
BIOETHICS OUTLOOK

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◆ Our leading article on page 3 concerns lying. It is written by Professor C A J Coady. Tony Coady holds the Chair of Philosophy at the University of Melbourne. His article was originally published in *Res Publica*, the journal of the Centre for Philosophy and Public Issues at the University of Melbourne.

In a world in which there often seems to be so little agreement about both what is right and wrong and what is good and evil, lying stands out as something about which we do agree. Lying - habitual lying - is wrong. One doesn't need to be outstandingly wise to know that. It is a piece of moral knowledge that comes easily. Even young children know it. Our tendency to excuse our own lies suggests we adults recognize well enough that we ought not lie.

The difficulty comes in knowing quite what is wrong with lying, or (put another way) why lying is wrong. As Aristotle said, there is a difference between knowing moral truths (for example, that lying is evil) on the one hand and appreciating the reasons why these truths are truths. On that subject readers will find Tony Coady's article instructive, thought-provoking and a pleasure to read.

◆ On page 7, Gerald Gleeson takes up one issue in Tony Coady's article: the evil of lying in the special relationships in our lives. He argues that in that context lying is a form of infidelity.

◆ On page 9, John Quilter takes up another aspect of the value of truthfulness in the health care context in his discussion of the 'Doctor's Dilemma'.

Withdrawing nutrition and hydration

On Wednesday 25th August, the John Plunkett Centre for Ethics held a public seminar at which Professor John Finnis discussed whether the withdrawal of nutrition and hydration from a patient who is in a "persistently vegetative state" was euthanasia.¹

The case under discussion was that of Anthony Bland, whose lungs were crushed in the Hillsborough Football Stadium disaster in England in 1989. Bland's brain was deprived of oxygen and he suffered severe and irreversible damage to the cerebral cortex. After intensive efforts to restore him to consciousness, he remained for several years in a 'persistently vegetative state', a state of wakefulness without awareness. Though he could breathe unaided, he could not swallow and was fed through a naso-gastric tube.

Three years after the accident at Hillsborough, he was still alive, and the Airedale General Hospital applied for declarations from the Family Division of the Supreme Court that it could "lawfully discontinue all life-sustaining treatment and medical support measures designed to keep the patient alive"... and that it could "lawfully discontinue medical treatment and thereafter need not furnish medical treatment to the patient except for the sole purpose of enabling the patient to end his life and die peacefully with the greatest dignity and

the least of pain, suffering and distress." The Court made these declarations. The case went on appeal to the Court of Appeal and to the House of Lords but in each case the appeal was rejected. Anthony Bland died soon after.

Meaning of "euthanasia"

The word "euthanasia" can be used in a quite specific way to refer to a particular kind of act, that is, it can be used to refer to the hastening of someone's death **with the intention** of relieving that person's suffering (where the hastening may be accomplished by either an act - such as the administration of a lethal injection - or an omission - such as the failure to resuscitate someone who has a cardiac arrest). On the other hand the word "euthanasia" can refer to any intervention or failure to intervene which has **the effect** of hastening a person's death. John Finnis used the word in the first, quite specific sense. (There are good philosophical reasons for refusing to use it in the second way, that is, as an umbrella term with wide scope: for that wide usage implies that a large range of morally-different practices are really all the same kind of thing.) So Finnis' question was: is the withdrawal of artificial nutrition and hydration from a patient in a persistently vegetative state a case of hastening that person's death with the intention of relieving his suffering or (to put it another way) is it relieving someone's suffering by hastening his death?

The legal judgment

John Finnis began by analysing the reasoning of the various judges who deliberated upon the case. They determined that discontinuing such treatment was proper even when chosen for the sake of hastening Bland's death. This shows that they thought of the withdrawal of artificially-supplied nutrition and hydration from Anthony Bland as a genuine case of euthanasia. How could they therefore have thought it lawful? Finnis argued that they mistakenly relied on a simple distinction between the moral significance of an act and the moral significance of an omission. They thought that an act intended to terminate a life would be unlawful but an omission intended to bring

about the same purpose would be legal. But in so thinking they ignored the legal duty of a person who undertakes to care for a dependent person to supply the necessary food, clothing, etc. John Finnis concluded that the case crossed the legal Rubicon between caring for a living patient and actively causing his death to avoid or to end his suffering.

Moral issues

The legal judgment aside, Anthony Bland's case raises deep, difficult and important moral issues. What is the moral significance of the distinction between tube feeding and feeding by means of a spoon? What does it mean, from a moral point of view, to call a medical intervention "invasive"? What is the moral difference between intending something as the object of one's action and foreseeing something as the likely or certain side-effect of one's action? In what sense does the life of a person who is irreversibly insensate and unaware have intrinsic value?

In the course of his discussion of these issues, John Finnis argued that medical treatment designed to prevent, retard or cure illness to a patient such as Anthony Bland could be discontinued without the intention to bring about his death and without the willingness to abandon him as though he were not a human being in need. That is to say, the decision to withdraw artificial nutrition and hydration from a patient in a persistent vegetative state could be an appropriate and permissible clinical judgment, that it need not be euthanasia. But he concluded by reaffirming his claim that in their reasoning about the question the House of Lords embraced the legal permissibility of euthanasia.

¹ John Finnis is an Australian who holds the chair of law and legal philosophy at the University of Oxford. For a fuller version of John Finnis' remarks, see "Bland: Crossing the Rubicon", *The Law Quarterly Review*, Vol 109, July 1993. Copies of his paper are available at the John Plunkett Centre.

B M T

The Morality of Lying

Tony Coady

Dishonesty has always been perceived in our culture, and in all cultures but the most bizarre, as a central human vice. Moreover, the specific form of dishonesty known as lying has generally been scorned, and the habitual liar treated with contempt. There are perfectly good reasons for this that I will shortly explore, but we should note at the outset that this perception is consistent with a certain hesitancy about what constitutes a lie and with the more than sneaking suspicion that there might be a number of contexts in which lying is actually justified. At the very beginning of our intellectual tradition, for instance, we find the genius of Plato deployed in defence of the politically expedient lie. In the first great Western work of political theory, "The Republic", Plato defends the idea that rulers should lie to their citizens where it is for their benefit (459c), and this follows naturally from his claim that the rulers themselves should be deceived, if possible, by a "noble lie" about their origins (414d).

Subsequent philosophical tradition has vacillated between this bold Platonic paternalism and a total rejection of lying. St Augustine and Immanuel Kant condemned lying in any circumstances, though Augustine thought some lies much graver than others. By contrast, the 19th Century moral philosopher, Henry Sidgwick, thought that the public might have to be deceived about the very nature of morality. Sidgwick thought that a certain version of utilitarianism was the real truth about how we should live, but also thought that if the world at large knew and acted upon the principle of utility then the results would be disastrous. So utilitarianism itself required that most people not act upon it. Only the elite few could be trusted to frame their actions on the basis of seeking the greatest happiness of the greatest number, and their principles should be

kept secret from the *hoi poloi* who could get on with ordinary duty and morality. Sidgwick also thought it was perfectly alright to lie to children or the sick if you thought the truth would be injurious to them. Interestingly, we are much less confident about these categories than Sidgwick and his contemporaries were, and that is partly because we are much more impressed with the value of autonomy and the associated right to have enough information to govern the direction of your own life even if you are very sick or very young.

Even some of those who thought it always wrong to lie were driven by the complex intricacies of life to acknowledge that there might be legitimate ways of speaking with intent to mislead that did not count as lies, and were sometimes morally defensible. The late medieval tradition of casuistry, so bitterly and often unfairly attacked by Pascal, devoted much ingenuity, some of it certainly twisted, to the discussion of such matters under the heading of equivocation and mental reservation. But to this I shall return.

Defining lies

It is time to look to matters definitional. Lying is a species of dishonesty. Honesty involves more than veracity, but includes it. The honest man keeps faith broadly; his word is his bond and he doesn't lie. But what are lies? Why do they matter morally? And how strict is the prohibition against them? Although theorists have differed strikingly on how to define a lie, there is a central core of agreement that a lie is at least the stating of what one believes to be false with the intention of giving an audience to understand that it is true. For some, this is not a sufficient characterisation because they think we do not lie if we speak thus to an audience which has no right, in the circumstances, to the

truth. The sort of case that raises the question of a right to the truth most dramatically and also poses the most obvious and striking challenge to the absolutist about lying was anticipated by St. Augustine. He asked in his treatise, "On Lying", whether it might be permissible to lie in order to avoid betraying "a just and innocent person" (or even a guilty one) to capital punishment. He answered firmly, though against his natural inclinations, that it was not. But others would say that the woman who tells the Nazi thugs that she has no Jews in the house though she knows she has a Jewish refugee in the cellar is not even lying because the Nazis have no right to this truth.

A right to the truth?

This definitional strategy is not merely devised to avoid a difficulty. It is based on the thought that dishonesty is a form of injustice, and that what is wrong with it is its injuring of the rights of others to the truth. This is the line taken by the great Protestant philosopher, theologian and jurist, Hugo Grotius, one of the founders of the field of international law. Here is Grotius defending this approach: "Then further, it is required that the right which is infringed belong to him with whom we converse, and not to another, just as in the case of contracts also injustice arises only from an infringement of the right of the contracting parties." And he goes on to insist that the wrong of lying resides in the injustice done to an intended audience.

One advantage of this sort of definition is that it may enable us to hold that lying is always wrong, because it excludes the most awkward cases of what seem to be good "untruths" from the category of lies. It also has the consequence, drawn by Grotius and others, that an audience can waive its rights to the truth, and that, where it has, one does not lie to eavesdroppers for whom the communication is not intended. Knowing, for instance, that your office phone is likely to be bugged by a rival corporation or by ASIO, you explain to your family in advance that any business information you tell them on that phone may well be false. You then tell them about some non-existent deal and the business rivals are bugging the phone and are deceived, but not lied to. One might, of course, say that you intended to deceive them, but I am not sure

that this is true of the case as described. In any event, since they have no right to the truth, it will not be a lie even if you do intend to deceive them.

This approach will also mean that the woman does not lie to the Nazi thugs when she tells them that there is no Jew in her house. It is, I think, possible to operate with such a concept of lying, but it strikes me as inconsistent with our actual linguistic practices, for it seems counter-intuitive to hold that the woman hasn't lied to the Nazis. So I prefer to operate with the more descriptive definition of lying, which makes no reference to rights, and which then must face up to the question of exceptions. The issue of an audience's right to the truth, or lack of it, will then come up as a central moral issue determining the wrong of lying and possibly when it is permissible to lie.

Either definition shows how absurd were the apologists for Mr. Hawke who claimed that he hadn't lied to the electorate when he said that he would serve a full term as leader from 1990 because (look!) he now is going to serve a full term after all. (They were wrong, of course, but this was his intent at the time they spoke.) If Hawke was being straight with Keating, then he lied when he said he would serve a full term even if he later changed his mind. On the other hand, if he lied to Keating then he was not lying to the electorate - and this was true even though he turned out not to serve a full term because Keating challenged again and defeated him.

What the speaker believes is all important, and, in the case of some people in public life, part of our problem seems to be that they have trouble knowing what that is at any given time.

Intent to deceive

The intent to deceive is a crucial element of the definition because we do not want to say that many jokes or literary pretences which involve falsehood are lies, or that uttering false statements in the course of testing someone's hearing are lies. Of course, some jokes are intended to deceive, albeit briefly, and much Christian tradition, especially that influenced by Augustine, has classified them as lies and

frowned upon them, whilst treating them as less sinful than many other categories of lie. But neither is all deception lying; deception is a broader category than lying and may sometimes be justified where lying is not. I cannot be obliged to make sure that everyone has true beliefs so I may very well be entitled to remain silent about the truth when it is clear that someone who might expect me to correct him is in error. Furthermore, it is possible to deceive someone by telling him the truth, for you may know he will make a false inference from your truth-telling. You may even be able to take advantage of the fact that someone does not trust your word so that by telling him the truth you may ensure that he concludes to what is false.

Liars trade upon and betray trust, usually in pursuit of self-interest, and their activities debase the currency of language and undermine the ease of communal interactions.

fundamentally unrealistic. The circumstances that challenge the rigorist position embrace the extremes of triviality and disaster. Some lies are so removed from the context of harm and benefit that they seem morally insignificant.

Someone who is embarrassed by another's effusive thanks for some kind act which cost quite a lot may nonetheless

try to stop the flow of thanks by saying untruthfully, "It was nothing really." Or we may greet a tiresome acquaintance with "How nice to see you" whilst feeling nothing but distaste for the encounter. Some of these utterances may not even be lies because the strength of convention can attach to them in ways which eliminate their force as statements or override any intent to deceive.

Legitimate lies?

Definition aside, there is the issue of morality. Lying is wrong because dishonesty is a vice. Communication is built upon trust, and so is much else that is essential to our lives together. Liars trade upon and betray this trust, usually in pursuit of self-interest, and their activities debase the currency of language and undermine the ease of communal interactions.

But is lying always morally wrong? As we have seen, some of the greatest thinkers in our tradition have thought that it is. St. Augustine and Immanuel Kant are amongst the most unyielding rigorists on this matter. Kant declared that the duty not to lie was "an unconditional duty which holds in all circumstances". Lying vitiates the source of all law and deforms the liar by destroying his human dignity and making him worse than a mere thing.

Yet so stern a position is hard to accept in several types of circumstance. Indeed, many Christian thinkers before Augustine had taught that lying was sometimes (though rarely) justified, and had pointed to instances of lying and dissembling in the Bible. The great Christian humanist, Erasmus, thought Augustine's rigorism impossible in practice, and

This point about convention is interesting, because where people do not expect a speaker to tell the truth, for reasons unconnected with his honesty, then his saying what is false may not have the force of a lie and may even produce good or prevent evil.

In the domain of modern politics, for instance, a Treasurer may be asked some direct question about a possible devaluation of the currency (which is not free-floating) in a context where refusal to answer will be taken as confirmation of a devaluation. He has, let us say, already decided to announce a devaluation the next week, but the economy will take a battering if the word is out before then. Whatever he has decided, he is expected to say "No", so the element of deception has almost disappeared. Cardinal Newman gives an interesting example, which he attributes to Burke, of someone making it clear in his utterance that it is not to be taken as a serious disavowal. The speaker has been asked for some information that he is not at liberty to reveal so he says: "Whether I had done the thing or not, I would say to you that I had not done it. But let me say: 'I did not do it.'"

At the other extreme, lying to save an innocent person or group from genuine disaster

may be justified by the very requirements of virtue which ground the prohibition on lying itself. This is especially cogent when one lies to those who are malevolently bent upon inflicting the disaster (as in the Nazi example). If we think, like Grotius, in terms of rights and injustice, then we can't help reflecting that we may be morally entitled to defend the life of the fugitive Jew by directing violence against the Nazi thug even to the point of bringing about his death. But if that is permissible, why is it forbidden to lie to him?

This point prompts the reflection that if there can be just wars (as Augustine certainly allowed) then their successful prosecution seems to require a good deal of deception of the enemy, including, in some contexts, lying. We might also reflect that warfare, and a great deal of international diplomacy, is facilitated by the practice of spying, and this practice is hardly possible without a fair degree of lying, though I have no doubt that much more is practised than is necessary or justified.

The requirements of discretion and of confidentiality can also create circumstances in which lying can seem justifiable. The medieval casuists were greatly exercised about problems arising from the confidentiality of the confessional. But much of what they say is relevant to contemporary professional codes of confidentiality. This must have been important in the context of the Inquisition where confessors could have been asked whether their penitents had confessed to heretical acts or views. Some of the casuists held that it was permissible for a confessor to answer such questions with "I don't know" thereby meaning that he didn't know in a way that could be publicly admitted. This "mental reservation" as it was called, was allowed by Soto, for instance, only because it would be generally known to any likely audience that knowledge gained in the confessional was incommunicable. Here, the mental reservation story is close to the reliance upon convention discussed earlier in the case of polite phrases.

We should be particularly wary of establishing practices of deception lest we erode the habit of truthfulness, and deceive ourselves about the necessity and value of lying.

The casuists also recognised equivocation as permissible in certain contexts, and, here, their position has some plausibility, though it was occasionally taken to absurd extremes. Equivocation involves taking advantage of an ambiguity in the question asked in order, for example, to avoid revealing a confidence. One answers truthfully according to one standard interpretation of the sentence, even though it is unlikely to be the one the audience will take. So, Raymond of Pennafort (a contemporary of Aquinas) thought that one way of dealing with the pursuers of the innocent fugitive was to reply to them in Latin with "Non est hic" which can mean either "He is not here" or "He does not eat here."

Many find the use of such ingenuity (even when strongly restricted to special circumstances, as it was by the major casuists) morally dubious, if not repugnant, and think it better to lie boldly in the exceptional cases. They may be right. Certainly, the outright lie will often afford the fugitive better protection, though the casuistic options are intended to preserve more effectively the agent's habits of speaking truthfully. It is a moot point whether the development of what the critics would see as the skills of deviousness is too great a cost to pay for risking habits of mendacity.

In any case, if we allow exceptions to the prohibition on lying, we must guard against their spreading, and we should be particularly wary of establishing practices of deception lest we erode the habit of truthfulness, and deceive ourselves about the necessity and value of lying. Confronted with the prospect of lying in a good cause it is a useful test (as Sissela Bok has suggested) to put yourself in the shoes of the victims and ask whether the lie would be acceptable to them when they know the full circumstances. This won't work, of course, where the victims are such as the Nazi pursuers; it is intended more for the cases where the justification for lying invokes the good of those deceived, as when it is proposed that one should lie to the terminally ill patient about her

condition. A parallel consideration is to see whether you could publicly defend the principle underlying the exception you propose to make. This test is particularly relevant to the deceptions said to be necessary for public life.

Some claim, following Machiavelli, that politics is so different from other areas of life that normal moral virtues do not apply to it. This might appear a comforting doctrine for politicians (though alarming for the rest of us) but the fact is that politicians themselves seldom endorse it overtly, unless they are stuck for justifications. In the case of lying, what is true is that democratic politics puts such a glare of publicity upon politicians, and such a premium upon their vote-getting capacities that they are under very strong temptation to lie their way out of trouble and into power. Rather than seek excuses for political immorality, we would do better to seek changes to the institutions of democratic politics so that there are fewer pressures to lie.

In the meantime, temptations abound. But a temptation is not a justification or an excuse. What is alarming about so much of democratic politics is the way in which politicians have come to treat their own plans or ambitions as justifying a distressing degree of lying, as if the survival of this or that politician, policy or party is tantamount to the aversion of massive disaster. The destruction of trust which this has involved is one of the principal reasons why our politicians are held in such contempt, and why the electorate is so cynical about democratic processes. A capacity to compromise and negotiate is essential to political life, but when everything, including character, is up for negotiation then the craft of politics becomes merely crafty and contempt is the proper response to it. This is the sad contempt encapsulated in Huck Finn's weary remark about politics to the slave Jim: "All kings is mostly rapscallions."

Useful reading:

Sissela Bok: *Lying, Moral Choice in Public and Private Life*, Pantheon, 1978.

Sissela Bok: *Secrets; On the Ethics of Concealment and Revelation* Vintage, 1984.

Albert R. Jonsen & Stephen Toulmin: *The Abuse of Casuistry: A History of Moral Reasoning* University of California Press, 1988.

Philip Kerr: *The Penguin Book of Lies*, Penguin, 1990.

"The Morality of Lying":

A Response

Gerald Gleeson

As Tony Coady notes, lying is that form of dishonesty which undermines the trust on which communication is built. "Liars trade upon and betray this trust ..."

For some, the evil of lying is a matter of **injustice** towards those to whom we owe the truth. Coady thinks this restrictive definition solves the difficult cases too easily. For him, the **consequences** of lying show why it is evil, for those who lie "debase the currency of language and undermine the ease of communal interactions".

Both these views of the evil of lying apply to human communication across the board. I wish to reflect on the very particular way in which truthfulness bears upon the special relationships in our lives, towards our friends, within families, in the work place. Lying in these situations is fundamentally a type of **infidelity**.

An aged relative is admitted to a hospice in her last illness. She is worried about her faithful and long time pet dog. "Is Sally alright?" - "Yes, she is being looked after by nephew John." Unfortunately, Sally has been put down, but wouldn't it be unkind to say so? It is easy to think of many more serious items of family news that one might believe should be withheld from a dying relative.

A young woman breaks her engagement. "Is there someone else?" - "No, I just need time alone to think". Yes, she has just met someone - but it would be too hurtful to say so.

When, if ever, are we justified in lying to those closest to us? Is it a mistake to believe that

sometimes it is necessary to lie to those we care about, precisely because we care about them?

Coady identifies three contexts in which we are inclined to justify lying - triviality, disaster and confidentiality. In these contexts a lie seems either insignificant, or necessary to stave off great evil, or necessary to protect some other intrinsic value such as professional discretion. None of these descriptions quite fits the lying that is motivated by care.

In the case of those who matter most to us, truthfulness is more than justice, and more than a pre-condition for fruitful communication. Truthfulness in personal relationships is a matter of disclosure. I want to be truthful because I want to ensure my heart is open to the other. "How are you going?" When a real friend asks me, I want to answer honestly. If I stick to the conventional response when I could speak more openly, I am curtailing our intimacy.

But what if the truthful response will be hurtful to the other? It is important to identify the different kinds of hurt that may be occasioned by untruthful speech. Certainly, the truth one speaks may wound the other. And refraining from speaking may only postpone the hurt, for usually the truth will out. But when I lie to the other a further hurt will ensue, for in addition to the hurtful truth itself, my heart will have been hardened. I will have introduced dishonesty as well as pain into our relationship. The other will suffer in knowing that my heart is no longer open to him. I no longer recognise him as one to whom my heart is truthfully disclosed.

My care for those who matter to me makes me want to be truthful with them, and so to prefer silence to a lie and, when the truth would wound, to search creatively for a form of words which is not untruthful, even though it fails to disclose the potentially hurtful truth.

Wittgenstein remarked: it isn't difficult to find the right gift to give a friend, it just takes time. So too, it often takes time to find the right words

which will not wound another, but will not mark the closing of my heart to the other. But what if it is not possible simply to refrain from speaking the truth? What if there isn't time to find the right words which would spare the hurt, while keeping faith? When would a lie be justified? Only, I surmise, when the lie leads to not just any good, but when it serves precisely a deeper fidelity in relationship.

Here the lie has the character of delaying the truth, or holding the truth in reserve, rather than of attacking it directly. My friend will say: "I'm glad you didn't tell me that news just before my examination (or before the operation, or till after the wedding ...)". Sometimes it is necessary to delay disclosure of the truth towards those who matter most to us, because either they or our relationship cannot yet bear it. Such situations may arise when our relationships are under stress in sickness and death, at times of crises and suffering and of the breakdown of relationships.

Of course, our relationships ought to thrive on the sharing of truth, on the disclosure of our hearts. But at times - rarely, we trust - truth must be delayed, preferably by silence, occasionally by a lie.

There is an interesting corollary to this link between fidelity and truthfulness. The closer I am to someone, the more truthful I want to be, and therefore the more serious would be the impact of a lie on our relationship. Accordingly, I do not want to expose those closest to me to the danger of having to lie to me. At times, therefore, I will refrain from asking those questions the answers to which I half suspect, and which I know may tempt the other to lie rather than to tell me a painful truth.

With those we care about, truthfulness is more than justice or utility, it is a form of fidelity. Fidelity calls for reverence and sensitivity. For the truth of mutual disclosure is too precious for us to jeopardise it, either by lying or by the invasive question which forces another to have to open his heart when it is not yet appropriate to do so.

Informed Consent and the Doctor's Dilemma

John G. Quilter

I first heard the following line of thought some months ago from a doctor. It concerns the value of taking time to ensure that one's patient has made an informed consent. His idea went like this.

The Doctor's Dilemma:

There is a problem with informed consent. When the treatment is successful, most of the time all one will have achieved in filling the patient in on his treatment options and associated risks (if one has not already scared the patient away) is to raise the patient's anxiety level. The treatment will still have worked and the patient's health will have improved but only at the cost of heightened worry about usually insubstantial risks. On the other hand, informed consent is important when the treatment fails or something goes wrong and the patient either does not improve or gets worse. Then, the patient has been warned of the risk and the doctor is protected because she has told the patient of the risks and the patient has voluntarily assumed those risks. The problem for the doctor is that she does not know in advance whether the treatment will work or not. She does not know whether the information given the patient will only uselessly raise his anxiety or whether it will provide a necessary protection for all parties if something goes wrong. But the doctor is in the best position of anyone to know - a position better than the courts, health care administrators, government or bureaucrats. Matters of informed consent should therefore be left to the medical profession rather than adjudicated from outside it. This is so for the sake of the better care of the patient as much as for anything else that might be at stake.

The Doctor's Dilemma impresses many people. However, there is something wrong

with this argument and it is this that I want to expose here. I will concentrate on one point: it misplaces what the issue really is and who is in the best position to resolve it.

One central feature of the Doctor's Dilemma is that it makes the value of informed consent hinge on one thing: the success or otherwise of the treatment. If the treatment does not work, informed consent makes sense as worth pursuing; if treatment does work, informed consent often can be harmful. While not totally wrong-headed, such a conception of what is at stake in patient consultation and treatment decisions is unsatisfactory and confused.

Many would criticise the Doctor's Dilemma for assuming that the only thing at stake in consultation and treatment decisions is the welfare of the patient. These critics will complain that this is not so. There is also the fact that the patient is a competent person, one capable of making up his own mind, one who should be given the opportunity to decide about treatment in the light of his own life choices and his conscience. I do not want to deny this. I strongly support it. In this context, however, I will not assume it. I wish only to stay within the broad terms of the assumptions of the Doctor's Dilemma and argue that even on these terms there is no argument here for the view that matters of informed consent should be left to the medical profession.

The Doctor's Dilemma seems to posit that the doctor has a choice to make between successful and unsuccessful treatment. But, as soon as such a point is made, it is clear that this cannot be so. Rather, the *choice the doctor has to make* is between giving the patient the opportunity to make an informed consent and not giving the patient this opportunity. Successful treatment

and unsuccessful treatment are merely possible outcomes in which the choice the doctor makes may result.

Once one sets up the question like that, it is clear that the options between which the doctor has to choose and the possible outcomes are *two independent variables* in the doctor's deliberations. This means that, contrary to what the Doctor's Dilemma assumes, there are (at least) four considerations to bear in mind, not just two: on scenario (1) the doctor informs the patient and the treatment is successful; on another, (2) the doctor informs the patient but the treatment does not work; on another, (3) the doctor does not inform the patient and the treatment is successful; and (4) the doctor does not inform the patient and the treatment is not successful.

What the Doctor's Dilemma points out is that situation (2) is a better situation than (4). But it does not show that not informing the patient is better all up than informing him. To do that, situations (3) and (4) taken together would have to be better than (1) and (2) taken together. That is, it would have to be shown that the patient stands to benefit more or suffer less harm from the doctor's not informing him than by the doctor's informing him. Let us try to think this comparison through.

Situations (2) and (3) are imponderable to compare. Which is worse for the patient: for the treatment not to work though she knew of this and other risks or for the treatment to work but not to have been told of the risks? Let's assume the latter, as I guess many doctors would be inclined to assume (even though this idea is in tension with the thought that it is better to have died free than live without control over one's life).

Then, what is the comparison between (1) and (4)? That is, is the anxiety of knowing risks even though the treatment works so bad that it is clearly worse than not having been informed when the treatment fails? This seems implausible. In fact, scenario (4) is clearly by far the worst situation of all four. Certainly, the treatment's failure will come as a horrible shock to the patient. The difference between (4) and

(2) is that in (4) the patient can blame the doctor. So, from the doctor's point of view too, this is seriously worse than all other situations for obvious reasons.

Perhaps (3) is best of all, for the patient suffers no anxiety. Situations (1) and (2) will fall in between (3) and (4). The issue then between informing and not informing depends on by how much (3) is better than either (1) or (2). By how much is it better to be ignorant and restored to health than to be apprised of one's predicament, successfully healed or no? In particular, is healthy ignorance so much better than informed consent that it outweighs the seriously worst of all, failed treatment of the ignorant patient, situation (4)? To be healthy but uninformed of what one's situation had been, if better, is not clearly *much* better than informed consent. It is even less clear that it is sufficiently better to outweigh the significant amount by which ignorance *cum* treatment failure is the worst of all situations.

This is another imponderable in the terms in which we have considered the issue¹. What does seem clear is that contrary to what the Doctor's Dilemma argues, the doctor does not have any *special* qualifications to decide such a question. It is a question of value, self-concept and need for participation on the part of the patient. The medical profession in its role as expert on the conditions of health and its restoration etc., has no *special* qualifications for deciding such issues. The answers to such questions will vary from patient to patient in keeping with their exercise of the right to self-determination. There is no general support to be found in the argument of the Doctor's Dilemma or the descendant of it I have looked at here for the conclusion that matters of informed consent should be left to the medical profession. In fact, given how seriously bad situation (4) is, there is, I would urge, a general argument of this sort *in favour* of informing the patient carefully and fully.

¹ The terms in which I have considered the issue in this discussion have been deliberately simplified in two ways: (a) I have tried to argue in the general spirit of the Doctor's Dilemma, that is, in terms which take there to be at stake in the decision only the good of the patient; and (b) I have excluded the benefits to the patients which come directly from being informed.

Society, the law and health care

A Review by Bernadette Tobin

Over the last thirty years there has been a remarkable change in the social context in which health care decisions - in clinical and research settings - are made. The change can be summed up as a growing recognition of the idea that patients (and research subjects) ought to be able to participate in the making of decisions the outcomes of which significantly affect their lives.

In *Medicine, Law and Social Change*¹ Leanna Darvall of the Legal Studies Department at Latrobe University sets out to identify the main forces for change in our thinking about health care and to analyse the impact of these forces on the manner in which health care is organized and delivered. She distinguishes three major motivators of change: the consumer movement, the women's movement and the application of contemporary philosophical theories and techniques to the practical problems associated with good health care.

The first issue which Darvall selects to illustrate the changes that have taken place is the emergence, in social thought and in case law, of the doctrine of informed consent. In a discussion which canvasses the torts of battery and negligence, the notion of the reasonable doctor and that of the reasonable patient, causation, the role of expert evidence in establishing professional standards etc., careful analysis of English and American cases sets the context for a presentation of Australian institutional and legal developments. The book was delivered to the printers shortly before the landmark decision of the High Court in *Rogers v Whitaker*. While the High Court did not adopt the American view of informed consent, Darvall's discussion of informed consent highlights not only the significance of that judgment in deciding how fulfilment of the doctor's duty of care is to be determined, but also the historical forerunners of the judgment in earlier Australian case law.

The second issue is the refusal of medical treatment. Starting with the Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research which was published in 1983, a series of seminal American decisions concerning treatment refusal (which set the scene for the Congress to enact the Patient Self-Determination Act of 1990) is traced. The Victorian Medical Treatment Acts of 1988 and 1990 are then analysed in a discussion which canvasses the evaluations of a wide range of commentators.

The regulation of research on human subjects is Darvall's third illustration of the ways in which social thought has influenced health care. Since the abuses of such subjects at Willowbrook State Hospital in New York and at the Tuskegee Institute in Alabama were revealed, it is now widely recognized that the human (and animal) subjects of medical research require protection. Darvall traces the institutional responses in the United States and in Australia to the social and legal recognition of the need to balance the welfare of subjects with the anticipated social benefits of the new knowledge gained through research. In addition, lobby groups associated with people suffering from HIV and AIDS have thrown into question such research instruments as randomized clinical trials by arguing that the needs of people presently suffering from HIV and AIDS should take precedence over the long-term value of research for future patients.

Given its sociological purpose, *Medicine, Law and Social Change* is an aptly-named book: it is stronger in its analysis of legal, governmental and institutional forces which have influenced changes in health care than in its analysis of developments in moral philosophy. That said, it will provide a most useful text for anyone wishing to understand some of the main elements in the public debate about health care.

¹ Darvall, Leanna: *Medicine, Law and Social Change*, Dartmouth Publishing Company, 1993

NOTEBOOK

New Administrative Assistant for Centre

We are pleased to introduce Barbara Reen. Barbara is the new Administrative Assistant of the John Plunkett Centre. She has come to us from the University of New South Wales where she held a similar position. So she has had plenty of experience of the pleasures and challenges of the position.

We welcome Barbara very warmly to the John Plunkett Centre.

We express our sincere thanks to Heather Curry, the previous Administrative Assistant, who worked with great energy and dedication over the last three years.

Second Annual Ethics in Nursing Practice Seminar

Monday, 20th September 1993

St Vincent's Hospital, Sydney

8.50 a.m. - 5.00 p.m.

(Registration from 8.30 a.m.)

The theme of the seminar is Ethical Decision Making in Health Care. The focus will be on the role of the nurse in this process. The seminar will also include updates on topical issues.

Venue: Sacred Heart Hospice (entrance Darlinghurst Road)

Cost: \$100 (includes light refreshments, lunch and seminar papers (post seminar))

For seminar enquiries contact **Christine Lennon** phone (02) 361 2322

Video Available

As part of a Video Series on Ethical Issues in Health Care, the Australian Catholic Health Care Association together with the John Plunkett Centre for Ethics in Health Care, have produced a video entitled

"Euthanasia"

The 20 minute video offers a frank and comprehensive introduction to the subject of Euthanasia. The combination of interviews, statements and graphics will stimulate discussion among:

- senior secondary and university students;
- professionals in the field; and
- anyone interested in this important health care issue.

An order form for the video is enclosed with this issue of *Bioethics Outlook*.

SEMINAR PROCEEDINGS: WHAT SHOULD PATIENTS BE TOLD?

This seminar was organised into two main sessions. In the first session, Mr John Quilter discussed the ethical implications of informed consent. In the second session, Mr Terence Tobin QC discussed the legal ramifications of *Rogers v Whitaker*. Each presentation was followed by clinical commentaries from a range of health care professionals

Papers from this Seminar are now available at a cost of \$10 (\$8 for Subscribers)

See Order Form enclosed with this issue of *Bioethics Outlook*

Bioethics Outlook is a quarterly publication of the John Plunkett Centre for Ethics in Health Care, a Research Centre of Australian Catholic University and St Vincent's Hospital, Sydney.

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