

Choosing War

by Hugh White

Hugh White examines changing trends in attitudes to war, and calls on policy makers to exercise 'due diligence' in assessing the merits of particular wars.

Choosing to go to war is something we do often these days. We hardly used our defence forces from the time Australia withdrew from Vietnam in the early 1970's until the late 1980's. But over the past fifteen years Australian military forces have been deployed on all sorts of missions to places as diverse as Namibia, The Gulf (many times), Cambodia, Rwanda, Somalia, Western Sahara, Bougainville, East Timor, Afghanistan, Iraq and the Solomon Islands. Initially many of these deployments were strictly peacekeeping; our troops were authorised to use force only to defend themselves or those under their protection. But some of them—and more of them in recent years—have been made under rules of engagement that provide our forces with wide latitude to use lethal force to achieve their missions. In plain English, we are sending our forces to war.

Wars of Choice

Moreover we are choosing to go to war in a more significant sense: our recent wars—such as the occupation of Iraq in March this year—have been 'wars of choice'. By that I mean that these were not wars forced upon us by overwhelming threats of great immediacy, in which the resort to war was the only alternative to imminent catastrophe. Our recent decisions to go to war in Iraq and in Afghanistan, like our decision to join the coalition to expel Iraqi forces from Kuwait in 1991, were choices made from a range of plausible policy options to address long-term concerns about trends and developments in the international system which we believed were contrary to our interests. In other words, war has become again, as it was for the European dynasties of the eighteenth century, or the colonial powers of the nineteenth, an instrument of policy. As Clausewitz famously said, 'an extension of politics by other means'.

It is not hard to explain why societies like ours—which have traditionally prided themselves on being peace-loving—have become again so willing to resort to lethal force for relatively modest reasons. After the failure in Vietnam there was an understandable reaction against the

use of military force to achieve limited policy objectives. But since the end of the 1980's, two factors have undercut our post-Vietnam reservations. First, the end of the Cold War itself reduced the risks that small military campaigns in obscure parts to the world might escalate into global war, so wars have become more easily containable. Second, the Gulf War of 1991 reassured Americans and others that their militaries could achieve decisive results quickly and at relatively low costs. Occasional setbacks like Somalia have been more than outweighed by major successes in Kosovo, Afghanistan, and Iraq. Societies like ours have now regained the confidence of our Imperial predecessors, captured so well by Hilaire Belloc: 'Always remember that we have got/The Maxim gun, and they have not.'

Of course this confidence may not last. Kipling provided the counterpoint to Belloc's self confidence in the pessimistic 'Recessional' with its admonitions against the 'frantic boasts' of those who put their faith in 'reeking tube and iron shard.' We might in our turn, as Kipling said of the British after the Boer War, be taught 'no end of a lesson' sometime soon. There remains a clear risk, indeed, that Iraq may teach, or re-teach, that lesson as our allies struggle to replace the regime they have so effortlessly removed with a new government that vindicates their reasons for occupying Iraq in the first place.

The Burden of Decision

But in the meantime we may expect that going to war by choice—the wars of precautionary pre-emption that George Bush and John Howard have spoken of—will continue to be a clear policy option in a range of situations over coming years. So the basis on which such choices are made becomes again an important question—as it was in earlier

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We may expect that going to war by choice will continue to be a clear policy option.

centuries. Choosing to go to war has always been seen as the most onerous responsibility of those who practise statecraft, involving great ethical questions. Modern leaders—including our own Prime Minister—often describe such choices as the most serious decision a Government can be called upon to take. And the level of public interest in matters of peace and war, though partly no doubt reflecting the excitement of the military spectacle, also suggests that many citizens sense their association with decisions by their government of more than usual ethical weight.

The debate in Australia over the rights and wrongs of our most recent war has provided an interesting sampling of our approaches to these decisions. Since the war the debate has taken a new turn, with the failure (so far) to find weapons of mass destruction in Iraq raising a new set of questions about the integrity of the case made by governments here and in the US and UK to support their decisions for war. Not surprisingly, the debate has shown deep differences in the community about how we should make those decisions. So it seems worth standing back a few paces and looking more reflectively at the ways in which we make these choices for war—what philosophers for centuries called the doctrine of *jus ad bellum*, the right to make war.

Looking Back

Our thinking on these issues draws on a rich vein of thought about the conditions of just war dating back to Thomas Aquinas and Augustine. This tradition held that it was right to go to war to enforce or protect a legitimate claim. But by the late Eighteenth Century this way of thinking about war as a legitimate recourse for the enforcement of rights against other states was already coming under stress from the thinkers of the enlightenment when it was subject to the even more crushing pressure of the Napoleonic Wars and the experience of conflict between modern nations in arms. The scale and cost of war in the new industrial age of the early nineteenth century, which delivered huge armies, well-equipped and well-supplied for sustained campaigning, made war too expensive to be played by the old rules.

In the century after Waterloo, thinking about war, especially in Britain, developed in two complementary ways. One strand, led by Bright and Cobden of the Manchester School, held that all war was a waste of time and money; it was an inefficient way to protect a country's own rights, and military intervention to support the rights of others was an unnecessary indulgence. The other strand, typified by the strange and commanding figure of Gladstone, agreed with the first of Bright's positions, but not the second. They came close to regarding it as a

crime to go to war to promote Britain's own interests. But it was a high moral duty to go to war to protect the interests of others, especially the oppressed subjects of brutal absolutist regimes. Thus Gladstone would rail against the cost of armed forces, but mount in his famous Midlothian campaign of 1879 the first and still the most sustained political argument in favour of humanitarian intervention, on behalf of the oppressed subjects of the Turkish Empire, and as Prime Minister he would undertake the annexation of Egypt in 1882 on similar grounds.

Neither of these two approaches proved very practical. As AJP Taylor puts it, 'Press Bright's policy to its conclusion, and you arrive at isolation... Press Gladstone's policy to its conclusion, and you have universal interference'. But at any rate neither could survive the shock of the First World War. The overpowering determination to ensure that no such thing should happen again led in one of two directions: either complete pacifism, which held that war was never justified and always immoral under all circumstances, or to a view that war could only be justified as part of an international effort aimed at preventing an even worse conflagration—the doctrine of collective security.

It is hard now for us to understand how broad and deep was the commitment to pacifism and collective security in the decade and a half after the guns fell silent; perhaps Frank Moorehouse has done it best in *Great Days*, his first novel about an Australian working at the League of Nations in the 1920's. His work reminds us that war is a much more acceptable policy instrument for our society today than it was for our grandparents or great grandparents in the 1920's and early 1930's. This was the era of the Peace Pledge.

The Munich Metaphor

All that, of course, was swept away in the late 1930's by the onset of the Second World War, and especially by the appeasement of Hitler which culminated in the division of Czechoslovakia at Munich in 1938. Munich has become the defining strategic metaphor of our era. It has been invoked in every almost debate about choices for war ever since. It was central—in the West at least—to thinking about the management of strategic rivalry with the Soviet bloc throughout the long decades of the Cold War. It cropped up in Vietnam, in Suez, in the Falklands, in Iraq in 1991, and again in relation to Iraq this year. Often it is cited explicitly, but even when not, it lies there embedded in the structure of our arguments. The message of Munich has three parts. First, it says that we can legitimately resort to war to prevent a worse outcome—and in particular a worse war. Second, it implies this is the only legitimate reason to go to war—a carryover from the doctrines of collective security of the 1930's. And third, it carries the implication that it is a moral duty to resort to war early, if there is a significant risk that avoiding war now might lead to a larger or more dangerous war later.

The Munich metaphor shapes debate and decision about choices for war from both sides. Those who support war argue that if we do not fight now, we will have to fight a bigger and more destructive war against a more dangerous opponent later. Those who oppose war argue that the war we propose to fight now is more dangerous and destructive than the supposedly more dangerous future war, and usually suggest that the risk of future war is exaggerated.

The argument over Iraq this year had exactly this structure; so did the argument over the expulsion of Iraq from Kuwait in 1991. But in recent years the Munich doctrine has been extended. The kind of bad outcomes which it is legitimate to go to war to prevent has been expanded to cover a range of humanitarian disasters as well as traditional state to state wars. The metaphor of Rwanda has been added to that of Munich, to extend the circumstances justifying military action to the prevention of major humanitarian disaster.

The NATO campaign in Kosovo is the most striking example of this principle in action. Supporters of the campaign argued that military action was justified to prevent a major humanitarian catastrophe; opponents argued that war was more likely to cause than to prevent such a disaster.

All Utilitarians Now

This seems to bring us to a kind of rough and ready utilitarianism. War is justified if it avoids a worse outcome, and otherwise not. The intriguing thing about this approach to judgements about the legitimacy of decisions about peace and war is the way in which it reduces the choices we make to judgements about the likely consequences of different course of action. Few participants in the public debates about recent wars seem to doubt that war would be justified if it prevented a worse calamity, and the differences exposed in those debates reflect different judgements about the likelihood of such worse calamities and the chances that going to war would indeed avoid them.

Supporters of the current Iraq War argued that the danger from Iraq's Weapons of Mass Destruction was high and that it could not be contained by other means than regime change in Baghdad; that an invasion to remove Saddam Hussein would be quick and easy; and that the subsequent replacement of Saddam's regime with a better alternative would be relatively simple. Opponents of the war argued the opposite: that Saddam's WMD posed a modest risk that could be contained in other ways; that the invasion of Iraq could be long and bloody, and that the establishment of a new Government in Iraq would be fraught with difficulty.

Very few participants in the debate argued that war might be right or wrong on the basis of principles rather than outcomes. Pacifism, once a significant element of debate on these issues, hardly featured in the discussion—less indeed than it did in 1991. In the mainstream debate relatively little attention was paid to the question of whether the invasion would contravene international law. The closest we came to an issue of principle in the debate was the question of the role of the UN: whether war could be legitimate without the sanction of the Security Council. But here it appeared that the key question was one of authority rather than principle; the Security Council was

seen by some as the only body authorised to make judgements about the balance of risks in Saddam's WMD program and America's plans to remove him. But there was little suggestion that some other standard or principle should be applied in the choice for war.

And of course many who opposed the war argued against the actor rather than against the action itself: distaste for American power and values was widely expressed. But that was really *obiter dicta*: an action cannot be wrong simply because one does not like the actor, nor can it be right because one does like them.

The centrality of judgements about consequences in attitudes to the Iraq war were neatly captured in an article by Joanna Murray-Smith in the *Sunday Age* in early May. 'It could all have gone horribly wrong, but it didn't', she wrote. 'America, in all its infuriating arrogance, acted. Not so long ago, I dreaded this. And now, I have to admit, I was wrong'.

Of course since this was written, the US has acknowledged that the war in Iraq is not over, Iraq's WMD look less threatening than they seemed to some before the war, and the task of rehabilitating and democratising Iraq looks harder than ever. It is probably still too early to judge who was right and who was wrong about the balance of costs and risks in the decision to invade. But this only reinforces the key point here: that our judgements—including our moral judgements—about whether to go to war or not seem to be based almost entirely on predictions about future events: the balance between the future evil risked by going to war and that risked by not going to war. Quick easy wars—like the 1991 Gulf War—that seem to avoid later disasters are judged not just a success, but legitimate. Long bloody wars that seem worse than the problems they were meant to avoid—like Vietnam—are judged not just a failure, but wrong. To paraphrase Talleyrand: our view today is that war will not be a crime unless it is a blunder.

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Gambling on Events

The breezy cynicism of Talleyrand is usually thought to be very much to policymakers' liking. Supposedly impatient of moral principle, and interested above all in the pursuit of national interest, they might be expected to be very comfortable in the utilitarian milieu I have described. But in fact this has become a tough time for those whose job it is to choose war—or conduct the arguments concerning it—on behalf of their communities. The implications of the utilitarian approach we seem to take in judging choices about war these days is that the rightness or otherwise of those choices will depend on contingent future outcomes which are unknowable at the time the choices are made. Policymakers need to guess what the future holds, and future judgements about the morality of their actions will depend on how well they guess. If they guess wrong, their blunders will become crimes in retrospect.

This is not a new problem, nor is it unique to the moral choices we make about war. Indeed it is at the heart of Kant's original assault on utilitarian ethics, when he said in the *Metaphysics of Morals* that attempts to guide actions by judgements about their consequences for human happiness 'leads to good only by accident, and very often also to evil'.

But the problem of judging strategic decisions in the light of future events is especially fraught. It is very difficult subsequently to recreate in our imagination the genuine range of possibilities that policymakers feel themselves to be facing at the time of decision. In retrospect the outcome that actually occurs always seems inevitable, and the other possibilities, real though they were, appear delusional. This is nowhere better illustrated than in the example of Munich itself. War with Germany having come to pass, we think of it as inevitable, and judge the actions of those who sought to avoid war as deeply misguided. But of course war with Germany was not inevitable, and it might perhaps have been avoided. Likewise the decision to bomb Kosovo looks right in retrospect, because Milosevic did cave in and comply with NATO demands without the need to launch a ground attack. But there was a clear possibility that he would hold out, in which case the decision to bomb would have looked much less justifiable.

A special case of the problem of judging past strategic decisions is neatly described by Frank Moorhouse in the second of his two novels about the League of Nations, *Dark Palace*. His heroine, trying to explain choices confronting the League in the Abyssinian Crisis, describes what she calls the Dilemma of Preventative Action. 'If you take a strong and successful action—be it military or economic—to prevent some predicted dreadful thing happening, history will never know if that predicted dreadful thing would have happened.' We cannot now, for example, judge whether the US-led war in Vietnam

really stopped the spread of communism in Southeast Asia or not. Because the dominos did not fall, it is easy to argue now that they were never going to fall. But that is more than we can know: and we must at least acknowledge that those who were making choices in the early 1960's had good reason to fear that the dominos would fall if they did not resist North Vietnam.

The heart of this problem is the need, in thinking about the outcomes of our strategic choices, to balance in retrospect the *known* costs of an action against the unknown risks of other courses of action. Perhaps the most poignant example is the decision to use nuclear weapons against Japanese cities in 1945. The awful costs of those choices are known and documented. The dangers that they may have helped avoid—the dangers of a full-scale US invasion of Japan's home islands—are speculative. But they were very real to those who made the decisions.

The East Timor Test

These points about the perils of judging past strategic choices on the basis of their outcomes can be illustrated by glancing at Australia's most morally complex recent strategic decision. Australia's choice to accept and eventually to recognise Indonesia's incorporation of East Timor is seen as a classic example of pragmatism winning over principle. But I think the more accurate way to describe the choice is to say that it was based on a judgement about the balance between two evils. Supporters of the position adopted by successive Australian governments argued that the costs to Australia of opposing Indonesian incorporation outweighed the benefits that would flow—both to Australians and to East Timorese—from such opposition. That assessment was based on a set of judgements about the implications for Australian-Indonesian relations of Australian rejection of incorporation, and the extent to which Australian rejection would have improved the situation of the East Timorese.

In the years after 1975 it was judged that if Australia rejected incorporation, our relations with Indonesia would have been poisoned, with serious consequences for Australia. And it was judged that Australia's position would not have much impact on the situation of the East Timorese under Indonesian rule. Looked at from here, both of these judgements seem questionable; our relations with Indonesia have generally been good since 1975, and the East Timorese people did indeed suffer badly under Indonesian rule. But to assess the decision fairly, we need to go back and ask some deeper questions. Was there a real risk of bad relations with Indonesia? How serious would that have been? What else

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could we have done about it? And were our initial relatively optimistic judgement about the welfare of the East Timorese under Indonesian rule justified?

Rules for Policymakers

How should policymakers—and those who reflect seriously on policy choices—proceed in this complex landscape? What moral principles can help to guide our conduct in making choices about war? I think the soundest starting point is the recognition that most of our debates are about facts and predictions, not about values and principles. The key questions at stake in most strategic decisions are those that relate to the uncertain outcomes of different courses of action; whether removing Saddam is a greater risk to peace than leaving him in power, or whether Japan was likely to surrender without the need to use nuclear weapons. There is no way to be certain these judgements have been made correctly; the future is inherently unknowable. And there can hardly be a moral principle that says that it is morally wrong to judge wrongly. But there is a moral responsibility to judge carefully: to weigh the evidence, consider the possibilities, examine all the options, and to ensure that as far as possible our judgements are supported by the data we have available.

This is harder to do than might at first appear. Partly it is a matter of time. Choices for war are almost invariably made in an atmosphere of crisis. Under pressure for urgent decisions it is easy to skip steps and jump to conclusions. But that is only part of the problem. Choices for war bring out a kind of atavistic tribalism in the most

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polished bureaucracies and political elites. Passions are roused, and dissent can look like disloyalty. The social pressure to support an emerging consensus for war can be very strong. That affects people's judgements; swept up in the moment, less care is put into the scrupulous assessment of complex possibilities than there should be. Great ends seem to justify inadequate means.

These pressures are not confined to the internal workings of government; they are reflected too in the public presentation and debate. We have seen something of these pressures at work in recent months in relation to Iraq, but the clamour for action over East Timor in September 1999 had some of the same elements. Edward Gibbon caught the atmosphere of moral ambiguity in such situations perfectly in the *Decline and Fall*: 'From enthusiasm to imposture the step is perilous and slippery...a wise man may deceive himself, a good man may deceive others, and the conscience may slumber in a mixed and muddled state between self-illusion and voluntary fraud.'

The antidote to this atmosphere is a kind of dogged commitment to what is called in the commercial world 'due diligence'. Company directors are not held to be at fault simply because they make mistakes, but only when they have not taken proper care—due diligence—to ascertain the facts, assess the risks and judge the possibilities with an open and unprejudiced mind unclouded by enthusiasm.

This might be the kind of standard we should apply to policymakers. One can glimpse the moral authority of due diligence in the character of John F Kennedy as portrayed in a recent film about the Cuban missile crisis called *Thirteen Days*. The film—quite true to history, as it happens—shows Kennedy striving throughout the crisis to look beyond the immediate situation, stretching his imagination to see the full range of consequences of different courses of action, and struggling to avoid being carried along by events. The contrast with what we know of Kennedy's own approach to Vietnam—drift, uncertainty, inattention—is instructive. But so is the contrast with the sense we have of the quality of decision making in his current successor's Administration in the difficult time since September 11 2001.

Is 'due diligence' an adequate moral basis for decisions about war and peace? I'm not sure that today we have any other standard to apply that is true to the way such choices are actually made. But we might feel better about it if we think of it in different, more classical terms. Because the idea of due diligence is perhaps just a modern version of the Stoical conception of a person performing their special function well. There may not be much more we can ask.

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Individualism And Economic Reform In China

by John J. Hanafin

How are the interests of the individual and the collectivity to be reconciled in a socialist market economy? John Hanafin investigates the subject of heated debate in China.

As an effect of the process of economic reform initiated at the Third Plenary Session of the 11th Party Congress (Dec. 18-22, 1978), the issue of how the interests of the individual and the collectivity should be reconciled in a socialist market economy has been the subject of heated debate in China. The discussion of the individual and the collectivity in contemporary China is by no means a recent development, generated, it would seem, by the perceived conflict between the collectivist ethos of Marxism and the role of the individual in a market economy. There are strong, and to a certain extent unique, cultural and philosophical precedents to this debate in China that are expressed in the persistence of certain traditional themes.

For instance, the Reform Movement led by Kang Youwei in 1898, and directed at institutional change, is an example of the Confucian tradition attempting to come to terms with the Western notion of individualism. A conservative Confucian, Kang maintained that the notion of people's rights was incompatible with that of state power. He believed that if individual rights and privileges were extended the power of the state would necessarily be weakened. For Liang Qichao, a conservative like Kang, individualism was an obstacle to national reconstruction. The New Culture Movement (1916-22), on the other hand, was anti-Confucian, Chen Duxiu, for instance, criticized the Confucian doctrine of the 'three bonds': the loyalty and obedience of the minister to the prince, the son to the father, and the wife to the husband. This doctrine, he maintained, was contrary to the notion of individual independence. For Wu Yu, the chief precept of Confucian ethics was filial piety, which was the basis of absolute monarchy and the family system.

The vicissitudes of the Reform Movement and the New Culture Movement indicate quite emphatically that in contemporary China, the vestiges of authoritarianism, familism, the preference for self-cultivation and propriety in handling human relations rather than the rule of law, a lack of civic responsibility, the stress on obligations rather than rights, have their origins in a Confucian heritage.

How the notions of the individual and the collectivity are to be understood in the Chinese tradition is also a controversial issue for Western scholars. For example, it has

been claimed that Chinese society is group oriented. For some commentators this means that the Chinese acceptance of the collectivist ethos of Marxism is a natural consequence of this proclivity to see the group or collectivity as primary. Others have maintained that Chinese society is individualistic. Consequently, these commentators have held the view that socialism is contrary to the strong individualistic nature of the Chinese. It has also been remarked that although Chinese Confucianism emphasises the dignity and internal autonomy of the individual, it has, by conscious choice, never developed this into a doctrine of individualism. Benjamin Shwartz believes that it is necessary to distinguish between differences in the way the notion of the individual is conceptualised in East-Asia and the West. For Shwartz, the Confucian concept of the individual is related to self-development and moral improvement. This is echoed by Lucian Pye who holds that the Chinese individual believes that social control has to come from within the self and that the ideal of social order rests upon self-discipline.

In view of the forgoing comments, it appears curious that C.P. Fitzgerald maintains that the Chinese are a nation of individuals. However, when we look more closely at what he says it becomes obvious he is referring to familism. He argues that for the Chinese it is a case of every family, rather than every person, for themselves. In times of trouble a person has to use their family's influence to the fullest as the community will not help them. Other scholars maintain that apart from this stress on the family in the Chinese tradition there is an emphasis placed on the collectivity. For example, Pye claims that in Chinese civilisation the basic themes of social, political, and philosophical life all tend to converge in accentuating the importance of the collectivity. The individual finds his identity only as a functioning member of the social order and the family order.

Speaking from an American cultural perspective, Richard Solomon holds that the West places a strong emphasis on the importance of the individual in society, on personal responsibility, and on self-realisation. He considers that the Chinese emphasis is on social interrelatedness, on the basic importance of group life, and on submission of the individual to collective interests. For

Solomon, this stands out as a fundamental cultural difference. However, despite what Pye and Solomon say, it is questionable that in the Chinese tradition there is a commitment to a collectivity apart from and outside of the family, clan or lineage. Fitzgerald's observations may be more pertinent in this regard. In fact, Francis Fukuyama emphatically states that Chinese society is not group oriented. However, Fitzgerald and Fukuyama are really making the same point. Fitzgerald sees the family in individualistic terms and Fukuyama does not count the family as a group.

As there are strong grounds for believing that traditionally the Chinese are family oriented rather than group oriented then one can conclude that collectivism is not a traditional value but one imposed by an official discourse. With the virtual collapse of the extended family due to the one child policy it is possible to speculate that individualism, under the impetus of the market economy, will eventually replace collectivism as the dominant

social value. There is support for such a view in the discussions of the individual and the collectivity at national forums on ethics. At these forums ethicists are putting forward the view that collective interests are best served by pursuing individual interests. This is not a rejection of collectivism, but a challenge to the maxim that

both collective and individual interests are best realised by pursuing collective interests. Nonetheless, in terms of the official discourse in China there is a sustained censure of individualism. It is perceived as one of the main factors, if not the only one, involved in the rise of morally negative phenomena in China.

There can be little doubt that under the influence of the market economy the questions of the role of the individual, individual interests and values have come to the fore. In a developing market economy, as opposed to a planned one, qualities such as independence, initiative, enterprise and a spirit of individualism are generally deemed essential, yet these are seen by some Chinese to be a threat to a sense of social responsibility. They reiterate the traditional theme that self-cultivation and education are important factors in coping with the perceived excesses of individualism.

Individualism and the Market Economy

The notion of individualism in capitalism has been described by Russell Keat as the conception of economic activity as the rational pursuit of individual self-interest; the reinforcement of competitive, acquisitive and possessive attitudes; the perception of the 'problem of social order' as that of reconciling peaceably the intrinsically

conflictual nature of individual interests. This understanding of the nature of individualism in capitalism is echoed by some Chinese writers. However, in rejecting capitalism, they are not rejecting the market, but what they believe to be the individualism inherent in the neo-classical economic paradigm. Consequently, they maintain that the fundamental ethic of capitalism is individualism and egoism which, in turn, determines that the interests of the individual are placed before those of the collectivity and are the basis of the communal interests of society.

In their analyses of the emergence, development, nature, and historical function of individualism in Western society, Chinese writers, on occasion, resort to the observations of Western commentators. In the writings of the latter, they find support for the view that individualism stresses the principle of the struggle for existence, advocates the ascendancy of the strong over the weak in politics, and defends and encourages aggrandisement and competition in economics. Other Chinese point out that the intrinsic relationship between collectivism and socialism on the one hand, and between individualism and capitalism on the other is the reason why there is conflict between collectivism and individualism and opposition between the ideologies of socialism and capitalism. For this reason they believe that adopting individualism will not help resolve the question of appropriate and legitimate interests but could further intensify the contradiction between the individual and society. More generally, they reject individualism because they hold it to be historically a less progressive value than collectivism; a value that does not conform to China's traditional culture and one that is incompatible with China's current circumstances.

Thus, in view of what they believe to be the conflictual nature of self-interest in capitalist societies and the inability and futility of attempting to reconcile them under that system, some Chinese thinkers see the essential problem of individualism in a socialist society as the reconciliation of individual interests in terms of contributing to the interests of the collectivity. Consequently, they perceive the problem of individualism in a socialist society as one of establishing in what context the pursuit of individual interests is rational and ethical from the perspective of a discourse and system that privileges collective interests over those of the individual. If we assume that there is a creative tension and a perpetual search for balance between two primary forces—those of the individual and those of the collectivity, then we can speculate that discussion amongst Chinese on the relative merits of individualism and collectivism is both an attempt to come to terms with the creative tension between these two primary forces and a quest to find a balance between them. For example, in the words of Amitai Etzioni, does individualism entail an absence of a commitment to serve shared needs as well as non-involvement in the collectivity that attends to these

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needs? Is individualism the negative, divisive, pursuit of self-interest that is inimical to social order and the public good? Or does the pursuit of these very same self-interests enhance the general well-being and good of the collectivity? Similarly, is the collectivity inherently hostile to the individual's pursuit of their self-interests? Is the collectivity the source of authority and legitimacy that in the name of duty imposes behavioural standards on individuals and leaves an insufficient basis for individual freedom and other individual rights? Or do individuals freely involve themselves in the collectivity in that they surrender their sovereignty and voluntarily commit themselves to its values?

The Censure of Individualism

The criticism of individualism in contemporary China echoes that of Liang Qichao who regarded individualism as inspiring minority demands, undermining common beliefs, championing undisciplined freedom and opposing national goals. In the contemporary censure of individualism as a negative value there is little, if any, distinction made between it and egoism and extreme individualism; all are equally believed to be focused or centered on the self and to have the same consequences. There are three dimensions to this criticism of individualism as a negative value: (i) its perceived effect on the morality of individuals; (ii) its effect on the relationship between the individual and the collectivity; (iii) and its effect on society. With regard to personal morality, individualism is believed to engender selfishness, selfish desires, self-interest, an awareness of self, self-realisation, self-choice, decadent life styles, money worship, unhealthy tendencies, corruption, deviation from moral norms, cupidity, the weakening of convictions etc. With respect to the relationship between the individual and the collectivity, individualism is seen as privileging the individual over the collectivity, advocating disregard for collective and social interests in favour of the blind pursuit of self-interest, and regarding China as an illusory collectivity. In terms of the nation and the broader society, it is held that individualism, apart from corrupting the youth of China, is detrimental to the achievement of national goals, undermines the style of the party, government and people, and impedes and does considerable harm to China's material and spiritual civilisations.

Nonetheless, writers take pains to distinguish between individualism and legitimate individual interests. Thus, the pursuit of legitimate individual interests is not considered to be unethical unless these interests are pursued 'blindly'. As early as the late 1970s Li Qi insisted that personal or individual interests should not be confused

with individualism. Zhang Ruifu also holds that people should be free to discuss the question of individual interest. It is difficult, however, to make a distinction between people pursuing their self interests in the market and manifestations of individualism. It could be argued, for instance, that selfishness in the market is just as effective in advancing the interests of society as is seeking legitimate individual interests. Adam Smith, for example, in discussing the 'invisible hand' made no such distinction between the pursuit of legitimate interests and the effect of the natural selfishness and rapacity of the rich who in seeking their own convenience and the gratification of their own vain and insatiable desires through the employment of labour advanced the interest of society without intending to.

In China there are two aspects to the censure of individualism—the economic, and the social and political. Economically, the problem for Chinese writers is that if, as Adam Smith believed, selfishness and rapacity in the market lead to benefits for the larger community, then such things as greed and money worship may be a necessary consequence of developing a market economy. This makes it difficult to distinguish between legitimate and non-legitimate self-interest if a long-term view of the

market is taken. However, from a social and political perspective, individualism is believed to be inimical to social order and the public good. It seems counter-productive, to say the least, that such obviously positive values as self-choice, self-realisation and awareness of self are criticised.

One can speculate that this is because they are believed to lead to the questioning of commonly held beliefs and a growth in minority demands. Authority can be challenged and the direction the country is taking questioned. The merit of national goals and the way they are to be achieved is open to discussion. Consequently, manifestations of individualism are regarded as socially divisive.

The Challenge of Individualism

A number of Chinese commentators believe that the true nature and value of collectivism as a principle was distorted by the excesses of the previous ultra-Leftist regime in which any expressions of individualism, self initiative, or attempts to improve one's circumstances were heavily penalised. They see individualism as the principal problem facing Chinese society. For example, for Luo Guojie the most important lesson for post-Reform China is that it has neglected to come to terms with the harm brought about by the increase in individualist thinking. He believes that there has been no consistent, clear-cut stand in upholding collectivism as a guiding

Individualism is believed to be inimical to social order and the public good.

value. He also considers that, in terms of a guiding value, the fundamental opposition in China is between individualism and collectivism. He is critical of what he sees as an open attack on collectivism and the promotion of individualism. Collectivism, he believes, should not be rejected because at times it has been misrepresented and legitimate individual interests overlooked in favour of overall interests. In a similar vein, Ze Pu makes the point that in the past the problem was that the distinction between legitimate and non-legitimate individual interests was not clear and consequently individualism was confused with the pursuit of legitimate individual interests and individual effort was regarded as a manifestation of individualism. Now he sees the problem as those who maintain that individualistic and even egotistical tendencies are consistent with China's reform and opening up and who propose that the negative perception of individualism be redressed. People are now, Ze Pu believes, being encouraged to emphasise the individual at the expense of the collectivity.

There is also an assumption amongst some Chinese commentators that in the past people were generally willing to sacrifice their individual interests in favour of the collectivity (although for many this sacrifice must have been for an undefined and unspecified entity). Guo Xuexian, for one, laments the passing of the time when he claims the majority of people, cadres and party members unconditionally subordinated their individual interests when these were seen to be in conflict with those of the collectivity. Now he sees an unwelcome tendency towards 'conditional subordination'. This change he contends is a consequence of the development of the market economy. Thus, Guo attributes the growth of individualism to the intensity of competition in the market economy where, he argues, the strong overcome the weak and those with ability are able to survive and develop. As a result, he points out, it is easy for those with ability to consider that the moral qualities the market economy requires are independence, initiative, enterprise and a spirit of individualism. This in turn results in the overstatement of individual ability, of the struggle between individuals, and of individual interests and values. Hence, he sees a weakening in people's sense of social responsibility and an inability to perfect the moral quality of the individual.

Nonetheless, despite the censure of individualism there are other Chinese who are in favour of evaluating the role of the individual in the market. For example, there are those who, whilst subscribing to collectivism as a socialist principle, propose that the role of the individual, individual interests and individual values should be appraised with a view to the requirements of the market economy, and in the light of new values fundamentally different to those of the past. They maintain that the existence of the individual should be taken as the starting

point; consequently, both the individual as the subject in the market economy as well as individual values should be given prominence. In addition, they believe particular attention should be given to the safeguarding of the interests and well being of the individual. They see the goal as the free and all-round development of the individual. Others, however, go further and maintain that in the relationship between the individual and society individuals are of primary importance as they are the bearers and creators of all social relations.

Some Concluding Remarks

The ideal in the Chinese tradition is that harmonious social relations are based on self-cultivation, education and propriety. This was why Kang Youwei rejected the rule of law in favour of self-cultivation and propriety in the Reform Movement of 1898. However, most Chinese commentators now believe that education and self-cultivation are inadequate ways of addressing individualism. There are two obstacles presently standing in the way of a general acceptance of individualism in China and one factor actively promoting its acceptance.

In the first place, there is the effect of tradition. This is most explicitly manifested in the views of those Chinese who maintain that individualism does not conform to China's traditional culture. We must also take into account the lingering influence of the traditional Chinese emphasis on duties rather than rights, on authority rather than autonomy etc. All of these count against the development of a sense of the individual.

In the second place, there is the influence of the collectivist ethos of Marxism. The factor working in favour of the acceptance of individualism is, of course, the market economy. In a command economy decisions on policy are arrived at by the relevant bureaucracy. There is little opportunity for those who carry out these decisions to use their initiative. In addition, as the means of production are state owned and the ownership of private property, rather than personal property, is not permitted, there is less opportunity to develop individual personality. As Hegel, maintained, the unfolding of individual personality is dependent on the fact that one can express oneself by creating and modifying things, which in turn requires that others recognize one's property rights. One can further argue that unless one is permitted to use one's initiative to the fullest possible extent, to engage in making choices, the development of those

The factor working in favour of individualism is, of course, the market economy.

unique abilities and talents that constitute individuality will be given no occasion to develop.

Another important consideration is that many Chinese have lived through a period during which it was impossible to make a correct evaluation of the respective merits of individualism and collectivism. Manifestations of initiative and individuality were severely penalized. The effect of this is that today many Chinese find it difficult to distinguish between legitimately pursuing one's own interests and individualism. One might add that this is compounded by lack of clarification of exactly what constitutes a collectivity to which individual interests are subordinated. It does not seem to refer to what are termed collectivities and sub-collectivities in the Western literature (racial or ethnic groups, work or neighbourhood groups etc.). Sometimes collective interests are contrasted with social interests. Generally collectivism indicates the proletariat, the people, the 'masses of the people', society or the nation. At times it appears to be simply the antithesis of the individual or a reference to some amorphous entity distinct from and opposed to the individual. It certainly does not refer to ethnic groups, regional or local associations, clan or lineage based affiliations. These are seen as narrow self-interest groups. Partial interests are often contrasted with overall interests but these are left undefined. Even when the notion of collectivity is discussed it is in the form of what it is not rather than what it is. For example, in a discussion of socialist collectivism it was maintained that it is not a minor value like groupism, familism, factionalism, localism or nationalism.

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The Ethics of Medical Misadventure

by Grant Gillett



The high costs of medical litigation are arguably unsustainable, but are there viable alternatives to litigation? Grant Gillett canvasses three ways of dealing with 'medical misadventure'.

Although the art of healing is the most noble of all the arts, yet, because of the ignorance both of its professors and of their rash critics, it has at this time fallen into the least repute of them all. (Hippocratic writings: The Canon)

These words are a timeless comment on popular opinion about medical malpractice and misadventure. However, throughout the world, societies are buckling under the financial weight of the medical litigation industry and it is time the real issues were addressed. Suits are based on the idea that misadventure results from negligence and incompetence. But in fact many bad medical outcomes are not a result of individual failing but of systems faults, or they should be expected on statistical grounds. Our mechanisms of remedy and redress should reflect these realities.

The Problems that Occur

Patients do suffer harms in the medical setting in up to 5% of admissions to reputable hospitals (Brennan 1991, Vincent, Davis). About one quarter of the complications are due to clinical negligence, and another quarter to errors of other kinds (Leape 1991). 'Medical misadventure' covers all events where patients suffer harm in clinical settings and can be usefully divided into 'medical mishaps' and 'medical errors' (a terminology which happens to be used in New Zealand). A *mishap* is an event in which an adverse event happened despite competent treatment and an *error* occurs when a mistake is causally responsible for the harm. As Fitzjohn and Studdert point out, tort law exacts damages from the agent who caused a harm and therefore only properly applies to medical errors. Given that there is a statistical rate of adverse outcomes to be expected even when no error occurs, a careful review of any adverse event should assess both the base rate or probability of that event happening on that occasion, and the occurrence or otherwise of an error.

In fact, even though the difference between mishap and error seems clear, there is often a borderline at or about which 'luck' plays a role, so that in assessing alleged misadventure, it is important to look at case mix, track record, and peer review.

Case mix: It is obvious that any doctor who routinely deals with cases that are complex, difficult, or dangerous, would be expected to have more adverse outcomes than somebody with a much less demanding scope of practice.

Thus caseload—a statistical rate of expected bad outcome relativised to the type of patient being treated is extremely important.

Track record/audit: Doctors are increasingly being required to keep an audit of their practice in terms of the morbidity and mortality of their case management which allows a particular complaint to be assessed against a framework of practice rather than being dealt with as a one-off *ad hoc* judgement based on sometimes conflicting opinions about what should have been done in the case in question.

Peer review: Peer review is a means of supplementing clinical audit by reflection and conversation designed to improve the participants' practical skills. It is light years away from the kind of commentary on practice that tends to emerge from expert opinions in an adversarial setting. The latter is more like the work of credible 'hired guns' whose contract is to support one side or other of a case in which there has got to be a winner and a loser.

Therefore there is good reason, when litigation is resorted to, to move away from the expert witness system as it currently operates and move towards assessments by a panel of respected experts. Such a panel can provide the considered opinion that one cannot hope to get from 'the expert witness' acting for an interested party. I will also urge that a systematic audit, perhaps enhanced by critical incident reports and conducted in association with peer review, is vital in coming to a balanced assessment of any clinician's practice and assisting his or her own reflection on that practice. And I will finally suggest that an atmosphere of safety, support, and care for one another as professionals and colleagues is essential in delivering good clinical care to patients and communities.

The Hippocratic Oath is sometimes blamed for an ethos protecting bad doctors.

I will pay the same respect to my master in the Science as to my parents and share my life with him and pay all my debts to him. I will regard his sons as my brothers and teach them the Science, if they desire to learn it, without fee or contract. I will hand on precepts, lectures and all other learning to my sons, to those of my master and to those pupils duly apprenticed and sworn, and to none other. (Hippocratic writings: The Oath)

The Hippocratics conceived of the profession as an extended family with its own traditions and sense of honour.

But it is not clear that this set of injunctions, in the context of the other writings, supports any such professional protectionism. The Hippocratics conceived of the profession very much as an extended family with its own traditions and sense of honour. It is in the light of this conception of the profession that we ought to consider the current crisis in malpractice and professional discipline.

The need to be vigilant in monitoring the profession has been evident since Hippocratic times as is seen in the following remark:

[S]orry doctors who ... cure men but slightly ill ... [and] their errors are unperceived ... but when they have to treat a serious and dangerous case, a mistake or lack of skill is obvious to all. (Hippocratic writings: Tradition)

The Hippocratics had also figured out the relationship between practice and luck:

Even I do not exclude the operations of fortune, but I think that those who have received bad attention usually have bad luck, and those who have good attention good luck. (Hippocratic writings: Science)

We are therefore faced not only with a crisis in malpractice arrangements but also with a need to ensure professional standards, to improve the quality of medical and surgical care, and to reassure the public that this is being done. These desiderata do not throw a favourable light on the current system in Australia.

What We Have Now: Three Ways of Dealing with Bad Outcomes

Given that bad events are, like the poor, always going to be with us, there are three ways of dealing with medical misadventure when it occurs:

1. litigation;
2. discipline;
3. clinical governance and safety.

We can take these in turn and attempt to evaluate their relative merits in terms of the way that they deal with the needs of patients, their effect on the quality of medical practice, and their efficacy in detecting and correcting the failings of those clinicians who make errors.

The role of litigation

There are a number of justifications for civil litigation as the means of responding to medical negligence. Whelan outlines them as follows:

- a) it directly penalises those who have been negligent;
- b) it imposes liability on the more knowledgeable and powerful party;
- c) it is less restrictive than government regulation;
- d) it deals with minor as well as major negligence where that leads to harm.

These justifications are credible in that, according to

Brennan (1991), 27.6% of misadventure is due to medical error, including both surgical and other negligence. Tort based systems rest on the justification that a penalty should fall on the causative agent and thus, a doctor who harms a patient should be able to be sued. The alternatives do not punish the fault and the responsibility for remedy lies with a third party insurance provider or the community acting through some other agency. What is more it is plausible that doctors ought to take responsibility to avoid litigation so that the cumbersome and expensive process of regulation and compliance is kept out of health care costs. And minor mistakes, not serious enough for the heavy hand of regulation, can still be redressed so that there are incentives to eliminate them. Unfortunately these justifications are all flawed.

First, the system is not just because: (i) *court settlements do not track errors* but tend to be driven by the extent of patient harm and (ii) *doctors are insured for malpractice liability*.

The first problem has now been shown in studies of misadventure and litigation.

In a multivariate analysis, disability (permanent vs. temporary or none) was the only significant predictor of payment ... There was no association between the occurrence of an adverse event due to negligence ... and payment. (Brennan 1996)

In fact, according to Studdert, not only are genuine malpractice and settlements unrelated, but there is no correlation between negligence and claims against doctors.

Medical malpractice litigation infrequently compensates patients injured by medical negligence and rarely identifies, and holds providers accountable for, substandard care. (Localio)

This damning conclusion, firmly based in evidence, undercuts the main justification for a tort system of dealing with medical misadventure.

The second problem is a corollary of the first. Doctors are insured so that suits for medical harm are settled by a third party—the company indemnifying the doctor. Such companies recognise that bad things can happen which are not straightforwardly attributable to negligence or incompetence and they do not impose punitive premium adjustments against doctors who are found against. Thus any settlement causes the insurance premiums paid by all doctors to increase, and, as legitimate overheads of clinical practice, premiums affect doctors' fees. The net result is that the guilty parties among those subject to litigation are not necessarily punished and all patients end up paying more so that settlements for those who get compensated can be paid. In other words we have a '*multi-million dollar medical malpractice lottery*' which offers some patients the chance of becoming fabulously wealthy at the cost of

their health but on the basis of increased medical costs for everybody else.

Things get even worse when we look at positive reasons for not buying into a tort system.

It is *unfair* to patients who suffer serious harms but cannot prove fault; their needs are as great as those who succeed (in the lottery) but those needs go unmet. This is unjust.

It wrongly *isolates the doctor* as causative agent when mistakes often have a multifaceted cause so that a doctor, acting within accepted standards of professional care, can be part of a chain of events in which there is a bad outcome. It encourages *defensive medicine* and adversarial attitudes in what should be a partnership with the patient. These jointly raise the costs of medical care. The adversarial attitudes are extremely damaging in that clinical medicine ought to be a mutual problem-solving exercise in which an informed and engaged patient works with a clinician to try and produce a solution to the clinical problem that both can live with. These problems are not solved by the traditional alternative—medical discipline—although that avoids the worst excesses of the *multi-million dollar medical malpractice lottery*.

Medical discipline for malpractice

A doctor who is not acting according to the standards of the profession is dealt with by the relevant disciplinary mechanism which generally takes the form of a dual set of provisions: (a) to control licenses to practice medicine, and (b) to deal with complaints so doctors can be assessed according to professional standards and suitable disciplinary action taken according to the relevant professional guidelines. Warren lists the following requirements, which any doctor should meet:

- (1) he must possess the degree of professional learning, skill and ability which others similarly situated possess;
- (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and
- (3) he must use his best judgement in the treatment and care of his patient.

Traditionally allegations of negligence are brought to the attention of the licensing body by a patient but in some places (in fact, in New Zealand and Sweden) there is also mandatory reporting of medical misadventure by the state funded compensation mechanism.

The disciplinary process can investigate any doctor at any time, but it is usually triggered in one of the two ways suggested. The disciplinary process can cause a doctor to be 'struck off' the list of qualified medical practitioners so that he has to give up practice but most countries have bodies (with either state or national jurisdiction) that can:

issue reprimands, limit a physician's license to practice, or place a physician on probation... require a physician to receive additional medical education or to submit to a professional competency exam before a suspension or probation will be terminated ... or suspend or revoke a license. (Warren)

Such systems have many critics.

Patient groups and the public often think that doctors 'close ranks' and protect their colleagues when something goes wrong. However such regulatory bodies now tend to have both professional and lay representation so that they are not only well informed but also open to the voice of the community and open to scrutiny from outside the profession.

Three further problems are not addressed by the disciplinary mechanisms *per se*.

Disciplinary and complaints mechanisms do not come into play until somebody is so seriously harmed that the problems surface. Quasi-judicial frameworks support a 'blame and shame' culture for medical misadventure which does not directly improve safety or support the practitioners concerned. We therefore need to create a better context or societal ethos for good professional practice.

Clinical governance: Where can we go from here?

The third response to medical misadventure is to promote a climate where patients are safer because errors are prevented. A Harvard study cited by Leape reckoned that 58% of adverse events were preventable, and a New Zealand study called nearly 40% of adverse events 'highly preventable' (Davis). Throughout the world there is current or pending legislation and health policy initiatives aimed at safeguarding and providing for the maintenance of competence (Malcolm). This kind of policy can produce external, heavy handed, and suffocating regulations on practice rather than improving procedures in leading to adequate clinical practice within health care institutions.

Clinical governance focuses on methods of audit and collaborative consultation whereby the standards of every practitioner are improved through involvement in a structured process. It tends to involve clinical staff in management decisions, and Scally and Donaldson suggest it promises to go a long way towards workable professional standards relating clinical practice to scientific research. Therefore governance is a huge step towards eliminating misadventure.

However, one must beware of systems which tend towards mandatory reporting of medical adverse events and the suspected incompetence of one's colleagues, because any good effects can be easily outweighed by undesirable con-

We have a 'multi-million dollar medical malpractice lottery'.

Clinical governance focuses on methods of audit and collaborative consultation.

sequences. The mandatory reporting requirement is radically changed by what we put in place around it. In the 'support and safety' environment which is fostered by clinical governance measures, there is a measure of protection not only for the public but also for professionals. A period of remedy, correction, and rehabilitation is preferable to a consumerist, adversarial, and litigious orientation in which grievances rule and those baying for blood are the voices that are heard. We do not want a situation where any settlement for misadventure is forestalled by an evasive profession and non-cooperation because of fear of litigation. Such an outcome depends not on legislation but on education, public attitudes, and the socio-political climate that is generated around health care. In fact this 'climate' has a profound effect at many levels.

Reforming the System

Clinical governance, audit, ethics education (involving training in virtue), and mentoring have a good chance of making health care safer and better. But there remain the cases in which clinicians do fail and people are harmed. Some form of remedy or redress is therefore still required and a fairly robust reporting system and a mechanism for principled distinctions between malpractice (error and negligence) and misadventure are far better than the tort system. It looks as if this should supplement a system of clinical governance. Expert panels and audit considerations, a compensation scheme for patients which does not require the patient to prove fault and which places significant limitations on settlements, and improved safety measures all seem to be positive moves. Such provisions would justify the belief that a community is served by a profession that is governed and held accountable for practice in the way most likely to protect patients from harm and remedy the causes of bad clinical management.

In the present crisis in medical insurance, an out-of-control malpractice industry and somewhat haphazard professional regulation, it is imperative that we take the practical and legislative steps required to regain what we have lost—a vocation with an internal morality that conduces to safety in practice, effective self-regulation in partnership with our patients, and realistic support for one another as professionals. It is only within such a climate of practice, and the collegial relationships that will sustain it, that the moral tools of the profession can hope to be adequate to the task for which they have been crafted.

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The Code and The Guide—Practical Instruments for Practical People

A Reply to Cannold

by John Fleming

John Fleming considers Leslie Cannold's critique, in *Res Publica* 11/2, of the Code of Ethics and Guide to Ethical Conduct for Residential Aged Care.

Leslie Cannold's write up, in the last edition of *Res Publica*, of a paper she delivered at a Melbourne Conference represents, at least superficially, a full-blooded attack on the *Code of Ethics for Residential Aged Care* (the Code) and the associated *Guide to Ethical Conduct for Residential Aged Care* (the Guide). She asserts that no reasons have been given as to why the concepts of mutual obligation and rights were used to underpin the Code and Guide. The consequence of this mistaken decision is, she claims, that 'the Guide advocates some actions...that are either unnecessary, nonsensical, outside the province of ethics and/or even unethical.' It will be contended in this response that these criticisms are without foundation and have not taken into account the context in which aged care services are delivered in Australia, especially the *Aged Care Act* 1997, and the *Charter of Residents' Rights and Responsibilities*.

Outline of the Cannold Case

Leslie Cannold seems to have adopted two different and mutually contradictory criticisms of the Code and Guide. Cannold-1 judges 'the use of 'mutual obligation' as a justification for applying the same values to all the partners in the aged care enterprise' to be 'problematic' because it supposedly 'ignores important power differences between aged care facility employers, employees and residents'. For Cannold-1 a patient rights discourse is apparently preferable and expresses some important values. Cannold-2, on the other hand, finds the use of rights language inadequate for the purpose, weakening the effectiveness of the Code, and then proposes that some of the values expressed in the Code be restated as 'obligations rather than rights.' Moreover, both Code and Guide are to be criticised for not containing fully elaborated philosophical arguments.

The position then appears to be this. Cannold-1 dislikes 'obligations' but likes 'rights'; Cannold-2 dislikes 'rights' but likes 'obligations'; both Cannolds like the complex philosophical arguments and the language of 'values'; but neither Cannold seems much to like the idea of 'mutuality'. Neither criticism seems to take full account of the audience for which the Code and Guide are intended—providers, practitioners and recipients of aged care services (and their families). Nor do these criticisms demonstrate any awareness of the context of the two documents, which is made abundantly clear in the introduction to the Code and Guide: the *Aged Care Act* 1997 (as amended), the *Aged Care Principles* established under subsection 96-1 (1) of the *Act*, and the *Charter of Residents' Rights and Responsibilities*. I shall try to make sense of all of this by taking each of her/their assertions separately to see what can be made of them.

Cannold's Assertions

Two of Cannold's assertions, that the Guide advocates some actions for each of the groups to which it is addressed which are 'unnecessary' and 'nonsensical', can be simply dismissed for want of evidence or argument. Despite the seriousness of these 'charges' (her word), absolutely no evidence is offered in their support, with 'space limitations' being offered as the reason for this omission. This is, to put it mildly, hardly fair. If such serious charges are to be made they must surely be justified.

Mutual Obligations

Next Cannold promises to 'argue' that 'the use of mutual obligation to structure the Code ignores important power differences between aged care employers, employees and residents.' In fact Cannold really only asserts this to be the case. Attention to the documents themselves reveals the real strategy of the Code and the Guide.



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In the first place, mutual obligation is not used to structure the Code. It is used to structure the Guide. The Code represents agreed human values, all but one expressed as rights, and which are applicable in the area of aged care services. The Guide, structured on the basis of mutual obligations, assists in the interpretation of the Code by

providing the obligations that each of the parties has to the others thereby providing reasonable limits to expectations that rights and duties alone do not describe.

Second, Cannold says that she is worried about mutual obligations as a structuring device 'not because it is untrue that all partners in aged care have obligations, but because these obligations are likely to be different and asymmetrical due to the differences in the roles and power of each of the partners.' So we have an acceptance that, *as a matter of truth*, there are in fact 'mutual obligations'. Cannold's problem is, then, about power differentials. But these power differentials are a fact of nearly all relationships where mutual obligations apply. That is precisely the reason why we need to emphasise the *rights* of the less powerful and the *obligations* associated with each role. It is precisely why we need a Code. Abandoning the concept of mutuality is unlikely to encourage either side to address the power imbalances or act ethically with respect to them.

That a serious attempt has been made to meet the question of power imbalance can be seen in the content of the obligations set out in the Guide. Over four and a half pages elucidate the obligations of approved providers, four pages the obligations of employed and contracted staff and about two pages the obligations of attending professionals. Alongside this there are only two and half pages dealing with the obligations of residents and their families/representatives. And when one reads what those obligations are one sees the many ways in which approved providers, contracted staff and other professionals are committed to the well-being of those for whom they care.

The fact is that the Code and Guide have not arisen in a vacuum. They represent the values, aspirations, and good practice which characterise the vast majority of residential aged care services.

Cannold suggests that there is a confusion in the Code and Guide by playing off against each other two important statements which, in the context of the whole document, are clearly and repeatedly complementary. In the Background section of the total document it is observed, as a matter of fact, that 'the fundamental human values identified in the *Code* drive the way in which key personnel and all those involved in the provision of services to Aged Care residents, in partnership

with the Commonwealth, make, implement, and evaluate policies which affect the delivery of those services for the benefit of Aged Care residents through the *Guide*.' Cannold completely misconstrues this as 'the aim of the Code and Guide', which it is not! The context of that sentence is the paragraph which begins 'The Aged Care sector is committed to the provision of care to a standard appropriate to the needs of all those who are residents of residential Aged Care services under the *Aged Care Act 1997*.'

Put another way, the Code and Guide identify human values universally accepted as true and to which Australia has committed itself by (1) its endorsement of the Universal Declaration of Human Rights and the various treaties made under that Universal Declaration, (2) its membership of international medical and nursing care bodies which also assert such values, and (3) its long-standing practice in aged care. The sentence, which Cannold inexplicably reads as prescriptive, is in fact descriptive and represents an acknowledgment of the fact that aged care professionals have always seen themselves as operating in a profoundly ethical manner.

The same Background section announces the basis upon which the Code and Guide have been developed or formalised, i.e. on 'an understanding of the mutual obligations and interests of all the parties involved, including aged care residents and their families, and on the need for all partners to comply with all relevant legislation, service agreements and other professional codes of practice.'

Thus Code and Guide demonstrate well the complex community involved in aged care and the complex of obligations or responsibilities that each has to themselves and to each of the others. Without a concept of mutuality aged care could easily be misconceived as the mere purchase of a service by a consumer or as various rival parties competing for their own self-interest. Mutual obligation recognises that aged care involves a relationship of community or team between the various parties in pursuit of a good which is common to them but which must be protected and promoted by a clear sense of the obligations of each party. The 'confusion' which Cannold asserts is in fact no confusion at all once one reads the text accurately.

Any examination of the philosophical basis of the Code and Guide in terms of obligation must have regard to the literature which considers the concept of obligations and its scope. For example, John Finnis' conclusion on obligation is instructive:

For our earlier accounts of obligation terminated at the common good: those actions, projects, and commitments are obligatory which are necessary if the common good of persons in our communities is to be realized. This left an unanswered question: In what sense are we to take it to be necessary to favour the

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common good, which after all will end, sooner or later, in the death of all persons and the dissolution of all communities?

Finnis goes on to provide his answer, an answer which is in important respects different from the answers proffered by Hume. What is lacking in Cannold's account of obligation is not only an adequate account of the legal and social context within which residential aged care services are delivered in Australia, but also an adequate appreciation of the philosophical literature.

Obligation to Meet Financial Responsibilities

Cannold's sole example of how the mutual obligations strategy allegedly fails is the requirement in the Guide that residents and their families/representatives 'meet their financial obligations for their care.' Cannold declares that this obligation is 'not an ethical but rather a fiduciary obligation that residents have to service providers and that it is inappropriate for it to appear in a code of ethics.' This is an extraordinary proposition for which one might have expected reasons to be given. On the contrary, no reasons are given as to why paying your debts is not an ethical obligation. In fact the duty to pay your debts, including the limits to that duty and the basis of that duty, is an archetypical example of an ethical obligation. And all fiduciary obligations, unless constructed in the most narrowly legally positivist sense, are ethical.

Bernard Williams puts it this way:

Moral obligation is inescapable. I may acquire an obligation voluntarily, as when I make a promise: in that case, indeed, it is usually said that it has to be voluntarily made to be a promise at all, though there is a gray area here, as with promises made under constraint. In other cases I may be under an obligation through no choice of mine. But, either way, once I am under the obligation, there is no escaping it, and the fact that a given agent would prefer not to be in this system or bound by its rules will not excuse him; nor will blaming him be based on a misunderstanding.

Cannold continues by playing off the inability of a person to meet their financial obligations against the ethical obligation to pay, such that the obligation to pay is no longer an ethical one. This misses the point. Australian society accepts the fact that commutative justice may give way to distributive justice when the family or, failing the ability of the family to pay, the community as a whole accepts a further responsibility to a person who is financially destitute. In such circumstances the State provides a pension and under our current legal arrangements 85% of the pension may be used by the aged care facility in full payment of the resident's financial obligations.

Worse still, Cannold then suggests that under the Guide an approved provider would be justified in, for example, evicting a person who had become financially destitute. Not only does the Guide say no such thing, such matters are already anticipated in the *Aged Care Act 1997*. And the opening sentence in the section *Purpose of the Code and the Guide* says this:

The aim of the Code and the Guide is to set out the ethical commitments made by the Aged Care sector in addition to its legal obligation to comply with the Act and the Principles made under the Act.

The question of security of tenure for a care recipient is dealt with in various parts of the *Act* and the *Principles*. The idea that an aged care provider,

faced with a resident who cannot meet their financial obligations (or even with one who can but won't) could do as they please at law or under the Code would be laughable if it were not so insulting to the aged care sector as a whole.

The Guide and Whistleblowing

Cannold takes exception to the way in which the right to privacy and confidentiality is applied in the Guide. In fact she describes it as 'ethically suspect'. This is so because the Guide recommends that employed and contracted staff respect the privacy and confidentiality of 'the provider'. She then concludes that such staff would be put in an ethically impossible decision if they needed to blow the whistle on unacceptable practices tolerated by the provider.

In fact all confidentiality clauses have their limits. Some nurses may, for example, properly reveal some confidences about patients to some people some of the time. In any case the Guide anticipates the problem to which Cannold refers, as does the law. She has overlooked the provision in the Guide in the previous section which deals with value 5, *The right to an appropriate standard of care to meet individual needs*. Here it is stated that employed and contracted staff should

report any observed failures of standard of care through the appropriate complaints mechanism.

Moreover, the Guide specifically refers to the expectation that health care professionals 'will also adhere to their own professional code of ethics', codes which adequately express the obligation of health professionals to those in their care as a first priority.

Cannold and Rights

Cannold concedes that 'rights are the most common and accepted currency in our society for articulating ethical demands.' Nevertheless, she says, 'they may not always be the best one.' Fair enough. But a Code has to look for

All confidentiality clauses have their limits.

the framework or grammar that best expresses its particular ethical concerns in a way that is accessible to its readership, keeps the document to the length expected of a code and guide, and is practically useful in the field. Cannold gives no real reason for thinking rights language unhelpful here.

Furthermore she seems to overlook the fact that the Code and Guide do not simply rely on the rhetoric of human rights. The Code and Guide access a rich vein of ethical concepts including mutuality, obligation, responsibility, duty, agency, code and profession.

Now Cannold-2 admits, what Cannold-1 denied, that 'a largely reciprocal relationship exists between rights and responsibilities'. Some would even contend that they are simply two rhetorics to express the same normative content. However, Cannold believes that 'the language of responsibility may...be more appropriate in ethical codes of conduct.' This is because, she says, while it is often deemed empowering to the more dependant individual/groups 'to imbue them with rights without real autonomy and power, less weak dependant groups may have a hard time realising them: making the rights 'empty'. Responsibilities, on the other hand, take the claim-onus from the less empowered and put the action-guiding obligation on those more able to exercise it.'

This is a highly tendentious line of reasoning. If the more powerful party claims to have fulfilled its responsibilities, where is the less powerful party left if it has no rights claims? The fact of the matter is that one needs both rights and responsibilities to define the scope of one's obligations to meet the rights claims of the other. In the Australian context the power imbalance between residents and those who care for them is obviated by residents' rights being strongly supported by the development of advocacy agencies in each state, resident agreements, the Aged Care Complaints Resolution Scheme, a National Commissioner for Complaints, and access to the Community Visitors Scheme.

Cannold goes on to make the highly contentious claim that 'rights language is ... more open to misuse and abuse

than the language of obligation ... [and that] public debate is rife with deadlocked rights-holders while this practically never happens regarding obligation.' Does Cannold really mean this? There are so many cases in litigation precisely in the area of obligation, duty of care, where the litigant is able to contend, often successfully and with significant financial rewards, that someone failed in their obligations, someone who must be made to pay!

The strategy of the Code and Guide has been carefully crafted to maintain reasonable limits on the reach and scope of rights and obligations.

The truth is that whatever rhetoric we use each needs to be constrained by the other, which is why the strategy of the Code and Guide has been carefully crafted to maintain reasonable limits on the reach and scope of rights and obligations.

Cannold says, 'rights may preclude the articulation of supererogatory actions—those that go above and beyond the strict requirements of morality—like love, charity and self-sacrifice.' In the first place the Code and the Guide, considered as complementary documents, allow for supererogatory actions when it is said that they are intended 'to set out the ethical commitments made by the Aged Care sector *in addition* to its legal obligation(s).' In the second place, it would be a highly attenuated account of morality which left out 'love, charity and self-sacrifice', an account totally at variance with the traditional codes of ethics of the nursing profession and the other health care professions.

The Trial Period of the Code

Cannold calls for 'the abandonment of the Code and Guide's structuring mechanism of mutual obligations and a restatement of some of the values articulated as obligations rather than rights' during the trial period. But you cannot give something a trial for a period and then change it while it is still on trial. A trial means just that: you give something a go and then evaluate it. The Code and Guide are in the process of that evaluation within the aged care sector. Upon the basis of that evaluation decisions will be made whether or not to modify to a greater or lesser extent, or even scrap the whole thing. And I have no doubt that the feedback will be practical while philosophically sound, rather than impractical but philosophically rarefied.

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