Third Edition

Classic Cases in

Medical Ethics

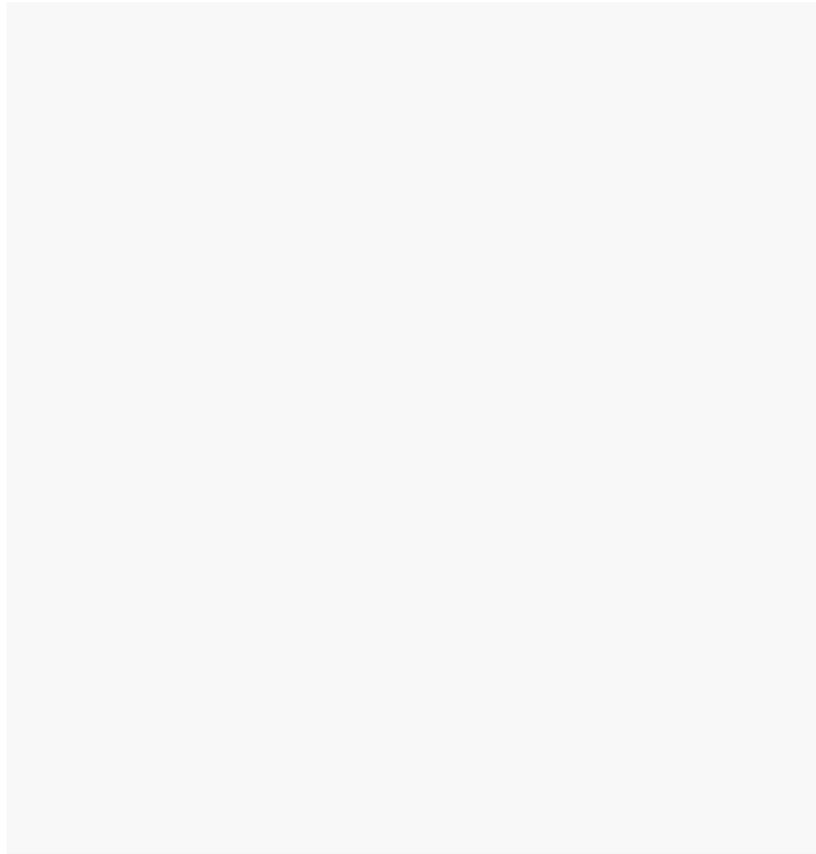ACCOUNTS OF CASES THAT HAVE

SHAPED MEDICAL ETHICS, WITH

PHILOSOPHICAL, LEGAL, AND

HISTORICAL BACKGROUNDS

GREGORY E. PENCE

Classic Cases
in Medical Ethics

Accounts of Cases that Have Shaped Medical Ethics,
with Philosophical, Legal, and Historical Backgrounds

McGraw-Hill Higher Education

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About the Author

GREGORY E. PENCE is a Professor of Philosophy in the School of Medicine and Department of Philosophy at the University of Alabama at Birmingham, where he has taught since 1976. He has recently written *Who's Afraid of Human Cloning?* and edited *Flesh of My Flesh*: *The Ethics of Cloning Humans - A Reader* (both published by Rowman & Littlefield in 1997). He has cowritten *Seven Dilemmas in World Religions* with G. Lynn Stephens (Paragon, 1995). He has published articles in *Bioethics, American Philosophical Quarterly, Canadian Journal of Philosophy, The New York Times, Wall Street Journal, Newsweek,* and *Journal of the American Medical Association.* He has also edited *Classic Works in Medical Ethics*: *Core Philosophical Readings,* a companion anthology to this work (McGraw-Hill, 1995). He also directs the BS/MD program at UAB.

Preface

The two big changes to the third edition are that, first, this work is now more of a stand-alone textbook, with an introductory chapter on ethical theories, and second, two key chapters dealing with ethics at both ends of life have been completely rewritten (physician-assisted dying and assisted reproduction). All the chapters were reviewed and, of course, updated, but fast-moving events in both of the above areas necessitated brand new chapters. Also, because many professors believed that Dr. Kevorkian is not the best model for physician-assisted dying, the focus has now changed to Oregon's legalization. Chapter 5 on assisted reproduction now goes far beyond baby Louise Brown's in vitro fertilization and discusses up-to-date issues such as egg donation, choice of embryos, and the possibility of cloning human genotypes.

The chapter on ethical theories provides an overview of such theories that is compatible with the case-focused material of this text. I do not pretend that knowledge of ethical theories can give us definitive answers to each case, but I do claim that such knowedge helps us discover what the best answers are.

More and more of the living people involved in the cases have been commenting on their case. Kenneth Edelin was kind enough to read and suggest improvements to Chapter 7 which details his trial for doing an abortion in 1976. During her visit to UAB in 1995, Nancy Wexler generously critiqued the chapter featuring her. Griffith Thomas, M.D., the new attorney representing Elizabeth Bouvia, provided me invaluable videotapes and updates about Elizabeth's case. Russ Fine, a participant in the McAfee case, continues to help me, especially about the final months of Larry's life. Norman Fost, a pediatrician involved in the original Baby Doe cases at Johns Hopkins, continues to keep me accurate about the effect of the federal government's attempts to regulate the medical care of impaired newborns, as well as other issues.

Students and professors all over the country have contributed to this edition through their inquiries and comments. Please continue to do so by contacting me via email at pence@uab.edu. You may also visit my web page at: *www.uab.edu/philosophy/faculty/pence/*

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PART ONE: MORAL REASONING

A. Common Mistakes in Moral Reasoning

There are well-known pitfalls into which students often fall in discussing issues in contemporary ethics, and one that is peculiar to medical ethics. In the following brief section, these mistakes are covered.

Begging the Question is to assume to be true what should be proved to be true. It is obviously easier to just assume a contentious point under debate than to do the hard work of proving it. Even if we can't prove a point, we must attempt to give reasons for it. To simply state that our given position is *obvious* is to avoid giving such reasons and not intellectually respectable.

Begging the question occurs frequently in debates about who is and who is not a person in those cases at the margins that involve comatose humans, human embryos and fetuses, and also, non-human animals. For example, someone may say, in referring to a nine-day-old human embryo, "No mere bit of cells the size of a dot could be a person." This debater has assumed that the size of a being, not its genes, DNA, or potential, determines its personhood, but that assumption needs both to be made explicit and defended. Similarly, someone might assert that "Anyone who calls a Crisis Center and says he is planning to commit suicide should be committed because he is not in control of his mind." This also begs the question because we have assumed that all suicides are irrational without even inquiring about the reasons a caller has for wanting to die (there may be cases of rational suicide, e.g., where a person is in the last stages of cancer and still mentally competent).

In general, we should not slip our key conclusions over on other people but rather defend them. Sometimes that involves identifying and justifying key premises—both factual and evaluative—in our arguments.

Approaching the Arguments: Premises, Conclusions, and the Fact-Value Gap In moral reasoning, a conclusion about a moral issue is supposed to follow

logically from certain premises. If the premises logically support the conclusion, the argument is said to be *valid.* In practical reasoning, validity should not be confused with "truth": *Validity* refers to the form of an argument, whereas *truth* refers to the content of its premises. A *sound* argument is one that has both valid form and true premises.

In any moral argument, the conclusion will of course be evaluative. Such a conclusion can be based entirely on evaluative premises, or it can be based on some combination of evaluative and factual (nonevaluative) premises. But a moral argument can *never* be valid if the evaluative conclusion is derived from solely factual premises. Moral conclusions commonly state that something "ought" or "should" be the case; factual premises, on the other hand, state that something "is" the case. A point made famous by the eighteenth-century philosopher David Hume is that an "ought" conclusion cannot be validly derived from only "is" premises. A valid moral argument, therefore, must have at least one evaluative premise, so that the evaluative element in the conclusion is not pulled out of the air from factual premises but "flows through" the argument from the evaluative premise or premises to the evaluative conclusion.

In addition, if a moral argument includes a factual premise, in order to be valid it must somehow connect the factual and evaluative elements. The connection can take the form of a separate *connecting fact-value premise,* or it can be part of a larger premise.

Drawing an evaluative conclusion from solely factual premises—or omitting the fact-value connection if any premise is factual—is an error, sometimes called the *is-ought problem* or the *naturalistic fallacy;* more simply, it is called *jumping the fact-value gap.*

For example, suppose that someone says, "First, a fetus has a brain wave after 25 weeks of gestation," and "Second, a conscious adult has a brain wave," and then draws the conclusion, "Killing a fetus after 25 weeks gestation is as wrong as killing a conscious adult." The crucial point with regard to ethical reasoning is that, while either the first or the second statement is entirely permissible as a *premise,* the two statements together do not lead to the conclusion: They are both factual, whereas the conclusion is evaluative. In other words, this is not a valid moral *argument,* because it has jumped the fact-value gap; something important is missing.

By contrast, here is a valid argument:

Premise 1 (factual). A human fetus has a brain wave after 25 weeks of gestation.
Premise 2 (connecting fact-value premise). A human with a brain wave is a person.
Premise 3 (evaluative premise). Killing a person is morally wrong.
Conclusion (evaluative). Therefore, killing a fetus with a brain wave is morally wrong.

As noted above, it would be permissible to combine premises 1 and 2 as "A human with a brain wave is a person (connecting fact-value premise)," if the fact

about fetal brain waves is understood. The traditional format for such an argument is:

1. A human with a brain wave is a person.
2. Killing a person is morally wrong.

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3. Therefore, killing a human with a brain wave is morally wrong.

When a moral argument is valid—that is, when its premises are made explicit and lead properly to the conclusion—we can see it clearly, and we can also see exactly where we agree or disagree with it. In this example, for instance, it becomes clear that either the evaluative premise or the connecting fact-value premise could apply not only to abortion but also to euthanasia; this gives us a perspective from which we may or may not accept these premises.

It is helpful to understand that in a valid argument, each key term must be defined in the same way throughout. To define a key term in more than one way is to commit the fallacy of *ambiguity.* Obviously, then, defining a key term factually in a premise but evaluatively in the conclusion commits two fallacies: ambiguity and jumping the fact-value gap.

Jumping the fact-value gap is in essence a special version of begging the question because the evaluative nature of the conclusion (the question) is "begged" by being assumed in the factual premises. This naturalistic fallacy is sometimes inadvertent, but it often appears when people do not want to make the real premises of their argument explicit. When hidden premises (assumptions) are revealed, these premises must be justified, and that can be a difficult job.

Reductio Ad Absurdum is an argumentative strategy used so often in moral debates that it deserves early notice. Literally meaning *reduce to the absurd*, this strategy takes a premise of an argument and tries to show that it has ridiculous or absurd implications. For example, to the person who believes that nine-day-old embryos are persons, a *reductio* reply might be, "So you would baptize all the embryos that fail to survive to become fetuses? And you think Heaven has millions of embryos?"

If the advocate of the premises accepts that the implication is absurd or ridiculous, then he must either give up the premise that is the basis for the implication (perhaps by changing the premise) or by denying that the absurd implication really follows from the premise. In some situations, a proponent may reject the "absurdness" of the implication. For example, in arguing about whether nonhuman animal pain should count in our moral calculus, someone who disagrees might try a reductio by saying, "If you believe that, you can't eat hamburgers and hot dogs!" But the proponent of animal rights might accept this implication and not think it "absurd" at all but merely a consistent implication for living of his general position.

Ad Hominem   When discussion in ethics works best, people give objective reasons for their views. Sometimes people get frustrated with this difficult task and

try to short-cut the process by making attacks on another person. Often such attacks impugn the personal behavior of opponents and suggest negative things about them. *Ad hominem* literally means "to the human" and suggests a personal attack on an opponent.

Suppose two people are arguing about a single-payer system of medical finance. The first, a physician, opposes such a system, while the second, a lawyer, favors it. Suppose that after an initial attempt at refuting the physician's reasons, the lawyer says, "You physicians just fear a single-payer system because you're afraid that your high incomes will change under a new system." The lawyer here has made a personal attack on the physician by implying that the physician's reasons against a single-payer system are badly motivated, in this case, by greed. (Of course, if the physician replied, "And you lawyers just want a complicated system so everyone will have to go to court all the time and make you rich," then he or she too would have committed an *ad hominem* fallacy.)

Avoiding the Evaluative Premise   When it comes to discussing moral issues in medicine, one common fallacy among medical students and physicians is to persevere in acquiring and discussing facts while never mentioning the underlying moral premise. Perhaps because such people shy away from open moral disagreement (in order to get along) or because their training has emphasized the acquisition of facts, there is a mistake that often occurs where people argue more and more about the facts surrounding a moral issue and never explicitly discuss the ethics of the moral issue. This is a mistake because, for real discussion and any hope of progress, the real moral issue must be identified and discussed.

For example, and as we shall discuss at the end of Chapter 7 where abortion is discussed, a new movement has started to teach young women that possible pregnancies can be prevented after unprotected sex by immediately using common birth control pills in doubled dosages. This method works by preventing a very early human embryo from implanting on the uterine wall, after conception has occurred and the embryo has traveled down the fallopian tubes.

This method is called *emergency contraception* by its proponents, but conceptionist critics (this is, people who believe moral personhood begins at human conception) argue that this method is an abortion. Medical students and physicians often retort that no abortion occurs because there is no "pregnancy." And why is there no pregnancy? Because many medical dictionaries define pregnancy as starting when the human embryo successfully implants on the uterine wall (mainly because many embryos do not successfully so implant).

But why should we let a dictionary define our moral views? After all, dictionaries were not written to provide moral guidance. The medical dictionary also is defining pregnancy partly in terms of likelihood of successful continuation of embryonic development and not making a statement about the moral status of the being before implantation.

A similar approach is to claim that, just as birth control pills act by preventing pregnancy, so their use after conception is also merely "contraception" because they are similarly (and only) "preventing" pregnancy, not creating abortions. (And so it also follows that physicians prescribing birth control pills for such purposes are not in the business of doing abortions.)

The point is that no recourse to semantics or fact gathering will advance thinking in this example if the real moral issue (premise) is avoided. In fact, just the opposite occurs because the real moral issue—the possible personhood of a very early embryo—is avoided or begged by semantic obfuscation about contraception. Ultimately, someone has to have the guts or clarity to state, "I don't believe that early human embryos have moral status" or to state the opposite. Only then will we see the evaluative premise at stake and then we can begin to give reasons for or against that premise. But it won't help to endlessly deal just in facts or definitions.

B. Other Aspects of Moral Reasoning

Moral Disagreement   As we shall see in Chapter 2, the Quinlan and Cruzan cases directly involved *moral disagreement:* that is, conflicting standards of morality and conflicting judgments about particular issues. In the case of Karen Quinlan, the nuns who were administrators at the hospital believed that morality is founded on unchanging standards given by God, whereas Karen's parents and their parish priest believed that moral rules must change in order to be compassionate. In the case of Nancy Cruzan, the attorney general of Missouri believed far more than Nancy's parents did that the state should protect vulnerable incompetent patients. Indirectly, these cases also involved general philosophical questions about morality: Where does morality come from? Is there such a thing as moral truth? If different standards exist by which to judge an issue, how are we able to live together?

When reasonable people need to discuss moral conflicts and general questions about morality, philosophical reflection can sometimes help. For instance, we can ask (as Socrates asks in the dialogue *Euthyphro*) whether morality depends on a god or gods, or whether it can exist independently. If we believe that morality depends on a deity, we must then go on to ask—to specify—how we know that any particular moral rule is that deity's will. If we turn to a source such as the Bible, we need to ask which of various interpretations we will choose, and how we will justify that choice. To engage in such *moral reasoning,* it is useful to consider several concepts.

Moral Pluralism   One common solution to moral conflict is simply to accept that a certain irreducible amount of moral diversity exists in everyday life. This idea is sometimes called *moral pluralism* or simply *pluralism.*

Moral pluralism has a great deal to recommend it. First, when we consider that, for example, the world has several major religions, each with billions of adherents, not all of us will be confident enough to assert that only our own religion is true or that followers of other religions are condemned. Religion, of course, is only one example of such disagreement; there are a multitude of others, including the issues discussed in this book: death and dying; conception and birth; experimentation; the individual versus the public good. Second, even if we did feel confident that our own beliefs or judgments about such issues were best, it is an undeniable *fact* that people disagree greatly over them. Therefore, publicly adopting an attitude of complete certainty about our own ideas can make us

seem moralistic, arrogant, prejudiced, and closed-minded. Moral pluralism, on the other hand, gives us a chance to demonstrate, rather than simply announce, the value of our ideas; also, it gives us a chance to recognize what is valuable in other people's ideas.

Moral Truth   Pluralism raises the question whether there is or is not such a thing as truth in ethics. It is worth noting that this question goes back at least as far as the fifth century before the Christian, or Common, era (B.C.E.), when Socrates debated it with the Sophists; and it has also been a primary focus of ethical theory throughout the second half of the twentieth century. In part, this question has to do with the limitations of reasoning in ethics. Although moral truth is a rather difficult concept and is not the subject of this book, saying something about it at this point will be helpful.

Moral philosophers differ greatly about whether there is any truth at all in ethics. *Moral skeptics* believe that no objective ethical truth is possible. Against this is the position that a moral idea or statement can be true; ethical theories which hold that moral statements can be true (or false) in some objective way include *cognitivism, realism,* and *naturalism.* In theories like these, however, moral truth is not necessarily characterized by universal agreement. To put this second position another way, the premise, "If a statement is morally true, everyone will agree about it" does not necessarily hold. (This idea is not really startling: Consider that in science there are also truths which are known only to a small, highly educated elite.) The ancient Greeks, for instance, developed a naturalistic ethical theory called *perfectionism,* which assumed that people will not always agree about moral truths because some people are wiser than others.

Worldviews and Moral Issues   A *worldview* is a comprehensive concept of life: Worldviews include overall philosophies of life such as religions, political theories such as Marxism or feminism, psychological theories such as Freudianism or behaviorism, and specific ethical theories such as utilitarianism. It is sometimes thought that a worldview will provide answers or solutions to all moral issues, but this is not necessarily true.

To begin with, some people believe that no one worldview or ethical theory could be good enough to capture the complicated reality of contemporary moral life. As a practical matter, we may be able to find small bits of truth even without discovering a true worldview or developing a completely satisfactory ethical theory. If we refused to act without the moral certainty of a worldview, we would be paralyzed. In actuality, throughout our lives we do formulate moral judgments as best we can when we make decisions and face crises: when we marry, give birth, raise children, and bury our dead. We may not be certain about what we should do, but most of us get by.

Keep in mind that most of us do not arrive at adulthood with a pure worldview. Most of us have inherited bits and pieces of different worldviews from different cultures, views which may have been reshaped or discarded by larger, pluralistic societies. Though there are some total communities (such as the Amish, Orthodox Jews, Jehovah's Witnesses, conservative Catholics, and the Primitive Baptist Church), even those of us who are raised in them may question

our worldviews when confronted with very different moral ideas—as we typically are when we enter college.

Nor is it necessarily a bad thing that we don't have one all-encompassing worldview, because most such worldviews are simplistic and rigid. In bioethics, good judgments require knowledge of complex concepts, general facts, and specifics of each case, and the ability and willingness to balance different values. To impose a single, absolute worldview on an issue in bioethics would violate the rights of those involved and would therefore lead to many undesirable outcomes.

Similarly, it is not necessarily a bad thing that we can't figure out one monistic answer to a question such as "What makes an act right?": People and people's lives may be more complex than monistic answers to such questions would allow. Absorbing different aspects of several worldviews gives us more flexibility to adapt to changing situations in the modern world. Accepting parts of many ethical theories gives us different insights into moral issues without binding us to one rigid view.

Intuition and Moral Reflection   Suppose that we think in terms of moral pluralism, understand that moral truth may not presuppose universal agreement, and recognize that for most people a worldview may not solve moral issues. How, then, is reasoning possible in ordinary morality?

The answer, as suggested above, is pragmatic, or practical. Not all of us have to agree on everything in order to agree on one particular thing. We can take specific cases one at a time; within each case, we can take specific arguments one at a time; and within each argument, we can sometimes even take specific premises one at a time.

In ethics, basic core beliefs are called *intuitions*. We all carry intuitions around inside us, and these come from many sources, including our own feelings. Ethical reasoning must always start somewhere, and intuitions are often our basis for accepting or rejecting premises in moral arguments; sometimes our intuitions themselves can serve as premises in such arguments. Some of our intuitions go together—in which case they are said to be *consistent*—but some contradict each other. We always need to see what our intuitions imply, how they may contradict other intuitions, how they compare with known facts, and how they compare with the views of people we respect.

In essence, seeing these aspects of our intuitions is *moral reflection*. Moral reflection is what allows us to accept or reject each premise of an argument; it is what allows us to find a good answer in a specific case. We should not be surprised if the premises we accept or reject, and the decisions we make in specific cases, vary as we gain more knowledge and experience in life; and we should not be surprised if some of our decisions change as a result of the process of moral reflection itself.

Moral reflection is a slow process, and it will not please those zealots who are impatient for moral progress and who want to uplift humanity rapidly by achieving moral consensus. But given the limitations on our powers of reasoning in ethics, we may have no other choice than to adopt this slow process. Even if we accept moral pluralism, even if we cannot discover moral truth, and even if we cannot develop a perfect ethical theory, we still need rules by which to live.