offer a range of cases, with judgement by the ethics committee.¹⁴¹ What exactly the purpose of these cases is, is unclear. It could be that the cases are meant to be an indication of the views or direction of the committee, or that they are to be used by others to decide on cases.

Also unclear is how the committee itself reaches their judgements. What is said is that the starting points are the code of conduct of the bank itself and guideline or rules that the bank has committed itself to such as the Universal Declaration of Human Rights.¹⁴² Additionally, a general and vague list of tasks or aspects is provided, but these leave ample room for interpretation and they are not provided with explanations of how they are considered or what the underlying values are. One example is the task of 'looking at, or judging, and weighing practical situations against norms and values of the group'.¹⁴³ Here, almost every word in the sentence is unclear: what is meant by

141 Rabobank, "Ethische Kwesties," *Rabobank*, accessed June 16, 2015, <https://www.rabobank.com/nl/about-rabobank/in-society/ethics/index.html>.

142 Ibid.

143 Ibid.

looking at, or judging, and weighing? How is that done? What criteria are used? Are there criteria to select relevant 'practical situations'? What are relevant norms and values? How are they determined (and justified)? Who is 'the group'?

Much more explanation and justification would be needed in order to even begin to understand, and subsequently assess, this methodology.

Aside from ethics committees within individual banks, this sector also has the *Meldpunt Mores*. This is an independent foundation where people can turn to with complaints about 'unacceptable behaviour' within the financial sector.¹⁴⁴ Unacceptable behaviour is not defined as such, but it is clarified in the sense that it is not about 'disappointing interest percentages', but for example about a misuse of power.¹⁴⁵ Here, four 'criteria' for assessment are given, namely laws, relevant NGO's and/or other social organizations, codes accepted in the sector, and 'generally accepted social mores'.¹⁴⁶ Aside from being vague (susceptible to a multitude of interpretations), these criteria also seem to contain a lot of formal rules and only a little morality. And the only moral point mentioned is 'generally accepted social rules', wherefore no moral justification is offered.

Here the question seems to be whether this committee really is an ethics committee, for it seems much more concerned with prudential and formal criteria. This, again, would have to be examined in more detail, though.

3.3. Ethics committees for animals testing

In ethics committees dealing with animal testing different aspects of the research under discussion are weighted; roughly speaking the suffering (or diminished welfare) of the used animals is weighed against the possible gain from the research.¹⁴⁷ Hereby these committees thus seem to rely in some sense on a consequentialist foundation, especially concerning the gain of the research. This is in

144Meldpunt Mores, "Over Ons," *Meldpunt Mores*, accessed June 16, 2015, <https://www.meldpuntmores.nl/over-ons/>.
145Ibid.

146Meldpunt Mores, "Commissie Ethiek," *Meldpunt Mores*, accessed June 16, 2015, <https://www.meldpuntmores.nl/commissie-ethiek-mores/>.

147VU/VUmc DEC, "Proefdieren in de wetenschap - VU & VUmc; Jaarverslag 2013," 2013, http://www.vumc.nl/afdelingen-themas/cs-kanker/zorgpad/cs-onderzoek/info-proefdieren/8547389/Dierexperimenteel_jaarversl1.pdf; Centrale Commissie Dierproeven, "Over CCD; Activiteiten en werkzaamheden," accessed June 17, 2015, <http://www.centralecommissiedierproeven.nl/over-ccd/activiteiten-en-werkzaamheden>; Dierexperimentencommissie, "Jaarverslag 2011 Dierexperimentencommissie AMC/UvA," 2011, 2, <http://www.nvdec.nl/resources/jaarverslagen-2011/Jaarverslag-AMC-UVA-2011.pdf>; DEC Utrecht, "Jaarverslag 2014 Dierexperimentencommissie Utrecht," ed. S. Oosterhoff, 9, accessed June 17, 2015, <http://issuu.com/tjerkzweers/docs/dec-jaarverslag-2014?e=3311488/13037330>.

need of justification because 'consequentialism', in ethics, is not a logical necessity. The question then is whether this is the morally right starting point.

Additionally, ethical considerations as such often only feature as (or as part of) one point in a list of aspects to consider.¹⁴⁸ This makes me wonder whether all the other points are considered in ethical perspective at all; it seems it are just prudential weightings that are made, rather than a moral reasoning. For example, the *CCD (Centrale Commissie Dierproeven)* has one part of their verdict that mentions morality (the other points are about the goal of the research, accordance with the law, scientific motivation and possible reviews afterwards).¹⁴⁹ This criteria reads that 'a damage- and benefit analysis of the projects is made, in which is investigated whether the damage to the animals – in the form of suffering, pain or fear – is being justified by the expected results'.¹⁵⁰ Added to this is that 'hereby, ethical considerations are involved and also the expectation as to whether the outcomes will, in time, bring benefits to man, animal, or environment'.¹⁵¹ The question then remains whether this is the only moral component of the deliberation, or are all components supposed to be considered from a moral point of view? Subsequently it can also be asked which one is needed for a deliberation or method to be called 'moral', is one moral component enough for that?

A more detailed explanation of what is done in committees for animal experimentation (*Dierexperimentcommissies, DEC*s) I found in a chapter of the book *De weging gewogen*, where Henriëtte Bout writes about the weighing model used by the *DEC* of the *Vrije Universiteit*.¹⁵² This chapter is not (just) meant as an explanation of what is done in this *DEC*, but the model could also be adopted by other *DEC*s.¹⁵³

The model Bout describes consists of two steps. The first is a formal checklist; because the legal rules for animal testing are quit clear in The Netherlands research is first checked against them, before the *DEC* starts its process of weighing.¹⁵⁴ The second step is then that normative weighing of (competing) aspects.¹⁵⁵ On the one hand there is the interest of the animal, concerning which Bout claims animals have a right not to suffer unnecessarily.¹⁵⁶ This means researchers have an obligation to justify any suffering animals in a test will experience, and also that any research

148Dierexperimentencommissie, "Jaarverslag 2011," 7; Centrale Commissie Dierproeven, "Over CCD"; DEC Utrecht, "jaarverslag 2014," 49; VU/VUmc DEC, "Proefdieren in de wetenschap."

149Centrale Commissie Dierproeven, "Over CCD."

150Translated from: Ibid.

151Translated from: Ibid.

152Henriëtte Bout, "Wanneer is een dierproef toelaatbaar?," in *De weging gewogen*, ed. Jac. Swart, Margreet Jonker, and Ronno Tramper, vol. 3, Dierproeven (DAMON Bundel, 2009), 79–87.

153Ibid., 79.

154Ibid., 83.

155Ibid.

156Ibid.

which does not provide this justification is thereby immoral.¹⁵⁷ This animal interest has to be weighted against the interest of the researcher, or more precisely the interest that is served with the research (its scientific or social results).¹⁵⁸ Criteria for this interest are the quality of the research, its chance of success (knowledge acquisition), and the extent to which its results will contribute to direct or indirect increase of well-being or the decrease of (chances of) suffering.¹⁵⁹

According to Bout these two interests, although very different in nature, can be weighed. Her model of weighing is as follows:

Serious suffering can only be morally justified if there is both a very important social interest and a very important scientific interest.¹⁶⁰

Moderate suffering can be morally justified when there is either a very important social or a very important scientific interest.¹⁶¹

Modest suffering can be morally justified when there is at least sufficient social interest or at least a sufficient scientific interest.¹⁶²

Even though this is presented as a usable model, in my view it actually says nothing. Because the degrees of 'serious', 'moderate', and 'modest' suffering as well as 'very important' and 'at least sufficiently important' interests are still in need of much interpretation and people might reasonably disagree on them, the model seems empty with this formulation, and is especially not a moral method as such, for it does not seem to provide any moral reasons or arguments for its judgments.

3.4 Itemized summary

As mentioned a few times throughout this chapter, it was quite difficult to find detailed information about the contemporary use of casuistry. Possible reasons for this might be because a) there is no definition of 'the casuistry' (because of its diversity), b) even if casuistry is used it may not be named as such, c) the used casuistry may be more closely related to simple case discussion than a coherent ethical theory, and d) institutions or commissions are not keen on letting everyone access and follow their reasoning. Perhaps there are other reasons, but the question does arise whether the lack of transparency here is (morally) justified.

157Ibid.

158Ibid., 84. (see also: DEC Utrecht, "jaarverslag 2014," 48.

159Bout, "Wanneer is een dierproef toelaatbaar?," 84–85.

160Translated from: Ibid., 85.

161Translated from: Ibid.

162Translated from: Ibid., 86.

As a consequence of the limited information I found, I have been (and will be) cautious with filling in too much; adding things that contemporary casuists might not agree with. There are however some discussion points that I noted, and which I will briefly be summarized here.

Discussion point 1: Practice, transparency and moral justification

The difficulty I had with finding out the reasoning process of the different institutions and committees made me wonder whether this might be a real problem in applied ethics. Could it be that applied ethics concerns itself too little with naming methods and explaining processes, to such an extent that no (sufficient) moral justification is provided either?

As already mentioned, there might be (prudential) reasons for not being fully transparent, but the question then is whether that could ever be morally justified?

Discussion point 2: Mixed method?

One possible reason for why information for this chapter was so hard to find is that ethics committees in practice do not stick with one method, but for example combine a form of casuistry with a form of moral case deliberation. Mixing methods in theory is already not an easy task, but when methods are mixed in practice (where theoretical justification is often lacking) there seems to be a real worry concerning justification.

Discussion point 3: Consequentialism

Ethics committees dealing with animal research seem to base their reasoning in a consequentialist foundation; depending on the expected benefits the research will bring more animal suffering is allowed. The question is whether this is the (morally) right perspective.

Discussion point 4: Ethical versus prudential reasoning

I wonder whether ethics committees really deal with moral problems, use moral reasoning, and yield moral solutions. Many of the aspects that are used in deliberating a case still seem to be prudential, for example relating research or medical cases with what is said in the law, or even the weighing of pros and cons (such as in research committees).

4. Discussion; Assessment of the method

In this chapter I will discuss what I think are some important problems with casuistry. For this I will relate the assumptions and discussion points of both previous chapters to the two criteria I discussed in the introduction, consistency and moral justification

4.1 The first criteria: Consistency

As discussed in the introduction 'the first criteria is about consistency between assumptions, processes, and outcome. A method cannot be considered to function if there are contradictions within it. Assumptions or implications of the process or outcome may however be overlooked or hidden. Therefore all assumptions and implications should be brought to the surface in order to determine the consistency of the method. Concerning casuistry there are two broad problems in this area.

4.1.1 Casuistry is under-determined

A very important assumption in classical casuistry is that the casuistical process is based on practical reasoning. However, how this practical reasoning is supposed to work is unclear, and no 'rules of relevance' (rules for describing a case, determining and weighing relevant factors, as well as rules for drawing sound analogies) are formulated.¹⁶³ This makes it difficult to assess this method in terms of consistence. Of course, even though it cannot be judged inconsistent, this does not make the method consistent either; a lot more would need to be explained concerning rules of relevance and weighing – and also the use of phronesis – in order to determine whether this method is consistent or not.

Even more importantly, however, more explanation is needed for the theory to be complete. For “without an appeal to principles that operate at a low or intermediate level of generality [principles of relevance], one cannot explain what features of a case are relevant [and subsequently] one cannot come to a shared understanding of what features matter, and thus what cases are

¹⁶³Hanson, “Casuistry in a Pluralistic Society,” 103, 106; Arras, “Getting down to Cases,” 40.

analogous, and thus what resolution of the case at hand is justified.”¹⁶⁴ Casuistry thus cannot even explain how principles and maxims are related to an eventual judgement of the case, in other words; it is unclear how one reasons from the starting position to the solution.¹⁶⁵

Without this further explanation – the formulation of criteria for formulating, interpreting and sorting facts – casuistry is thus not even a self sufficient method.¹⁶⁶ This could possibly even extend to the point where casuistry could be said not to function at all; since it is unclear what has to be done in order to follow the method.

Contemporary uses of casuistry don't seem to fare any better concerning this aspect, for I had quite some difficulty finding information about the reasoning process of ethics committees. Worst case scenario this could be a problem of applied ethics in general; that too little attention is spent on explaining and justifying what is done (see 3.4). One example is the possibility of mixing methods. In theory (literally and figuratively) this might be fine because in this way a new method could be created. However, if no explanation or justification for the 'mixing' is provided then it seems arbitrary: we do these things just because they sound good or because we like them. This of course is not morally sound, which I will return to in 4.2.1.

One possibility is that there might be (good) reasons for methods in practice to be vague or secretive (see 3.4). For example privacy of the committee members or possibilities of fraud (if all criteria are known then applicants might find loopholes). I am not aware of any of these reasons, though, and I also wonder whether any prudential reason could be good enough to justify not giving more specifications, especially when talking about moral issues and thus moral justification (see also 4.2.1).

4.1.2 A clash of assumptions

A second, and very significant, problem for classical casuistry, in the domain of consistent functioning, is that two of its assumptions seem to undermine each other. Those are: first the assumption that what matters in casuistry is superficial agreement, not agreement on theories or reasons (see 2.2); and second that casuistry essentially uses reasoning by analogy to come to solutions (see 2.1).

¹⁶⁴Hanson, “Casuistry in a Pluralistic Society,” 104.

¹⁶⁵Tomlinson, “Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?,” 14, 17.

¹⁶⁶Hanson, “Casuistry in a Pluralistic Society,” 113, 116–117; Arras, “A Case Approach,” 123.

This point has also been discussed in 2.2, where an example was given on two abortion cases with two judges who argued from the mother's and the child's point of view respectively. They agreed superficially on the first case, but precisely the deeper level (on which they did not agree) seems to determine how this case is seen against, or placed in analogy with, a second case. Jonson and Toulmin write that agreement, or the 'locus of certitude' (in their inspiring situation of the agreeing commission¹⁶⁷) "lay[s] in a shared perception of what was specifically at stake in particular kinds of human situations,"¹⁶⁸ and not in deeper agreed-upon principles.¹⁶⁹ However, this does not seem to make sense logically; agreeing on 'what is at stake' seems to be related to, indicative of, or even synonymous with agreement on a deeper level. In the abortion examples 'to agree on what is at stake' seems to be 'to agree on whether the child's perspective or the mother's perspective is more important', and that is exactly what the two judges in the example disagree on.

The point here is not that superficial agreement might not really be agreement (although this is also an interesting point for further meta-ethical discussion), but that the assumptions of 'reasoning by analogy' and 'superficial agreement' clash with, or contradict each other.

John Arras, for example, writes that "to reason by analogy, we must already have a sense of what is valuable, of what to look for,"¹⁷⁰ and that our intuitions will divert especially in difficult cases.

Additionally, this critique is often made in reference to the modern pluralistic society: that in a society with multiple cultures living together the common ground needed for casuistry seems to be impossible.¹⁷¹ However, even in less multicultural societies, people may have very different views on the good life,¹⁷² and moral practices, rules and policies may (thus) carry different meaning or weight to different people¹⁷³ because they have different views of what is essentially at stake, or of what features matter (most).¹⁷⁴

It thus seems that, unlike what Jonson and Toulmin claim, the process of "casuistical reasoning depends upon deep-seated agreement on fundamental values,"¹⁷⁵ rather than superficial consensus about cases. This is a devastating critique for casuistry because to solve it, it seems one of the assumptions would have to be changed or abandoned, except that both seem essential for casuistry.

167Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, ?; Jonson, "Casuistry," 239.

168Jonson and Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning.*, 18.

169Ibid.

170Arras, "Common Law Morality."

171Arras, "A Case Approach," 123; Arras, "Common Law Morality"; Hanson, "Casuistry in a Pluralistic Society," 104, 117–119.

172Arras, "Common Law Morality."

173Arras, "Getting down to Cases," 42.

174Hanson, "Casuistry in a Pluralistic Society," 104.

175Arras, "A Case Approach," 123.

Whether this is also a problem for contemporary uses of casuistry is difficult to assess due to the limited information I could find. However, it seems to me that the assumptions of 'superficial consensus' and 'analogical reasoning' are the core of casuistry and thus a necessary part of any casuistry, including contemporary forms. At the very least any 'new' form of casuistry will have to find a solution to these clashing assumptions for it to be consistent.

4.2 The second criteria: Moral justification

The second criteria that is needed, as noted in the introduction, is about moral justification – of the starting position, as well as the process and the outcome of the method – and whether the method is indeed located in the moral domain. In this area I will discuss a total of six issues, although not all are equally threatening to casuistry.

4.2.1 No specification means no moral justification

The first problem concerning consistency (under-determination, see 4.1.1) is also the first problem for moral justification. Because specifications concerning the process of reasoning and its criteria are lacking (as discussed in 4.1.1), any specifications used are not justified, and thus they can also not be morally justified.¹⁷⁶

Some examples are the use of practical wisdom, determining relevant features and drawing proper analogies (in contemporary uses an example is the apparent reliance on consequentialism in *DECs*, see 3.3).

Additionally, this lack of provided justification does not seem to be a mistake, or something that is still being worked on. It seems that proponents of classical casuistry claim that such further justification is not needed. Carson Strong for example writes that “the case comparison method [casuistry] enables us to see [...] how it might be possible to justify normative statements without having such foundation,”¹⁷⁷ and John Arras writes that “in the absence of a theoretical warrant for our moral judgements, Jonson and Toumin assert that whatever certainty we might achieve in

¹⁷⁶Ibid.

¹⁷⁷Strong, “Justification in Ethics,” 207.

matters of ethics is due entirely to our intuitive responses to paradigmatic instances of right and wrong.”¹⁷⁸

The claim that no justification is needed thus seems to be based on the assumption of a common morality, possibly paired with practical wisdom, whereby any moral judgement based on the common morality is thereby justified and in no need of further, more fundamental justification.¹⁷⁹ This would indicate that the lack of (moral) justification is in some way an (essential) part of casuistry, which – unless itself morally justified – makes the method flawed when considering its moral justification.

Until these specifications and justifications (see 4.1.1) are provided – if that is indeed possible within casuistry – a final judgement concerning the moral justification of classical casuistry will have to be postponed. The same is true for contemporary uses of casuistry, since they don't seem to give any more explanation or justification than Jonson and Toulmin do.

Perhaps a way out of this problem could be found by referring to the superficial agreement of Jonson and Toulmin. If only the final judgement is of moral importance and the reasons for it or the reasoning that led to it are not, then there would be no need to be transparent about these reasons. This, however, makes me wonder whether casuistry, with this addition, could ever function in practice, for transparency is also a tool of reflection and correction. This could bring us closer to the critique that casuistry is insufficiently critical (see 4.2.6).

4.2.2 The moral domain

Whether casuistry takes place within the domain of morality is, as already said in the introduction, a complicated question, for what is morality? A more specific question that could be asked in this respect is how moral problems or dilemma's are distinguished from non-moral problems.¹⁸⁰

An example of a case given by Loretta Kopelman is that it is clear that a child who is about to undergo a (painful) surgery, should be given anaesthetics.¹⁸¹ I wonder whether this, in the core is really a moral case. For it could also be argued that the child should be given anaesthetics because otherwise it will scream and won't be able to sit still, thus making the surgery impossible. This is a

178Arras, “Common Law Morality.”

179Strong, “Justification in Ethics,” 207–208.

180Arras, “Getting down to Cases,” 38.

181Kopelman, “Case Method and Casuistry,” 23.

prudential way to explain why this case is so clear. Why do we need to resort to morality? Perhaps I am being too sceptical in asking this question, and I do see that there is a moral aspect to the case in the sense of suffering – perhaps of an (innocent) child, perhaps unnecessary – but what I do not see is any justification why the moral approach is better suited to, or more appropriate in, this case. Which is exactly the question that needs to be answered to find out if casuistry (or any other method) functions from within the moral domain or not.

This question briefly came up in 2.3, where the answer of classical casuistry seemed to be that morality is intuitionist in some sense; our intuitions about cases matter, and principles also seem to be derived from these intuitions (also see 2.5). Again, though, Casuistry does not define 'morality', formulate a list of morally relevant factors, nor provide it with moral justification. Which makes it quit impossible to asses whether the process of casuistry really takes place in the domain of morality, without basing judgements on factors that are morally irrelevant. In order to assess casuistry concerning this aspect of moral functioning, it would have to be shown that what the method does indeed falls within the moral domain.

For contemporary casuistry a similar worry can be made. In the information I found it was clear that indeed a lot of prudential criteria are used in the reasoning process. One example is that the law is always one of the aspects, which in my view is a prudential consideration. Of course an argument could be made concerning the relation of law to morality, and one could even go so far as to argue that following the law is the morally right thing to do, but that is not sufficient in this context. First of all, (contemporary) casuistry does not make this argumentation, and secondly I think law will always be prudential (or at least have a significant prudential aspect) because not following the law results in (chance of) punishment, and avoiding punishment is (I think) always a prudential consideration.

It thus seems that both classical casuistry and contemporary uses of it might be too concerned with prudential or other non-moral factors to be considered a moral method. More information is needed – both about the method and about what the moral domain is – however, in order to make a real, or final, judgement about this.

4.2.3 Casuistry as an amoral method of reasoning?

Because there are some uncertainties as to what Jonson and Toulmin exactly have in mind with their casuistry, I would like to address a somewhat alternative interpretation. This is that the aim of casuistry is to be a method of reasoning that derives its principles from existing theories and does not pose to be a moral method on its own (this was also discussed in 2.3.2). It would then become more of an 'engine of thought' or a 'means of organizing cases', rather than a 'moral compass' or an 'independent and higher ground of moral justification'.¹⁸² This would still mean many more clarifications are needed (as discussed in 4.1.1), but the lack of (moral) justification would no longer be a problem because the justification then comes from the used/underlying theories. Casuistry, so described, would thus not be a moral method on its own.

There are indications in the work of Jonson and Toulmin to support this kind of interpretation, as can be read in 2.6. On the other hand, however, this interpretation could also be claimed to conflict with their work, for example with their reliance on practical wisdom; if casuistry is just a tool, then it should be neutral and practical wisdom (as Aristotle's 'prhronesis') requires moral justification and is thus not neutral.

Other (critical) authors also seem to think that this alternative interpretation is not correct, as for example the quote from John Arras in 2.6 points out; that casuistry is an account of where moral principles come from.¹⁸³

4.2.4 Phronesis, intuitionism, and bias

A core assumption of casuistry (I think both classical and contemporary forms) is 'phronesis'. This starts with the idea that abstract principles or theories always need interpretation in their application to real life, and then assumes that such interpretation is guided by intuition, rather than rules (see 2.1 and 2.5). However, what this intuition, or practical wisdom, really is or how we can recognize it remains unclear, and there are (subsequently) several problems with it.

The first problem, as mentioned in 2.6, is that not everyone sees morality as intuitionistic and thus as a field where practical wisdom is an adequate tool. This is a paradigm meta-ethical question, because it asks about the nature of morality itself; science or experience. This question I cannot even begin to answer here, however.

The second problem is whether it is possible to explain in more detail what our practical

¹⁸²Arras, "Getting down to Cases," 41; Arras, "A Case Approach," 123; Tomlinson, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?," 7–8.

¹⁸³Arras, "Getting down to Cases," 31.

wisdom does, or how it works. If we cannot do this, then we are stuck with practical wisdom as a black-box concept; the box has input and output, but we have no idea what happens in the box itself, and thus how the input is used to yield the output. This means we can not know whether what happens in the box (what practical wisdom does) is morally justified or not. This would be a significant problem for a moral method.

A final problem is that it is even unclear whether practical wisdom could function as is required for casuistry, considering all we know on bias, prejudice and other distortions of our intuition or practical reasoning in everyday life (also see 2.5).¹⁸⁴

For example, in a fairly recent psychological study a significant order-effect on moral judgement was found, meaning that the order in which cases were presented had a significant influence on how they were judged, both by non-academics, academics and philosophers.¹⁸⁵ While this study is about moral ad hoc reasoning and expertise of philosophers, it shows that moral reasoning even in philosophers – who are presumably more trained in practical reasoning – is vulnerable to distorting influences.

Another striking example is found in the field of animal ethics, where many conflicts can be uncovered between keeping pets, eating meat, standing up against animal cruelty (experimentation, bio industry, hunting), buying animal products (tested on animals, or made with animals cruelty), donating money to save endangered species, etc.¹⁸⁶ Especially noteworthy is that cuteness – while overall considered morally irrelevant – is probably one of the most important factors in our behaviour towards animals, for example “one of the biggest factors in how much money people say they would donate to help an endangered species is the size of the animal’s eyes.”¹⁸⁷

Besides being influenced by such biases, we also seem to have a huge capacity to ignore inconsistencies we do find in our thinking.¹⁸⁸

This all indicates that we need some way to structure our moral reasoning to be able to avoid these biases and inconsistencies in our practical reasoning, in other words “we need to address problems of bias in order to use case methods to reach morally justifiable conclusions.”¹⁸⁹ The question is whether casuistry (or perhaps other applied ethical methods) support us in that or that their results

184Kopelman, “Case Method and Casuistry,” 21, 27, 33.

185Eric Schwitzgebel and Fiery Cushman, “Expertise in Moral Reasoning? Order Effects on Moral Judgement in Professional Philosophers and Non-Philosophers,” *Mind & Language* 27, no. 2 (April 2012): 135–53.

186Hal Herzog, *Some We Love, Some We Hate, Some We Eat. Who It’s so Hard to Think Straight about Animals* (HarperCollins e-books, 2010), 5–8, 8–12, 138–141, 141–144, 147–149, 150–151.

187Ibid., 25.

188Ibid., 152.

189Kopelman, “Case Method and Casuistry,” 21.

are actually (partly) based on our distorted, and unjustified, reasoning.

4.2.5 Superficial discussion ignores important questions

A critique, made by John Arras, is that by ignoring deeper arguments, reasons and disagreements we also ignore “important global questions bearing on who we are and what kind of society we want.”¹⁹⁰ This is a problem because the questions – or rather, the answers we give to them – tell us what we think is important to aim for in moral reasoning; what values are important, what constitutes 'a good life', ect. Without discussing these questions, and finding answers to them, we don't even have a moral aim to reason towards.

4.2.6 Casuistry cannot be critical

A final problem with classical casuistry is that many opposing authors claim that the method cannot be critical: because principles (the bases for moral judgements) are derived from practice, intuition, and everyday life, including all its cultural influences and biases, casuistical judgements will simply reflect this at all times and can thus not be critical towards this foundation.¹⁹¹ It could be said that casuistry is a method that adheres to the saying 'garbage in, garbage out'; if the starting intuitions and maxims are flawed, then so are the resulting judgements, with no way to control for that.

The question is how important this problem is and where it fits in; are uncritical methods inconsistent, or do moral methods perhaps always have to be critical? It also matters how casuistry is interpreted; if it were formulated as a method of (mere) applications, as proposed in 4.2.3, then its critical nature as well as all (moral) justification would be drawn for the used theories instead of having to be present in casuistry itself.

However, this problem emerges again, possibly even stronger, when we look at contemporary uses of casuistry. Without any transparency, there can be no control or reflection from the outside and thus possibilities for critical reflection are significantly limited (see 3.4); only the people in the committee can take part. This could thus be a weakness of casuistry in practice.

¹⁹⁰Arras, “Getting down to Cases,” 47.

¹⁹¹Arras, “A Case Approach,” 120; Arras, “Getting down to Cases,” 45–46; Hanson, “Casuistry in a Pluralistic Society,” 108; Tomlinson, “Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?,” 14, 16–17.

4.3 Summary

In this chapter, important issues – concerning casuistry and its consistency and moral justification – have been discussed. First of all there is the problem that casuistry, both in its classical and contemporary form, gives too little specification which makes it under-determined. The consequence of this is that the method cannot be assessed on overall consistency; because assumptions are simply not known (4.1.1). However, an even more problematic consequence is that no moral justification can be provided for unspecified assumptions, and thus, because it lacks specification the method of casuistry also lacks moral justification (4.2.1).

The second, basic, and detrimental problem discussed lay in some of the assumptions that are known of the method. Classical casuistry works in its core with 'superficial agreement' and 'analogical reasoning', but these two core assumptions are inconsistent: superficial agreement prevents analogical reasoning from being affective (4.1.2).

Also there was the complex problem of the moral domain; because it is unclear what the moral domain is, it is equally unclear whether casuistry works from within that domain or not (4.2.2). A subsequent attempt to define casuistry as an amoral method seemed not to correspond to the descriptions of Jonson and Toulmin (4.2.3).

Then the concept of 'phronesis' came with several issues (4.2.4). First I noted that the use of this kind of practical wisdom is not theory-neutral and thus is in need of moral justification, which casuistry does not provide. Then I noted that it has not been specified what happens in the 'black-box of practical wisdom and that it would be a significant problem for casuistry if such specification is not or cannot be provided. Finally I discussed the problems concerning bias, prejudice and other forms of distortion of our practical wisdom in every life. If it could ever be a tool for moral reasoning than practical wisdom will have to be protected against these distortions, but it seems uncertain at best whether that is possible.

Finally, there were two more issues, namely that ignoring the deeper questions obstructs the formulation of moral aims (4.2.5), and that casuistry might be a conservative and non-critical method, which might not befit a moral method (4.2.6).

It thus seems there are many problems plaguing casuistry, both in its classical form and in contemporary uses. Some may be solvable, but others seem to be deeply rooted in the core of what the method is, and may thus only be useful in creating a new, better, method, rather than to help improve casuistry.

5. Conclusion

The goal of this thesis was to investigate the assumptions and implications of the applied ethical method of casuistry. In order to do that I started by following Jonson and Toulmin's *The Abuse of Casuistry*, in which the method of casuistry (as Jonson and Toulmin see it) is explained in detail. I named this 'classical casuistry' and opposed that to contemporary uses of the method. Investigating contemporary casuistry, however, was a difficult endeavour. I did not manage to find much detailed information about what contemporary ethics committees do, and whether that should or should not be counted as a form of casuistry.

Within these two chapters I noted several important assumptions and points of discussion, which I worked out further in the discussion. I noted a few significant problems with both classical and contemporary casuistry. One (detrimental) problem for classical casuistry is the clash between two of its core assumptions; that superficial agreement undermines successful reasoning by analogy. Because these both seem to be core assumptions this problem may be impossible to solve.

Another important problem that I noted was that casuistry seems to be a widely under-determined method, which makes it dysfunctional because it remains unclear what is supposed to happen in the reasoning process. Additionally, undetermined content is not morally justified and thus casuistry as a whole, being vastly under-determined, is not morally justified.

And finally, the concept of 'phronesis' gave rise to some difficult questions. For the assessment of casuistry it is most problematic that practical wisdom seems to be vulnerable or even prone to bias, prejudice, and other forms of distortion. This seems to make it a poor tool for moral reasoning. Additionally, if it cannot be specified what exactly our practical wisdom does then it becomes a black-box concept with no possibility for critical reflection.

These three problems alone seem to make casuistry as it is – both in its classical as in its contemporary forms – not only not morally justified, but inconsistent in its core assumptions as well. Perhaps there are ways to solve these problems, although I am not sure if casuistry can be saved in that process. Discussing these problems, however, might bring us closer to an applied ethical method that actually is complete, consistent, and morally justified.

Two of the discussed issues might help with with that, although they will need much more work. The first one is that a lot is still unclear about casuistry, especially about its contemporary use. To improve casuistry – or create a better method – it would thus be useful, or even necessary, to do a

more thorough investigation of what really happens within the field(s) of applied ethics. For example what exactly ethical committees do.

The second issue is a meta-ethical issue, namely how to define 'the moral domain' and with it what it means for a method to function within this domain. This would require an in-depth investigation or discussion into what morality is, as well as the more practical endeavour of formulating criteria to constitute a 'moral method'. In this thesis I tried to do this with the two basic criteria of 'consistency' and 'moral justification'. Perhaps these criteria are indeed correct, but I think at least more – or more specific – criteria are needed. Personally I do not think it is possible to assess moral methods without this kind of meta-ethical investigation. That, however, is a subject for another time and place.

Finally, aside from this conclusion for casuistry (or other methods), the discussion also offered an issue for a wider perspective, namely the field of applied ethics in general and its relation to meta-ethics.

I noted that it seemed like the lack of specification in casuistry might be an issue that is related to the practical nature of applied ethics. However, if practices in applied ethics in general indeed try to keep away from deep argumentation and extensive theory – for the purpose of keeping as close as possible to practice – there is always the threat that too little is explained and justified. Especially moral justification is important here since we are still talking about ethics, even if it is practical rather than theoretical.

If under-determination is a part of applied ethics, then other significant threats looms. If the deeper discussions and questions are not considered then it will be unknown what 'morality' even means, but also (more practical) what the morally right things are that we should aim for in applied ethics. This brings us back to the meta-ethical investigation I just proposed. If indeed applied ethics and its methods cannot function or be morally justified without deep theoretical forethought, then practical ethics – without eye for meta-ethics – is not possible. This, I think, is worth investigating more.

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