

Principles of Biomedical Ethics SECOND EDITION

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To
Georgia, Ruth, and Don

I can no other answer make but thanks,
And thanks, and ever thanks.

Twelfth Night

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5. Talcott Parsons, *Essays in Sociological Theory*, rev. ed. (Glencoe, Ill.: The Free Press, 1954), p. 372.
6. *The American Medical Association Code of Ethics* of 1847, largely adapted from Percival's *Medical Ethics* (1803), was to a great extent a response to a crisis in public confidence. See Donald E. Konold, "History of the Codes of Medical Ethics," *Encyclopedia of Bioethics*, ed. Warren T. Reich (New York: The Free Press, 1978). Professional ethics may be formal or informal and may or may not be backed by sanctions held by a disciplinary body. Medicine is characterized by both formal codes and disciplinary bodies, but some other health professions lack disciplinary structure and sanctions (e.g., social workers).
7. See Sissela Bok, "The Tools of Bioethics," in *Ethics in Medicine: Historical Perspectives and Contemporary Concerns*, eds. Stanley Joel Reiser, Arthur J. Dyck, and William J. Curran (Cambridge, Mass.: MIT Press, 1977), pp. 137-41.
8. See George J. Annas, *The Rights of Hospital Patients: The Basic ACLU Guide to a Hospital Patient's Rights* (New York: Avon Books, 1975). For a discussion of the evolution of medical codes, see *Encyclopedia of Bioethics*, "History of the Codes of Medical Ethics."
9. See Public Law 93-348 and various publications of this Commission. See also the several volumes published by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.
10. Thomas R. Dye, *Understanding Public Policy*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1975), p. 1.
11. Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p. 34. Chaim Perelman writes, "in morals absolute preeminence cannot be given either to principles—which would make morals a deductive discipline—or to particular cases—which would make it an inductive discipline. Instead, judgments regarding particulars are compared with principles, and preference is given to one or the other according to a decision that is reached by resorting to the techniques of justification and argumentation." *The New Rhetoric and the Humanities: Essays on Rhetoric and its Applications* (Boston: D. Reidel Publishing Co., 1979), p. 33.
12. Public Law 93-348, emphasis added. See note 9 above. For a discussion of some of the issues and major positions, see James F. Childress, "The Identification of Ethical Principles," *Journal of Religious Ethics* 5 (Spring 1977): 39-68. We often use the term "moral" and "ethical" interchangeably, although some distinctions can be drawn between them. Cicero apparently formed the Latin word *moralis* (from *mores*) to translate the Greek term *ethikos*. Etymologically their meanings are similar and stress manners, character, and customs. Contemporary usage suggests some rough but not very precise distinctions between them. "Ethics" often refers to reflective and theoretical perspectives, while "morality" often refers to actual conduct and practice. Our use of the terms "ethics" and "morality" in this book respects this rough distinction, although we use the adjectives "moral" and "ethical" interchangeably.
13. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *Report and Recommendations: Research on the Fetus* (Washington, D.C.: U.S. Department of Health, Education, and Welfare, 1975), p. 66.

2

Utilitarian and Deontological Theories

A well-developed ethical theory provides a framework of principles within which an agent can determine morally appropriate actions. But in light of the tests we developed in the previous chapter, which ethical theory is most satisfactory? In this chapter, we shall concentrate on the two types of ethical theories that have received the most attention in recent years: utilitarian and deontological theories.

The classical origins of utilitarianism are found in the writings of David Hume (1711-76), Jeremy Bentham (1748-1832), and John Stuart Mill (1806-73). Utilitarianism is only one of several ethical theories that gauge the worth of actions by their ends and consequences. These theories are sometimes said to be consequentialist or teleological (derived from the Greek term *telos*, meaning "end"). They hold that morally right actions are determined by the nonmoral value, such as pleasure, friendship, knowledge, or health, produced by their performance. The value is said to be *nonmoral* because it is the general goal of such human activities as art, athletics, and academics, and thus is not a distinctly moral value as is, for example, fulfilling a moral obligation. A common feature of these theories is that duty and right conduct are subordinated to what is good, for right and duty are defined in terms of goods or that which produces goods.

By contrast, deontological theories (derived from the Greek term *deon*, meaning "duty") deny precisely what teleological theories affirm. Their classical origins are more diverse and include, for example, some religious ethics that concentrate on divine commands. However, the ethical theory of

Immanuel Kant (1734-1804) is generally regarded as the first unambiguous formulation of a deontological ethical theory. Deontologists maintain that the concept of duty is independent of the concept of good and that right actions are not determined exclusively by the production of nonmoral goods. Whereas the teleologist (and thus the utilitarian) holds that actions are determined to be right or wrong by only one of their features, viz., their consequences, the deontologist contends that even if this feature sometimes determines the rightness and wrongness of acts, it does not always do so. Other features of an act are also relevant, e.g., the fact that it involves telling a lie or breaking a promise. In this chapter we consider these two general approaches to ethics as ways to account for rightness and wrongness in biomedical ethics. Rather than considering the many different versions of teleological theories, we focus on the most prominent version, utilitarianism.

Utilitarianism

While the term "utilitarianism" is familiar to most of us, its popular usage can be confusing and misleading. It is said, for example, to be the theory that "the end justifies the means." It is also said to be the view that "we ought to promote the greatest good of the greatest number." Since "utility" is commonly translated as "usefulness," this theory is sometimes said to be the view that what is right is what is most useful. In some respects each of these popular characterizations is accurate, but utilitarianism is considerably more sophisticated and refined than such characterizations suggest. In this book the term "utilitarianism" refers to the moral theory that there is one and only one basic principle in ethics, the principle of utility. This principle asserts that, in all circumstances, we ought to produce the greatest possible balance of value over disvalue for all persons affected (or the least possible balance of disvalue if only bad results can be brought about).

An example of utilitarian thinking is the following: It is universally agreed that physicians should minimize the costs for and suffering of their patients. This obviously does not mean that physicians should never charge fees to patients or should never allow any suffering or risk of harm to patients. But it does mean that whenever there is a choice between different but equally efficacious methods of treatment, patients' benefits should be maximized and their costs and risks minimized. Any other approach would rightly be regarded as an unethical practice. This example and many similar ones from everyday life—such as designing a family budget to meet the family's needs or creating a new national park in a wilderness region—reflect a utilitarian method of calculating what should be done by balancing resources and

comparing the actual needs of everyone affected. According to this method, any decision is justified if it produces more good than any alternative would.

Utilitarians do not believe this method of calculating imposes something alien or even unusual on the moral life. They think that utilitarianism simply renders explicit and systematic what is already implicit in ordinary deliberation and justification. The utilitarian believes that such reasoning is dominant both in individual actions and in public policy. Case #33 in the Appendix discusses a 1980 policy decision announced by the twelve lay trustees of the Massachusetts General Hospital. These trustees voted not to permit heart transplants at that institution "at the present time" because "in an age where technology so pervades the medical community, there is a clear responsibility to evaluate new procedures in terms of the greatest good for the greatest number." They had decided that the costs of heart transplantation would probably outweigh its benefits. This is a splendid example of the way a utilitarian approach has filtered down from a philosophical system into practical policy decisions affecting medicine.

While this discussion reflects elementary utilitarian thinking, there are disputes among utilitarians concerning how the theory is best characterized, as well as disputes over which values are most important. Some grasp of these internal disputes is required to understand utilitarian ethics.

The concept of utility

We have seen that all utilitarians share the conviction that human actions are to be morally assessed in terms of their production of maximal nonmoral value. But how are we to determine what value could and should be produced in any given circumstance? Utilitarians agree that ultimately we ought to look to the production of what is intrinsically valuable rather than extrinsically valuable. That is, what is good in itself and not merely what is good as a means to something else ought to be produced. For example, neither undergoing nor performing an abortion is considered by anyone to be intrinsically good. However, many people would sometimes consider it intrinsically good as a means to another end, such as the restoration of an ill woman to a state of health. Utilitarians believe that we ought to seek certain experiences and conditions in life that are good in themselves without reference to their further consequences, and that all actions are ultimately to be gauged in terms of these intrinsic values. Most utilitarians would include health and freedom from pain among such values. From the utilitarian perspective, the whole point of the institution of morality is to promote such human values by maximizing benefits and minimizing harms.

An intrinsic value, then, is a value in life we wish to possess and enjoy just for its own sake and not for something else it produces. Without such values, the things we pursue as means to other things would lose their value. If, for example, a surgical procedure restores a person to a state of health, but he or she does not value health, then it is hard to understand why the surgical procedure is valuable to that person. The value of most procedures in medical practice and research derives from some other basic value, such as health. Sometimes, of course, a single item can possess both intrinsic and extrinsic value. For example, new knowledge about nuclear-powered, artificial hearts (see Case #32) may be intrinsically valuable to scientific investigators, but it may also be extrinsically valuable for thousands of (future) patients. Health also can be extrinsically good, as a means to the end of an enjoyable and productive life. Still, the main task for utilitarians is to provide an acceptable theory that explains why things are intrinsically good, and that develops categories of such goods.

Within utilitarian theories of intrinsic value a major distinction is drawn between hedonistic utilitarians and pluralistic utilitarians. Bentham and Mill are referred to as hedonistic utilitarians because they conceived utility entirely in terms of happiness or pleasure—two very broad terms that here may be taken as synonymous. Bentham, for example, viewed utility as that aspect of any object or event whereby it tends to produce different pleasures in such forms as benefit, advantage, good, and the prevention of pain.¹ Mill went to considerable lengths not to be misunderstood on the matter of what “happiness” means. He insisted that happiness does not refer to “a continuity of highly pleasurable excitement,” but rather encompasses a realistic appraisal of the pleasurable moments afforded in life, whether they take the form of tranquillity or passionate excitement.² The principle of utility for Bentham and Mill thus demands courses of action that produce the maximum possible happiness in the broad sense of the term employed by these philosophers. That is, an action ought to be performed if the sum of the happiness of all affected individuals would be maximized by the performance of that action.

Mill and Bentham knew, of course, that many human actions do not appear to be performed merely for the sake of happiness. For example, they were aware that highly motivated professionals—such as research scientists—can work themselves to the point of exhaustion for the sake of knowledge they hope to gain, even though they might have chosen different and better routes to happiness and pleasure. Mill's explanation of this phenomenon is that such persons are initially motivated by pleasure. They are at that time interested either in prestige or in money, both of which promise pleasure. Along the way, however, either the pursuit of knowledge becomes itself

productive of happiness or else such persons never stop associating their hard work with the money or prestige they hope to gain (despite their not actually deriving much, if any, pleasure from it). Mill also believed that there are qualitatively different kinds of pleasure, some worth cultivating more than others because they are intrinsically more valuable. This claim proved difficult to sustain, but Mill's problems with it cannot be considered here. The main point is that for some utilitarians, including two of its leading proponents, happiness or pleasure is the single form of intrinsic value, even though it may be analyzed into many different subtypes.

Later utilitarian philosophers have not looked favorably on this monistic conception of intrinsic value. They have argued that other values besides happiness possess intrinsic worth; among these values are friendship, knowledge, courage, health, beauty, and perhaps even certain moral qualities. According to G. E. Moore, who defended this view, even some states of consciousness can be valuable apart from their pleasantness.³ The idea that there are many kinds of intrinsic value eventually received widespread acceptance among utilitarians. Its proponents held that the greatest aggregate good, as well as all moral rightness or wrongness, is to be assessed in terms of the total range of intrinsic value ultimately produced by an action.

However, in recent philosophy, economics, and psychology, neither the approach of the hedonists nor that of the pluralists has prevailed. Both approaches seem inadequate for purposes of objectively aggregating widely different interests in order to determine where maximal value and, therefore, right action lies. The major alternative approach is to appeal to individual preferences. For this approach, the concept of utility refers not to experiences or states of affairs, but rather to an individual's actual preferences, as determined by his or her behavior. To maximize a single person's utility is to provide what that person has chosen or would choose from among the available alternatives. This approach rejects both hedonistic and pluralistic views of intrinsic value. What is intrinsically valuable is what individuals prefer to obtain, and utility is thus translated into the satisfaction of those needs and desires that individuals choose to satisfy.

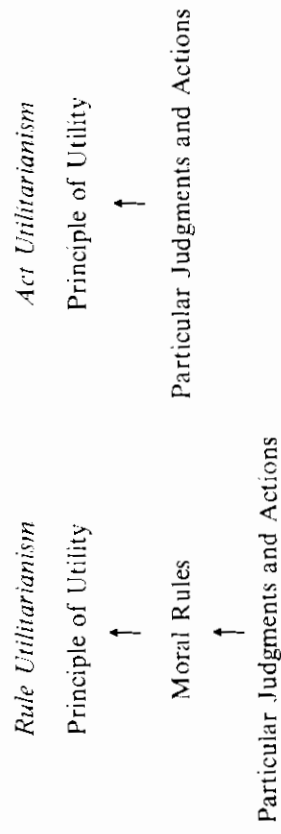
This modern approach to value has seemed to many preferable to its predecessors for two main reasons. First, recent disputes about hedonism and pluralism have proved interminable, sometimes ideological, and in the view of many, irresolvable. One's choice of a range of values seems deeply affected by personal experiences—a problem preference utilitarianism perhaps avoids in that personal preference is part of the theory. Second, to make utilitarian calculations, it is necessary in some way to measure values. In the monistic theory espoused by Bentham and Mill, for example, we must

making this calculation we would ask how much value and how much disvalue—as gauged by the preferences of those affected by our actions—would result in the lives of all affected, including ourselves. Once we have completed all these calculations for all relevant courses of action, we are morally obliged to choose the action that maximizes intrinsic value (or minimizes intrinsic disvalue) for all affected parties. Knowingly to perform any other action is to take a morally wrong course.

It would be easy to overestimate the demands of this moral theory. While we must always attempt to make accurate measurements of the preferences of others, this seldom can be done because of our limited knowledge and time. Often in everyday affairs we must act on severely limited knowledge of the consequences of our actions. The utilitarian does not condemn any sincere attempt to maximize value merely because the consequences of the attempt turn out to be less than maximal. What is important, morally speaking, is that one conscientiously attempts to determine the most favorable action. Because common sense and careful deliberation will ordinarily suffice for these calculations, utilitarians cannot be accused of demanding more than we can do, as some critics have alleged.

Act and rule utilitarianism

The next distinction to be considered is between act and rule utilitarians. For all utilitarians the principle of utility is the ultimate source of appeal for the determination of morally right and wrong actions. Controversy has arisen, however, over whether this principle is to be applied to particular *acts* in particular circumstances in order to determine which act is right or whether it is to be applied instead to *rules* of conduct that themselves determine which acts are right and wrong. Using the scheme of ascending levels of justification introduced in Chapter I, we may outline how utilitarians attempt to justify moral actions and, at the same time, illustrate how act and rule utilitarians differ:



be able to measure pleasurable and painful states and then compare one person's pleasures with another's in order to decide which is greater. Yet, it is uncertain what it means to measure and then compare the values of pleasure, health, and knowledge—or any value at all, for that matter. As Alasdair MacIntyre observes, "The happiness which belongs peculiarly to the way of life of the cloister is not the same happiness as that which belongs peculiarly to the military life. For different pleasures and different happinesses are to a large degree incommensurable."⁴ It does make sense, however, to develop a utility scale that numerically measures strengths of individual and group preferences. This approach has proved fruitful in recent discussions of health economics, to take just one of many examples.

The preference approach nonetheless is not trouble-free. A major problem of utilitarianism arises when individuals have what are, according to ordinary views about morality, morally unacceptable preferences. For example, if a skillful researcher derived supreme satisfaction from inflicting pain on animals or on human subjects in experiments, we would condemn and discount this person's preference and would seek to prevent it from being actualized. Utilitarianism based on subjective preferences is an acceptable theory only if a range of acceptable preferences can be formulated. This task has proven difficult, and may even be inconsistent with the preference approach, because human value is logically tied to preferences in the theory.

The main utilitarian response is that unacceptable desires can be distinguished. On the basis of past experience, some utilitarians maintain, we can know which preferences undermine utilitarian social objectives by creating conditions adverse to the production of human value. Such desires would then not be permitted to count in the utilitarian calculus. Thus, we would refuse to acknowledge preferences to taunt and abuse aged citizens, not only because these preferences obstruct the preferences of the aged, but because more generally such preferences destroy or undermine the achievement of human value (themselves determined by firmly established preferences). Such preferences thus deserve no status whatever in a calculus of goods. This account is presumably consistent with preference utilitarianism because both preferences and the principle of utility are sources of value. The principle of utility simply excludes some preferences on more general utilitarian grounds. However, whether this exclusion of preferences is consistent in a theory based upon preferences is debatable.

If utilitarianism could be fully worked out along the lines we have envisioned, it would give us a definite procedure for making moral choices. We would first calculate, to the best of our knowledge, the consequences that would result from our performance of the various actions open to us. In

According to the schema on the left, the rule utilitarian justifies actions and judgments by appealing to rules such as "Do not steal" and "Do not lie," which in turn are justified by appeal to utility. An act utilitarian simply skips the level of rules and justifies actions by appealing directly to the principle of utility.

The act utilitarian considers the consequences of each particular act, while the rule utilitarian considers the consequences of generally observing a rule. Accordingly, the act utilitarian asks, "What good and evil consequences will result from this action in this circumstance?" and not "What good and evil consequences will result from this sort of action *in general* in these sorts of circumstances?" The act utilitarian may see rules such as "You ought to tell the truth" as useful rules of thumb in guiding human actions, but not as prescriptions. According to this species of utilitarian, the question is always "What should I do now?" and not "What has proved generally valuable in the past?" Act utilitarians take this position because they think observance of a general rule such as truth-telling would not on some occasions be for the general good.

For this latter reason, act utilitarians regard rule utilitarians as unfaithful to the demands of the principle of utility. This principle requires that we maximize values or, in the traditional formulation, "do the greatest good for the greatest number." But there are circumstances in which abiding by a generally beneficial rule will not prove most beneficial to the persons involved, even in the long run. Why ought a rule be obeyed in individual cases if obedience will not maximize value? A contemporary utilitarian, J. J. C. Smart, has argued that the rule utilitarian cannot reply to this criticism that it would be better that everybody should obey the rule than that nobody should. This objection fails, according to Smart, because there is a third possibility between never obeying a rule and always obeying it—viz., that it should *sometimes* be obeyed.⁵ For example, physicians do not always tell the truth to their patients. They sometimes withhold information and even lie. Perhaps they invoke the legal doctrine of therapeutic privilege as a justification for their action, but they nonetheless violate general moral rules of truthfulness. They do so because they think it is better for the patient and for all concerned, and they do not think their act really undermines the moral rules. Smart's objection seems in the end reducible to the empirical prediction that we will be better off in the moral life if we sometimes obey and sometimes disobey rules, because this selective obedience will not erode either moral rules or our general respect for morality. Rules are stabilizing but dispensable guides in the moral life: that is, they are useful rules of thumb, but they are not valid for all circumstances.

An example of act-utilitarian thinking emerged in a case of research in the social sciences. (See Case #3 in Appendix I.) In order to observe homosexual behavior, a sociologist posed as a lookout for male homosexuals using isolated public facilities (so-called "tearooms"). His desire to provide a thorough study of this form of lifestyle led him to record the automobile license plate numbers of the participants so that he could subsequently locate their residences. By misrepresenting himself as a researcher pursuing a different and innocuous kind of study, he gained entrance to their homes and obtained data on family background, marital status, and the like. This research methodology has been heavily criticized not only because it put the subjects studied at risk (because the police might have obtained damaging data, including license plate numbers), but also because it involved outright deception, including a set of lies to gain entrance to private homes. In other words, it violated a number of standard moral rules prohibiting deception, lying, invading privacy, and placing other persons at risk. The sociologist involved defended his work on act-utilitarian grounds. He argued that his study would provide a valuable understanding of the motives and general behavioral patterns of those who perform homosexual acts—and also that it would help others appreciate the social pressures that can lead to homosexual activity. In short, he attempted to justify the violation of standard moral rules by appeal to the valuable and otherwise unattainable goals of his research.

Act utilitarianism has been subjected to sharp criticism in recent moral philosophy—justifiably, in our view. One major theoretical reason for its rejection relies on examples of intuitively wrong but undetectable actions. For example, suppose a physician kills by an undetectable means his rapidly deteriorating dialysis patient, who would have died in two to three months anyway, on the grounds that the patient's death would maximize utility in the circumstances. Now imagine a second physician who performs the identical action under the identical circumstances, except that the action is detected. It would seem that, according to act utilitarianism, the second action is morally wrong, whereas the first is not necessarily so. The first action plausibly does maximize utility in the circumstances. After all, the dialysis patient has little life left and is a severe financial and psychological burden to his family. In addition, the first doctor does not suffer the consequences of public criticism or even imprisonment. In the second case, however, the doctor does suffer imprisonment, and the families of both the patient and the physician may suffer the embarrassment, guilt, and anguish that usually accompany such events.

This conclusion of act utilitarianism strikes many as odd and unacceptable,

for at least two reasons. First, the killing (if wrong) seems to be equally wrong in both cases; the second action does not appear more blameworthy simply because of a chain of unpleasant consequences. Second, we are inclined to say that the consequences of the physician's action, apart from the immediate consequence for the victim, are disconnected from our *moral* assessment of the action as wrong. Act utilitarianism seems to make certain extraneous consequences such as imprisonment not only relevant when they should be irrelevant, but relevant in such a way that they should change our assessment of the moral value of the action.

A similar and by now standard form of counterexample to act utilitarianism is captured in the following imagined sequence of events: Suppose that you are mountain climbing with your closest friend, a person whom you admire and respect, and from whom you have received many favors. Now suppose you lose your grip on a rope while he is descending a sheer cliff. He falls. By the time you reach him he is dying. In these dying moments he asks that you make a secret promise to him, and you agree. He reveals a great financial secret he has been harboring. Through years of hard work and careful investments he has hoarded a million dollars. He asks you to deliver this money to an uncle who has helped him in the past. But you know that this uncle is a very rich gambler and will eventually squander the money. No one else knows about either the promise or the secret cash. On act-utilitarian principles, it would appear that you should not carry out your promise to your dying friend. You could surely put the money to much better use by giving it to charitable institutions. You would not disappoint the man to whom you made the promise because he is dead. Nor would you weaken faith in the socially useful institutions of promise-making and promise-keeping.

The point of these counterexamples is to show that act utilitarianism is inconsistent with our common convictions about moral rightness, or what might be called the common moral consciousness. We saw in Chapter I that one test of an ethical theory is its congruence with these common, but well-considered, ethical convictions. The rule utilitarian would agree with this objection from common morality on the basis of the utility of the rule of promise-keeping in general. The act utilitarian would reply that although promises usually should be kept in order to maintain a climate of trust, this consideration fails to apply in cases where more good is produced by breaking the promise, which, in any event, is not public.

Arguments that similarly stress utilitarian consequences have been used to justify research into private behavior and the use of confidential information. A defense of those practices has been constructed on the basis of predictions

about the likely consequences of curtailing research into private behavior or of prohibiting the research use of confidential information. The argument is that beneficial consequences for public health or some other public good are possible only through research methods that in some respects "invade" privacy. Methods of data collection in epidemiology, for example, may in some cases violate participant rights to privacy and confidentiality, yet alternative procedures may not be available or affordable.⁶ The act utilitarian willingly admits this inconsistency with ordinary moral convictions in all such cases, but responds that we need to revise our ordinary convictions, not to discard act utilitarianism.

Act utilitarianism certainly challenges our ordinary convictions, as Case #34 nicely indicates: It features two Harvard professors who became interested in facts and policies pertaining to high blood pressure in American society. These investigators wanted to determine the most cost-effective way to tackle the problem of controlling hypertension in the American population. As they developed their research, they discovered that, rather than launching a community-wide campaign, it is more cost-effective to treat three classes of persons in the attempt to reduce the general public health problem of high blood pressure: (1) younger men, (2) older women, and (3) those patients with very high blood pressure. When they combined these findings with other findings that large-scale, public screening and informational programs are not medically effective (and not cost-effective), they concluded that:

A community with limited resources would probably do better to concentrate its efforts on improving adherence of known hypertensives, even at a sacrifice in terms of the numbers screened. This conclusion holds even if such proadherence interventions are rather expensive and only moderately effective, and even if screening is very inexpensive. . . . Finally, screening in the regular practices [of physicians] is more cost-effective than public screening.

This recommendation, if acted on by the government, would exclude the poorest sector of the country, which is also in greatest need of medical attention, from the benefits of high blood pressure education and management. Public screening would be sacrificed in order to do a larger good for the whole community; only persons known to have high blood pressure and already in contact with a physician about their problem would be recontacted. These investigators were concerned because there seemed to them to be a possible injustice in excluding the poor and minorities by a public health endeavor aimed expressly at the economically better-off sector of society. Yet their statistics were very compelling: No matter how carefully planned

the efforts, nothing worked except programs directed at those already in touch with physicians. They knew that in light of other health needs, there would be no new federal allocations of public health money to control high blood pressure. Yet it would take massive new allocations even to begin to affect the poorer sections of society. These investigators therefore recommended what they explicitly referred to as a "utilitarian" set of criteria for allocation. This is the most difficult kind of case presented by act utilitarianism for testing our ordinary moral convictions.

The objections thus far considered are exclusively directed to act utilitarianism and cannot be used without modification to refute the rule utilitarian. According to rule utilitarians, rules themselves have a central position in morality and cannot be disregarded merely because of the exigencies of particular situations. Because of the substantial contributions made to society by the general observance of rules such as truth-telling, the rule utilitarian would not compromise them in a particular situation. Such a compromise would threaten the integrity and existence of the rule itself. For example, the act of a physician who withheld information from a patient would be immoral unless he or she were able to justify it by appeal to a moral rule strong enough to override the rule requiring that the truth be told. Such rules are selected in the first instance because their general observance would maximize social utility better than alternative rules or no rules. For the rule utilitarian, then, the conformity of an act to a valuable rule makes the action right, whereas for the act utilitarian the beneficial consequences of the act alone make it right.

A relevant example of rule-utilitarian thinking is found in Case #1 in the Appendix. In this case, which we discussed in Chapter 1, a woman was killed by a man who had previously confided to a psychiatrist his intention to kill her. The psychiatrist did attempt to have the man committed but, on grounds of patient/physician confidentiality, did not communicate the threat to the woman when the commitment attempt failed. The majority opinion in the case holds that if a patient presents considerable physical danger to another person, there is an ensuing obligation on the part of the psychiatrist to use reasonable care to protect the intended victim. This could possibly include giving the endangered individual a direct warning. Justice Tobriner goes on to argue that "public policy" in such matters is based on the relative importance of rules—in this case rules protecting confidentiality and rules protecting persons from violent assault. The judge not only appeals to the public importance of observing rules, but on utilitarian grounds holds that rules of confidentiality are less important than rules protecting persons from violent assault.

The opinion of Justice Clark, the dissenting judge in this case, expresses rule-utilitarian thinking as well. He reasons as follows:

Policy generally determines duty. . . . Overwhelming policy considerations weigh against imposing a duty on psychotherapists to warn a potential victim against harm. While offering virtually no benefit to society, such a duty will frustrate psychiatric treatment, invade fundamental patient rights, and increase violence.

After this paragraph the judge lists a series of consequence-centered reasons supporting a firm rule of confidentiality regarding information transmitted to psychiatrists. Not observing such a rule, he argues, would cause irreparable harm to "the very practice of psychiatry" and would even deter people from seeing psychiatrists. Although the judge does not expressly invoke utilitarian ethical theory in support of his views, his opinion is a fine example of rule-utilitarian reasoning.

While many rule utilitarians justify various rules by their consequences, some rule utilitarians propose that we consider the utility of *whole codes or systems of rules* rather than independent rules. Among the defenders of different versions of this position are David Hume, the eighteenth-century Scottish philosopher, and R. B. Brandt, a contemporary American philosopher.⁷ According to this approach, the rightness or wrongness of individual acts is determined by reference to moral rules that have a place in a general code or system of rules. The system is assessed as a whole in terms of its overall consequences. It is necessary to consider the consequences of moral rules not as *independent* rules, but as parts of an entire network of moral rules again using the scheme of ascending levels of justification introduced in Chapter 1, we may illustrate this version of rule utilitarianism:

Principle of Utility [Supreme Principle]



Moral Code [Whole Scheme of Rules]



Moral Rules [Single Rules]



Particular Judgments and Actions [Judgments and Actions]

While this whole-code approach resembles simple rule utilitarianism, it allegedly has additional advantages. Most importantly, proponents claim

that we are more likely to be able to maximize utility across an entire society with a whole system of rules than merely with single rules, each isolated from the consequences of other rules in the system. It would be difficult to motivate individuals in society to conform to rules if they were individually tested for their consequences, and we rarely think of morality in this way. Most of us accept a morality that determines a whole way of life, and we generally think of morality as a system of integrated principles and rules, none of which stands in isolation.⁸ It may be that *traditional* moral rules already endorsed in society will (for utilitarian reasons) be a better set of rules than some *ideal* set, but this obviously depends on the particular features of social circumstances.

It is important to note, in concluding this section, that from the rule utilitarian's perspective no rule (and hence no moral action) is ever absolutely wrong in itself, and no rule in the system of rules is absolute and unreviseable. A rule's acceptability in the system of rules depends strictly on its consequences. Even rules against killing may be revised or substantially overturned. There has, for example, been considerable discussion in recent biomedical ethics of the possibility that seriously defective newborn infants should be killed rather than merely "allowed to die," as is now the practice in some cases. (See Case #22 in the Appendix.) The rule utilitarian argues that we should support rules *permitting* such killing if the rules would maximize value; but the rule utilitarian also insists that instead there should be rules *against* such killing if those rules would maximize value. To some this utilitarian approach seems shocking and outrageous, because in theory it would permit radical shifts in our present system of moral rules. But utilitarians are not impressed by this "conservative" objection. They point to the reason why we now have the rules we do have. Specifically, we presently do not permit the killing of newborn infants because of the adverse consequences that would be produced for many affected by such actions. But if this unhappy series of consequences did not generally occur, then the utilitarian would see no reason *in principle* why such killing should be prohibited. Such cases indicate why utilitarianism is strictly a consequentialist theory and also why utilitarians view their theory as responsive to unprecedented social change.

Deontological theories

We have seen that a teleological or consequentialist theory holds that the right is a function of the good, specifically of intrinsically valuable ends or consequences. Within such a theory one determines what should be done by

asking whether an act or class of acts would probably produce the greatest possible balance of good over evil. By contrast, deontological theories (sometimes called formalist theories) hold that some features of acts other than, or in addition to, their consequences make them right or wrong. They insist that the concept of right or duty is not wholly derivative from the concept of good. In Case #4, where a therapist deceives a patient by substituting a placebo, a deontologist would consider both the feature of deception itself (not merely the effects of the deception) and the therapist's motives. For many deontologists deception is a wrong-making characteristic regardless of its consequences. As we shall see, a deontologist need not hold that deception or any other type of action is absolutely wrong and never justifiable. However, to qualify as a deontologist, one must hold that at least some acts are wrong and others right independent of their consequences. In deontological systems right-making characteristics such as fidelity to promises and contracts, gratitude for benefits received, truthfulness, and justice determine right acts and duties.

Versions of deontology

Different deontological theories compete with each other, as well as against teleological theories. It is possible to analyze these theories from several perspectives. First, we could explore the different ways deontologists try to vindicate their judgments that certain acts are right or wrong. Some moralists in religious traditions appeal to divine revelation (e.g., to God's promulgation of the Ten Commandments), while others appeal to natural law, which they contend can be known by human reason. Some philosophers, including W. D. Ross, find intuition and common sense sufficient. Still others, such as John Rawls, derive their principles from a hypothetical social contract by asking which principles rational contractors would adopt if they were placed behind a "veil of ignorance" and thus blinded to their talents, abilities, and conceptions of the good life.⁹ To analyze and assess these and other warrants for moral judgments would lead us into the thickets of metaethics (theories of the meaning and justification of ethical terms), and this pursuit would be an unnecessary detour. Most of the principles and rules that we will consider are accepted by most deontological theories and can also be discovered in the "common morality."¹⁰

Second, like utilitarian theories, deontological theories may be *monistic* or *pluralistic*. A *monistic* deontological theory holds that there is a single principle or rule from which all other rules or judgments about duty and about right and wrong can be derived. Thus, a deontologist could affirm a

single basic principle such as love, or respect for persons, or "the Golden Rule," and then derive rules such as truth-telling and fidelity from it. A contemporary example appears in Alan Donagan's *The Theory of Morality*. Donagan tries to locate the "philosophical core" of the morality of the "Hebrew-Christian tradition," or the part not dependent upon explicitly theistic beliefs. He identifies the fundamental principle of this common morality: "It is impermissible not to respect every human being, oneself or any other, as a rational creature."¹¹ Donagan believes that it is possible to derive all other moral principles and rules of the common morality in the Hebrew-Christian tradition from this fundamental principle.

Donagan is clearly indebted to Immanuel Kant's classic proposal of a single "categorical imperative" for testing all maxims of action. As an example of Kant's thesis, consider a person who desperately needs money and knows that he will not be able to borrow it unless he promises to repay it in a definite time, even though he also knows that he will not be able to repay it within this period. He decides to make a promise that he knows he will break. According to Kant, when we examine the maxim of his action—"When I think myself in want of money, I will borrow money and promise to pay it back, although I know that I cannot do so"—we discover that it cannot pass the basic test of the categorical imperative, according to which maxims must be *universalizable*. This test of universalizability is richer and more complicated than the formal test of universalizability that we introduced in Chapter I.

To be universalizable, according to Kant, a maxim must be capable of being conceived and willed without contradiction as a universal law. The above maxim about misleading promises cannot be *conceived* as a universal law, for it would contradict itself. As Kant writes,

"How would things stand if my maxim became a universal law?" I then see straight away that this maxim can never rank as a universal law of nature and be self-consistent, but must necessarily contradict itself. For the universality of a law that everyone believing himself to be in need can make any promise he pleases with the intention not to keep it would make promising, and the very purpose of promising, itself impossible, since no one would believe he was being promised anything, but would laugh at utterances of this kind as empty shams.¹²

Some maxims that can be *conceived* as universal nonetheless cannot be *willed* without contradiction. Consider, for example, the maxim of a person who is well-off but refuses to help those who are struggling. According to Kant, an agent cannot, without contradiction, will that his maxim of refusing to help become universal law, for he might be in need of others at some point, and he would certainly want their help.

Although few philosophers would hold, as Kant appears to, that the universalizability of a maxim is both necessary and sufficient for determining its acceptability, most concur that it is a necessary condition of the validity of ethical judgments, rules, and principles. Kant himself may actually have had more than one basic principle, since the several formulations he offers of the categorical imperative are not clearly equivalent. In any case, neither Kant nor others who have proposed monistic theories have worked out a compelling account of a single fundamental principle.

Pluralistic deontologists, by contrast, affirm more than one basic rule or principle. For example, W. D. Ross, a prominent twentieth-century deontologist, held that there are several basic and irreducible moral principles, such as fidelity, beneficence, and justice. While this pluralistic approach may at first glance appear more plausible than monistic approaches because it is closer to our ordinary judgments, it encounters the difficulty—as Ross recognized—of what to do when these principles or rules come into conflict. Case #2 provides an example of this problem. A physician has to determine whether to tell the truth or to break a confidence. He cannot do both, yet each of the two principles or rules commands his allegiance. The pluralistic deontologist may give us little guidance about which rules or principles take priority in such cases of conflict. For example, Ross held that the principle of non-maleficence (noninfliction of harm) takes precedence over the principle of beneficence (production of benefit) when they come into conflict, but he gave no answer about the priorities among the other principles except to say that several duties (such as keeping promises) have "a great deal of stringency." Finally, he quoted Aristotle: "the decision rests with perception."¹³ While we intuit the principles, according to Ross, we do not intuit what is right in the situation; rather we have to find "the greatest balance" of right over wrong. However, if a pluralistic deontological theory does not provide some ordering of its principles and rules or some method of determining the relative weight of moral claims, it offers little guidance in many hard decisions.

One major recent attempt to overcome some of these difficulties of pluralistic theories is John Rawls's *A Theory of Justice*, which arranges general principles of justice (not the whole of morality) in a serial or lexical order. Such a lexical order reduces the need for a pluralistic deontologist to appeal to intuition or to balance every single principle against every other principle. As already noted, Rawls argues that rational contractors behind the "veil of ignorance" in a fair bargaining situation would accept the following principles of justice: (I) the principle of equal liberty, (IIa) the difference principle (which permits inequalities in the distribution of social and economic goods

only if those inequalities will benefit everyone, especially the least advantaged, and (IIb) the principle of fair equality of opportunity. According to Rawls, it is not necessary or permissible to balance these principles because we have to satisfy (I) before we can consider (IIa) or (IIb). Thus, the principle of equal liberty has absolute weight relative to the second principle. And within the second principle, (IIb) has priority over (IIa). Rawls does not, however, propose that this sort of ordering can be extended to cover all moral principles.¹⁴

Finally, just as there can be act and rule utilitarianism, deontologists may focus on *acts* or on *rules* that cover classes of acts. Few philosophers or theologians have tried to defend act deontology, though traces of it can be seen here and there. It has been held, for example, that an individual can immediately and directly perceive what he or she ought to do by intuition, conscience, or faith in God's revelation and grace. (Someone might advise a physician "Just follow your conscience!") But act deontology is problematic for several reasons. We do not have firm grounds for confidence in our own or others' intuition, conscience, or faith to perceive right and wrong in the situation—particularly in the light of immediate pressures, lack of time for deliberation, and the power of self-interest to distort perception. Furthermore, to judge that a particular act is wrong in the situation is implicitly to appeal to a rule. *If* we are making a moral judgment when we say that act X is wrong, we are saying that all relevantly similar acts in similar circumstances are wrong. To say it is wrong to lie to a patient who asks a direct question about his prognosis is to say that it is wrong to lie in all similar circumstances. Such a statement is at least an incipient rule.

As we will see later in this chapter, in the section on rules, the act deontologist as well as the act utilitarian may recognize some "rules." But neither will accept those rules as rigidly prescriptive. For the act utilitarian, "rules" are suggestive generalizations from past experience that alert us to possible consequences of acts; they are not binding, either absolutely or even in most circumstances. For the act deontologist, "rules" may identify what people have previously viewed as intuitively required, as dictated by conscience, or as commanded by God in particular situations. Such "rules" do not, however, bind the agent in new situations, because intuition, conscience, or God may prompt new decisions. Act utilitarianism is more plausible than act deontology because, at the very least, it requires agents to try to *calculate* the good that might be produced by alternative actions. In act deontology, the agent's response to the situation is more mysterious.

For *rule deontologists*, the heart of morality is a set of binding principles and rules that classify acts as right, wrong, obligatory, or prohibited. Kant,

for example, held that several rules could be derived from the basic categorical imperative. According to Ross, there are several independent duties that can be stated as rules or principles. Some of these duties rest on one's previous acts. For example, promises and implicit promises give rise to duties of *fidelity*. And one's previous wrongful acts engender duties of *reparation*. Other duties rest on the previous acts of other persons. When they render services to us, for example, we have duties of *gratitude*. Ross goes on to develop duties of *self-improvement*, *nonmaleficence*, *beneficence*, and *justice*. Several of these duties will be central in later chapters. At the moment we only want to indicate how one version of rule deontology regards some classes of acts as right or wrong independent of their consequences.¹⁵

Rule deontology is widely represented in contemporary biomedical ethics. Frequently, major opponents are best characterized as rule deontologists whose disputes hinge on which principles or rules are primary or more stringent. For example, Paul Ramsey is a rule deontologist who believes that various principles and rules can be derived from love or covenant-fidelity; those derivative principles and rules include the sanctity of life. Because of this principle, it is permissible to override even a competent patient's refusal of lifesaving medical treatment. Thus, Ramsey recognizes the legitimacy of strong paternalism (which we discuss in Chapter 5). By contrast, both Robert Veatch and H. Tristram Engelhardt, Jr. defend the priority of the principle of liberty: A competent patient has the right to refuse even lifesaving medical treatment. Both Veatch and Engelhardt thus oppose any strong paternalism. But when Veatch and Engelhardt consider the allocation of health care resources, Veatch argues for the priority of the principle of equality and Engelhardt for the priority of the principle of liberty (i.e., noninterference with people's property, even to tax them to cover the health needs of others). In both sorts of conflicts—over refusal of lifesaving medical treatment and over justice in the allocation of health care resources—the method of analysis used by these rule deontologists would be opposed by act utilitarians such as Joseph Fletcher,¹⁶ although the practical results may in some cases be the same.

Deontology as an ethical theory

What are some of the major characteristics, as well as the strengths and weaknesses, of deontological theories as compared to utilitarian theories? First, utilitarians hold that only one moral relationship between persons is fundamental: the relationship of benefactor and beneficiary. All other im-

those who would probably be the most productive for society. However, these utilitarians usually applied this standard only to *admission* to dialysis. With a few exceptions, they held that once a commitment has been made to a patient, it would be morally improper to remove that patient from the machine to make room for a more qualified patient, one who would probably contribute comparatively more to society. Utilitarians were not willing to call for a reassessment every few weeks or months of all the patients on, and candidates for, dialysis. Of course, the rule-utilitarian view underlying this unwillingness is that a rule calling for faithfulness to those to whom we have made implicit if not explicit commitments will ultimately maximize good. To justify this rule, one could argue that a practice of frequently reassessing patients and breaking commitments to some of them would probably destroy the morale of all patients and thereby reduce the program's success rate. The rule deontologist, however, would concentrate directly on the commitment itself, apart from the consequences of respecting that commitment. Here, as elsewhere, the rule utilitarian and the rule deontologist may wind up holding similar or even identical rules, but for apparently different reasons.

Third, utilitarianism conceives the moral life in terms of means-to-ends reasoning. It asks: "What is our objective?" and "How can we most effectively and efficiently realize the objective of the production of the greatest possible good?" This conception of the moral life in terms of means to ends relates well to such empirical sciences as economics. Deontologists, by contrast, hold not only that there are standards independent of the ends for judging the means, but that it is a fundamental mistake to conceive the moral life in terms of means and ends -- a matter of the wrong starting point. Why? In part, because it seems to deontologists to presuppose a greater capacity to predict and control than we actually have. Deontologists also insist that the utilitarian model of choosing effective and efficient means to good ends fundamentally distorts the moral life. Antony Flew reflects this deontological view: "To do one's duty, or to discover what it is, is rarely if ever to achieve, or to find a way to achieve, an objective. Rather and typically, it is to meet, or to find a way to meet, claims; and also, of course, to eschew misdeeds. Promises must be kept, debts must be paid, dependents must be looked after; and stealing, lying, and cruelty must be avoided."¹⁷ From this view we are not merely agents who initiate acts for good ends; we also directly encounter the claims of others. Our responsibilities to others are more varied and more specific than the responsibility to promote good and prevent harm.

Fourth, the deontologist's standard, and perhaps most attractive, objection is that utilitarianism can lead to morally unacceptable conclusions. One test of moral theories, as we saw earlier, is their congruence with our

portant human moral relationships are derivative. Deontologists, however, take various relationships between people as more or equally basic. For them it is not sufficient to say that we should maximize the good and that each person counts as one and only one. They claim that we do not encounter other people merely as depositories of good, as beneficiaries, each one counting as one and only one; rather, we are related to them in various ways by their and our previous acts. For example, the physician does not confront each sick person merely as someone needing attention and care. If the physician has already been treating a patient, the relationship to that person is different from the relationship to another person who appears at the office door at the same time with the same ailment. The physician makes an implicit commitment to a patient by taking care of the patient and generally does not have the right to abrogate that relationship merely in order to maximize good for others. The texture of the moral life thus seems to deontologists richer and more complicated than any utilitarian model suggests, for numerous relationships with others have special moral significance: parent and child, friend and friend, promisor and promisee, as well as physician and patient. Parents assume certain obligations to their children, and the children incur certain obligations to their parents. It is not the case, of course, that utilitarians deny such relationships. The disagreement here is that deontologists think such relationships do not merely rest on a utilitarian foundation. They believe that such relationships have independent moral significance.

A second and closely connected point concerns the role of past actions in our moral assessments. Utilitarianism seems to have little room for the past in moral judgments, because of its orientation toward the present and the future. If utilitarianism considers the past from a moral standpoint, it is only because paying attention to the past appears to be important for present and future consequences. For example, to reward people for their past accomplishments tends to encourage them and others to act in similar ways in the present and the future, just as punishment discourages negative behaviors. But for a rule deontologist such as Ross, the mere fact that one has performed certain acts in the past by itself creates certain obligations, quite independent of the consequences in general for human relationships. If I have made a promise, for example, I have an obligation to fulfill it that is independent of the consequences of doing so.

The debates of a few years ago concerning kidney dialysis illustrate these points about the moral significance of interpersonal relationships and past actions. Some utilitarians held that we should distribute this scarce, life-saving resource by choosing (after the appropriate medical and psychiatric judgments) the patients who shoulder the greatest social responsibilities and

ordinary moral convictions. Deontologists pose this situation against act utilitarians: Suppose we have two acts, A and B, which appear to yield the same utilitarian score when we balance their respective good and evil results. The scales appear to be perfectly balanced. But suppose that A involves lying to a patient, while B does not. In the end, the result is the same: The patient can be expected to get well. The consistent act utilitarian must say that the acts are equally right. Now suppose that act A, which involves lying to a patient about his or her condition, is preferable on utilitarian grounds because it offers a greater chance of success in restoring the patient's health while act B, which does not involve lying, has a slightly smaller chance of success. According to act utilitarianism, A is right and obligatory and the physician should therefore lie to the patient because it is in the patient's interest. (This assumes, of course, that one can reliably predict in the circumstances that other consequences—such as a loss of confidence in the physician—will *not* eventuate.) The deontologist claims that in both cases act utilitarianism leads to morally unacceptable judgments.¹⁸

Perhaps the rule utilitarian can avoid these difficulties by holding that a fuller analysis of the consequences, including the remote or long-term consequences, leads us to assign greater weight to the rule of truth-telling. But while rule utilitarianism thus appears to be more congruent with our ordinary judgments, it does not, according to many critics, adequately account for claims of justice, which most people believe are valid apart from the consequences of adopting rules or principles of justice. For example, consider the issue of fairness in hearing the burdens of some common enterprise such as conserving water in a crisis. One possible (perhaps unrepresentative) utilitarian view is, "if a person happened to know that nearly everybody else was in fact going to make a sacrifice that no one wants to make, and if he knew that, as a result, a similar sacrifice by him was not really essential for the public welfare, then he need not make it."¹⁹ If he has good grounds for thinking that his act will not be known (and emulated) by others and that the enterprise will in no way suffer from his using water, he would have no obligation to conserve water on some act- and rule-utilitarian systems. Nevertheless, according to some interpretations of our ordinary judgments about fairness, this person acted unfairly and wrongly, regardless of the consequences. Such a case indicates that our sense of fairness or justice may not be reducible to utility.²⁰

On balance, which ethical theory is to be preferred? For one author of this volume rule utilitarianism is more defensible than any deontological theory, while for the other, rule deontology is more acceptable than any form of utilitarianism. We come to these different conclusions after testing the

various theories for their consistency and coherence, their simplicity, their completeness and comprehensiveness, and their capacity to take account of and to account for our moral experience, including our ordinary judgments. Still, for each of us, the theory that we find more satisfactory is only slightly preferable, and no theory fully satisfies all the tests.

Whether one takes the utilitarian or deontological standpoint no doubt makes a great deal of difference at many points in the moral life and in moral reflection and justification. Nevertheless, the differences can easily be over-emphasized. In fact, we find that many (not all) forms of rule utilitarianism and rule deontology lead to *identical* rules and actions. It is possible from both utilitarian and deontological standpoints to defend the *same rules* (such as truth-telling and confidentiality) and to assign them roughly the same weight. These standpoints draw even closer if utilitarians take a broad view of the values supporting the rules and consider a wide range of direct and indirect, immediate and remote consequences of classes of acts, while deontologists admit that moral principles or rules such as beneficence and non-maleficence require us to maximize good and minimize evil outcomes.

At least one substantial theoretical difference would remain, however. The rule utilitarian believes that the principle of utility justifies the other principles and rules, which have their point and rationale in the prediction that they will maximize utility over time. By contrast, the rule deontologist believes that some principles and rules are justified apart from utility and that they are binding even if they cannot be reliably predicted to maximize utility. While the rule deontologist may hope and perhaps even expect that such principles and rules will maximize good, that hope or expectation does not *justify* the principles and rules. The rule deontologist may believe that having moral rules will maximize utility, but will not believe that we can determine which rules we ought to have only by considering their utility.

Such theoretical differences *can* of course have practical significance and can even produce radically different points of view. For example, we shall see throughout this volume that utilitarians tend to support a wide variety of types of research involving human subjects on grounds of the social benefits of the research. Deontologists, by contrast, tend to be skeptical of much of this research on grounds of its actual or potential violation of principles of autonomy and respect for persons. Roughly this difference of approach characterizes the debate between McCormick and Ramsey found in Chapter 1 (although McCormick cannot be safely classified as a utilitarian).

An indication that those utilitarians and deontologists who accept a conception of the moral life as rule-governed can and sometimes do develop similar or even identical rules—rather than fragment into disagreement—is

found in the writings of Richard B. Brandt, a contemporary utilitarian philosopher. As we have seen, he argues that morality should be conceived as an ideal code consisting of a set of rules that guides the members of a society to maximize utility. While Brandt appeals to utilitarian reasoning to justify rules in the code, the following statement is revealing:

[The best code] would contain rules giving directions for recurrent situations which involve conflicts of human interests. Presumably, then, it would contain rules rather similar to W. D. Ross's list of *prima facie* obligations: rules about the keeping of promises and contracts, rules about debts of gratitude such as we may owe to our parents, and, of course, rules about not injuring other persons and about promoting the welfare of others where this does not work a comparable hardship on us.²¹

That Brandt appeals to utility and that Ross appeals to intuition to ground an identical set of rules is a significant difference on the level of ethical theory, but it may turn out to be a trivial difference when it comes to what we ought to do as a matter of moral rightness and how we should judge our actions and those of others.

Moreover, within what we would consider the most adequate rule-utilitarian theory and the most adequate rule deontology, moral agents have to face some of the same issues: What should we do when rules come into conflict? What shall we do when we cannot realize all the claims upon us or all the goods that we seek? How can we resolve these competing demands? The fact that no presently available rule utilitarianism or rule deontology adequately resolves all moral conflicts perhaps points to their incompleteness. But this incompleteness may reflect more the complexity and even the tragedy of the moral life than any failures of the theories.

The observation that even the most adequate moral systems are substantially incomplete may seem odd, for we argued in Chapter 1 that one test of any moral theory is its "completeness and comprehensiveness." Our present point is that no available moral system *fully* satisfies the ideal set forth by this criterion. In reference to consequentialist theories, Alan Donagan has correctly observed that "In all the vast and imposing body of work on consequentialist moral theories, there are many sketches and projects for constructing moral systems. But none has been constructed."²² This assessment, we suggest, applies as well to deontological theories. The most complete and comprehensive of the latter theories tend to be on special subjects, such as justice, rather than providing a comprehensive account of the moral life. (Some would contest these claims in the cases of Kant and others.)

It is quite possible that the moral life is so diverse that no theory can stand up to the completeness test even though a theory may capture some specific

domain of that life, such as our conception of "justice" or our conception of "the public interest." Yet each of the broad general ethical theories that we have examined arguably offers a valuable *perspective* from which to view morality. Perhaps we can best appreciate the contributions made by these theories by extracting what is insightful and rejecting what fails the tests set out in Chapter 1. This will be our approach in the ensuing sections of this book.

The place of rules

Many utilitarians and deontologists, as we have seen, find that the moral life requires various rules. They thus reject "situation ethics," which may take either act-deontological or act-utilitarian forms. Although there are several versions of situation ethics, many of its proponents hold that there is a single fundamental principle such as utility, love, or obedience to the divine command, and that all the moral agent has to do is discern the meaning of that principle in the situation. Thus, the agent asks what would serve the greatest good for the greatest number, what would be the most loving deed, or what God commands at the moment, without relying on intermediate rules that connect the basic principle and the situation. In defending a rule-governed concept of morality, we have implicitly rejected situation ethics by giving several reasons for favoring rule utilitarianism and rule deontology. These theories are viable in light of the tests set out in Chapter 1, while all forms of situation ethics must face insurmountable problems of coordination, cooperation, and trust. The following encounter between act utilitarians in a medical setting, as envisioned by G. J. Warnock, expresses some salient reasons for rejecting all act and situation theories:

Suppose that I, a simple Utilitarian, entrust the care of my health to a simple Utilitarian doctor. Now I know, of course, that his intentions are generally beneficent, but equally that they are not *uniquely* beneficent towards me. Thus, while he will not malevolently kill me off. I cannot be sure that he will always try to cure me of my afflictions; I can be sure only that he will do so, *unless* his assessment of the "general happiness" leads him to do otherwise. I cannot of course condemn this attitude, since it is the same as my own; but it is more than possible that I might not much like it, and might find myself put to much anxiety and fuss in trying to detect, at successive consultations, what his intentions actually were. But conspicuously, there are two things that I could not do to diminish my anxieties: I could not get him to promise, in the style of the Hippocratic Oath, always and only to deploy his skills to my advantage; nor could I usefully ask him to disclose his intentions. The reason is essentially the same in each case. Though he might, if I asked him to, promise not to kill me off, he would of course keep this promise only if he judged it best on the whole

to do so; knowing that, I could not unquestioningly rely on his keeping it; and knowing *that*, he would realize that, since I would not do so, it would matter that much less if he did not keep it. And so on, until his "promise" becomes perfectly idle. Similarly, if I ask him what his intentions are, he will answer truthfully only if he judges it best on the whole to do so; knowing that, I will not unqualifiedly believe him; and knowing *that*, he will realize that, since I will not do so, it will matter that much less if he professes intentions that he does not actually have. And so on, until my asking and his answering become a pure waste of breath. And this is quite general: if general felicitific beneficence were the only criterion, then promising and talking alike would become wholly idle pursuits. At best, as perhaps in diplomacy, what people said would become merely a part of the evidence on the basis of which one might try to decide what they really believed, or intended, or were likely to do; and it is not always obvious that there is much point in diplomacy.²³

Situational theories of ethics can recognize rules, of course; but they treat all rules as mere *summary rules* or *rules of thumb* that are expendable in decisionmaking, because they merely summarize the wisdom of the past by expressing better and worse ways to handle recurring problems. Such rules assist deliberation, but can be set aside at any time according to the demands of the situation. For example, an investigative reporter seeking facts about a potential political scandal might "have to" lie and break laws governing privacy and confidentiality; yet from the perspective of a situational theory, the reporter's acts may be justifiable because of the importance of the story. Moral and legal action-guides are thus treated as rules that may direct but do not prescribe with authority what we ought to do. Such rules illuminate but do not bind. A rule of thumb in baseball is "Don't bunt on third strike," but in some situations it would be advisable for the batter to bunt despite having two strikes. The rule is jettisoned when it does not serve us well. For act deontology, act utilitarianism, and all situational theories, moral rules approximate this rule of thumb in baseball.

We have argued against this view of moral rules. Even if some moral rules may resemble rules of thumb (e.g., some rules in professional codes), others are more binding, e.g., the rules that prohibit murder, rape, and cruelty. It is therefore important to consider whether some rules are not only *binding*, but *absolute*—that is, rules that cannot be overridden under any circumstances. Obviously, there are good reasons for being suspicious of such a view of moral rules. It undermines the freedom and discretion of moral agents (rightly emphasized in act theories), and an overly rigid adherence to rules can produce moral victims. Even if it is not true that everything depends on the consequences, it seems undeniable that in some cases, such as emergencies, the consequences of following some moral rules would be so terrible that those rules should be overridden.

Nevertheless, we have to face the possibility that some moral rules are virtually exceptionless or absolute: (a) Some rules that refer to traits of character whose development and expression are always good may be absolute. To exhort a physician colleague to "Be caring" or "Be a loving physician" or "Be conscientious" is to call for the development and expression of traits of character that are good. Of course, one may obscure the important aspects of one's responsibilities by misconstruing or too narrowly construing the demands of care, love, or conscientiousness. (In the final chapter we will examine traits of character and virtues.) (b) Some rules of action formulated to include all exceptions may be absolute. An example might be, "Always obtain the informed consent of your competent patients except in emergency or low-risk situations." There might still be considerable debate about what constitutes an "emergency" or a "low risk," but the rule would be absolute if *all* exceptions could be included. (c) Finally, some rules that do not specify exceptions may also be virtually absolute. If "murder" is taken to mean "unjustified killing," then its prohibition would be absolute; and the prohibition of cruelty can be considered absolute if the term means "Do not inflict suffering for the sake of suffering." In medical contexts, especially in some therapeutic settings, there might at first appear to be exceptions to this second prohibition; but if a therapist intentionally makes a patient suffer so that the patient will become angry and assume responsibility for his decisions, this act does not fall under the prohibition of cruelty, since the infliction of suffering is strictly a means to the valuable end of assuming responsibility.

These examples indicate that the debate about whether some rules can be defended as absolute hinges in part on the definition of moral terms such as "murder," "cruelty," and "lying." Suppose Nazi soldiers investigating a hospital in Germany in the late 1930s had asked the administrator whether there were any Jewish patients in the hospital. If the administrator insisted that the hospital had no Jewish patients, although he knew there were in fact several, how should we describe this exchange and, in particular, the administrator's statement? Consider two possibilities: (1) The administrator's statement is a *lie*, but the lie is justified because it is intended to save the lives of innocent patients. (2) The administrator's statement is not a lie, because his questioners have no right to the truth. In (1) "lying" may be defined as intentionally telling a person what one believes to be untrue in order to deceive him or her. In (2) "lying" may be defined as not giving the truth to a person to whom it is due. The first involves a "neutral and relatively definite description" of lying, while the second involves a "nonneutral and relatively indefinite description."²⁴ The first definition indicates what counts as lying or truth-telling, but not how much moral weight lying or truth-telling has. The

second definition, however, indicates how much lying or truth-telling counts, but not what is to count as lying or truth-telling. Although the second approach holds that lying is always wrong, it leaves open the question when the truth is *due* someone. The first approach could stress that the moral life often involves doing the "lesser of two evils." It may sometimes be necessary to lie in order to prevent a worse evil. Proponents of the second approach may stress the harmony rather than the conflict among various principles and rules once we appreciate their meaning and thus their range of applicability.

The importance of the meaning of central moral terms may be illustrated as follows: In Case #2, a father decided that he did not want to donate a kidney to his five-year-old daughter. His reasons are complex, and they include an uncertain prognosis for his daughter who had been on chronic renal dialysis for three years. He asked the physician to tell the other family members that he was not histocompatible, because he feared that the truth would lead to recriminations against him and would wreck the family. The physician informed the family that "medical reasons" prevented the father from being a donor. One could hold that the physician told a lie by intentionally deceiving the wife, but that it was justified because of the evil it prevented. Or one could hold that it was justified because, in a conflict of duties, the protection of confidentiality takes precedence over telling the truth to another "patient," and the father had entered into a relationship of confidentiality with the physician. Or one could hold that the "lie" was justified not because there was a stronger competing duty, but because the physician had no duty to tell the wife the truth. Because what transpired between the father and the physician was confidential, the wife had no right to that information; hence, deceiving her was not even an act of lying. In this analysis, we have not eliminated the possibility of holding that the statement to the wife was an unjustified lie. The present point is merely that different approaches to moral dilemmas and rules may hinge on different understandings of the relevant moral terms, such as "lying," as well as on their weight and stringency.

In addition to conceiving of moral rules as rules of thumb or absolute rules, a third and very important possibility is to conceive them as *binding*, but not absolutely so. W. D. Ross has usefully distinguished prima facie duties from actual duties. He uses the phrase "prima facie duty" to indicate that duties of certain kinds are on all occasions binding *unless* they are in conflict with equal or stronger duties. One's *actual duty* in the situation is determined by an examination of the weight of all the competing prima facie duties. Duties such as beneficence and promise-keeping are not absolute,

because they can be overridden under some conditions. Yet they are more than rules of thumb. Because they are always morally relevant, they constitute strong moral reasons for performing the acts in question, although they may not always prevail over all other prima facie duties. One might say that they count even when they do not win.

For example, Ross considers nonmaleficence—noninfliction of harm—as a prima facie duty. (Indeed all of the moral principles taken as primary in this book state prima facie duties in Ross's sense.) While it is plausible, as we have seen, to hold that murder is absolutely prohibited because of the meaning of "murder," it is not plausible in most moral theories to hold that killing is absolutely prohibited. Even the prohibition against killing in the Ten Commandments is more accurately translated as the prohibition of "murder" or "unjustified killing," since the Hebrew people recognized justified killing in self-defense, in war, and as a form of punishment. Killing human persons nonetheless is prima facie wrong, because it is an act of maleficence. To call "killing" prima facie wrong, then, is to say that insofar as an act involves killing, it is wrong.

Because acts have many features, other features besides killing may lead to moral conflicts. The duty not to kill someone, for example, may come into conflict with the duty of justice, which includes protecting innocent persons from aggression. The duty not to kill may also come into conflict with the duty of beneficence, the duty to benefit others—as mercy killing illustrates. It is not clear that killing a person in order to alleviate that person's pain would always be wrong, as the case of a person trapped in a burning wreck illustrates. Indeed, W. D. Ross's view that nonmaleficence always has priority over beneficence is a dubious general thesis. The point to notice about prima facie duties, however, is that insofar as an act involves killing, it has a wrong-making feature. It is always prima facie wrong and always actually wrong unless justified by another overriding prima facie duty. Yet killing may be the only way to meet some other prima facie duties; and, if so, then killing can even become an actual duty.

To choose a different example, if lying is prima facie wrong, the fact that a physician deceives a patient by giving a placebo (see Case #4) is a moral reason against the action. One traditional formulation of the rule for truth-telling in medical matters is, "When you are thinking of telling a lie, ask yourself whether it is simply and solely for the patient's benefit that you are going to tell it. If you are sure that you are acting for his good and not for your own profit, you can go ahead with a clear conscience."²⁵ From the Kantian perspective it would be impossible to *universalize* this rule without contradiction. Another difficulty is that this rule always gives beneficence

priority over both truth-telling and respect for autonomy when there is a conflict. It also fails to recognize the weight of the duty not to lie in the medical context, for it would authorize any lie for benevolent motives. But if, as we think, the duties of veracity and respecting autonomy are strong, then lying must be the most acceptable alternative in a situation in order to be justified.

Furthermore, when a *prima facie* duty, such as veracity, is outweighed or overridden, it does not simply disappear or evaporate. It leaves what Robert Nozick calls "moral traces."²⁶ The agent should not only approach such a decision conscientiously, but should also experience regret and perhaps even remorse at having to infringe this duty. The duty's "moral traces" should also lead the agent to seek to minimize the effects of the infringement. For example, in the case (#4) in which a therapist deceives a patient by giving a placebo, the deception, which in this case will later become known, will harm the patient's self-conception and his confidence in and reliance upon the therapist—just as Warnock envisions in the aforementioned "simple utilitarian" example. Other moral rules and principles require conscientious efforts to minimize such risks. At the very least, the overridden duties of veracity and respect for autonomy should require the therapist to give an explanation and an apology to the patient.

The argument in this section thus culminates in a strong endorsement of rule-based moral theories, but we note in conclusion some inherent limits of any rule-based morality (beyond those problems we noted in discussing the *prima facie* and absolute interpretations of rules). First, it can be quite unclear whether a case falls under a rule. For example, it may be unclear whether a physician's disclosure to a patient is or is not deceptive under the circumstances, and hence any rule that simply and unqualifiedly bans deception in the patient-physician relationship cannot determine one's precise moral obligation in all circumstances. Indeed, the strongest argument advanced by situational theories is that rules can be so abstract or unclear in their applicability that we are forced to call upon non-rule resources. We agree that rules can conflict without mediating rules being available to resolve the conflict, and that there will be times when we are uncertain as to whether a rule applies. But this concession does not commit us to situational ethics. To recognize the importance of casuistry, of *applying* principles and rules to particular cases, is not to deny the binding principles and rules themselves.

Second, these rules are not constructed to take account of competing factors (including nonmoral factors) that no moral system could ever fully account for. Family responsibilities, religious convictions, and professional

obligations may all on occasion compete with moral obligations. Life in all its particularity is like that (as act theories rightly, to this extent, insist), and no system of rules can make these problems vanish. It scarcely follows that we can or must dispense with general action-guides or treat all of them merely as rules of thumb. Without general rules, judgments about right and wrong can rarely if ever be made in particular circumstances. The question to be asked is where discretion rightly enters and how such rules are to be understood and applied, not whether they apply at all.²⁷

Rights

Throughout our discussion we have used terms like "right," "wrong," "obligatory," "obligation," and "duty." We have examined how principles and rules in both deontological and utilitarian theories establish our duties and obligations, as well as the rightness and wrongness of our acts. It may seem odd that we have not employed the language of *rights*, since so many moral controversies in biomedicine and public policy involve debates about such rights as a right to die or a right to reproduce. For example, controversies about abortion often pit the woman's right of privacy or right to determine the use of her body against the fetus's right to life. In discussions of health care delivery, proponents of a broad extension of medical services often appeal to the "right to health care," while opponents commonly appeal to the "rights of the medical profession." We have witnessed an explosion of rights language in numerous contexts, from biomedicine to foreign policy—as debates about international "human rights" exemplify. Indeed, our moral, political, and legal debates often appear to presuppose that no arguments or reasons can be persuasive unless they can be couched in the language of rights.

Rights language is especially congenial to the liberal individualism pervasive in our society. From Thomas Hobbes and John Locke to the present, liberal individualists have employed the language of rights to make their moral, social, and political arguments. Our Anglo-American legal tradition has broadly incorporated this language. In the tradition of liberal individualism, the language of rights has sometimes served as a means to oppose the status quo, to assert claims that demand recognition and respect, and to force social reforms. Historically it was instrumental in securing certain freedoms from established orders of religion, society, and state—e.g., freedom of the press. Although statements of fundamental rights are shared across many societies, they are not universally accepted. Indeed, some languages, such as ancient Hebrew and Greek, do not have equivalent expressions for

Some philosophers distinguish the *violation* of a right from the *infringement* of a right.²⁹ "Violation" refers to an *unjustified* action against a right, while "infringement" refers to a *justified* action overriding a right. When a (prima facie) right is justifiably overridden, it is therefore infringed but not violated. Just as prima facie principles and rules stating duties do not disappear when they are justifiably overridden, so rights do not disappear when they are infringed. They continue to have an impact on the action, often by requiring that the infringement proceed in certain ways (for example, if a right of noninterference is overridden, it still requires that the least restrictive alternative be used) or by requiring an explanation and even compensation to the right holder. Even though the right holder has only a prima facie right, he or she retains that right even if it is justifiably overridden or infringed.

It follows from the analysis thus far that rights express morally valid demands on human conduct. Relatedly, we believe there also exists what David Braybrooke calls "a firm but untidy correlativity" between obligations and rights, a relation that makes it possible to analyze both obligations and rights in terms of principles and rules.³⁰ According to the doctrine of the "logical correlativity" of obligations and rights, a right entails that someone else has an obligation to act in certain ways.³¹ For example, if a physician agrees to take John Doe as a patient and commences treatment, he incurs an obligation to Doe that he does not have toward strangers, and Doe has certain rights against the physician. There are rights to a certain standard of care and rights in care—such as the right to refuse treatment. We thus could analyze the moral issues in the relationship between the physician and Doe either by examining the physician's duties or by examining the patient's rights, because the doctrine of the logical correlativity of rights and obligations holds that it is possible to start from a right and infer a correlative obligation, and vice versa. It indicates that we can secure the same moral content from either standpoint, that of the right or of the obligation. However, the doctrine does not tell us whether obligations are ultimately grounded in rights or vice versa, and we take no stand on this issue here.

While the doctrine of the logical correlativity of rights and duties is generally sound, there is a generalized use of "requirement," "obligation," and "duty" that sometimes appears not to imply correlative rights. For example, we sometimes refer to "duties" or "requirements" of love, charity, and self-sacrifice that do not seem to be restatable in terms of rights. It seems awkward in most instances to hold that one person can claim another person's love or charity as a matter of right. The problem is that some so-

our terms "a right" or "rights." Nevertheless, rights language is important, not only because of its symbolic significance in our society, but also because it plays a legitimate role in ethical theory. It is difficult, however, to determine the status and content of those rights that deserve recognition.

Most recent writers in ethics recognize that "rights" should be defined in terms of claims. In our framework, rights are best understood as justified claims that individuals and groups can make upon others or upon society. A right is thus analogous to property that one holds and over which one has discretion. Legal rights are claims that are justified by legal principles and rules, and moral rights are claims that are justified by moral principles and rules. A moral right, then, is a morally justified claim or entitlement—i.e., a claim or entitlement validated by moral principles and rules.²⁸ Just as obligations and duties may take many different forms (such as religious, legal, and moral obligations and duties), rights may be justified by different forms of principles and rules. For example, in dealing with the abortion issue, the Supreme Court had to determine whether the Constitution and the law embodies legal rights relevant to this issue. Because of the nature of its inquiry, the court did not confront the question of moral rights, except by implication. However, even the court recognized that moral rights and legal rights often are similar and sometimes even identical.

Are the claims designated "rights" absolute? Here we need to recall the prima facie *duties* discussed in the previous section on rules. We noted that duties are not absolute but instead make strong moral demands that may be validly overridden by more stringent competing demands in particular circumstances. The same conflicts can occur among rights—as we noticed about the fetus's right to life and the woman's right to privacy. Even the right to life cannot be plausibly maintained to be absolute, irrespective of competing claims or social conditions, as is evidenced by common moral judgments about killing in war and killing in self-defense. We have only a right not to have our life taken without sufficient justification, not an absolute right to life. This and any right can be legitimately exercised and can create actual duties on others only when the right overrides rights that compete with it. Thus, rights claims are also prima facie claims. However, philosophical and practical controversy rages not only about the weights of rights—whether they are prima facie, absolute, or only relative—but also about their meaning, their scope, and the conditions of their possession—e.g., whether fetuses and animals qualify as rights holders. (We will touch on some of these questions in subsequent chapters, although we will concentrate on duties.)

called duties and obligations express what we ought to do in the light of ideals and supererogatory actions, such as those of heroes and saints, that are somewhat inappropriately labeled *moral requirements* (probably because they are morally *demanding*). More likely, they express self-imposed duties not strictly required by morality—as when we believe that we *ought* to contribute substantially to charity, even though morality does not strictly require it. We will discuss such ideals and self-imposed requirements in the final chapter.

John Stuart Mill usefully approached this problem by employing the distinction between duties of perfect obligation and duties of imperfect obligation: "Duties of perfect obligation are those duties in virtue of which a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right."³² Mill goes on to indicate that duties of perfect obligation are duties of justice that entail rights, while duties of imperfect obligation belong to other spheres of morality: "Justice implies something which is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practice those virtues towards any given individual."³³

Both rule utilitarianism and rule deontology, as obligation-oriented theories, can incorporate the language and substance of rights. This claim may appear somewhat surprising, since some utilitarians have vigorously opposed certain conceptions of rights, and many of the strongest supporters and theoreticians of individual rights have operated within deontological frameworks. Indeed, in ordinary moral discourse, we frequently set the rights of individuals and groups in opposition to social utility. Nevertheless, it follows from the doctrine of the logical correlativity of rights and obligations that both rule utilitarianism and rule deontology are logically committed to rights as well as to obligations.³⁴

An illustration of this claim is found in Ronald Dworkin's argument about the possibility of rights within a rule-utilitarian political theory, an argument that also holds for moral theory:

A political theory might provide for a right to free speech, for example, on the hypothesis that the general acceptance of that right by courts and other political institutions would promote the highest average utility of the community in the long run. . . . If the theory provides that an official of a particular institution is justified in making a political decision, and not justified in refusing to make it, whenever that decision is necessary to protect the freedom to speak of any individual, without regard to the impact of the decision on collective goals, the theory provides free speech as a right.³⁵

Rights, according to our use of the logical correlativity thesis, may serve as constraints or "trumps" within either rule utilitarianism or rule deontology. In rule utilitarianism, they are justified by their likely contributions to utility, and Mill defended rights of autonomy and liberty in precisely these terms (as we shall see in subsequent chapters). In a deontological framework, rights are likely to be based on respect for persons, autonomy, or some similar nonutilitarian principle; rights express and embody those principles, and are not merely instrumental to the maximization of good consequences. Of course, there will be disputes about whether certain claims qualify as "rights," about their scope, and about their relative weight, but these particular disputes will probably be no more frequent or intractable between rule utilitarians and rule deontologists than among defenders of one of these two general approaches to ethical theory.

An important distinction thus far neglected is between positive rights and negative rights. As Joel Feinberg writes, "A *positive* right is a right to other persons' positive actions; a *negative* right is a right to other persons' omissions or forebearances. For every positive right I have, someone else has a duty to *do* something; for every negative right I have, someone else has a duty to *refrain* from doing something."³⁶ Examples of both sorts of rights can be found in biomedical practice and research. If there is a right to health care, it is a positive right to goods and services, grounded in the principle of justice, while the right not to be operated on without one's consent is a negative right, grounded in the principle of autonomy. The liberal individualist tradition has generally found it easier to justify negative rights, especially those that call for noninterference with liberty, than positive rights; but the recognition of welfare rights has extended the range and power of positive rights. Positive rights may be directed against other individuals or against the society as a whole.

Much confusion in moral discourse about public policies governing biomedicine can be traced to a failure to distinguish positive rights from negative rights. One example comes from the controversy surrounding the Supreme Court decisions on abortion.³⁷ Some who contend that the abortion decisions are contradictory fail to see that the Court recognized a negative right in 1973 and refused to recognize a positive right in 1977. In *Roe v. Wade* and *Doe v. Bolton* (1973), the Court ruled that a woman's right to privacy, especially in relation to her physician, gives her a right to abort her fetus within certain limits. If the decision is made within the first trimester of the pregnancy, the state may not intervene. The state, however, may regulate abortions for the protection of maternal health in the second trimester; and in the third trimester it may even prohibit abortions, except in cases of a threat to the mother's life or health. The constitutionally protected right of

privacy is here construed as a negative right. It identifies a sphere of general noninterference and limits state interference to certain specified circumstances. This right was interpreted in the *Danforth* decision (1976) to exclude a husband's veto of his wife's and her physician's decision to terminate her pregnancy. Again, the Court recognized a right of noninterference.

Many people apparently thought that the Court had also recognized a positive right—i.e., a right to have aid and assistance from the state or others in abortions. They were therefore surprised that the Court in 1977 ruled that the federal and state governments do not have to provide funds for nontherapeutic abortions; governments do not have a duty to provide such funds, and pregnant women who are seeking nontherapeutic abortions do not have a right to financial assistance. The Court's reasoning is consistent: It affirms a negative right in one decision and denies a positive right in another. Although it is possible to argue that the Court *should* have found a positive right as well as a negative right, there is no inconsistency over rights.

Opponents of the most recent decisions may, however, charge that these decisions embody a different order of inconsistency in that they affirm a positive right to financial assistance for bringing a pregnancy to term while they deny a positive right to the services necessary to terminate a pregnancy. Some opponents contend that abortion and birth are two legitimate alternative ways to deal with the condition of pregnancy. One of the strongest arguments for the view that the legislature morally ought to provide funds for poor women who seek abortions appeals to a principle of justice (cf. Chapter 6): It is unfair not to assist poor women in obtaining abortions, if other women can easily obtain them; and it is unfair for the society to try to salvage its conscience about abortion by forcing poor women to complete pregnancies that others can terminate or by forcing them to seek inexpensive and risky abortions in unsafe surroundings.

This abortion controversy, and rights claims more generally, may also be analyzed by reference to the distinction between the statements (1) "X has a right to do Y" and (2) "X acts rightly in doing Y." The distinction is between "rights" (or "a right") and "right conduct," as well as between "rights" and their "right exercise."³⁸ Sometimes when we say that a person has a right to do X, we mean that he or she does not do wrong in performing X. But often our statement that someone has a right to do X implies nothing about the morality of the act; it means only that we believe others have no right to interfere with the act. Thus, one can affirm that a woman has a moral or a legal right to have an abortion without affirming that she acts rightly in those circumstances. A society might create a legal right to abortions because of pervasive and distressing consequences of criminal prohibition (e.g.,

women seek illegal abortions under unsafe conditions); and one might argue that there is a moral right to an abortion for the same reasons. Nevertheless, it is not inconsistent to say that a woman who has this legal and moral right to have an abortion is not acting rightly in having an abortion. Perhaps her reasons are not strong enough to warrant an abortion, or perhaps she acts on false information. To say that she has a right is merely to say that no one has valid grounds to intervene in her decision.

As the controversy over abortion makes clear, many disputes that plague obligations and duties reappear in discussions of rights. For example, is there a right of privacy, and does the fetus have a right to life? How much weight do we assign to these different rights? When they come into conflict, which (prima facie) right takes precedence? Answers to these questions, which may finally be unanswerable to everyone's satisfaction, can only come through systematic reflection on moral principles and rules, including a careful examination of particular duties, obligations, and rights that allegedly have the weight of morality behind them. We shall examine such principles and rules in subsequent chapters.

Notes

1. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner Publishing Co., 1948). Cf. Principle I.3.
2. John Stuart Mill, *Utilitarianism, On Liberty, and Essay on Bentham*, ed. with an Introduction by Mary Warnock (New York: New American Library, 1974), pp. 256–78.
3. G. E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1962), pp. 90f.
4. Alasdair MacIntyre, *After Virtue* (Notre Dame, Ind.: University of Notre Dame Press, 1981), p. 62.
5. J. J. C. Smart, *An Outline of a System of Utilitarian Ethics* (Melbourne: University Press, 1961), and "Extreme and Restricted Utilitarianism," *Philosophical Quarterly*, VI (1956), as reprinted in *Contemporary Utilitarianism*, ed. M. Bayles (Garden City: Doubleday Anchor Books, 1968), especially pp. 104ff in the latter source.
6. See R. Jay Wallace, Jr., "Privacy and the Use of Data in Epidemiology," in *Ethical Issues in Social Science Research*, ed. Tom L. Beauchamp, et al. (Baltimore, Md.: Johns Hopkins University Press, 1982), pp. 274–91; see also, Leon Gordis and Ellen Gold, "Privacy, Confidentiality, and the Use of Medical Records in Research," *Science* 207 (January 11, 1980): 153–56.
7. David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Oxford University Press, 1888). Book III, Parts I and II, especially pp. 494–500. Richard B. Brandt, "Toward a Credible Form of Utilitarianism," in *Contemporary Utilitarianism*, ed. Bayles, pp. 143–86. Brandt's later views are found in his *A*

Theory of the Good and the Right (Oxford: Clarendon Press, 1979), especially Chapters 14 and 15.

8. Moral code utilitarianism also may provide a way of circumventing a prominent objection against the act/rule distinction that has been advanced by David Lyons in *Forms and Limits of Utilitarianism* (Oxford: Clarendon Press, 1965). He argues that whatever would count for an act utilitarian as a reason for *breaking* a rule would count equally for a rule utilitarian as a good reason for *emending* a rule—and hence the two come in practice to the same theory. It would be very difficult and perhaps impossible to emend an entire code with the frequency with which a rule could be validly broken by act utilitarians.

9. See W. D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930) and *The Foundations of Ethics* (Oxford: Clarendon Press, 1939); and John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

10. Utilitarians face a similar problem: Because they derive the concept of duty or right from the concept of good, it is necessary for them to define and determine what is good before they can make judgments about right and wrong. They too have various ways of defining and determining what is good, including a psychology of human desires (Mill) and intuition (Moore). For our purposes it is not essential that we examine different metaethical theories.

11. See Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977), p. 66.

12. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by H. J. Paton (New York: Harper and Row, Harper Torchbooks, 1964), pp. 90–91.

13. Ross, *The Right and the Good*, pp. 22, 41–42.

14. Rawls, *A Theory of Justice*, Pars. 8, 11, 46 (especially pp. 302–303) and 51 (especially pp. 339–40).

15. See Ross, *The Right and the Good* and *The Foundations of Ethics*.

16. See Ramsey, *The Patient as Person* (New Haven: Yale University Press, 1971), and *Ethics at the Edges of Life: Medical and Legal Intersections* (New Haven: Yale University Press, 1978); and Veatch, *Death, Dying and the Biological Revolution* (New Haven: Yale University Press, 1976) and *A Theory of Medical Ethics* (New York: Basic Books, 1981). For an analysis of Ramsey and Veatch, see James Childress, "Ethical Issues in Death and Dying," *Religious Studies Review* 4 (1978): 180–88. Among Engelhardt's various writings, see Karen Lebacqz and H. Tristram Engelhardt, Jr., "Suicide and the Patient's Right to Reject Medical Treatment," in *Death, Dying and Euthanasia*, eds. Dennis J. Horan and David Mall (Washington: University Publications of America, 1977), pp. 669–705, and Engelhardt, "Health Care Allocations: Responses to the Unjust, the Unfortunate, and the Undesirable," in *Justice and Health Care*, ed. Earl E. Shelp (Dordrecht, Holland: D. Reidel Publishing Co., 1981), pp. 121–37. Another major deontologist in biomedical ethics is Charles Fried. See his *Medical Experimentation: Personal Integrity and Social Policy* (New York: American Elsevier Publishing Co., 1974) and *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978).

17. Antony Flew, "Ends and Means," in *The Encyclopedia of Philosophy*, ed. Paul Edwards (New York: Macmillan and Free Press, 1967), vol. II, p. 510.

18. See William Frankena, *Ethics*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1973).

19. This example is quoted from Richard B. Brandt, *Ethical Theory* (Englewood Cliffs, N.J.: Prentice-Hall, 1959), p. 404. Brandt mentions the view only to reject it.

20. See Lyons, *The Forms and Limits of Utilitarianism*.

21. "Toward a Credible Form of Utilitarianism," in *Contemporary Utilitarianism*, ed. Bayles, p. 166.

22. Alan Donagan, *The Theory of Morality*, p. 191.

23. G. J. Warnock, *The Object of Morality* (London: Methuen and Co., 1971), p. 33.

24. Donald Evans, "Paul Ramsey on Exceptionless Moral Rules," *American Journal of Jurisprudence* 16 (1971): 184–214. See also Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Pantheon Books, 1978), pp. 13–16.

25. Richard C. Cabot quotes one of his teachers to this effect. See Cabot, "The Use of Truth and Falsehood in Medicine: An Experimental Study," *American Medicine* 5 (1903): 344–49, as reprinted in *Ethics in Medicine: Historical Perspectives and Contemporary Concerns*, eds. Stanley Joel Reiser, Arthur J. Dyck, and William J. Curran (Cambridge, Mass.: MIT Press, 1977), p. 213.

26. See Robert Nozick, "Moral Complications and Moral Structures," *Natural Law Forum* 13 (1968): 1–50.

27. In Stephen Toulmin's vigorous article, "The Tyranny of Principles" [*Hastings Center Report* 11 (December 1981): 31–39], it is unclear whether he is opposed to principles and rules *as such* (as his language sometimes implies) or only to *absolute* principles and rules (as his argument generally seems to indicate). For a defense of easuistry, or "clinical ethics," see Albert R. Jonsen, Mark Siegler, and William J. Winslade, *Clinical Ethics* (New York: Macmillan, 1982). But such "clinical ethics" can only be done within principles and rules, which it applies to clinical situations, even though the principles and rules do not always provide clear answers. There is then room for discretion.

28. See Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p. 67. Feinberg prefers the narrower term "validity" to the broader term "justification," since validity "is justification of a peculiar and narrow kind, namely justification within a system of rules."

29. See Rex Martin and James W. Nickel, "Recent Work on the Concept of Rights," *American Philosophical Quarterly* 17 (July 1980): 172–74. See also the discussion of rights in Theodore M. Benditt, *Rights* (Totowa, N.J.: Rowman and Littlefield, 1982).

30. David Braybrooke, "The Firm but Untidy Correlativity of Rights and Obligations," *Canadian Journal of Philosophy* 1 (March 1972): 351–63.

31. Feinberg, *Social Philosophy*, p. 61.

32. Mill, *Utilitarianism*, p. 305.

33. *Ibid.* It is still largely undecided whether we should ascribe rights to nonpersons, such as trees and animals. We have a duty not to be cruel to animals, for example, but is it appropriate to ascribe rights to them? The answer to this question will obviously depend upon one's theory of rights and their foundation. According to one theory, only entities capable of having *interests* can have rights,

and therefore trees and vegetables cannot have rights. However, both animals and future generations can be said to have interests, and therefore they can be said meaningfully to have rights. See Joel Feinberg, "The Rights of Animals and Unborn Generations," in *Philosophy and Environmental Crisis*, ed. W. T. Blackstone (Athens, Ga.: University of Georgia Press, 1974).

34. Act utilitarians, by contrast, seem committed to the translation of rights into interests and needs in order to facilitate utilitarian calculation; but rule utilitarians need not resort to this maneuver. The utilitarian critique of natural rights offered by Bentham is well-known: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts." That critique, however, was aimed at the epistemology of *natural* rights, not at all uses of the language of rights or at all developments of a theory of moral rights. Bentham's invectives were thus directed against "naturalistic" theories rather than "rights." Bentham, *Anarchical Fallacies*, in *The Collected Papers of Jeremy Bentham*, vol. 2, ed. John Bowring (Edinburgh, 1843), as reprinted in *Human Rights*, ed. A. I. Melden (Belmont, Calif.: Wadsworth Publishing Co., 1970), p. 32.
35. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp. 96–97. See also Richard Flathman's justification of the practice of rights in *The Practice of Rights* (Cambridge: Cambridge University Press, 1976).
36. Feinberg, *Social Philosophy*, p. 59. The distinction between positive and negative rights is usefully situated in the context of contemporary political affairs by Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), pp. 5ff, 35ff.
37. The relevant decisions are: *Roe v. Wade* 410 U.S. 113 (1973), *Doe v. Bolton* 410 U.S. 179 (1973), *Planned Parenthood of Missouri v. Danforth* 423 U.S. 52 (1976), *Beal v. Doe* 432 U.S. 438 (1977), *Maher v. Roe* 432 U.S. 464, *Poelker v. Doe* 432 U.S. 519 (1977).
38. See A. I. Melden, *Rights and Right Conduct* (Oxford: Basil Blackwell, 1959).

3

The Principle of Autonomy

Diverse figures in philosophy, ranging from Kant, Mill, Nietzsche, and Sartre to Robert Paul Wolff, have held that morality requires autonomous persons. Their philosophies are different, however, because they select different themes from a family of ideas associated with autonomy: rights of individual liberty and privacy, free choice, choosing for oneself, being one's own person, creating one's moral position, accepting ultimate responsibility for one's moral views, and the like. These divergent interpretations suggest a need to examine the *concept* of autonomy before trying to develop a *moral principle* of autonomy and sketching its implications for biomedical ethics.

The concept of autonomy

The autonomous person

"Autonomy" is a term derived from the Greek *autos* (self) and *nomos* (rule, governance, or law) and was first used to refer to self-rule or self-governance in Greek city-states. The most general idea of personal autonomy is still that of self-governance: being one's own person, without constraints either by another's action or by psychological or physical limitations. The autonomous person determines his or her course of action in accordance with a plan chosen by himself or herself. Such a person deliberates about and chooses plans and is capable of acting on the basis of such deliberations, just as a truly