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Articles

## Ethics in Government

**Richard Baron** tries to be good in government.

This article considers some of the ethical questions that arise in the conduct of government, in the light of two leading approaches to ethics. The two approaches will throw light on the questions, and the questions will reveal some features of the approaches.

I will start by outlining the approaches to ethics, utilitarianism and deontology. Utilitarianism tells us to promote happiness. Deontology tells us to do our duty. I will then set out some relevant features of the government of large democracies. Finally I will analyse the questions. I will cover whether a government may mislead the public without actually lying; how far civil servants should maintain political neutrality; whether civil servants should leak information to the press and whether a government should avoid getting legal advice that it might not like.

The questions are drawn from the world of the politician and the policy-making civil servant, the world in which new laws are proposed and new policies are decided. All of the questions arise in practice. I will refer to features of the British governmental system, but the same issues will arise under other systems.

### Approaches to ethics

The basic principle of utilitarianism is that the right thing to do is whatever will promote the greatest happiness of the greatest number of people. It is the results of our actions that matter, and those results are measured by reference to the condition of people generally.

The purest form of utilitarianism is act-utilitarianism. Each action should be evaluated by reference to its consequences, given all the circumstances. For example, while we might have a general idea that telling the truth has good consequences, we should stop and think every time that telling the truth may have significant adverse consequences, such as hurting people's feelings. Will our hearers make serious mistakes if we lie and thereby mis-inform them? Will telling a lie save their feelings? If they feel better because of our lie, will they be kinder to the next people they meet? And so on.

While act-utilitarianism should lead to the right answer every time, at least if we accept utilitarian principles, it is clearly impractical to calculate consequences every time. Rule-utilitarianism offers an alternative. We start by identifying rules that will, on the whole, promote human happiness. A rule that we should tell the truth would be a good candidate. Having selected our rules, we then resolve to follow them without calculating the consequences of every action.

Deontology has no truck with calculations of consequences. It tells us that we have certain duties, and we must perform those duties regardless of the outcome. How we arrive at our list of duties is another matter, and different philosophers will offer different lists. But a list of duties that might be given to those in government is quite likely to include a duty not to mislead people, a duty to act within the law, a duty not to cover up outrageous conduct and a duty to keep the promises one made when accepting employment – promises to do the job required and to keep government secrets. We will see some of these duties come into conflict.

### Large democracies

In a large democracy, we elect politicians every few years. Some of them form the government and become ministers responsible for different areas of policy – education, defence and so on. Of course, ministers cannot govern by themselves. They set general objectives. Civil servants then come up with specific policy options which ministers accept or reject.

In this sort of system, no one person understands everything that is going on. Everyone, including the minister, is a cog in a big machine. That in itself can generate ethical difficulties. On the one hand each person owes a duty to the machine to perform his or her function and help the machine to achieve its greater purpose. On the other hand each person must decide what is right and what is wrong, on the basis of his or her personal values.

The system will only work with a politically-neutral civil service, ready to serve any government. The top layer of civil servants may be political appointees, who change when the government changes, but it would be impractical to change most of the policy-making civil service. In Britain, all civil servants stay in post when a new government takes office. The civil service must therefore be loyal to the government, but without being wedded

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to the political party that forms the government. This tension can give rise to ethical conflicts.

Against this background, I will now turn to the ethical questions themselves.

## Misleading the public

Democratic governments do not often tell outright lies. If a minister states that 27 new public hospitals were built last year, you can be confident that the statement is true. However, the minister may tell the truth while not mentioning other relevant information. For example, the minister might not mention that 30 old hospitals were closed last year, or that the new hospitals were all very small. Is it acceptable to do this, misleading by silence?

An act-utilitarian will try to work out the consequences, and might very well conclude that they would not be serious. After all, the minister's soundbite is about public medical care in general. People who really care about the state of public medical care, for example because they want to campaign for higher public spending, because they are making business plans to supply equipment to hospitals or because it is the one issue that will decide how they vote at the next election, will need much more information, so they will do their own research anyway. On the positive side, the minister's soundbite, without additional information that would have undermined the good news, may boost the morale of health service workers. An act-utilitarian would not necessarily say that it was acceptable to mislead the public by silence, but he or she might well do so.

Of course an act-utilitarian could equally well argue that politicians should not mislead by silence, because we gradually become aware that they do so and start to ignore their soundbites, reducing our interest in politics. But that argument is not likely to rule out any one misleading soundbite, because only an accumulation of misleading soundbites will have the adverse effect. The focus of act-utilitarianism on each act limits its ability to deal with cumulative effects. An act-utilitarian could strongly object to one misleading soundbite if it would be the last one needed to tip the public over the edge from respect for politicians to contempt for them. But it would be very hard to show that we were close to the edge, and in any case there would probably be a gradual slope of declining public confidence rather than a cliff-edge.

Rule-utilitarianism is better than act-utilitarianism at taking a longer-term view. The adverse consequences of a whole string of misleading soundbites could justify a general rule against misleading by silence. Politicians should avoid misleading the public, not because it is always better not to mislead, but because never to mislead produces a better result than misleading the public whenever a politician can persuade himself that it would be justified.

The rule-utilitarian's position is a practical one. We cannot work out the consequences of every action, and act-utilitarianism is not good at taking a long-term view. That presents a risk. If rule-utilitarianism is merely a practical substitute for the ideal of act-utilitarianism, it becomes easy for a politician to argue for exceptions. He could say "I know that I should not mislead the public, but this is an exceptional case where misleading the public will be hugely beneficial. The purpose of the rule is to reduce the danger of making mistakes, a great danger if we consider actions one by one. But here the benefits of breaking the rule are so obvious that there could not be any mistake. I should, therefore go back to act-utilitarianism and mislead the public, just this once". Few of us would trust politicians with such an easy get-out clause. To be really safe from dubious act-utilitarian arguments, we would need something stronger than rule-utilitarianism.

Deontology looks promising. Under a deontological approach, if you should avoid misleading people, you should do so because it is your duty, not because of the consequences. There is no space to plead that the current case is a special one in which the normal rules should be suspended.

However, while deontology appears to offer a better guarantee of complete and consistent honesty than utilitarianism, it only does so if people believe that honesty is a duty. Most people do believe that. But there is always scope to ask "Why should I do my duty?". If the answer is "Doing your duty will lead to good consequences", then we will not have progressed beyond rule-utilitarianism. Politicians could still argue for get-out clauses, even if they first had to argue for an exemption from the deontological rule against pleading that the current case was a special one.

Other reasons for doing one's duty have been proposed. For example, some would say that duties are prescribed by God. But until we find a reason for doing one's duty that is pretty much universally accepted, and that does not refer back to consequences, it is hard to see deontology giving us a practical guarantee of complete honesty in politics.

## Political neutrality

Civil servants should serve any government that has been elected. The Government was chosen by the people to carry out the policies in its manifesto. Democracy would be a fairly meaningless exercise if civil servants obstructed policies with which they disagreed, so that the people's choice could not be put into effect. But democracy would be in danger if civil servants worked to ensure that the Government stayed in power, rather than leaving all parties on a level playing field at the next election. What should a civil servant do when he or she is asked to promote the party-political cause of the Government?

This can easily happen. For example, when a document outlining a new policy is published, it is likely to include an account of policy to date. That account will invariably put the Government in a good light. Thus a document on education policy will point out how many more people are now achieving qualifications than a few years ago. While the statistics in such documents may be unbiased, the documents also have a blatantly promotional purpose. And they are written by civil servants, who write in a promotional style because that is what ministers want. There is a tension here between the civil servant's duty to carry out the elected government's wishes and his or her duty to democracy.

Deontology puts the issue most starkly, but it does not offer easy answers. It recognises the conflict, and makes it plain that whatever the civil servant does, whether accept or refuse an instruction to work on a promotional document, he or she will fail to perform one duty or another. This illustrates a key difference between deontology and rule-utilitarianism, even though they are alike in giving us a set of rules. Rule-utilitarianism is a practical substitute for computing the consequences of every action individually. If it breaks down because rules conflict, that is a failure of the computational rule of thumb. We can then shrug our shoulders and fall back on act-utilitarianism. But in deontology, a conflict of duties is real, painful and potentially irresolvable.

Utilitarianism, unlike deontology, holds out the promise of making it clear what to do. Act-utilitarianism suffers, as usual, from the impracticality of working out all of the consequences of our actions. However a rule-utilitarian code for civil servants could be very helpful. For example, one could argue for a rule that civil servants should only write boring documents that stated policies and the thinking behind them in a flat and neutral way. Ministers would have to write separate documents, paid for by their political party, if they wanted to promote themselves.

Rule-utilitarianism might appear to resolve this ethical question, but only if we can find the right rules. The rule that civil servants should only write documents that state policies in a neutral way looks like a very good rule. However, it would not be difficult to argue for a different rule, that civil servants could write documents which engaged in a moderate amount of promotion. A lively document, arguing the government's case on the basis of its record, might provoke more public discussion than a dull, neutral document, and that discussion could lead to improved policies. So while rule-utilitarianism may be effective once we have worked out what the rules should be, deciding on those rules can be a difficult task.

## Leaks

Civil servants need to give ministers honest advice on the decisions that ministers have to take. Civil servants are therefore expected to keep the details of government business secret, so that internal discussions will be uninhibited. For example, a minister for trade may need to be told about a small risk that a proposed subsidy for manufacturing will be thought contrary to international trade agreements, and may therefore be challenged in court. No civil servant would dare to mention that small risk in an e-mail without a guarantee of secrecy, because if the e-mail became public then a legal challenge to the subsidy would be virtually certain.

Here we have a good reason for requiring civil servants to keep government secrets. The utilitarian can point out that secrecy allows government to work, because the thinking behind decisions can safely be documented. And a duty of secrecy also looks like a good candidate for inclusion in a deontological code for civil servants, both because they promise to keep secrets when they take up their jobs and because it would be hard to imagine carrying on government without adherence to that promise.

Having said that, there do appear to be limits. If, for example, a civil servant knew that a contract for new defence equipment had been a dreadful mistake that had been covered up to save the careers of those responsible, many of us would say that a leak to the press would be perfectly in order.

For deontology to contemplate allowing a leak in such circumstances, there would need to be a duty that would clash with the duty of secrecy. This would be a duty drawn from something wider than the role of a civil servant as set out in his or her job description. For example, there might be a duty on all citizens to report a deliberately concealed failure when we, as taxpayers, were all paying for it.

As before, deontology will leave the the civil servant facing a painful conflict of duties. The specific point which this example brings out is that a set of duties for a person needs to take account of all aspects of that person. Here, we have identified the aspects of a citizen (who should tell the press) and a civil servant (who should not). But many more aspects could be brought into play. For example the civil servant may be a parent, who has a duty to avoid getting sacked so as to have an income. And he or she could also be a personal friend of colleagues, who might well feel betrayed by a leak. The more aspects of a person that we bring into play, the more likely we are to find conflicting duties.

Act-utilitarianism suffers from the usual disadvantage that it is hard to calculate the consequences of telling the press, or of not telling them, in any specific case. Indeed when cover-ups are involved, it will be harder than usual to work out what to do because the full facts will be hidden. A civil servant contemplating a leak might well be unaware that a cover-up served some greater purpose which was of real benefit, and that a leak would destroy the benefit.

Rule-utilitarianism appears to be on stronger ground. One possible rule would be to keep secrets unless there were exceptional circumstances. The trouble with this rule is that it would be hard to tell when the circumstances were truly exceptional. And if we added to the rule by saying that any cover-up counted as an exceptional circumstance, the rule could generate counter-utilitarian results. It would do this by leading to the disclosure of small cover-ups that could have delivered great benefits if they had not been disclosed.

The general point here is that once we move away from high-level injunctions like "tell the truth" and "do not steal", and try to formulate a rule-utilitarian code for people doing a specific job, we find that we need subtle rules which include clauses like "unless there are exceptional circumstances". Clauses like that are difficult to apply in practice. If we make them easy to apply, by giving a list of circumstances that count as exceptional, then we lose the subtlety that we need in order to get results that will really promote utility.

## Legal advice

Governments like to be sure that their policies are legal. But it is not always clear whether a policy is legal. For example, a law might say that the Government could allocate cheap housing to selected people "for social purposes." Suppose that the power had originally been meant to benefit people on low incomes. However, a government might have a policy of using the power to allocate the housing to healthcare workers regardless of income, on the grounds that healthcare was for the benefit of society. That policy could well be challenged in court as being illegal.

If a government fears that a policy might be illegal, it can take legal advice. If it gets clear advice that the policy is illegal, it must change the policy. However, civil servants will often start by having informal discussions with lawyers. If the lawyers indicate that they will probably condemn the policy as illegal, the government has a choice. It can grit its teeth, get formal advice and then change the policy if necessary. Or it can back off, tell the lawyers that they do not need to write out their formal advice, persist in the current policy and hope for the best.

An act-utilitarian is in an awkward position here. Normally, he or she would seek to establish the facts before trying to calculate the consequences of possible actions. But in this case the question is whether to maintain ignorance, because knowledge might force one to make an unwanted choice. The acquisition of knowledge is not a neutral procedure, prior to

deciding what to do. So this case presents a challenge to the picture of the act-utilitarian as one who can collect all the evidence, calculate and then decide.

Rule-utilitarianism does better. One plausible rule would be that a government should get formal legal advice when there was serious doubt about the legality of a policy. If governments are repeatedly found to have acted illegally, that is likely to undermine public trust in political institutions. Furthermore, while serious doubt is a vague criterion, it is not dangerously vague in the way that "keep government secrets unless there are exceptional circumstances" is dangerously vague. Common sense tells us that, for example, a 25% risk of illegality would amount to serious doubt, so the rule would err on the side of caution. It would require legal advice to be taken even when there was a good chance that a policy was in fact legal. And a probability of illegality, while it may be hard to measure, is much more likely to be understood in the same way by everyone than a concept like exceptional circumstances. We all know what a percentage probability means.

Finally, deontology identifies two conflicting duties. Civil servants have a duty to find out what the law is and to apply it correctly. But they also have a duty to carry on the business of government in a way that achieves the objectives set by ministers. That may well mean not getting unwelcome legal advice, because it would put a roadblock in the way of ministers' desires. Thus deontology plays its familiar role of confronting us with a clash of duties but not showing us the way forward.

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*Richard Baron is an independent philosopher in London (see [www.rbphilo.com](http://www.rbphilo.com)). He recently spent three years as a policy-making civil servant.*

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