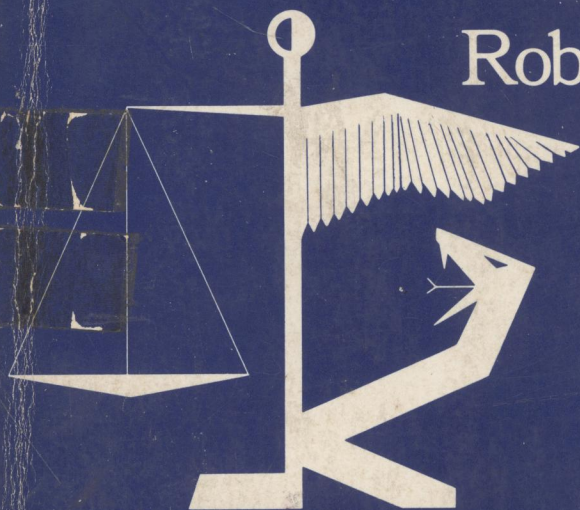

Biomedical Ethics ^{and} the Law

SECOND EDITION

Edited by
James M. Humber
and
Robert F. Almeder



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Biomedical Ethics and the Law

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PREFACE

In the past few years, an increasing number of colleges and universities have added courses in biomedical ethics to their curricula. To some extent, these additions serve to satisfy student demands for "relevance." But it is also true that such changes reflect a deepening desire on the part of the academic community to deal effectively with a host of problems which must be solved if we are to have a health-care delivery system which is efficient, humane, and just. To a large degree, these problems are the unique result of both rapidly changing moral values and dramatic advances in biomedical technology.

The past decade has witnessed sudden and conspicuous controversy over the morality and legality of new practices relating to abortion, therapy for the mentally ill, experimentation using human subjects, forms of genetic intervention, and euthanasia. Malpractice suits abound, and astronomical fees for malpractice insurance threaten the very possibility of medical and health-care practice. Without the backing of a clear moral consensus, the law is frequently forced into resolving these conflicts only to see the moral issues involved still hotly debated and the validity of the existing law further questioned. Take abortion, for example. Rather than settling the legal issue, the Supreme Court's original abortion decision in *Roe v. Wade* (1973), seems only to have spurred further legal debate. And of course, whether or not abortion is a morally acceptable procedure is still the subject of heated dispute. To take another example, the recent birth of a "test tube" baby in England has prompted the National Institutes of Health to reconsider its stand on fetal experimentation. Should such experimentation go forward in an attempt to assure that future test-tube babies are free from mental and/or physical deformity? Or should such nontherapeutic research be proscribed? The issue is not one which is easily decided; and equally difficult questions arise in the areas of genetic intervention, therapy for the mentally ill, and practices relating to euthanasia.

As profound as the social and moral changes in this country have been in the recent past, they are outstripped by recent scientific and technological advances in the biomedical field. Deformed and mentally disabled children, who once would have died at birth, can now be kept alive. Should such beings be allowed to live? Like problems also arise at the other end of the life cycle. Should a person be kept alive even if he wishes a peaceful and "dignified" death? And when is a person dead? With the development of the heart-lung machine and

intravenous feeding, a person's body can be kept functioning indefinitely, long after his brain has ceased showing any activity. Does one die when one's brain dies? If not, when does one die? If so, how does one determine when the brain is dead? And then there are the moral and legal problems arising from recent advances in genetics. For instance, consider the dispute over recombinant DNA research. Should such experimentation be permitted? The potential benefits are great—it was through the use of this procedure, for example, that human insulin was able to be synthesized. At the same time, however, the dangers inherent in recombinant DNA research are not able to be assessed fully. In theory, at least, experimentation of this sort can be quite hazardous. What then should be done? The answer is far from clear; and in a milieu of shifting moral values, the conceptual, moral, and legal problems generated by advances in scientific and medical technology are all the more perplexing and worthy of urgent attention.

The problems faced by medical practitioners, researchers, and geneticists raise questions having social, moral, legal, philosophical, and theological implications. In a very real sense, then, the field of biomedical ethics is essentially interdisciplinary; and in constructing this anthology we have done our best to represent the interdisciplinary character of these problems.

The book begins with a brief introduction to ethical theory. The text itself is divided into five parts, each part being prefaced by an introduction in which the theses of the various authors are briefly stated. Our division of the subject matter is not hard and fast, and the student will no doubt perceive that the problems dealt with in each part are interrelated.

It is impossible to put together an anthology of this sort without the aid and assistance of many. However, we are especially indebted to our graduate students Dexter Christian and Mircea Manoliu, for compiling the bibliographies at the end of each chapter, and to Thomas Lanigan, formerly of Plenum Press, for his insightful suggestions and encouragement. Special thanks also go to Lynn Humber and Virginia Almeder, whose patience and understanding make our work considerably easier than it might otherwise be.

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INTRODUCTION TO ETHICAL THEORY

Consider the following case. A doctor has just examined his patient, Mr. P. Both the doctor and Mr. P know that P has a very bad heart and that he must avoid overexcitement for fear of precipitating a heart attack. In the course of his examination of Mr. P, the doctor discovers that P has cancer of the liver and will die in approximately six months. Naturally, P asks the doctor for the results of his latest physical examination. Should the doctor tell P the truth, and so chance causing him to suffer a fatal heart attack? Or should he lie and tell P that all is well? The issue is not an easy one to resolve because we feel pulled in two directions at once. But let us assume that the doctor does decide the issue, and that he opts to tell P the truth. How could the doctor argue for the rightness of his action as against one who disagreed with his decision?¹ One possibility is as follows:

DOCTOR: I told P the truth because it is always wrong to lie. That, after all, is the moral rule: it is wrong to lie.

CRITIC: Well, I don't like your moral rule; following it in all cases can lead to harm. Why should I accept your rule anyway?

DOCTOR: My rule must be accepted because it is what God wills. God wants us to tell the truth; and it is always right to do what God wants. God is the moral lawgiver, and His injunctions apply to all men whether you like it or not.

Whether or not the doctor's argument "works," and whether or not his decision to tell the truth is correct is, for our purposes, unimportant. What is noteworthy is that the above exchange illustrates how one usually goes about justifying his or her moral judgments. Ordinarily, what one judges are actions—in the case at hand, for example, the doctor's telling the truth to P. And in judg-

¹Some would say that the doctor's action cannot be shown to be right or wrong because there *are* no morally right or wrong acts. Others would say that the action cannot be shown to be right or wrong because it is impossible *to know* which acts are right and which wrong. Advocates of the first view are ethical nihilists, and those who accept the second view are ethical skeptics. A reader who accepts either of these positions need go no further. Indeed, he has erred in buying this text.

ing actions, one may appeal to a moral rule.² But moral rules can differ; and if a judgment concerning the rightness or wrongness of an action is to be fully defended, the rule to which an appeal has been made must itself be justified. For this purpose, then, one usually refers to an ultimate moral principle or standard.³ (In the above example, for instance, the standard to which the doctor is appealing is this: A rule (or act) is morally right if, and only if, it is in accord with what God wills.)

For the present, let us call a set of moral rules, justified by an appeal to an ultimate moral principle, an *ethical theory*. If there were only one ethical theory to which appeal could be made in making moral judgments, all ethical disputes would be, in principle at least, resolvable. Of course, things are not that simple in real life, and what we find as we go about the process of living is that we have to choose among many competing ethical theories. These theories can and do differ, sometimes quite radically. Despite individual differences, however, most ethical theories may be classified under one or the other of the following headings: (1) teleological ethical theories, (2) deontological ethical theories. Teleological theories assert that the rightness or wrongness of an act is ultimately to be determined by the action's *consequences*, i.e., an action is said to be morally right if it produces good consequences, wrong if it produces bad consequences. Deontologists reject this view and hold that an act ultimately is right or wrong because of its character, form, or nature. In addition, many deontologists insist that an act cannot be morally right unless the person doing the act does it for the right reason. In order to clarify the teleology/deontology distinction and at the same time introduce the reader to some of the elementary problems encountered by ethical theories within each class, we will summarize and criticize two theories within each ethical tradition.

Teleology: Act Utilitarianism and Rule Utilitarianism

What all utilitarians have in common is acceptance of the principle of utility as the *ultimate* test of the rightness or wrongness of human action. The principle of utility asserts that an act is morally right if, and only if, it tends, more than any alternative available to the agent at the time, to produce the greatest good for

²Sometimes there is an appeal to a moral rule, but not always; for there are ethical theories in which moral rules play no part.

³Again, it is notoriously difficult to generalize when discussing ethical theory; and it is possible not to appeal to an ultimate moral principle to justify moral rules. An ethical intuitionist, for example, could claim that he has a special moral faculty and that this just allows him to "see" or intuit the truth of certain moral rules. Also, the ethical intuitionist could omit all reference to moral rules and claim that he "sees" that certain individual acts are right and others wrong. For a discussion of ethical intuitionism, see pp. 6-7.

the greatest number of all those affected by the act. This sounds simple enough, but unfortunately utilitarians are not all in agreement as to the meaning of "good." Some, like Jeremy Bentham, the founder of utilitarianism, take "good" to mean "pleasure." Others identify "good" with "happiness"; and still others claim that "good" cannot be defined but is an indefinable "nonnatural" property of things.⁴ To simplify matters, we shall limit our discussion to hedonistic utilitarianism and assume that "good" = df. "pleasure," where "pleasure" refers to any kind of pleasure.⁵

Utilitarianism is a teleological position because it asserts that the rightness or wrongness of an action ultimately depends upon the achievement of certain consequences. What makes a utilitarian an *act utilitarian* is acceptance of the view that the principle of utility is to be applied directly to *particular actions* (e.g., *X* lying to *Y* at time *T*) to judge their moral worth. Given this view, then, what we have is an ethical theory in which moral rules play no part.⁶ It is at this point that the *rule utilitarian* disagrees with the *act utilitarian*. What the *rule utilitarian* tells us is that we should use the principle of utility to justify certain *rules of conduct* and then use those rules to determine the rightness or wrongness of particular actions. For example, a rule utilitarian might hold that "do not kill innocent human beings" and "tell the truth" are proper rules of human conduct, because if these rules were followed by everybody, greater overall pleasure and less pain would result for everyone. And then, using these rules, the rule utilitarian would conclude that an action such as *X* lying to *Y* at time *T* was wrong because it violated the rule, "tell the truth."

An individual being introduced to utilitarianism for the first time might well wonder why the distinction between act and rule utilitarianism ever arose. Historically, rule utilitarianism evolved because of certain criticisms which were brought against act utilitarianism. Consider, for example, the following paradigm. Let us say that *M* is a totally amoral person, a man who will feel absolutely no pangs of guilt or conscience upon doing an evil act. *M* is alone with his mother

⁴The first position is known as hedonistic utilitarianism, the second as eudaemonistic utilitarianism, and the third as agathistic utilitarianism.

⁵For instance, we will not distinguish between sensual pleasure (e.g., eating, sex) and intellectual pleasure (e.g., reading Plato's *Dialogues*). It should be noted, however, that some utilitarians insist upon making this distinction, and argue that intellectual pleasure is intrinsically more valuable than sensual pleasure.

⁶This needs qualification, for some act utilitarians do allow that moral rules have a use in everyday life. For example, an act utilitarian might admit that there are situations when he will not have time to determine which act will produce the greatest amount of pleasure for the greatest number of people. In this case, then, he might say that the rational thing to do is to follow the moral rules accepted in his society. The important point, however, is that following the rule will *not* make the act utilitarian's action right. For the act utilitarian, our moral duty is *always* to obey the utilitarian moral maxim; and an act is right if, and only if, it does what this principle specifies. As a practical affair, we may have to refer to moral rules; but when we do so, we simply "take a chance" that we are acting rightly.

as she lies dying. M's mother tells him that she has \$100,000 hidden in her attic, and just before she dies, she gets M to promise faithfully that he will find the money and split it equally with her daughter, M's sister. After his mother dies, M finds the money and keeps it for himself and his wife. M's deceit goes undetected, and both he and his wife live happily ever after. Now, let us further suppose that had M's sister been given her share of the \$100,000, she would have derived very little enjoyment from it. Like her mother before her, she simply would have put it in the attic and forgotten about it until she died. Both M and his wife, on the other hand, know how to enjoy their money. The question then is this: Did M do anything wrong when he refused to share the \$100,000 with his sister? An act utilitarian would have to say no. Indeed, he would have to insist that M did the right thing, for he maximized pleasure. But this moral judgment violates our ordinary moral intuitions. We want to say that M should have kept his promise to his dying mother, that his failure to do so constitutes immoral behavior, and that any ethical theory which tells us the contrary is a theory which must be rejected.

Although a criticism of the above sort is telling as against act utilitarianism, it has no force whatsoever when directed against rule utilitarianism, because rule utilitarianism need not allow that M's action was morally right. It is easy enough to see why this is so. In reply to the above criticism, for example, a rule utilitarian need only say that "keep your promises" is a moral rule validated by the principle of utility, and that M's action is wrong because it violates that rule. Furthermore, since rule utilitarianism validates our ordinary moral intuitions in cases where act utilitarianism does not, the rule utilitarian would insist that his moral theory constitutes an advance over act utilitarianism.

Although rule utilitarianism is able to avoid many of the criticisms levelled against act utilitarianism, rule utilitarianism is not without its detractors. The common criticism of this position is that it fails to provide a sufficient ground for ethics because it may justify unfair or unjust treatment of some individuals for the sake of others. Consider this case. Let us say that you live in a society in which 95% of the population have red hair and 5% have blond hair. After some computation, the majority discovers that the greatest overall pleasure and least overall pain will result if the redheads enslave blonds and force them to do their bidding. If we assume that the redheads' computations are correct, it seems that rule utilitarianism must endorse a rule stating that it is morally right for redheads in this society to enslave blonds. But this is unjust or unfair, i.e., it is morally wrong for reasons which (apparently) have nothing to do with the principle of utility. Hence, it is said, the principle of utility alone is insufficient to provide an adequate foundation for ethics. Somehow, the demands of the principle of justice must also be met. But is this possible? At first glance, at least, the principle of utility and the principle of justice seem to be in opposition. On the one hand, the principle of justice tells us that no person should serve as