

Lecture Notes, 2004/2005 (Code: Med-02.03-v1-11.04)

Medical Law

Topic 2, (of 10) **Lecture 3** (of 4):

Introduction to Medical Ethics: (3);

Consequentialist / Utilitarian Theories

Aim:

To outline elements of a particular consequentialist theory of ethics: utilitarianism.

Objectives:

After careful study of this topic you should be able to:

1. Explain what is meant by consequentialism and utilitarianism and distinguish utilitarian theories from deontological theories;
2. Discuss the criteria on which the felicific calculus is based;
3. Discuss the claimed advantages of utilitarianism over deontological theories.

Consequentialist or Utilitarian Theories

The essence of a consequentialist theory is that it is the *consequences* of a given action which determine whether it is right or wrong and not the motive from which it is done. The most prominent consequentialist theory is *Utilitarianism*. Utilitarianism is traditionally associated with happiness or pleasure. Accordingly, if the consequence of an act is, for example, an increase of pleasure over pain, then the act is of positive moral value and it is 'right' to perform it. However, as 'pleasure' or 'hedonism' is such a simplistic yardstick, it has become regarded as somewhat crude and other measures of utility, such as a different increase in value over disvalue, or, say, a decrease in discomfort, have become regarded as legitimate. It may not be clear, however, what distinguishes these other values from 'happiness' or 'hedonism.' As a result, *Seedhouse* (*Ethics: The Heart of Health Care*, 2/e, 1998, p124) contends that at times it is "artificial to distinguish between utilitarianism and consequentialism".

With the determining factor in assessing whether an act is right or wrong being based on the principle of *utility*, it is noteworthy that this principle is simply stated as: *an action is right in so far as it tends to produce the greatest happiness for the greatest number of people.*

Beauchamp & Childress (*Principles of Biomedical Ethics*, 4/e, 1994) say that this equates with:

“‘The end justifies the means’ though..utilitarianism is considerably more sophisticated and refined [than this and they] use utilitarianism to refer to the moral theory that *there is one and only one basic principle in ethics, the principle of utility*, which asserts that we ought always to produce the greatest possible balance of value over disvalue (or the least possible balance of disvalue, if only undesirable results can be achieved).”

The ‘Felicific’ (or Hedonic) Calculus

According to *Bentham*, man is served by two sovereign masters: pain and pleasure. Every individual will seek to choose pleasure and try to avoid pain. *Harris (Legal Philosophies)* adds:

The happiness of an individual will be augmented if there is an addition to the sum total of his pleasures greater than any addition to the sum total of his pains. ... [and indeed] ... the happiness of the community will be increased if the total of all the pleasures of all its members is augmented to a greater extent than their pains.

Bentham lists fourteen pleasures and twelve pains as a comprehensive account of happiness-relevant consequences. When assessing the rightness of any proposed action, one notes which items on the list will result from it, and measures the value of each particular lot of pleasure or pain by reference to seven criteria: intensity; duration; certainty; propinquity; fecundity; purity; and extent.

The seven criteria are known as the ‘*felicific calculus*’. *Bentham* was of the opinion that *the felicific calculus was that ‘on which the whole fabric of morals and legislation may be seen to rest’*.

That there appears to be both a common basis for law and morals and, frequently, a ‘special relationship’ between law and morals, is an opinion that has found support in law, as expressed by *Coleridge LCJ* in *R v. Instan* (1893), when he said that: “... every legal duty is founded on a moral obligation”.

Nevertheless, ‘weighing’ or ‘measuring’ or ‘gauging’ the balance of pleasure over pain is far from easy on a moral basis let alone formulating the outcome and expressing it as a legal rule. A set of criteria for gauging this ‘pleasure (or utility) balance’ – the Felicific Calculus -that aim to achieve an indication, at least, were published by *Graber et al* in *Ethical Analysis of Clinical Medicine* (1985), who describe the seven criteria as follows:

A. Four Measures of the Intrinsic Value of an Individual Experience

1. Intensity

Some measure of the immediately felt degree of pleasure or pain. For example, the excruciating pain from a kidney stone is considerably more intense than the discomfort of a mild rash. Or the pleasure one receives from watching an uproarious slapstick comedy is more intense than the pleasure of hearing a mildly amusing joke.

2. Duration

Measuring how long the feelings of pleasure or pain last. For example, in considering the unpleasant side effects of a certain medication, one must compare how long they will last to how long the pain of illness will last if the medication is not taken.

3. Certainty

A measure of how likely one is to receive the type of feelings from a certain activity. For example, for a surgical treatment it is fairly certain that one will experience discomfort as the incision heals, whereas the effectiveness of the surgery in relieving one's original source of discomfort may be more or less uncertain.

4. Propinquity

A measure of how much effort one must make to achieve the feeling - state. For example, the satisfactions (and related physical-training effects) from swimming are more remote for most people than those of walking or jogging since they must travel some distance to a pool in order to swim, whereas they could run in their own neighbourhood.

B. Two Measures of the Instrumental Value of an Individual Experience

1. Fecundity

The probability of the experience being followed by additional sensations of the same kind. For example, if one enjoys learning to play tennis, this will be a fecund or fruitful pleasure because it also equips one to gain the enjoyments of playing the game later. If some self-destructive behaviour is painful, this will be a fecund pain, since it will cause additional pain later from its destructive effects.

2. Purity

The probability of it *not* being followed by sensations of the *opposite* kind. For example, the "morning after" hangover makes last night's state of inebriation an impure pleasure. The discomfort associated with surgery, on the other hand, is impure pain, since it may bring relief from the original complaint as a consequence.

C. One Measure of the Social Dimension of Experience

1. Extent

The number of people affected by the pleasure. For example, a public health measure that relieves some painful state for many people will be greater in extent than an individual procedure that effects the state of health and happiness of only one person.

It is claimed that Utilitarianism overcomes the four major defects of the deontological theories. (These are compared and contrasted in the table overleaf. Do you agree with the claimed advantages?)

Disadvantages of Deontological Theories	Claimed Advantages of Utilitarianism
1. Relies on moral intuition to identify moral principles despite the variability and unreliability of such intuitions	Two moral intuitions are self evidently true and accepted as true by everyone: suffering is an evil and happiness a good
2. The pluralism of many Deontological theories (N.B.: Not Kant's).	Happiness and suffering are poles of a continuum: Utilitarianism is a monist theory and no pluralist potential for conflict arises
3. The absolutism of more than one principle in some pluralist theories. If these principles apply without exception any conflict between them must be irreconcilable	Monist theory: no problems of fundamental or irreconcilable moral conflict
4. Lack of a consistent and reliable decision procedure for choosing the right course of action in particular circumstances	Provides a consistent and reliable procedure for making decisions in one or other variant of the Hedonic calculus

Criticisms of Utilitarianism

Gillon suggests that Utilitarianism can be criticised “in terms of the theory’s coherence, its justification, and its results”.

Coherence

Here, the questions to be answered include: the meaning of ‘the greatest happiness of the greatest number’, and the meaning of ‘happiness and how can happiness (and suffering) be measured?’

While both **Bentham** and **Mill** thought of utility entirely in terms of happiness or pleasure, Mill did not accept Bentham’s assertion that happiness equated with mere pleasure. The reason for this was **Mill’s** belief that the happiness to be maximised was *eudaimonia* or *human flourishing*. **Mill** expressed this as: ‘*Better to be a human being dissatisfied than a pig satisfied*’.

The impracticability of the *measurement of happiness* was voiced by **Jolowicz** who said:

Happiness is not capable of quantitative measurement. No one can really say whether he gets more pleasure out of eating a mutton chop or out of the sense of duty fulfilled when he’s helped a blind man across the road. Even if this could be done in the individual how could it be done between two individuals? Still less clear is the position of the legislator.

The *scope* of the theory is not at all clear, though ‘deontological ethical theories may be just as troubled about how to incorporate nonhuman animals, very young human beings and permanently unconscious human beings within their theoretical framework’. (**Gillon**).

Justification

The apparent inability of its supporters to adduce reasons to justify utilitarianism is a major problem - though, again, no more than (and no less than) for (say) any deontological theory.

Results

Gillon sums up the objections to Utilitarianism on the basis of the results it produces by referring to an example in which he speculated that:

... if overall maximisation of welfare is the supreme moral objective the individual seems to be in permanent jeopardy before the overriding interests of society. The ordinary intuitive deontological moral principles that govern our relationships, such as the respect for the integrity of each other's persons, for each other's autonomy, for promise keeping, honesty, and openness, for fairness and justice, and for the moral importance of special relationships, all seem disposable whenever overall maximisation of welfare requires us to ignore them.

Conclusion on the Deontological and Consequentialist Theories.

Whatever type of ethical theory one supports, *Beauchamp & Childress* note that: 'It is possible from both utilitarian and deontological standpoints to defend the same principles (such as respect for autonomy and justice) and rules (such as truth telling and confidentiality) and to assign them roughly the same weight in cases of conflict.' The authors go on and develop their argument and arrive at the conclusion that:

There are ... reasons for holding that the consequentialist / deontological or utilitarian / deontological distinctions are not as significant for moral theory as they have sometimes been taken to be. It is a mistake to suppose that a single great divide separates all moral theorists neatly into consequentialists and nonconsequentialists. Moreover, consequentialists sometimes disagree with their fellow consequentialists over the defining characteristics of consequentialist theories, and the same is true of deontologists in conflict with other deontologists. This suggests that "utilitarianism" and "deontology" are such general labels that they cannot reasonably be expected to characterize any single utilitarian or deontological account. Rather, the labels point to major trends and identify families of theories.

References

Beauchamp & Childress, Principles of Biomedical Ethics, 4/e. New York: OUP, 1994, pp47-55;

Gillon, Philosophical Medical Ethics. Chichester: Wiley, 1985, Ch,4

McHale, Fox, and Murphy, Health Care Law: Text and Materials. London: Sweet & Maxwell,1997, pp71-94.

Seedhouse, Ethics: The Heart of Health Care , 2/e. Chichester: Wiley,1998, Ch.7.

Stauch, Wheat & Tingle. Sourcebook on Medical Law, 2/e. London: Cavendish, 2002, Ch.1, pp3-44.

Workshop Questions / Potential Examination Questions/part-questions:

(Revise notes on deontological theories before attempting these questions).

1. To what extent, if at all, is it an accurate claim that ‘the morality of actions in a medical context is dependent entirely upon their consequences?’

2. If we believe in respect for the principle of autonomy then we must adopt a *deontological* approach to medical ethics.

Discuss.

3. A consequentialist approach to moral decision-making should underpin all medical law.

Discuss.

4. On what moral theory would you support or deny the assertion that doctors should be permitted to lie to their patients without attracting moral condemnation or incurring legal liability? Support your answer by reference to decided case law.

5. Whether one is a consequentialist or a deontologist is dependent on the issue in question.

Discuss.

6. Which, if any, of the following would you consider to be ethically acceptable and on what grounds:

(i) a judicial decision to separate conjoined twins in the knowledge that the separation would inevitably result in the death of one twin, would give rise to an uncertain quality of life for the surviving twin and would be carried out contrary to the wishes of the parents?

(ii) a couple agreeing to have the voluntary sterilization of the male reversed so that he could father a child from his female partner (both of whom are over 40 years of age) in order that they can have a child who will be the source of tissue-compatible bone marrow for transplanting to the couples 17-year-old daughter ?

(iii) a doctor who intentionally administers medication in such a dose to a terminally ill patient that an accelerated death of that patient is a foreseeable consequence of the action?