INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.
The view from somewhere: Moral judgment in bioethics

Wildes, Kevin William, Ph.D.

Rice University, 1993
RICE UNIVERSITY

THE VIEW FROM SOMEWHERE:
MORAL JUDGMENT IN BIOETHICS

by

Kevin Wm. Wildes, S.J.

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE
DOCTOR OF PHILOSOPHY

APPROVED, THESIS COMMITTEE

Baruch A. Brody, Director
Professor of Philosophy

H. Tristram Engelhardt, Jr.
Professor of Philosophy

Gerald P. McKenny
Assistant Professor of
Religious Studies

Houston, Texas
March, 1993
ABSTRACT

The View From Somewhere:
Moral Judgment in Bioethics

by

Kevin Wm. Wildes, S.J.

Secular bioethics has been involved in the resolution of moral controversies both in the clinic and in the discussion of public policy and there are three models used to justify moral judgments in bioethics. The first is the foundational model which seeks to build a theoretical account of the moral life. The foundational project must confront two difficulties. First, it must come to terms with the dilemma that there is no universal account of the nature of moral reason. Second, each foundational account requires some ranking of moral values if it is to make content-full judgments. Absent a universal moral narrative there is no canonical ranking of values.

Two attempts to circumvent these foundational dilemmas have been prominent in bioethics. The first is the middle level principle approach. This model appeals to a set of principles to justify moral judgments. The model assumes that these principles are shared and that they can resolve moral dilemmas without requiring the resolution of the foundational questions. The model faces three difficulties. First there is no conclusive argument as to why this list of principles should be canonical. Second, it is not clear how
the principles are related to one another. Third, the principles, without foundations, are ambiguous in their meaning.

Another attempt to avoid foundational dilemmas is the hope of Jonsen and Toulmin to revive some model of casuistry. Jonsen and Toulmin select the model of Roman Catholic casuistry in the High Middle Ages. Yet they fail to take full account of the moral values and moral authority which governed this practice of casuistry.

Both casuistry and principlism argue that we can reach agreement on moral controversies without appeal to foundations. In carefully examining what is agreed to one comes to see that the assertion of agreement is a sham. It becomes clear that secular discourse in bioethics must rely on a procedural morality which is empty of content. Content-full moral judgments can only be understood and accepted within particular moral communities.
ACKNOWLEDGEMENTS

John Cardinal Newman once wrote that Jesuits do not know the meaning of the word "home". While I admire him for many reasons, and agree with him on many things, the good Cardinal was wrong about that! In the course of their lives most Jesuits have many homes. One does not undertake a project like this without a home. That is, a place of security and familiarity from which one can roam and explore the world. Indeed in this project I have had many homes.

The first home I have had has been my intellectual home. It was provided first by Baruch A. Brody, my thesis Director, Professor of Philosophy at Rice University, and the Director of the Center for Ethics, Medicine, and Public Issues at Baylor College of Medicine. Baruch patiently guided me to new intellectual worlds first in the classroom at Rice and then in this dissertation. In that exploration I have not only found new intellectual worlds but rediscovered the one from which I came. As he helped me look for arguments Baruch also helped me keep the discipline of time so that this project would be completed. H. Tristram Engelhardt, Jr. has done much more than read this dissertation. His intellectual and personal friendship have helped me begin to understand what it is to "play" with ideas and explore new terrains. His friendship, and discipline of "chaos", are treasures. He will be a part of my wandering home for years to come. God willing. Gerry Mckenney provided the wisdom of a friend visiting the home.
As he was the first to read this dissertation through in its entirety I am indebted to his careful reading, comments, and questions. Andy Lustig and Larry McCullough provided daily conversations, questions, and encouragement as the project progressed and thoughtful questions when it was over. Sarah Brakman Youakim was a constant companion in this home who encouraged me and helped me keep sight of all that was going on. Dolores Smith and Linda Hunt encouraged and supported me with good humor each day.

There have been other homes which have supported this project as well. The parish community of St. Vincent de Paul not only gave me a place to live, but home which reminded me that this project is tied to my priesthood. I will be forever grateful to the parishioners who opened their hearts and their homes, literally, to me. Father Paul Felix, parochial vicar, has been a good friend and brother priest with whom to live. Monsignor Jim Jamail, who gave me this wonderful home at St. Vincent’s, is a prince among men. Words will never express what I owe. Borrowing the words of Lady Alice in A Man for All Seasons Jim is "one of the finest men I have ever known." While in Houston I have also had a home with my brothers in the Society of Jesus. The Jesuit community of Strake Jesuit College Preparatory School has been a constant support for my work and my vocation. Rev. Brian Zinammon, S.J., Rector and President, has been a "sturdy shelter" and treasure. Other Jesuits, scattered
throughout the world, have also provided endless encouragement and support. Jack Dennis, S.J., John Swope, S.J., Tim Brown, S.J., Joe Sobierajski, S.J., and Leo O’Donovan, S.J. have been faithful friends.

Before I came to Houston, or the Society of Jesus, I knew what it was to have a home. My family—brothers, aunts, uncles, cousins, in-laws, and nieces—has been my home. My mother and dad, Bill and Irene Wildes, have given me nothing but support, challenges, and love each of my days. The home they have given me has been the grace which has allowed me to go on the adventure of my life. As I said elsewhere, no words can express my debt to them.

In surveying all of my homes I remember the words of W.B. Yeats who once wrote: "Think of where man’s glory most begins and ends, and say my glory was that I had such friends." For my friends, my glory, who have been home to me and this project, I have nothing but thanks.
# TABLE OF CONTENTS

## Introduction

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 1</td>
<td>Introduction</td>
<td>1</td>
</tr>
</tbody>
</table>

## Chapter 1, Resolution by Appeal to Moral Theory

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 8</td>
<td>I. Introduction</td>
<td>8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 17</td>
<td>II. A Survey of Theories</td>
<td>17</td>
</tr>
<tr>
<td>A. Singer’s Utilitarian Project</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>B. Donagan’s Theory of Morality</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>C. Natural Law</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>D. Contractarianism</td>
<td>39</td>
<td></td>
</tr>
<tr>
<td>E. Virtue Theory</td>
<td>46</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 50</td>
<td>III. The Limits of Theory</td>
<td>50</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 56</td>
<td>Notes</td>
<td>56</td>
</tr>
</tbody>
</table>

## Chapter 2, Judgment and the Appeal to Mid-Level Principles

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 62</td>
<td>I. The Model of Mid-level Principles</td>
<td>67</td>
</tr>
<tr>
<td>A. Frankena</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>B. Beauchamp and Childress</td>
<td>81</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 87</td>
<td>II. The Standard Criticisms</td>
<td>87</td>
</tr>
<tr>
<td>A. The Meaning of Mid-level Principles</td>
<td>89</td>
<td></td>
</tr>
<tr>
<td>B. The Relationship of Principles</td>
<td>98</td>
<td></td>
</tr>
<tr>
<td>C. Foundational Questions</td>
<td>104</td>
<td></td>
</tr>
<tr>
<td>D. Summary</td>
<td>106</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 107</td>
<td>III. What Are Principles?</td>
<td>107</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 113</td>
<td>IV. The Moral Point of View</td>
<td>113</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 118</td>
<td>V. Principles, Cases and the Moral Point of View: Where to Go?</td>
<td>118</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 122</td>
<td>Notes</td>
<td>122</td>
</tr>
</tbody>
</table>

## Chapter 3, After Paradigms: The Crisis of Secular Casuistry

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 128</td>
<td>I. Jonsen and Toulmin and the Renaissance of Casuistry</td>
<td>134</td>
</tr>
<tr>
<td>A. The Need</td>
<td>135</td>
<td></td>
</tr>
<tr>
<td>B. The History</td>
<td>139</td>
<td></td>
</tr>
<tr>
<td>C. The Hope</td>
<td>144</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>p. 146</td>
<td>II. The Case Against Jonsen and Toulmin</td>
<td>146</td>
</tr>
<tr>
<td>A. Confessional Practice as a Disciplinary Matrix</td>
<td>148</td>
<td></td>
</tr>
<tr>
<td>B. An Example of Medieval Casuistry</td>
<td>165</td>
<td></td>
</tr>
</tbody>
</table>
C. Summary

III. Secular Casuistry: The Paradox of Trolleys and Transplants
   A. Shared Intuitions
   B. Summary: Trolleys, Transplants and Disagreement

IV. Conclusions

Notes

Chapter 4. Understanding Moral Judgments

I. Theories, Cases, Principles, and Judgment

II. Moral Judgments: Commitments to Reason and Content

III. Types of Judgment

IV. The Context of Secular Pluralism

V. The Bioethics of Friends, Strangers, and Acquaintances
   A. Moral Strangers
   B. Moral Friends
   C. Moral Acquaintances

VI. Conclusions

Notes

Bibliography
INTRODUCTION

THE VIEW FROM SOMEWHERE¹:

MORAL JUDGMENT IN BIOETHICS

In the last thirty years bioethics has emerged as a distinct interdisciplinary field often marked by controversy. Indeed the controversies and dilemmas of health care have often propelled bioethics into the headlines and "Nightlines". At the heart of the controversies and publicity of bioethics there is the phenomenon of moral judgment exercised in the public domain. Moral judgment in bioethics, unlike moral judgment in many other areas of human life, is often controversial because it is embedded in the practice of health care. Since health is a condition of our broader well being, happiness, and pursuit of goods, the practice of health care not only involves our physical or medical well being but our moral and general well being as well. The decisions of health care are not simply medical choices but they are set within the our understanding of ourselves. The practice of health care is also a cooperative and often public venture. Our choices are made with others and they affect others. In the midst of a society which is morally pluralistic the exercise of moral judgment in bioethics often takes on a public, controversial dimension.

Biomedical ethics has emerged in the last thirty years,
as a secular enterprise, to provide concrete guidance in the dilemmas of modern medicine through the use of reason without appeal to God, culture or religious faith. The field offers a special opportunity to explore the problems of modern moral philosophy and the emerging post-modern age in terms of concrete controversies. In the literature of biomedical ethics one finds a variety of approaches, historically tied to the rational traditions of modern moral philosophy, deployed to justify concrete moral judgments. Three models of justifying judgments have been used in biomedical ethics to accomplish modernity's project of justifying a content-full morality in the face of the moral dilemmas of biomedical ethics: appeals to moral theories, to moral rules and principles, and to casuistry.

The exercise of moral judgment provides a rich phenomenon from which to examine the possibilities and limits of bioethics and, more generally, moral philosophy. It is at the point of moral judgment when our moral agreements and disagreements can be most transparent. In the exercise of judgment we can discern and parse the many different judgments and assumptions which shape a particular judgment about a moral dilemma or controversy. That is, the prior judgment about the moral world which shape the geography of judgment in particular dilemmas. In the chapters which follow it will be argued that implicit in the exercise of moral judgment are prior judgments about the
content, shape, and values of the moral world, judgments about what constitutes a valid moral appeal, and, finally, judgments about what constitutes moral rationality itself.

Moral philosophy in the modern age has been preoccupied with moral agents, abstracted from their social and cultural environment, moral rules and the application of those rules to particular moral cases and problems. The moral agent has been conceived, in deontology and utilitarianism, as one who can stand outside all particular social practices and institutions and formulate moral judgment in universal terms. The challenge of moral philosophy for many in the modern age has been to establish what constitutes the moral point of view from which one can derive the rules of morality without imparting a particular parochial content or perspective. However, no account has been convincing. Many in bioethics have tried to meet this challenge by deploying strategies which appeal first to middle level principles or to other moral cases. These accounts also have been freighted with problems. We are left with many different and competing theories, sets of rules, and descriptions of cases in moral philosophy and bioethics.

In the chapters which follow each of the dominant models of moral reasoning and justification—theory, mid-level principles, casuistry—is presented and examined. In different ways each model must address a number of conceptual issues. Each must address how the general
model -of theory, principle, or casuistry- is specified to the dilemma at hand. Each must face the problem of justifying the foundation for its basic moral appeal. And each model must, in some way, give an account of the moral content of the model; that is, the moral commitments which move the model beyond the realm of the formal and empty and enable it to make judgments about controversies and dilemmas at hand.

Bioethics has been, as noted, a field of controversy and disagreement. It has also been a field where controversies have been resolved. The claim of the chapters which follow is that there is a range in the possible agreements and disagreements in bioethics based on the judgment at hand and the "background" judgments which shape it. Our ability to understand a judgment, or accept its justificatory relevance, will depend upon our acceptance of the moral appeal, the content, and view of moral rationality represented in any particular judgment. In this moral judgments are expressions of a language and they must be understood within the context of the moral community which understands the language.

The project of the modern age, to develop a content-full morality through the power of reason has its roots in the natural law tradition of Western philosophy which held that reason could determine what was morally required outside any appeal to a particular cultural or moral
tradition. While few philosophers of the modern age see themselves as attempting to complete the natural law tradition of the Stoics and the scholastics of the Middle Ages they have surely worked under its inspiration, and have been guided by its faith in reason.\(^3\) Moral philosophy in the modern age has kept faith in reason by trying to develop content-full moral systems without appeal to God and revelation. It has sought to develop a secular, philosophical response to moral questions. In what follows I use the term "secular" to identify a realm of public debate and discussion which is open to all and independent of particular communal traditions or beliefs. the secular is the view from "nowhere".\(^4\)

By examining each of these types of moral reasoning and justification one can see not only the limits of secular biomedical ethics as it has been conceived and practiced but also the limits of modern moral philosophy. We are, however, not only left with a failure but a direction for re-conceiving biomedical ethics and moral philosophy. The failures of these three types of justification point to the importance of understanding agents and their judgments contextualized in particular social practices, institutions, and world views which supply paradigmatic cases and sets of concrete rules for guiding judgment.

One comes to see in examining the different models of moral judgment that each model of judgment, and the
assumptions it employs, reflects the way one conceives both "bioethics" and moral rationality. Indeed this point has been made by a number of feminist writers in bioethics and general moral philosophy. It highlights the notion that moral pluralism is far more foundational than the choice of a particular moral content or moral appeal. In a post-modern, morally pluralistic age the most radical disagreements concern the nature and boundaries of moral reason itself. If we are left with no canonical understanding of reason, then there can be no appeal to the "foundations" of bioethics. Indeed there will be many "bioethics" and not just one.

NOTES

1. I am indebted to Professor Stuart F. Spicker for his help in coining this turn of phrase.


Littlefield, 1987).

6. I am indebted to Professor Laurence B. McCullough for his insights and questions in our discussions about "reason" and "foundations".
CHAPTER ONE
RESOLUTION BY APPEAL TO MORAL THEORY

INTRODUCTION

Systematic reflection and theorizing on proper conduct have ancient roots in the West. One has only to look at the works of Plato or Aristotle to find exemplars of such reflection. What marks off the project of "modern" moral philosophy is the effort to carve out the boundaries of the "moral" world without appeal to areas of belief, custom, or power such as religion or law. In the history of modern moral philosophy one finds the project, exemplified by Mill and Kant, to develop a moral theory from reason which yields moral principles that would apply, in turn, to moral cases and resolve moral questions. To understand the different theoretical approaches of bioethics it is helpful to see them in the relationship to the general, normative philosophical moral theory.

The contrast of Mill and Kant, however, provides a good example of the difficulty of defining the moral as an independent area. Mill speaks of the "foundation" of morality as the end for which actions are done -- happiness. Kant, however, looks for the conditions of moral worth, in the rational nature of agents, as the foundation of the "moral". He does not look to the effects of actions nor the achievement of happiness as the
foundation of moral philosophy. One of the difficulties of modern moral philosophy has been to establish an understanding of what the correct moral theory should be. The importance of such foundational choices should not be overlooked as the theory one deploys sets the boundaries of how one conceives the moral world and determine what will "count" as appropriate justifications of choices.

In general, ethical theories have attempted to articulate normative theories which guide behavior by systematizing and extending our moral judgments. One difficulty for any theory is that there are many components compounded under the rubric of "ethical theory". The underlying presuppositions one has about what constitutes a moral theory are important in that they will influence what one takes to be the components of the theory and the steps in applying the theory to moral controversies. The structure and content of a moral theory will determine which justifications are acceptable and those which are not. The different interpretations of "theory" and "moral" lead to different justifications. Danner Clouser distinguishes several components within an ethical theory: meta-ethics, foundations, and systems (principles, rules, bridging rules).

Clark and Simpson note that the term "ethical theory" has, however, a number of different meanings. They cite two particularly prominent understandings of theory in moral
philosophy. One is a rationalistic formulation in which theory "requires a set of normative principles governing all rational beings and providing a dependable procedure for reaching definitive moral judgments and decisions." In this view principles provide the foundation for judgment and serve to justify judgments. Another approach is to construe ethical theory in terms of a reflective equilibrium; (i.e., the reflective testing of ethical beliefs against others with the aim of developing a set of beliefs which fit together). Moral judgments are made in a way which renders them coherent with the larger set of one's moral beliefs. The process of reflectively balancing considered judgments is usually set in a social context, as part of the development of a general social contract.

The theories of bioethics reflect the ambiguities of moral theory which are highlighted by Clark, Simpson, and Clouser. Singer takes moral theory to be rooted in equality of interests while Donagan understands moral theory as the systematization of principles and rules grounded in the rational nature of persons. There are the approaches of utilitarianism (Singer), deontology (Donagan), and the natural law (Finnis, Boyle, and Grisez). In different ways each seeks to move from a basic principle, or set of principles, to justify particular judgments. There are also coherentist and contract approaches represented by Daniels or Veatch for whom a theory of morality is grounded in
agreement. In the virtue theory of Pellegrino and Thomasma one finds a theory which appeals to the practice of medicine itself and the virtues entailed in the practice. Each theory appeals to some aspect of moral choice which, in turn structures the theory (e.g. duty, consequences, etc.). In the choice of the point of departure for each appeal are implicit assumptions about the nature of moral reason.  

It quickly becomes apparent that there is a strong interplay between one's notion of moral theory and one's moral values. Each general approach encounters significant conceptual difficulties. Indeed, the difficulties encountered in the use of theories in the resolution of moral controversies are numerous and they are repetitive in that, as one examines the different theories, one finds the same set of conceptual problems appearing again and again. The theoretical accounts, prominent in biomedical ethics, must come to terms with two conceptual dilemmas which are, it will be argued, insurmountable obstacles to the hope of developing a coherent moral theory to address issues of bioethics.

The first difficulty for any moral theory, traditionally conceived, is the choice of the foundation for the theory. That is, there is a great variety of possible starting points for a moral theory. One finds, for example, moral theories which appeal to consequences, rights, respect for persons, duty, virtue, the natural law and the nature
of reason itself. Each of these has served as the foundation for different moral theories and different theories in bioethics. Each has been an insight for a moral theory. The choice of a foundation for a theory is a choice about how one understands the "moral" world; that is, what the furniture of that world is and how it is to be known. Theories are purchased at a high price since they carry metaphysical and epistemological commitments, as well as moral ones.⁸

Theories may work well within themselves. The conceptual difficulties arise if someone does not share the initial premises or assumptions which drive the theory. Bioethics makes these difficulties clear when one seeks to resolve moral controversies. The problem for any theory will be to justify why one set of insights or moral appeals should be given precedence over others. If one seeks to justify a particular moral judgment, a difficulty is to determine which appeal should be used to resolve a particular controversy. Often the justification for a moral appeal is given by the way a case is described. A description of a case, for example, can emphasize the dire consequences of one's choices and thus, indirectly, support a theory which is based on an appeal to consequences (e.g. someone must kill X in order to save the lives of Y and Z). The same case re-described, however, may emphasize the duties and integrity of the agent involved and the
importance of the agent not directly intending to take the life of an innocent human being. Another description of the same controversy may emphasize the agent not causing the death of X. Whether one emphasizes the act or the agent may yield very different descriptions of the moral controversy for which resolution is sought. The choice of a foundation for a theory has very practical consequences. What one understands to be central to the process of moral justification often reflects a commitment to a particular moral world view. That is, if one takes consequences to be the central (primary) moral appeal, rather than duties, virtues, or intentions, this choice, in itself, reflects a particular value commitment which in turn structures the interpretation and resolution of a case. If someone began reflection on a moral controversy with another moral appeal as primary this would indicate a different set of moral values. For example, a person who understood certain acts to be intrinsically evil will describe and judge cases differently from a consequentialist. A person's moral values and beliefs establish what will and will not count as proper justification for the conclusions.

The variety of appeals helps to glimpse a second conceptual issue which has beset modern philosophical ethics; that is, the pluralism of moral senses or values. It becomes clear that to resolve moral controversies it is not enough to establish a common moral theory. Any moral
theory will need some ranking of values, some moral sense, if it is to resolve moral controversies. Even if agreement existed on what appeal should be deployed, that agreement would not, in itself, be sufficient to resolve a moral controversy. For example, if we agree that consequences should govern our moral choices then some standard will be required to evaluate the consequences. What is the standard that should be used? Or, if it were decided to use some model of hypothetical contractors, each model will require a particular moral sense, or set of values, in order to structure the choices of the contractors. The variety of moral senses, evidenced both by the plurality of appeals and the plurality moral content, indicates that how moral controversies are described and resolved will vary according to the moral sensitivities and values invoked. In turn the sets of values which are presupposed may lead to different outcomes at least in certain areas. One cannot avoid the difficulty in that each moral appeal needs some particular moral sense, or set of moral values, in order to develop the content of the theory and reach moral judgments. The choice of a content face a conceptual dilemma similar to the choice of appeals. The choice of a particular set of moral values particularizes a theory. The ability of a theory to justify moral judgments will be limited by the degree it is particularized.

Some theories, as we shall see, build in mechanisms for
ranking values. Deontological theories, for example, often develop perfect obligations which can never be violated. Some contract theorists, such as Veatch, provide a ranking of principles. Other types of theory, such as the natural law, have "basic goods" which cannot be acted against and which therefore require rules which govern choices (e.g. "Double Effect"). If a moral theory is to guide moral choices the theory must have some ranking of values to give the theory content.

One can see the importance of these two conceptual issues if one looks at the justification of particular moral choices and judgments. Here I assume that moral philosophy, in the end, is primarily concerned with practical knowledge; that is, knowledge which informs what people do. If a theory is to guide, in some way, practical choices, then it must assume a some ranking of values by which cases are interpreted and resolved. The price of such specification is the loss of generality for a theory. Put another way, one might stress that such value commitments lead to an increase in controversy and contested points.

Each of the two conceptual difficulties, the selection of a moral appeal, the ranking of moral values, rests on a set of choices about the "nature" of the moral world, how it is known (rationality), and the values it supports. This claim is not simply an empirical claim or a claim of a sociology of morals made in the face of moral pluralism.
Rather it is an epistemological claim that in a secular context we have no foundational criteria by which to answer these questions. However, the claim should not be made stronger than it is. It is not a metaphysical claim for it is not a statement about the existence of moral truth. It is, rather, simply a claim that we do not know how to rationally articulate the means of rationally discovering the moral truth. In later chapters I will argue that what we know, in the moral realm, is shaped by what we believe about the world.\textsuperscript{10}

In what follows I will present each of the major theories of contemporary bioethics: utilitarianism of Singer, deontology of A. Donagan, contractarianism of Veatch and Daniels, the natural law theory of Finnis, Boyle and Grisez, and the virtue theory of E. Pellegrino and D. Thomasma. Each section presents an overview and critical examination of the theory in view of the pluralism of appeals and content and an assessment of how helpful the theory is in making judgments.
II. A SURVEY OF THEORIES

A. Singer's Utilitarian Project

1. An Overview:

In Anglo-American moral philosophy utilitarianism has played an extremely influential role in shaping modern moral philosophy. In the development of bioethics, utilitarianism has been influential as it has in general moral philosophy. A good example of utilitarian theory in bioethics is found in the work of Peter Singer. He begins by outlining the parameters of what ethics is not. It is not a set of prohibitions about sex, nor is it simply and ideal system about "goodness" which is unrelated to the difficulties of human life, nor is it a set of religious claims, nor, finally, is it relative and subjective.

Singer sets out a number of claims about the nature of ethics and from his definition of the nature of ethics. From these claims Singer argues that utilitarianism is the best form of moral theory. The first claim that Singer makes is that ethics is universal. To justify one's actions, on ethical grounds, one cannot point only to the benefits which one's actions bring to one's self. He sees this universal claim as something common to all theories of ethics. By "universal" Singer means that the "justification of an ethical principle cannot be in terms of any particular or sectional group. Ethics takes a universal point of
view." Singer holds that the universal element of ethical thought leads one to take a utilitarian position. One must do more than simply describe ethics as "universal" for this description is a formal and empty description. In arguing that the ethical point of view must be universal, Singer accepts that one's interests cannot count for more than those of any other. One's concern for one's own interests must be extended to include the interests of others. The choice of an action, and its justification, must include an account of all interests and the effect that choices will have on those interests. Singer thinks this universal calculation of interests is the basic starting point for moral theory. He argues that to go beyond this stance and accept non-utilitarian moral rules or ideals should only happen if there are reasons for such additional commitments.

Singer presumes that a central element built into the ethical enterprise is a notion of "equality". He understands equality to be a basic ethical principle and not an assertion of fact; that is, it is not based on any actual equality that people share. He moves on to develop how this equality may, in fact, be part of ethics. According to Singer the basic principle of equality is "the principle of equal consideration of interest." That is, we give equal consideration in our moral deliberations to the like issues of all affected by our actions and decisions. Singer sees
this to imply a minimal principle of equality in that it
does not dictate equal treatment for all, but merely equal
consideration of everyone's interests.

A crucial move for Singer's project is to determine
what constitutes an "interest". Singer argues that a
prerequisite for having an interest is that there be a
capacity for suffering and enjoying. He does not specify
what "suffering", "enjoyment" or "happiness" are. He gives
a wide range of interpretation such that he includes
sentient beings (animals) as having "interests".

2. Pluralism of Foundations and Moral Values:

Singer's project is open to the two criticism of
pluralism: the pluralism of appeals and the pluralism of
content. One criticism that can be made of Singer's project
is that his approach too narrowly construes the moral data
to be explained. Singer argues that the appeal to be
ethical, in any form, is a universal appeal. He argues
that appeals to universal laws, ideal observers, categorical
imperatives are all appeals to a universal dimension in
moral choices. He then goes on to posit that the most basic
and common universal element to all men and women are
"interests". Singer has chosen to operate in a moral
universe which contains universal choices about interests.
He argues that even appeals to "rights" and "duties" begin
in a "universal" appeal. In Singer's view, however, moral
appeals to "rights" and "duties" go beyond the minimal foundation of "interests". Those who would develop a theory of rights and duties are obliged, in his view, to offer an argument as to why we should go beyond the minimum.

The first difficulty here is that Singer's choice of the "universal" starting point is not as common as he would present it to be and that many would see the "universal" as but one possible appeal among many. Those committed to a deontological morality will not agree with Singer's presentation of the appeal to the "universal" element of ethical theory. The difficulty is that Singer has given one particular interpretation to the concept of "universal" while others understand the term differently. The difficulty with Singer is one which will appear again in other theoretical approaches and the appeals to middle level principles and cases. The difficulty lies in justifying the starting point. While many different moral theorists deploy the concept of "universality" the meaning of the term is not univocal. Indeed, Singer gives it a particular interpretation in terms of "interests". This appeal to "interests" as the starting point is problematic in at least two ways. First there is the problem that many will argue that morality is not based on interests but on obligations which are not always in our interest. There is no reason to accept this starting point for a theory of morality over any other. The second conceptual difficulty is the definition
of interest. That is, even if interests were accepted as a starting point for moral theory it is not at all clear that a strong enough understanding could be developed so as to be shared across moral viewpoints and communities.

Grasping this points toward the second conceptual difficulty for Singer's theory; that is, while grounding his theory in an appeal to the "universal" Singer has already begun to give the theory a particular content. The second consideration is that Singer, like any utilitarian or consequentialist thinker must build in, to his understanding of theory, a particular moral sense. Without some ranking of interests, the theory cannot deliver resolutions to moral controversies. This is particularly the case in health care which is often a cooperative venture involving people with competing sets of interests who become involved in moral controversies. For example, if one considers making decisions about level and type of treatment to be given a P.V.S. patient how does one weigh equally the interests of the patient, the family, other patients, those affected by the consumption of resources, and the insurers who pay for the use of resources without some ranking of values? There is no point of comparison from which to evaluate the added time "alive" for the patient, which may be valued by some members of the family, against the use of resources which may be of importance to providers, other members of the family, or other patients. There is no yardstick or metric
by which to evaluate the different interests and decide which is of greater value unless the theory devises some way to rank them. Unless the theory gives some ranking of values we are asked to compare incomparable interests.

Faced with particular circumstances of a moral dilemma it is difficult to see how Singer's utilitarianism will resolve moral dilemmas without addressing a problem of calculation. The interpersonal comparison of utility has been a conceptual difficulty for utilitarianism generally. The problem of moral sense, or content, is exhibited in the problems surrounding the notion of calculation. Moral dilemmas involve one's actions and relationships to others. It is in such dilemmas that utilitarianism seems least likely to succeed. There are two type of problems which the theory must face at this point. First there is the practical problem of how to calculate the maximization of interests. It is difficult to see how Singer's type of total utilitarianism can be executed on a practical level as there is no obvious way to determine the calculation of the interests of everyone involved. Aside from the practical difficulty of implementing the theory, there is a second problem in the interpersonal comparison of utility. This problem is epistemological in nature as we have no way to make an interpersonal comparison of utilities. Such comparisons are necessary for moral judgment on utilitarian model. However, one would need a "God's eye" view of the
universe to make such comparisons. While God may know how to calculate such comparisons that knowledge is lacking for mortals in a secular world.

The problem of comparisons of interests become a crucial problem for judgments set in the interpersonal realm which is so often the case in bioethics. The interests of everyone must be considered equally according to Singer. But the question becomes from what standpoint are such comparisons to be made. There is another dimension of the calculation problem in that it may undercut "personal" moral commitments by assuming a certain disinterested stance towards one's interests. While Singer would regard this a virtue it, nonetheless, reflects a particular moral commitment which may not be shared by others. How is one to determine, when one is the only person affected, which action to take? In some way the sense of "interest" will need to be more clearly defined and specified.

Singer's account does not provide an adequate account of moral justification. It is narrowly based on a particular dimension of moral choices (consequences) to the neglect of other possible foundations. Furthermore, the model must presuppose a particular moral sense for it requires some method of weighing the interests of those involved. Such a ranking of values is crucial to reaching moral judgments since it will determine which choices maximize interest. In utilitarianism the problem is
highlighted in the problem of calculation of interpersonal utility.

All of his central elements -- universality, interests, equality -- have a particular moral view and presuppose a set of values. This is apparent in the way "interests" are defined. He defines "interests" in terms of sentient suffering and enjoyment. By defining interests in this way he builds into the theory a commitment to certain moral values. The problem of building in values can also be seen in his discussion of equality as he sets aside other's ideas of equality (e.g. Rawls). In deploying notions of universality and equality Singer also builds in particular moral values. The difficulty is that in a secular world neither his theoretical basis nor the values which drive the theory captures the whole of people's moral experience nor provides reasons as to why they theory should be accepted to the exclusion of others. Singer says that it would be "foolhardy" to deduce an ethical theory from the universal aspect of ethics. Nonetheless he thinks the universal aspect is persuasive for the adoption of a broad utilitarian view. Yet he does not acknowledge that in order to accept this appeal to universal interest is to accept one appeal and a basic commitment to certain moral values. Indeed, the very concepts of "universal" and "interest" can be redefined so as to reflect a very different theory.
B. Donagan's Theory of Morality

1. An Overview:

Alan Donagan sets out another theoretical account of morality. His account stands in sharp contrast with Singer's utilitarian approach and it represents one of the other dominant theories in Western moral philosophy. Donagan sets out a philosophical theory which is based on the common morality of the Judeo-Christian tradition. In this account the nature of common morality is deontological in character; that is, there are a number of duties which structure moral deliberation. The structure of his account is monistic and deductive. It begins with a basic principle from which secondary principles are deduced. This is not surprising since he argues that a theory of morality is "a theory of a system of laws or precepts, binding upon rational creatures as such, the content of which is ascertainable by human reason."25

Donagan proposes to develop a philosophical system of the common morality of the Judeo-Christian tradition. He argues that the common morality of Judaism and Christianity is a theory of a system of laws and precepts binding upon rational creatures as such.26 He argues that morality is founded in the nature of reason and that the moral requirements of reason are captured in the Judeo-Christian tradition. Donagan hopes that the account he develops will not depend on any theistic beliefs. Rather, it will be a
deductive system based on precepts contained in a first principle which can be known by reason. If true, the system will be binding on all rational agents and it would be irrational not to follow it. However to make out his claims for the theory Donagan makes crucial presuppositions about nature, the human person, and human action. He sets out, clearly, the crucial presuppositions of the tradition as he understands them. First, man, considered as a moral agent, is a rational animal. Second, the world man inhabits is a system of nature in which events occur according to morally neutral laws.

Donagan argues that traditional common morality held that the relations of rational creatures with themselves and one another are derivable from a first principle. While it has had different formulations Donagan takes the first principle of common morality to be the Golden Rule: Do not do to your fellows what you hate to have done to you. Donagan cites the appearance of the principle in other, non-Western cultures (e.g. Confucius) as evidence that the rule is rational and not culturally basis. Donagan understands common morality to be a system of laws and precepts about human actions when they are considered objectively. The most familiar form of these laws and precepts are prohibitory in form. He defines "precepts" as any universal proposition of common morality. These precepts of common morality, he thinks, can be deduced from a basic principle.
Donagan acknowledges that there are other formulations of the Golden rule and he examines, for example, the formulation of the Golden Rule in the Thomistic school. In Germaine Grisez' formulation, following Aquinas, one should "Act so that the fundamental human goods, are promoted as may be possible, and under no circumstances violated." However, Donagan holds that a Kantian formulation is simpler and more inclusive than the Thomistic formulation. One should "act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.\(^31\)

From this first principle Donagan moves to develop specificatory premises which enable him to deduce the precepts of his system. He needs, as any monistic system does, some way to specify actions in relationship to the fundamental principle. These premises are to identify species of action as falling, or not falling, under the fundamental principle.\(^32\) The specificatory premises play a crucial role in moving from the general principle to particular judgments. According to Donagan the movement from the general principle to particular judgments is as follows:

1. An action is wrong if it treats human beings as a means only and fails to respect as an end.
2. Action X is treating a human being as a means.
3. X is wrong.

The second premise is the specificatory one in that it
delineates a species of action which treats human beings as
a means only. One might think of an action such as stealing
or murder as actions which treat human beings as means. In
turn we develop precepts against stealing or murder. The
crucial difficulty is to identify the source of these
premises and how we know them to be true.

Donagan compares the derivation of the specificatory
premises to the process of legal reasoning which works from
precedent cases to understand new cases. It appears,
however, that the specificatory premises are more
conclusionary than operative; that is, they reflect the
conclusions of common morality which we want to support
rather than function as part of a process for reaching those
conclusions. Donagan appears, in the end, to be more of an
intuitionist than a deductivist. From the specificatory
premises Donagan moves to deduce first order precepts.
These further specify one's duties and ways of acting toward
one's self, others, and society.

2. Critique: Pluralism of Foundations and Values:

A fundamental problem for Donagan's approach will be
the question of why we should assume common morality to be
normative. In making this claim Donagan builds into his
theory a particular moral sense with a whole set of claims
and values. The difficulties of an appeal to "common
morality" are at least two fold. First there is the
question of whether or not there is, in the West, a common morality. Many have argued that a common morality no longer exists in the West. Rather, one finds bits and shards of a once powerful and commanding moral vision. There are family resemblances among the utterances of various moral languages but no coherent, single language. This is not only an empirical question but a conceptual question about common moral practices and their normative force.

One might accept Donagan’s position that morality is a matter of being rational but reject the content he has given to moral rationality. One might argue, against Donagan, that the same common morality to which he appeals has, in the past, sanctioned practices people today often find morally repugnant (e.g. hereditary slavery) and prohibited practices many tolerate today (e.g. abortion). Furthermore, the system he sets out makes crucial assumptions, about the relationship of duties, principles, consequences and human action, which are controversial. Like other deontological theories, Donagan’s theory reflects an ordered moral world with clear delineation of responsibility. While this approach to the moral world is agent centered, it nonetheless misses dimensions of agency such as the virtues or intentions. Donagan also pays no significant attention to understanding consequences in moral actions. His appeal to "common morality" is really an appeal to a Kantian idea
that the rational should be treated as an end in itself.\textsuperscript{34} This appeal, however, presupposes a certain foundational, universalist conception of "reason" which then justifies the process of reasoning which leads to the content. Indeed, Peter Singer would object to limiting morality to "rational beings" as defined by Donagan. Just as Singer's choice of "interest" gives content to his theory, so Donagan's choice of "rational" does the same for his. Again the choice of a moral "appeal" contains within it the framework for the choice of a particular content.

The development of the premises seems to incorporate more of the conclusions Donagan wishes to achieve than he would like to admit. For example, he states that the development of the specificatory premises is analogous to legal casuistry. This means, however, that one will need to assume a great deal more about moral cases and the content of the theory than the deductive process would lead one to believe. Legal casuistry works within a defined process, tradition, and content.\textsuperscript{35} Legal casuistry is practiced within the boundaries of legislative codes, acknowledged precedent cases, and publicly acknowledged judicial office holders who have the authority to settle disputes. To apply this analogy of legal reasoning to moral reasoning one finds crucial elements lacking in the moral realm. It is not clear what the proper content of the premises should be, or who is to interpret definitively the content of the
premises. It also is not clear whether the content actually comes from the deductive process or whether the theory merely summarizes the norms which are already in place.

The specificatory premises reflect a ranking of values without which the theory would be unable to guide moral choices and judgment for there seems to be a significant conceptual gap between the general principle and particular problems and controversies. Like other moral theories, which are monistic and deductive in structure, the first principle has a character which is general.\textsuperscript{36} Left alone such principles are not content-less but they are unable to reach particular judgments since they can be interpreted in so many ways. Without some type of specification, one will never be able to frame a range from which to choose.

Donagan needs something like the specificatory premises to enable the theory to address particular moral problems. With such premises it is conceivable that the theoretical stance could deliver the limits for the range of choices in facing particular problems. However, without specification, the theory remains at such a general level that it is powerless to address moral questions. A conceptual difficulty, however, is to present an argument as to why we should accept one set of specifications over another.
C. Natural Law

1. Overview:

An important approach to moral theory and judgment is found under the heading of "Natural Law". This theoretical outlook has a long history in Western thought going back to the Stoics and it continues to have a profound influence on moral theory. The tradition embodies the belief that human reason can discover the moral law embedded in human nature which transcends time and culture. The common assumption of natural law theories is that moral duties can be known by reflection on human nature. However, different natural law traditions have differed significantly in their views about what human nature is and, as a result, they differ about the moral theory derived from reflection on human nature. It has had a profound influence in Western culture less for its content and more in terms of its presuppositions about reason and the ability of reason to know moral truth continue to be deployed particularly among Roman Catholic moralists.

The crucial assumption behind a natural law theory is that moral knowledge (principles) can be apprehended by reason. Contemporary versions of natural law theory address the difficulty of the pluralism of structure and appeal by trying to include a variety of appeals (deontological, teleological) within it. There are two significant conceptual issues for a theory of the natural law. While
natural law incorporate a number of moral appeals, it faces one of the crucial problems for all theories in that there is no conclusive reason to think that this appeal to "nature" should take priority over other appeals. Singer, for example, would be critical of a natural law theory's appeal to human nature as the basis of morality. Second, it will have difficulties in terms of content in specifying what "nature" is. The fact that there are numerous theories of natural law, some at great variance with one another, indicates that moral truth may not be as easily apprehended as proponents have thought. Like other deductive moral theories a theory of the natural law needs content. Left at the theoretical level alone, the natural law approach is unable to arrive at moral judgments.

A contemporary example of natural law thinking is found in the work of Finnis, Boyle and Grisez. Finnis, Boyle, and Grisez's discussion of the natural law is set out in the context of their examination of the justification for nuclear deterrence. Like Donagan they accept the norms of common morality as the data to be explained by moral theory. The theory they propose differs from consequentialism and other teleological, goal-directed theories, as well as from Kantian, deontological, duty-oriented theories which seek to ground moral norms in the nature of morality. They hold that their theory possess the strength of teleology in that it is a theory of human flourishing, while avoiding the
weakness of teleology which, in their view is that teleology, by itself, cannot support any deontological constraints which protect human persons. Conversely it has the strength of deontology in that moral judgments are grounded in the rational nature of the moral subject but it avoids deontology's overemphasis on universalizability which they take to be but one aspect of common morality. They understand the natural law theory as combining the strengths of both and avoiding the weakness of both.

Finnis, Boyle, and Grisez hold that morality can be derived from the human good, that is, "the goods of real people living in the world of experience." A "good" is any object of interest while a basic human good is something essential/necessary to human full-being. Out of these reflections they formulate the first principle of the natural law system: "One ought to choose and otherwise will those and only those possibilities whose willing is compatible with integral human fulfillment." In speaking of human fulfillment they go to great lengths to point out that they are speaking of the good of all persons and communities and not "self fulfillment" as the satisfaction of desires. This latter view of self fulfillment is characteristic of MacIntyre's "cosmopolitan" --the rootless modern who has no commitments to a parochial community and its vision. While the cosmopolitan carries no commitment to others, this notion of human fulfillment, for Finnis,
Boyle, and Grisez, is tied to the fulfillment and good of others. Finnis, Boyle, and Grisez hold that there are five basic human goods: life, knowledge, aesthetic experience, excellence in work and play, relations. These are different aspects of full human flourishing and each constitutes a principle of practical reasoning.

Like Donagan the authors face the problem of how to make the general principle less abstract. They argue that there are three intermediate principles which help to shape the interpretation and implementation of the first principle. The three are: 1) the Golden Rule, 2) a principle which excludes hostile feelings, and 3) the principle that one should not do evil that good may come of it. These intermediate principles shape the rational prescription of the first principle into definite responsibilities.

From these intermediate principles, which outline prohibitions of actions and the way actions may be done, specific norms can and are deduced. In this tradition there is a strong emphasis on both actions which are prohibited (malum in se) and the intentions and decisions of the agent. The agent's relationship to action is a central part of their theory. Like Donagan, Finnis, Boyle and Grisez develop a theory of action. Unlike Donagan, however, the role of "intention" plays a crucial role in evaluating any action.
2. Pluralism of Foundations and Values:

Again, as with the other theories we encounter the two crucial conceptual difficulties confronting any moral theory. The Natural law theory of Finnis, Boyle, and Grisez is an account of nature which is centered on an understanding of basic human goods. The theory does try to offset some of the foundational problems by incorporating different moral appeals (e.g. ends, duties, intentions). However, it does rely, most heavily, on a deontological structure; i.e. one can never act directly against the basic human goods. The dominant structure of the natural law are the basic human goods which are to be protected and promoted.

There is a crucial foundational question of why someone should take nature to be normative. There are those who would argue that nature is not the uniform, law governed reality the natural law tradition presupposes. Rather nature may be seen as the outcome of accidents, mutations, and chance occurrences. Even if it is the law governed reality portrayed by the theory one may still ask why nature should be morally normative.

Even if one accepts the normativity of nature, the natural law theorists still face the second conceptual problem of determining which description of nature should be held as normative. "Nature" is subject to many different descriptions. The multiplicity of descriptions is
problematic for a natural law theory since the description is taken to be morally normative. In reflecting on human nature, for example, Thomas Hobbes believed human beings to be motivated by their desire for pleasure and the aversion to pain. Kant's view of human beings as moral agents is that they should be essentially rational. The force of morality is not at all connected with human desires.

Even within Roman Catholicism there are at least two different descriptions of nature. On the one hand "nature" is often "read" from the physical structures of the world. That is, the moral norms are inferred from claims about physical or biological characteristics of human beings. This physicalist tradition has framed many of the moral rules about sexual conduct (e.g., teachings on artificial contraception and masturbation). This reading of the natural law is perhaps best exemplified by Pius XI's teaching on procreation in *Casti connubii* in which he says that "any use of matrimony which deliberately frustrates the natural power of matrimony to generate life is an offense against the law of God and of nature". The moral norms of sexual intercourse in marriage are determined by the biological functions of the act. There is, however, a "person" centered natural law tradition which focuses on the rational nature of the human person as the moral norm of nature, which takes into account the psychological aspects of human behavior. Finnis, Boyle, and Grisez offer yet a
third alternative reading of nature within this tradition. They deny that their system of basic goods is inferred from empirical or metaphysical claims about the biological or psychological composition of human nature. Rather, these basic goods are "self-evident" though not innate.

The description of nature which is used is, of course, crucial to the theory. The description provides the ranking of values which enables the theory to resolve moral controversies. For even if one could establish the foundation of the theoretical appeal to be morally normative, the first principle of the theory will be empty without a description of nature which articulated a set of values like the basic human goods.

The natural law theory then faces two basic questions. First, while attempting to incorporate a number of moral appeals it is only able to account for some appeals in a limited way (e.g. consequences). Furthermore it is not clear why the appeal to nature should be adopted. Finally, there is the problem of moral content; that is, one needs a set of moral values in order to interpret nature.
D. Contractarianism:

Contractarianism in bioethics is an adaptation of the social contract theory of western political philosophy. The term "social contract" circumscribes a similarity of method deployed in political and moral philosophy. This method has yielded a great variation of content.\(^8\) The heart of the contract method is a thought experiment to determine the moral or political principles to which a group of ideal contractors would agree. In this way one attempts to determine the principles which ought to govern social and political life. The two leading bioethicists who use such a model are Robert Veatch and Norman Daniels.

1. An Overview:

Veatch sets out his case by first arguing against a tradition of physician paternalism in medical ethics. Veatch regards the Hippocratic tradition as one which attempts to benefit the patient according to the physician's ability and judgment. Veatch argues that this approach is unacceptable since it is grounded only in the agreement of a professional group and does not include the patient. According to Veatch there is no reason for anyone outside the group to conform to judgments of physician's about benefits to patients. Veatch moves to stress the role of agreement. He holds that medical ethics can be grounded, not in utility or deontology, but in contracts. He argues that
the bare minimum for resolving moral conflicts would be by private agreement. However, this is not morally sufficient as we want to know not only what we can do, but what we ought to do. Veatch also hold that if we want to avoid cultural relativism, we need to establish some absolutist, universal basis for ethics. As a consequence of his understanding of ethics, Veatch emphasizes the universal dimension of moral thinking. But he goes on to qualify his position by arguing that a universal basis will need to be invented, rather than discovered.

To address questions of medical ethics Veatch argues that one must understand the physician-patient relationship within the wider social context. He argues that one can conceive this relationship through a model of three contracts. The model of triple contracts can be utilized those who understand morality as objective and absolute or those who conceive morality as subjective. According to Veatch the "objectivist" attempts to determine the ethical principles by use of reason or the use of moral sentiments to discover them. The "subjectivist" sees people coming together for the practical purpose of harmonious survival. Veatch thinks that no matter which perspective one takes there will be no difference in the principles which result. He believes that either project, done from the moral point of view, will lead to principles to which both objectivist and subjectivist can agree.
The first contract is a basic contract which specifies the content of the ethical system which governs all society. The basic contract is summed up in a number of principles: beneficence, autonomy, honesty, avoiding killing, justice, contract keeping. Second, there is the contract which exists between society and the different professional groups. This contract captures the relationship of the profession to society as a whole; that is, there are role specific duties which arise not from within the profession but from social expectations of the profession. He sees this second contract symbolized in the process of licensure. The first two contracts fix the broad boundaries of the patient-physician relationship which is the third contract. In this contract areas such as the extent of care are negotiated. A crucial conceptual issue, inherent in the basic contract, is the relationship of the principles to one another. He does acknowledge that there may be apparent conflicts between the principles. However, Veatch holds that there can be a balancing between the principles. He rejects the possibility that there can be an overarching principle which governs all the others. He sees beneficence as the best candidate but he rejects this candidate since production of the most good may be unjust. Since he thinks the search for a single principle is likely to prove fruitless Veatch raises the possibility of giving some lexical order to the principles.
He argues that if the nonconsequentialist principles are to have any power they must be given a priority over the principle of beneficence.\textsuperscript{58} When there is a conflict between any of the nonconsequentialist principles one should seek that course of action which produces the lesser violation of the principles on balance.\textsuperscript{59}

Another version of contractarianism is found in N. Daniels.\textsuperscript{60} He uses the method to address questions concerning the allocation of health care resources. Daniels uses the hypothetical contractors to address difficult issues of setting limits on access to health care resources. In elaborating his position Daniels relies heavily on the work of John Rawls.\textsuperscript{61} Daniels includes health care institutions among the basic institutions of society. He argues that health is a special good and that health care institutions should be governed by the principle of fair and equal opportunity. He argues that prudent contractors will limit access to health care in light of other goods and the needs of other institutions. Access will be restricted according to what the contractors think people should rationally want at a particular age.

2. Issues of Foundations and the Ranking of Values:

As with the other theoretical models, the conceptual issues of the choice of foundations and the ranking of values also plague the contractarian approach as well.
Veatch's theory, for example, is driven by an appeal which generates a set of principles. This pluralism appears to include a variety of moral appeals; that is, there are appeals to both deontological and consequentialist elements of morality. Unlike the other theories the contract method can incorporate a number of elements in that it does not appeal to a particular element of the moral action (e.g. consequences, first principles, basic goods, or intentions). Rather it appeals to a method. The most telling criticisms of the contractual approach come over the content of the contract. Such values and concerns cannot simply be added to the contract yet their omission may be seen as evidence that contractualism cannot adequately describe the moral world nor accommodate different rankings of values. It is far from clear that all rational people would agree to the ranking of principles as Veatch has them.62

The contractarian approach seems to incorporate a number of different views under the rubric of "agreement". However, the difficulty with the foundation becomes evident as soon as one turns to the content (the ranking of values) within the contracts. For example, Veatch thinks he can undercut the theoretical differences of the "objectivists" and "subjectivists". To successfully do this, of course, will depend on the capacity of the model to set out content acceptable to both. An objectivist may well argue that the ranking of values is wrong because the contractors have not
included certain moral features. However, even if one accepts his model of contracts it is seems clear that Veatch, through his treatment of beneficence, has built the structure with a deontological twist. He restricts beneficence because he is afraid it may be used to harm someone (override the other principles). Within bioethics, for examples, one finds appeals to other sets of principles such as that of Beauchamp and Childress' four principles.63 One could easily imagine rational people wanting to include principles such as the "sanctity of life" or a principled commitment to equality of treatment.

The Daniels's model faces a similar set of difficulties. While Daniels does not appeal to the "moral point of view" his appeal is an appeal to the "rational". Again, someone like Singer would object to this appeal since it is "speciest" and limits the moral realm to the rational and human. Perhaps the second conceptual issue, that of a particular moral sense, is the most difficult criticism for Daniels in that, ab initio he must presuppose a particular view of the "rational".

His discussions of choices in health care also masks the value laddeness of "health". Health is not only an empirical reality but it is also a personal and value laden concept.64 What constitutes health for one person may be different from the health of another. The place of health in one person's life may be different from the life of an
other person. The allocation of health care resources will be meaningless unless one assumes a standard of health and its relationship to other goods. Daniels's contractors, then, will need some ranking of values if they are to make the kinds of choices Daniels hopes they will make about health care.

Internal to both contractual theories there are difficulties of determining how we can possibly justify judgments. Veatch's theory relies on the set of principles developed and on balancing between the different principles. But it is far from clear how the balancing is to take place. At the very least, there is no metric by which to judge or balance. Indeed in describing the development of a set of principles and their balancing, Veatch speaks of these acts as taking place in "the moral point of view". Since all men and women can share this point of view the principles developed from it, and balanced within it, will be acceptable to all. The epistemological difficulty, however, is our inability to discover the moral point of view. Without this point of view it will be clear why Veatch's list or principles, or any other list, should be accepted. Without the "moral point of view" the weighing and balancing necessary for moral judgment cannot be achieved.

The contractarian approach seeks to circumvent the pluralism of moral appeals by incorporating within the contract a variety of principles. However, it fails to
incorporate appeals such as an appeal to virtue. So it is not entirely successful meeting this pluralism of appeals. Also, this approach must rely on a moral sense or ranking of values to develop content for the contract. Different contractors might well develop very different types of contracts for the medical profession.

E. Virtue Theory:

1. Overview:

Another approach to resolving conflicts of medical ethics has been an attempt to deploy virtue theory as a basis for medical ethics. Virtue theory has an ancient basis in western culture in the writings of Plato, Aristotle and the Stoics. Aristotle saw the virtues set within the context of a teleological view of the world in which the virtues, both moral and intellectual, were habits of the intellect and will which enabled men to fulfill proper ends.

In a similar way Edmund Pellegrino and David Thomasma offer an approach to bioethics which begins by describing the practice of medicine as a virtue. They begin by defining "[M]edicine as a disciplined body of knowledge is a science respecting the perfection of lived bodies concretized by skill in experiencing and effecting connections between corporeal symptoms and remedies." The practice of medicine is an art, a science, and a virtue (of practical reasons) which aims at achieving the end of a
right and good healing action for the patient. Pellegrino and Thomasma see medicine as a practical science defined by a proper end (health) which guides the physician to act in certain ways on behalf of the patient. The focus of medical ethics, understood through the virtue of medicine, is the professional code of the physician with a focus on the proper healing, and good of, the patient. In a more recent development of their thought they continue to speak of virtue as a character trait which breeds a disposition to live in accord with the moral law. These virtuous traits are defined by the ends and purposes of human life. The virtues of medicine lie in the physician who seeks the end of medicine; that is, the good and health of the patient.

Virtue ethics often incorporates a number of appeals. There is also an appeal to "practices" in which we define the virtues in terms of the types of practices we want to encourage in society. For example, a society which wants to maintain a traditional Western family structure might promote the virtue of fidelity. It is in this view of promoting certain "practices" that Pellegrino and Thomasma argue that medicine is a practical discipline and they try to develop a set of virtues required for the successful practice of the discipline of medicine. This concept of building the virtues around the notion of a practice ties
the appeal to a notion of human flourishing. The argument runs that to flourish as human beings certain practices are necessary and those practices require certain virtues.

While incorporating several different appeals, there are, nonetheless, certain moral appeals which are left out.

2. Foundations and Ranking Values:

Like the other appeals examined the appeal to virtue does not capture the whole of people's moral concerns. Some would argue that an appeal to virtue theory does adequately not address concerns about consequences or appeals to autonomy. One can well imagine a moral controversy created between a virtuous person whose pursuit of virtue intruded on the autonomy of another. Or one could easily imagine that a deontologist may see the moral universe with actions that ought never be done (mala in se). Such a view will not primarily be concerned with the virtues of an agent, or a profession, nor will it condone participating in such actions no matter what end is achieved. Another problem is that it is not always clear what the foundation of the appeal actually is. Is the appeal to virtuous acts or virtuous persons? Put another way, it is not clear whether the appeal is based on an understanding of moral acts and practices or on a view of the type of persons we want to flourish. This is often a strategic ambiguity for virtue
theorists.

However even if we could agree upon the moral normativity of one set of virtues, it is not clear that they alone would help to justify moral choices. A given situation might call upon an agent to do two things each of which can be described as virtuous. For example one might understand a situation to call for the virtue of "honesty" while also calling for "temperance" and "compassion". The virtues would seem to require the assistance of other appeals (rules, role models) in order to achieve justification.

The second conceptual difficulty is brought out by the fact that moral controversies in bioethics frequently have many actors such as patients, physicians, families, and institutions. The virtue theory of Pellegrino and Thomasma is too narrowly rooted in the physician's point of view. The theory of the virtues does not adequately address other health care professions or the role of patients except when subordinated to physicians. In turn one would need some meta-theory which addressed how the different sets of virtues interacted.

The more one understands "health" as a good, the more one must understand that health must be rooted within the particular value structure of the patient. The practice of health care also illustrates how a theory of virtues requires a ranking of values. One critical difficulty for
this approach is to show why one view of the patient's good (the physicians) trump others. This formulation of the theory also assumes that one can achieve a coherent and accepted professional ethic which can serve as the cornerstone of the theory. The contemporary discussion of the physician's role in assisted suicide reflects some widely different understandings of the profession and the patient's good. It is not clear that all would, or should, share the same conception of medicine and health which would allow the development of a virtue ethic. Medicine is a social and cooperative venture and it is not clear why the physician's interpretation of the patient's good should be the practice which dominates the field. Even if one could articulate a virtue theory for the profession, it is not clear why it should be morally normative.

III. THE LIMITS OF THEORY

If one hopes to resolve moral controversies, each of the theories examined presents obstacles for realizing for such hope. There are two conceptual problems which can be generalized and found in each theoretical model. First, there is the pluralism of possible foundations for a moral theory. Moral choices involve many different elements (e.g. consequences, obligations, causality, intentions, rules). The conceptual difficulty is to determine which element
should be the foundation of a moral theory. With variations
each theory focuses, in some way, on one type of appeal
(consequences, first principles) or an ordering of appeals
and each appeal presupposes some moral sense or commitment.
However, the conceptual difficulty is to present an argument
as to why one should, from a rational point of view, choose
one foundation over any other. There seems to be no
rationally compelling way to accept one appeal over others.
No one appeal captures the whole of our moral experience.
The second conceptual dilemma is that for any theory to
develop morally content-full responses to the problems of
bioethics, there will need to be some content, some ranking
of values, included within the theory. A crucial
assumption of my criticisms is that bioethical theories want
to develop content-full solutions to moral controversies and
not simply procedural solutions. Put another way, one goal
of moral theory is to guide moral judgment. Without some
ranking of values this goal cannot be achieved. But in a
morally pluralistic age, with a diversity of views of human
life and the morally "good", there is no reason to think
that any one set of moral values will, or should, constitute
the canonical moral sense for all agents. Each theory must
presuppose a particular moral sense in order to develop the
content of a theory. However, unless the moral sense is
shared neither the structure of the theory, nor the
solutions it develops, will be rationally convincing answers
to moral dilemmas for those who do not share the ranking of values. This problem is both epistemological and sociological. The epistemological difficulty is that there is no compelling reason why one should accept one particular moral sense over another. The conceptual difficulty for a philosophical moral theory is that there is no way to know what the ceteris paribus conditions for moral theory should be. What are the proper foundations for a theory and the proper ranking of values for a theory? Unless there is general agreement on both dimensions of this question then the theories will not be able to resolve moral controversies.

One can see these two issues by examining what is involved in the resolution of moral controversies. Each theory, developed in general terms, must give some account of how it moves to address particular questions. The difficulty is that if theory starts with a set of general principles (Veatch), or virtues (Pellegrino and Thomasma), or a general law or principle (Singer, Donagan, the Natural Law tradition) one has to develop some way in which to move from the general level to address the particulars of a moral case. Each theory needs a ranking of values in order to set out the possible resolutions for moral controversies.

In bioethics, much has been made of the problem of reaching particular judgments since it touches the heart of bioethics' self-understanding. Bioethics has been viewed
as providing content-full resolutions to moral controversies in a secular world. However, to so enable a theory to reach a judgment, or range of choices, one has to supplement the general level with specifications, or stipulations, which work as bridges between the general and the particular. In order to develop such "bridges", however, one needs to build in to a moral theory a "thick" set of descriptions and stipulations. Such moves, however, clearly will particularize a theory, which seems at odds with the philosophical hopes of secular bioethics.

Historically one finds a good example of such a thick theory in the practice of Roman Catholic moral theology in the High Middle Ages. Within the general practice of moral theology one finds a combination of elements such as rules, principles, paradigmatic cases, and theory. Many of the paradigmatic cases, moral principles, and rules, were established in the Christian culture long before the formulation of the Natural Law theory. These different elements all worked together to guide moral choices and evaluate moral justifications. The Christian culture also provided structural elements (e.g., the sacrament of penance) to guide people through the maze of moral values and insights. In its historical evolution the distinctions between these different elements became blurred so that in the twentieth century one finds, a moral appeal based on a faith in reason with little mention of religious faith.
The highly rationalist model of the natural law is as convincing as any other rational theory. Separated from the context of cases, rules, saints, and virtues the theory is open to wide interpretation and unable to address particular moral issues.

Another way to understand the relationship between theories and judgement is to turn to intellectual disciplines and investigations where theories have been successful conceptual tools. In general terms a theory seeks to explain why something is the way it is. An important element for the success of any theory is that there be some agreement on what requires explanation. A difficulty for the acceptance of a moral theory is that there is such disagreement on what needs to be explained. Often the very factors that will provide the explanation by a given theory (consequences, rationality, agreements) are central to describing the moral dilemma which the theory will try to explain. Justification by moral theory seems to be caught in circular explanation. The assumptions of the theory describe the moral controversy which those same element will then explain.

In principle a moral theory can help resolve dilemmas to the extent that it, along with bridging elements, is shared by those involved in a moral controversy. The moral "reality", from our limited vantage point, must be agreed upon rather than discovered. Indeed it is difficult to
advance a successful theory if one is unable to deploy a common language or description. It would seem that even in selecting a theoretical foundation one is exhibiting a moral sense—or a moral "faith"—a theory sets out what counts as data, problems, and how one distinguishes successful and unsuccessful resolutions of controversies.

We have then a diptych. There are two panels which tell a single story. Secular moral theories must face two problems: a choice of foundations and a choice of the ranking of moral values. The choice of foundations alone will not enable one to reach moral judgments. One requires a ranking of values to give specific content to the theory. However, in a secular world, with moral pluralism, we have come to realize a deep epistemological problem. That is there is no obvious way to know which foundation, or which ranking of values, should be normative. The dilemma becomes clear. Without these elements a theory cannot develop content-full resolutions to moral controversies and with these elements a theory becomes particularized and looses its general appeal.

Since the theoretical approach to moral controversies has left ethics with these two epistemological issues, some have sought to resolve moral dilemmas by sidestepping these epistemological problems. One way which has been suggested is to drop the use of theory and guide the resolution of moral controversies by appeal to mid-level principles.80
Such appeals build-in a shared content and attempt to avoid any particular structural appeal. Another way to approach the problems presented in this diptych is it to address the problem of specification by working with particular moral cases. Recent literature in bioethics has sought to recast moral philosophy in terms of the practice of casuistry as a way to avoid the problems of theoretical models and to respond to the dilemmas of applied ethics. The challenge for either of these alternatives will be whether or not one can resolve moral controversies without attending to the foundational question about the constitution of the moral world and the content question of the ranking of values. The next obvious moves are to examine the alternative approaches of mid-level principles and casuistry to see if either provides a way by which to justify moral judgments.

NOTES


2. John Stuart Mill, Utilitarianism, Chapter one.


6. Clarke and Simpson, p. 4. Also, Annette Baier argues that in modern moral philosophy normative theories are a system of moral principles in which the less general are derived from the more general. See "Doing Without Moral Theory?", same volume, p. 33.


10. In this I follow the lead of St. Augustine who wrote of our knowledge of truth saying: "'And ye shall know the truth.' Why so? ...They believed, not because they knew, but that they might come to know. For we believe in order that we may know, we do not know in order that we may come to believe." In I onnis evalgeliam, Tractate, 40.9.


15. Singer, p. 11.


18. Singer, Chapter two.
19. Singer, p. 27.
22. Singer, p. 11.
27. Babylonian Talmud, Shabbat, p. 31a
29. Donagan, p. 54.
30. Donagan, p. 61.
32. Donagan, p. 68.
33. See, for example, Jean-Francois Lyotard, The Postmodern Condition, (trans.) G. Bennington and B. Mussumi, (Manchester: Manchester University Press, 1984); See, also, H.T. Engelhardt, Bioethics and Secular Humanism: The Search for a Common Morality, (London, SCM Press, 1991); One finds a similar account in MacIntyre’s After Virtue.
34. Donagan, p. 229 ff.
35. See Chapter three for more extensive discussion.
36. As another example, the first principle of the Natural Law, according to Thomas Aquinas is to "Do good and avoid evil", Summae Theologica, I-II, 94, 2.
37. One finds, for example, in Gaius, an appeal to the "law that natural reason establishes among all mankind and which is followed by all people alike, and is called ius gentium [law of nations or law of the world] as being the law observed by all mankind. ("Quod uero naturalis ratio inter omnes homines constituit, id apud, omnes populos peraeque custoditur
occaturque ius gentium, quasi quo jure omnes gestes utuntur.")


40. Finnis, Boyle, Grisez, p. 276.

41. Finnis, Boyle, Grisez, p. 283.


43. Finnis, Boyle, Grisez, p. 287.

44. Finnis, Boyle, Grisez, p. 287.

45. Finnis, Boyle, Grisez, p. 288.

46. "...quemlibet matrimonii usum, in quo exercendo, actus, de industria hominum, naturali sua vitae procreandae vi destituatur, Dei et naturae legem infringere..." in Enchiridion Symbolorum, H. Denzinger and A. Schonmetzer (eds.), (Fribourg: Herder, 1963), #3717.

47. See, for example, Joseph Fuchs, S.J., "The Absoluteness of Moral Terms", in C. Curran and R. McCormick, Readings in Moral Theology, No. 1, (New York: Paulist Press, ), pp. 94-137.


50. Veatch, p. 113.
51. Veatch, p. 117.
52. Veatch, p. 137
54. Veatch, Part III.
55. Veatch, pp. 127-134.
56. Veatch, pp. 134-137.
57. See Veatch, chapters 6 and 11.
58. Veatch, p. 299.
59. Veatch, p. 304.
67. Pellegrino and Thomasma, pp. 80-81.
68. Pellegrino and Thomasma, p. 219.
69. Pellegrino and Thomasma, p. 148; *Metaphysics* 1140 b 5-6.
70. Pellegrino and Thomasma, pp. 177-180.
71. Pellegrino and Thomasma, pp. 192-220.


73. Pellegrino and Thomasma, 1981, pp. 50-56.


76. See, Baruch A. Brody, Moral Theory and Moral Judgments in Medical Ethics, (Dordrecht: Kluwer Academic Publishers, )

77. A comprehensive, theological expression of the natural law, as the framework of moral theology, was not found in the Christian tradition until the 13th century. See, for example, St. Thomas Aquinas, Summa Theologica, I-II, q. 90-96.

78. For example, one finds in Healy's medical ethics the first postulate for ethical principles to be the acceptance of "the existence of a Creator as a truth proved in philosophy", E.F. Healy, Medical Ethics, (Chicago: Loyola University Press, 1956), pp. 2-3.

79. See A. Baier, in Clarke and Simpson, p. 33; and B. Williams, "The Scientific and the Ethical", in Clarke and Simpson, pp. 65-86.

80. See, Beauchamp and Childress.

CHAPTER TWO

JUDGMENT AND THE APPEAL TO MID-LEVEL PRINCIPLES

Introduction

In health care ethics one of the most prominent alternatives to a theoretical approach to moral justification has been the appeal to mid-level principles. The best known model of mid-level principles in bioethics is offered by Tom Beauchamp and James Childress. They focus on the practical nature of moral reasoning; that is, it is reasoning which seeks to resolve particular moral issues in a way that can be justified. They argue that there is often "no straightforward application" of theory to particular judgments. To move from theories to practical application one needs the bridge of principles. In the mid-level principles model Beauchamp and Childress put forward an alternative to theoretical justifications. They argue that any theory, if is to address concrete moral dilemmas needs to develop principles or rules which can guide actions and choices. Since moral choices often rely on principles an appeal to principles, for justification, should be sufficient. The appeal to principles then should resolve the difficulty of addressing concrete moral problems. At the same time, Beauchamp and Childress believe that there are a number of principles from different theories which overlap. The moral standards captured by these middle level principles transcend groups, theories and traditions. The
justification of moral judgment through rules and mid-level principles constitutes an attempt to carry out the modern project of developing a content-full morality from the standpoint of reason. Having abandoned the hope of achieving theoretical agreement Beauchamp and Childress move to mid-level principles to justify judgments in the biomedical context.

To assess this approach to judgment one must understand three points about the project: 1) the 'nature' of a mid-level principle; 2) the advantages and reasons for this approach to judgment; 3) how one identifies mid-level principles.

This approach has been criticized for a number of reasons. The first general criticism is that it is not always clear what the mid-level principles mean or how they are related one to another. Further, it is not clear how the mid-level principles are to be applied to cases. These difficulties are, I think, well known. There are, however, three less well recognized conceptual challenges which lie at the root of these problems. First, there is a problem of clarifying the nature of a 'principle'. The proponents of a mid-level principle approach never spell this out clearly. In Western thought, principles have been conceived as the first elements of theoretical structures in ethics, mathematics and the sciences. The first principles of any science order the rest of the theoretical structure. In
practical reasoning, such as ethics, the first principles have given rise to secondary principles, precepts, or rules. The confusion which arises in the work of authors like Beauchamp and Childress over the relationship of principles to one another, and the relationship of rules to the principles, reflects a lack of clarity about what 'principles' are and what function they have. An understanding of the use of principles in the history of ethical thought may illuminate some of the problems facing the appeal to mid-level principles.

A second conceptual problem is that there is little discussion of what a moral principle is. While they proceed from two different moral theories, utilitarianism and deontology, Beauchamp and Childress assert agreement on the mid-level moral principles. But, the nature of the agreement is never spelled out in detail. The way one determines what those principles should be and how one interprets the meaning of the mid-level principles, will be influenced by one's understanding of the "moral point of view". A utilitarian seeking the greatest utility will understand the principle of autonomy differently from a deontologist. For example, in assessing social policies governing abortion the utilitarian will be concerned with those policies which promote the greatest utility. The deontologist will seek what is rational and universally binding without regard to the consequences. One can
conceive a scenario in which, proceeding from such different moral points of view, people may arrive at the same judgment about abortion for very different reasons. Since this "agreement" is coincidental, it is difficult to understand how it can be extended if the case is altered. Beauchamp and Childress actually make a stronger claim that proponents of the two views can come to an agreement, which would seem to indicate that the two parties could offer compelling reasons for their positions that each would find acceptable. Perhaps that which Beauchamp and Childress have focused on is not agreement regarding moral principles and cases but an accidental coincidence of two views which are fundamentally unintelligible to each other.

The third conceptual problem, overlooked in the account provided by mid-level principles, is how one is to understand "cases". Any case can be the subject of a wide variety of descriptions. How one describes a case, or even picks out what is to be considered as a moral dilemma, is influenced by the moral point of view one holds. The cases in the Beauchamp and Childress approach function as afterthoughts to the discussion of the principles.

These three issues point out not only the failures of the mid-level principle account offered by Beauchamp and Childress but also the crucial intellectual issues with this whole approach; that is, that without an intellectual and social context the principles are incoherent and
unintelligible. Absent a theoretical or social matrix the principles cannot be determined. Without a framework there is no reason to accept one set of principles as canonical over other sets of principles. Absent a theoretical or social matrix the principles cannot be interpreted. There is no reason to accept one interpretation of a principle over another. The attempt to structure content-full moral principles, without a theoretical or social context, leaves the meanings of the principles subject to dispute. There is no canon of interpretation available and so the principles are fated with having so many different meanings as to be meaningless.

However, to understand the issues five areas need to be explored. First, it is important to lay out fairly how an appeal to mid-level principles is claimed to work. Second, it will be helpful to examine the standard criticisms that have been leveled at this approach. Third, an historical examination of the use of 'principles' in ethics will be undertaken so as to illuminate the difficulties with the appeal to mid-level principles. Fourth, one needs to consider the role of the "moral point of view". Finally, from all that has gone before, it will be important to tie the elements of these examinations together to understand better what can be learned about moral judgments and justifications.
I. The Model of Mid-level Principles

The mid-level model of justification for moral judgments sees moral reasoning taking place in levels of abstraction. It functions like an appellate process. The first tier is that of concrete, individual judgments which individuals make on a daily basis. This is the tier that is rich with the details of the individual judge as a participant in the decision. However, when asked to justify or give reasons for the decisions made or the opinion held, people move to tiers of abstraction.

To 'abstract' means to "draw away" or "drag away" (abstraha). In English 'abstraction' can have a sense of drawing out an 'essence' from a particular substance and leaving aside the particular accidental details. There is also another sense of abstraction in which a generalization can be created rather than discovered. The generalization lacks the specificity of the first sense of abstraction and functions like a summary statement. Understanding these two senses of abstraction is important for understanding Beauchamp and Childress's appeal to mid-level principles. They view abstraction in the second sense of generalization. While Beauchamp and Childress never precisely discuss their understanding of "abstraction" one can conclude that they are using abstraction in the sense of "generalization". This conclusion becomes evident when one examines the exposition of any of the principles in that each principle
seems to include many diverse meanings. This means that
the mid-level principles will be summaries or
generalizations and will be open to many different possible
interpretations. They never offer an argument for why they
understand abstraction in this way. Furthermore, their lack
of clarity and the ambiguity of the term allows them to
slide between the two sense of abstraction making the
principles seem more powerful than they are.

In justifying particular moral choices, for Beauchamp
and Childress, we move to realms of abstract (generalized)
reasons. In this move to abstraction there are degrees of
abstraction in offering a justification. In response to the
'why' question one may offer a rule. When pushed further
one may offer a principle. The highest level or tier of
abstraction is a complete moral theory. The upper level of
abstraction is disengaged from any particular decision or
case. It is an articulation of a view of the moral life.
Theories need to be clear, internally consistent and as
complete yet as simple as possible. Between the level of
theory and the particular judgments lie the tiers of
principles and rules which are derived from theories and
treated as action-guides. They are 'mid-level' in that
they are more specific than the general theoretical level
and they are more general than particular concrete moral
judgments. Beauchamp and Childress diagram this
relationship as follows:
Moral theories

|^ Principles

|^ Rules

|^ Judgments

One of the characteristics of the mid-level principle approach, as we shall see, is that there is no priority of one principle over the others. Thus, no one principle is fundamental for the system. An approach which began with a fundamental principle would give that principle, or principles in a pluralistic system, logical priority over the other principles which are, in some way grounded in it. In this way the fundamental principle(s) establishes the relationship between the mid-level principles.

Why would one appeal to mid-level principles rather than appeal to moral theory in order to justify a moral judgment? One of the conceptual issues which has beset modern moral philosophy is how to justify moral judgments in light of the variety of different moral theories, each with its own set of strengths and weaknesses, which have been advanced and developed. This difficulty is brought into sharp focus in biomedical ethics as it seems hopeless to resolve moral controversies without an agreed upon starting point. The project of mid-level principles is conceived as an attempt to develop a normative ethics for biomedical problems in a pluralistic context. The principles, in the
Beauchamp and Childress model, purport to provide action
guides that can be shared across theoretical perspectives.7
They write: "We have argued that the distinction between
consequentialist (especially utilitarian) and deontological
theories, while important, can be and has been
overestimated....there are also major similarities across
certain rule-oriented theories. In particular, some rule-
utilitarian and rule-deontological theories (where "rule"
includes principles) converge on the same principles and
rules."8 However, Beauchamp and Childress also understand
that they are seeking normative principles in a pluralistic
context. The appeal to mid-level principles is an attempt
to address the problems of applied ethics in a context which
often has many different senses of what is morally
appropriate.

If the appeal to mid-level principles is to provide a
modus vivendi for the justification of moral judgments in a
pluralistic context then the extent to which it succeeds
will depend on some shared view of the meaning and
application of the principles. However, I think it is
important to clarify that there are different senses of
"agreement."9 For example, there is that species of
agreement in which the agreement is accidental. The
conclusions of moral reasoning, while they are the same, are
reached for very different reasons. There are two sub-
species of "accidental" agreement. One is agreement where
the parties simply concur on what is to be done but justify their decisions from very different points of view. For example, a good neo-scholastic Catholic and a secular humanist may both agree that artificial nutrition and hydration should be discontinued on a persistently vegetative patient while justifying their conclusions for very different reasons. A second sub-species of accidental agreement may occur when the justifying reasons appear to be the same but, in fact, are quite different. For example, a Kantian and Millian may both appeal to a principle of autonomy to justify a particular choice, yet mean very different things by the principle. One might ask why bioethicists should be concerned with these two types of accidental agreement. It would seem that the only concern should be to resolve the immediate moral controversy. The difficulty is that ethics, generally, and bioethics, in particular, is concerned with extending judgments about cases and controversies to new moral dilemmas. Unless there is a substantial agreement on the reasons justifying a judgment we will not be able to coherently extend the judgment of a particular case.

For example, in a particular case such as "Dax's Case" a utilitarian and deontologist might both agree that the principle of autonomy would direct the physicians to follow Dax's refusals of treatment. The utilitarian might argue that such a course of action was following a consumer model
of autonomy while the deontologist understands such an exercise of autonomy as respect for the person. If the case is altered so that Dax now asks to be euthanatized the utilitarian would continue to agree that this too is an exercise of consumer autonomy while the Kantian deontologist would not view such a request as a justified exercise of autonomy.

In controversies in which people may stand within the same moral framework and share the same types of moral reasons the principles may be of great help. But, the model is presented to resolve controversies in the situations where the background assumptions are not necessarily shared. Proponents of this approach to moral reasoning often stress the virtue of reaching agreement in moral disputes. It is reasonable then to carefully scrutinize the nature of such agreements.

Beauchamp and Childress characterize the principles as prima facie binding; that is, all else being equal the principles bind. However, they are not absolutely binding. Each principle has weight (due consideration) which should be given to it but not priority over any other principle. One of the difficulties with this approach will be a failure to articulate how, lacking a prioritization of the principles, we are to determine which principles are to be followed under what circumstances. Beauchamp and Childress do spell out four requirements for the infringement of a
prima facie binding principles. First, one must consider whether or not the moral objective has a chance of success. Second, the infringement must be the last resort. Third, the decision must represent the least possible infringement. Finally, we must seek to minimize the untoward effects.\footnote{10}

The task of applied ethics is to address particular practical problems. There are at least two crucial assumptions that must be made for a mid-level principle approach to succeed in applied ethics. The first assumption is that the mid-level principles can generate action guides that are specific to and fit the context of, concrete situations. One difficulty is to understand the relationship of the mid-level principles to moral rules and action guides. In several places Beauchamp and Childress speak of rules and principles equivalently while at other points they speak of rules as derived from the mid-level principles. This lack of clarity about this relationship is tied to the lack of an articulated view as to what principles are. The second assumption is that middle level principles can be developed which cut across boundaries set by moral theories and ways of living. Thus, we are able to come to general agreement and justification about judgments by appeal to those principles. This approach holds that when people face a controversy in biomedical ethics they can explain the judgments they make by appeal to these principles. An appeal to these principles should be
sufficient to offer a justification for moral judgments which would be satisfactory to others no matter from what theoretical perspective one works. The goal of a principle driven account of moral judgment is to be able to make normative moral judgments while avoiding the quagmire of developing a comprehensive moral theory. This avoids a relativistic account of moral judgment as well as the difficulties of adjudicating the claims of different moral theories which have dominated discussions of normative ethics in the modern age.

The project of the mid-level principle account seeks to make normative moral judgments, while eschewing moral theory, through an appeal to mid-level moral principles. The project attempts to navigate the Scylla and Charybdis of moral relativism and the foundational issues raised by moral pluralism.

One begins to sense the difficulties with this approach from the start when one realizes that there are differing accounts of what actually are the principles that need to be included in a principled account of moral judgment. While the best known account of an appeal to mid-level principles is found in the work of Beauchamp and Childress in medical ethics, there have been other accounts. A notable example is William Frankena who offers an alternative example of this approach. In particular, Frankena’s list of principles differs from that of Beauchamp and Childress.
A. Frankena.

In his examination of different types of utilitarianism Frankena finds each approach lacking in some respect. Against act utilitarianism Frankena finds that such a position is impractical in calculating anew each time the utility of each act. He also holds that the 'Butler-Ross' criticism is decisive; that is, when faced with a choice between two acts, A and B, A may produce a slightly greater balance of good over evil than B. A, however, involves some act, such as breaking a promise, being unjust, or telling a lie. He holds that act utilitarianism is committed to act A. This position, however, is at odds with 'the moral point of view'. The crucial assumption for Frankena’s criticism of utilitarianism is that acts may be made right or wrong by elements other than the balance of good and evil effects. He argues that the "moral point of view" constrains benevolence with justice.

General utilitarianism asks what the world would be like if everyone did a certain act X. One cannot look only to the particular case, but one needs to look to general practice. Frankena believes that general utilitarianism is based on an implicit appeal to moral principles at least at some formal level.

The rule utilitarian appeals to the need for sets of rules, that is, the claim is that in order to achieve the greatest good over time people must follow rules.
Frankena holds that all forms of utilitarianism are open to the following type of objection. Assuming that we know in advance the outcomes of our choices we may have a choice between two actions each of which produces equal amounts of utility. For the utilitarian, the moral 'score' is the same in both choices. However, the distribution of the utility may be quite different for each act. 'A' may distribute the good to a small number of people while 'B' may spread it over a wide number. He claims that we should say 'A' is unjust/wrong and that 'B' is morally preferable. Again, the strength of Frankena's criticism rests on an appeal to a notion of justice that, he thinks, we commonly hold. There are two assumptions for which he does not argue. One is that there is a single, canonical content-full notion of justice and second, that our commonly held moral beliefs/intuitions have normative force.

Frankena's criticisms of the forms of utilitarianism set the stage for the two principles he introduces in his positive proposal: a principle of beneficence and a principle of justice to guide one's choices in acts that affect the distribution of good and evil in the world.¹⁴

Frankena argues that, contrary to a deontological stance, it makes sense to talk about good and evil in quantitative terms.¹⁵ He holds, all else being equal, one ought to "..bring about as much of a balance of good over evil as we can."¹⁶
All of this leads Frankena to hold the following principle of beneficence: "we ought to do the act or follow the practice or rule that will or probably will bring about the greatest balance of good over evil in the universe." \(^{17}\) He sees this principle as different from the principle of utility since the principle of beneficence allows goods and evils to be measured but does not always require this to be the case as the principle of utility does.

In working out the meaning of the principle of beneficence Frankena insists that while beneficence may not be a requirement of morality, it may be superogatory, we still regard it as an important part of morality. He lists four parts to the principle:

1. One ought not to inflict evil or harm [what is bad].
2. One ought to prevent evil or harm.
3. One ought to remove evil.
4. One ought to do or promote good. \(^{18}\)

When any of these are in conflict we may use a maximizing principle to resolve the conflict, insofar as goods and evil are able to be measured. \(^{19}\) From these 'sub-principles' one can derive prima facie rules to determine our actual duties in any given situation such as 'one ought not to kick people'. So we see that the principle of beneficence can account for some of our rules for prima facie duties. \(^{20}\) But the principle of beneficence does not tell us how to distribute goods and evils since it only says that we should
produce one and prevent the other when possible. This is the work of Frankena’s second principle of justice.

While there is a prima facie obligation to achieve the greater balance of good this is not the only consideration in our judgment. The second principle that he takes to be a basic premise is some principle of just distribution. He sees justice as different from beneficence and not derived from it. Thus, it needs on his account to be a separate principle. Some acts, such as incest, he holds may be wrong but not unjust, while other acts, such as cruelty to children may be unjust (since such acts involve treating them differently) and also wrong.

The justice with which Frankena is concerned is that of distribution; that is, the comparative treatment of individuals. He is then faced with choosing which rule of distribution is to be used; that is, deserts and merits, or egalitarianism, or need. He argues for an egalitarian interpretation of the principle. He opts for this interpretation of justice because he thinks that, morally, before one can distribute according to merit one needs to be sure that all have an equal opportunity to ‘compete’. And so he interprets equality to mean "equality of treatment".

The considerations Frankena subsumes under the principle of justice are the deontological concerns of his "mixed-deontological" system. The principle is concerned with certain ways that people ought, or ought not, be
treated. One might imagine a case where the greatest balance of good might be served only by taking the life of a person. Frankena's concern is that while the overall good may be maximized, and the distribution of positive utiles improved, the person will be treated unjustly because he/she has been treated unequally. One might also imagine a case where the good may be maximized and the average utility improved by confiscating some of the land that is owned by one person. In the second case it is not so clear as to how Frankena's principle of justice would direct us. In one description of the case it may seem that it would be unjust to take the land since it would treat the landowner unequally from others in society. In another description, however, one might imagine people arguing that the land had been distributed unjustly [unequally] and that the principle justifies the taking of the land.

Having set out the two principles Frankena points out that justice, like beneficence, is a basic, prima facie obligation. Thus, it can be "overruled" by beneficence. Elsewhere he remarks that one of the difficulties which many people have with a deontological system is an inability to consider the role of effects and consequences. In his view the principle of love fuses the concerns of justice with those of consequences. Indeed Frankena acknowledges that there may be conflict between the two principles particularly on the micro and macro levels; that is, between
small injustices and the greater evil. He sees this simply as a problem with which any system, with more than one principle, must live.25

Frankena holds that all of our duties, of justice and beneficence, presuppose the existence of good and evil. He takes this presupposition to reflect the dictum that "love is what underlies and unifies the rules of morality."26 Frankena’s account of an appeal to principles, thus does implicitly appeal to a higher principle which unifies and grounds the two principles of beneficence and justice. Furthermore there seem to be other principles at work in his account, (e.g. the four sub-principles of beneficence, and the maximizing principle), and it is from these principles we derive moral rules.27 However, he does not spell out how the derivation of the two principles, and the subsequent rules, is to take place. What seems to emerge is less an appeal to principles and more an appeal to a theoretical account of mixed, or limited, deontology where the theory is based on a first principle of love which leads to mid-level principles of beneficence and justice.

The other area of concern which he raises is that of application. The two principles, Frankena admits, tell us too little. The principles do not tell us how they are to be applied and so they need to be supplemented in some way [not however, with other principles]. He sees the principles as supplemented by the customs and institutions of society.
The task of such institutions is to be as beneficent and equalizing as possible:

B. Beauchamp and Childress.

In the field of biomedical ethics a principle driven approach to moral reasoning and justification has found its principal expression in the work of Beauchamp and Childress who offer an account of the justification of moral choices by appeal to mid-level principles. Their view is that each type of moral theory offers an important moral perspective and there is no reason to think that any one theory is definitive or trumps all others. In their position they are taking a pluralistic approach. They write:

> Each type of theory offers an important moral perspective from which we stand to learn, and there is no reason why only one type of theory must be selected as preeminent.\(^{28}\)

In developing the appeal to mid-level principles they adopt a way of proceeding which allows us to take advantage of the insights of different theories without coming to theoretical agreement or the development of a meta-theory which ties all the other normative theories together.

Beauchamp and Childress also try to navigate between understandings of principles as either 'absolute' or as 'situational' and 'summary'. Instead they see rules and principles as "binding but not absolutely binding".\(^ {29}\) As such they argue for four principles which are prima facie binding.
The first principle they set out is that of respect for autonomy. They acknowledge that 'autonomy' has a number of diverse meanings. They state the principle as broadly as possible: Autonomous actions are not to be subjected to controlling constraint by others. Unlike other philosophical presentations of autonomy, the principle set forth by Beauchamp and Childress does not focus on the autonomous 'person' but rather on the autonomous action. The focus seeks to avoid intractable discussions of defining 'person' or ideals of autonomous choosers. Rather they focus on 'respect for autonomy' and 'the exercise of autonomy' "...which refer to normal choosers and their choices rather than ideal choosers." In delineating how normal choosers act autonomously they set out three criteria. Autonomous actions are those undertaken intentionally, with understanding and without controlling influences that determine the action. While Beauchamp and Childress attempt to focus on autonomous actions, rather than persons, it is not clear that they are able to avoid the conceptual difficulties involved in defining 'person' as they build into the concept of 'action' many of the controversial elements of concepts of 'person'.

The second principle adopted by Beauchamp and Childress is the principle of nonmaleficence. Unlike Frankena they distinguish nonmaleficence from a principle of beneficence. They argue that the two need to be separated in order to
capture distinctions of ordinary moral discourse.\textsuperscript{35} If one
tries to fit them under one principle, Beauchamp and
Childress hold, one will still be forced to distinguish in
one way or another as, they would contend, Frankena does.

The principle of nonmaleficence is stated as: One
ought not to inflict evil or harm.\textsuperscript{36} Of course, it will be
crucial for them to say what it is they mean by 'harm' which
they define to be: "The thwarting, defeating or setting
back of the interests of one party by the invasive actions
of another party."\textsuperscript{37} The principle of nonmaleficence
supports, in turn, several moral rules such as: "Don't
kill", "Don't cause pain", and "Don't disable" all of which
are prima facie binding; that is, if one undertakes an
action which causes such harm one must offer a moral
justification for the action. They use this principle to
outline what they see as 'due care' in medicine.\textsuperscript{38} It is
within this discussion of nonmaleficence that the authors
address other controversial areas of biomedical ethics such
as the obligations to treat, and the principle of double
effect. As the principle of autonomy protected the
competent person, the principle of nonmaleficence protects
the interests of incompetent patients.

The concept of beneficence "includes any form of action
to benefit another."\textsuperscript{39} The authors never give a clear
statement of what the principle is. They begin by saying
that the principle "asserts an obligation to help others
further their important and legitimate interests."\(^{40}\)
Already under the one principle of beneficence we have two other principles as possible interpretations. One requires the provision of positive benefits and the other requires the balancing of benefits and harms (utility).\(^{41}\) There is also the second 'essential addition' to the principle of positive beneficence. The limits of the principle are hard to determine since it is not clear whether or not it enjoins us to promote what is good as well as prevent what is bad.\(^{42}\) The danger is that the principle might be interpreted as "a morass of obligations that exceeds definable limits."\(^{43}\)

The authors set out an example of someone who sees a drowning man while walking past a lake. While the passerby may not be required to save the drowning person, the passerby may be required to call a lifeguard or the police. To establish limits to the obligation of beneficence Beauchamp and Childress set out five criteria:
1. Y is at risk of significant loss or danger.
2. X's action is needed to prevent this loss.
3. X's action has a high probability of preventing it.
4. X's action would not present significant risks, costs or burdens to X.
5. The benefit Y can be expected to gain outweighs any harms, costs or burdens that X is likely to incur.
They think this list helps specify the principle and give
greater direction to the agent than simply leaving the principle as an 'imperfect' obligation.44

In setting out the ground of obligation Beauchamp and Childress establish it in terms of reciprocity. It would seem that as such obligations are developed, either one acts out of role expectations [the lifeguard], or from contractual obligations of some form or another. Indeed one might well argue that obligations of beneficence in health care derive from social expectations regarding the profession and from contractual obligations between patients and providers.

Within the context of the principle of beneficence Beauchamp and Childress include a number of moral topics from biomedicine and health care which illustrate some of the difficulties of the mid-level principle approach. For example, Beauchamp and Childress discuss the problems of paternalism within the context of the principle of beneficence even though paternalism can also be discussed under the principle of autonomy.

Beauchamp and Childress develop a fourth principle, the principle of justice, which is concerned with the question of distribution of goods and benefits. What is striking is that Beauchamp and Childress do not clearly state what the principle of justice is. In fact, at different points in the text they speak of "principles" of justice.45 They note that the only common thread to all conceptions of
justice is Aristotle's position that "equals must be treated equally and unequals must be treated unequally". The principle is formal and empty of content. Moreover, Aristotle's formal principle is not the only formal principle of justice. In *The Institutes of Justinian* justice is defined as the constant and perpetual wish to render everyone his due. Again, as with other parts of the book, there is no argument as to why we should accept the Aristotelian principle of justice over the Justinian principle or any other formulation of justice.

Beauchamp and Childress move to consider alternative material principles which specify the relevant characteristics for determining equal and unequal treatment. The authors seem to lay out alternatives without any systematic overview and evaluation with the result that it begins to look as though there are actually ten principles. These, like other principles specify prima facie obligations that cannot have their weights assessed independently of particular circumstances.

Beauchamp and Childress conclude their model of mid-level principles by developing rules of veracity, privacy, confidentiality, and fidelity which help determine and justify morally required actions. The rules are introduced as applications of the principles. However, the grounding of the rules in the principles is never made clear. Beauchamp and Childress see obligations of veracity,
for example, involving "a special application of several principles".\textsuperscript{51} Thus, they ground veracity in autonomy, fidelity-promise keeping, and the necessity of trust between persons. It is, however, not at all clear from where the ‘principles’ of fidelity and trust come. Nor is the relationship of these three principles explained in any way. The introduction of the "rules" provides a glimpse of the internal problems of the mid-level principle model. What do the rules mean? How are they related? Why should we adopt this set of rules?

II. The Standard Criticisms

The justification of judgments through mid-level principles has captured a great deal of support in biomedical ethics. The important task ahead is to discern the strengths and weaknesses of this approach as a method of moral justification and determine what we can learn about moral judgments and justification. The principle criticisms of the approach have had to do with two hermeneutical questions and a foundational question. The hermeneutical questions concern the interpretation of the meaning of each of the principles and the interpretation of the principles in relationship to one another. Second there is a foundational question as to why this set of principles, and not others, should guide our moral judgments. These three sets of questions identify the basis for the difficulties in
applying the principles to cases and they have been the standard criticisms of this approach.

There is yet another, prior issue which surrounds the principal account of justification. The account via mid-level principles relies on mid-level moral principles. In each of the accounts we gain an understanding of what it is to be 'mid-level' but there is no account of what is to count as a moral principle. Beauchamp and Childress give examples of the principles but never say what counts as moral. This failure should not be surprising since one of the aims of Beauchamp and Childress's approach is to avoid the intractable difficulties of moral theorizing. To articulate what counts as a moral principle is to move in the direction of a theoretical account. The failure to provide this account leaves one with the foundational questions of why these principles, and not others. While Beauchamp and Childress endorse moral pluralism this approach gives us no way in which to cope with the pluralism. Moral pluralism means that judgments will be made from a variety of perspectives some of which are incommensurable. The four mid-level principles will be used with different, often incommensurable, interpretations and meanings. One way to deal with this problem would be to view principles as procedural guidelines; that is, guides to the proper exercise of authority and decision making. However, Beauchamp and Childress do not take this approach. Rather,
their principles are statements of moral content and this opens the door to problem of interpretation and foundation.

A. The meaning of the mid-level principles: The first area of criticism has been that the mid-level principles are open to a wide variety of interpretations and, consequently, are of little help in justifying moral judgments. Indeed, Beauchamp and Childress themselves acknowledge that autonomy, for example, has been used to refer to a diverse set of notions. They try to offset some of the diversity by focusing the mid-level principle of autonomy on actions, not persons. They use the case of Mohr v. Williams to illustrate autonomous actions.\textsuperscript{52} In the case the physician obtained the consent of Anna Mohr to operate on her right ear but in the course of the surgery he determined that the left ear was actually in need of surgery and operated on it. A court found that the physician should have obtained the patient's consent since it is the patient who authorizes the physician to operate then express consent is required since it is the patient who authorizes the physician to operate to the extent consent is given.\textsuperscript{53} Beauchamp and Childress hold that the authorization in the informed consent is the autonomous action. However, they have built in criteria (understanding, absence of control, intentional authorization) which the agent must "substantially" possess to make an act of informed consent. So it seems clear that
while they focus on autonomous actions, their discussion
presumes certain qualities of the agent. They argue that
health care, like other areas of decision making (such as
financial planning) should presume that a person is
competent to make autonomous choices.\textsuperscript{54}

In one of their case discussions\textsuperscript{55} of autonomy an
involuntary mental patient seeks institutional release which
is opposed by his family. Beauchamp and Childress note that
the case is 'troubling'. Yet they do not elucidate why it
is troubling or how they think we should think about it.
Furthermore, in medical settings, where patient's actions
are often limited, it would seem that autonomy, as they have
defined it, can be easily lost or impaired. Indeed by
interpreting the principle in this way the health care
providers in "Dax's Case" are justified in their beneficent
interventions.\textsuperscript{56}

What seems to be occurring is that under the principle
of respect for autonomous choices, they have included a
number of complex components and it is not at all clear what
the relationship of these components is one to another.
Furthermore they do not give any clear account of what it is
"substantially" to fulfill the requirements they have set
out. It seems as though one is left to one's intuitions and
ideas about what they mean in order to interpret the
principle.

Respect for autonomy, and autonomous choices, provides
a good example of what is glossed over in the Beauchamp and Childress discussion. Respect for autonomy which can be interpreted in at least two fundamentally different ways. In explaining the principle of autonomy Beauchamp and Childress cite both Kant and Mill in support of their mid-level principle.\textsuperscript{57} For Kant one acts morally only when one acts autonomously in the sense of willing what reason demands. For Mill, autonomy is shaped by one’s liberty and freedom to act. On Mill’s account one is an autonomous agent when one acts in the pursuit of the different desires and goals of his/her life. But such choices are heteronomous choices for Kant, not autonomous, moral choices. While the same word is used, there are two very different meanings for the term. Beauchamp and Childress pass over the difficulty of these meanings and focus on autonomy in terms of free action.

However, it would seem that they should use two different place holders for ‘autonomy’. There should be ‘autonomy\textsubscript{b}’ for Beauchamp and ‘autonomy\textsubscript{c}’ for Childress.\textsuperscript{58} For it would seem that not every ‘autonomous\textsubscript{b}’ action will be ‘autonomous\textsubscript{c}’. Beauchamp and Childress state that the Kantian and Millian theories would probably not "require significantly different courses of action."\textsuperscript{59} However, the differences in reasoning and justification do become apparent when one examines the limits of rules and an account of exceptions. This is a point which will be covered later in the chapter.
The principle of autonomy can also be treated as a procedural principle; that is, it need not presuppose a particular moral content but only outline a way in which people determine who has proper authority in a morally pluralistic world. Yet, Beauchamp and Childress offer little discussion of this interpretation and they do not present an argument as to why they reject it. So, the principle of autonomy can be understood either as a procedural or political principle or as a moral principle endorsing a particular moral viewpoint.

The problem of interpretation is also seen in the other principles. In interpreting the principle of beneficence there is a wide field of meanings in which to understand what it is to set back the interests of another. To understand what constitutes 'harm' one needs to understand it in relationship to 'interest'. Indeed, they seem to offer an interpretation of harm as tied to basic welfare interests. However, the principle, as such, does not determine this as its only meaning. In light of the principle of autonomy one might ask how one is to interpret harms to which consent is given. This points to the question of how the principles are to be related one to another.

In spelling out the principle of beneficence Frankena listed four different statements about the content of the principle. He acknowledges that the four are different yet
he sees them each as part of the principle of beneficence. He does, however, give priority to the fourth element; that is, that one ought to do or promote the good. But are these four equivalent? Suppose I am walking down the street and encounter a homeless person on the sidewalk asking for money. Suppose that I simply pass on by. Have I been beneficent? On the first account I have as I have done nothing to inflict evil or harm (§1). But, the same action, by the second, third, fourth accounts is a failure on my part to be beneficent to the homeless person. Furthermore, if one takes the third and fourth statements as accounts of beneficence, what are the limits, if any to the principle of beneficence? What is the extent of the nature of 'removing evil' or 'promoting the good' in this case? We receive no guidance from the principle as to how we should understand it and apply it.

Frankena offers a list or rules which, one might think, help in applying the principle. The rules he lists instruct one to keep promises, tell the truth, show gratitude, make reparation when appropriate. He holds that they follow directly from the principle and are prima facie binding. However, absent an underlying theory, the rules and directives are not tied together in a coherent way. The relationship of the principle and the rules are not sufficiently worked out to the extent that the principle guides which rule to follow. Suppose a physician has made a
promise to his patient, a man in a terminal condition, that he would not tell the man’s wife about her husband’s condition. At the same time the wife, also a patient and friend of the physician, asks about her husband’s condition. Which rules of beneficence should the physician follow? Frankena’s principle and rules give us now way to justify a choice, or set of choices.

Beauchamp and Childress note that beneficence can mean the provision of benefits and/or the balancing of benefits and harms. They choose the second interpretation of the principle. Furthermore, they argue that the principle of beneficence is grounded in the practice of biomedicine. The difficulty with interpreting this principle is that the principle relies on a notion of the 'good' and its implications for patients and this must be specified.

A central problem with the principle of beneficence is the difficulty in determining the limits of beneficence. This is a particular problem for the authors, or anyone who wishes to treat beneficence as an obligation and not as an act of charity. I will argue later that this problem is indicative of the difficulties with the mid-level principle approach since there is no way authoritatively to interpret the meaning of the principle.

In examining the example of the drowning man one can ask why am I obligated to 'do something'? Why isn’t my attempt to rescue an act of charity or a supererogatory act of
moral heroism? Indeed, we often treat such people as heroes. The point is simply that with a free standing principle, having no definition of its scope and strength, there is no reason to conclude that an obligation exists.

There seems then to be no clear statement of the principle; however, the attempt to set limits to the principle indicates that the limitations and content of the principle are derived more from social and professional roles than from the principle itself.

Each interpretation of justice has its roots in a different ethical theory. Each highlights a material principle that is important for moral reflection. In the end there is no clear statement of what principle of justice is being used by the authors. This is the case despite the fact that recent moral, social and political philosophy has been marked by considerable discussion of justice as for example by J. Rawls and R. Nozick. The former offers a content-full theory of justice while the latter offers a procedural account of justice. Beauchamp and Childress acknowledge the different approaches to justice and opt for a Rawlsian account of fair opportunity in health care. However we are never told why this interpretation should be accepted. Because of the conceptual difficulties involved in specifying a theory of justice, Beauchamp and Childress' version of this principle best exemplifies the shortcomings of their whole approach. The principle is not a summary of
a theory of justice and it lacks conceptual clarity. It even lacks a clear statement. So it is not obvious how much it yields by way of content and decision making for biomedical ethics.

Frankena specifies a principle of justice in egalitarian terms; that is, the basic standard of justice is equality of treatment. ⁴₈ Like his principle of beneficence this principle fails to be an adequate action guide. For the principle to work one has to determine the relevant characteristics or qualities that are to be treated equally. But the principle, as it stands, gives no direction as to how such characteristics are to be identified. So, the principle of justice is open to a wide array of interpretations.

One possible way to come to terms with the meaning of moral principles is to see them in relationship to the rules which they generate. Frankena’s rules of beneficence have illustrated the difficulties in developing and implementing the rules of a principle absent a theory or moral community. The same difficulty emerges for Beauchamp and Childress. Moral rules are, generally, regarded as more specific action guides derived from the principles. ⁴⁹ Indeed, on the appeal to mid-level principles, the principles serve to justify rules. It seems that rules specify types of actions which fall under particular principles. For example, the principle of respect for autonomy may give rise to several
rules, (e.g. 'It is wrong to lie' or 'It is wrong to use force against the innocent'). But the attempt to understand the meaning of a mid-level principle through the rules it generates will not give us a way to interpret the principle for we are left with the problem of identifying the rules which belong to the principle and the relationship between the rules and how they are to be employed when in conflict.

In determining the meaning of a principle Beauchamp and Childress often illustrate the mid-level principle through cases and moral problems. The cases are used as a way to illustrate the application and interpretation of the principles. In their discussion of the principle of nonmaleficence Beauchamp and Childress include a discussion of the treatment of handicapped newborns in which they say that when there is doubt one ought to err on the side of preserving life.\textsuperscript{70} This interpretation of the principle tells us to whom the principle applies (the newborn). They do admit that such a judgment about the application may be controversial and that such controversies cannot be resolved without "an integrating theory".\textsuperscript{71} The lack of such an integrated theory has been characterized as one of the great weaknesses of their approach.\textsuperscript{72} But as one looks at the case neither the principle nor the case spell out that "not doing harm" means saving a life in such cases. Perhaps it means forgoing treatment to allow relief from long term pain and suffering for the newborn. Further, there seems to be
no reason given as to why the scope of the application of the principle in this case is drawn only to consider the newborn. Such cases can cause harm to families in terms of costs, burdens, and suffering and harm to society as well.

In summary, in examining a principle driven account of moral reasoning it is not at all clear that the principles give us the conceptual machinery to determine how any of the principles should be interpreted and applied or how interpretations and rules are related to one another. There seems to be no way, in this approach, to establish a canonical interpretation of the meaning or application of a principle.

B. The relationship of principles: The inability to specify the meaning of a principle confounds the attempt to interpret the principles in their relationship to each other. The obvious question is how they are to be applied when they conflict. One can easily imagine cases in which the principles of beneficence and autonomy conflict with one another. "Dax's case" provides just such an example where the patient’s choices, at the time of the intervention and following were in conflict with what the health care providers saw as their duty and the patient’s best interests. In a discussion of the case, Childress argues that Dax’s autonomy, at some point, takes precedence over the beneficent actions of others, but in the mid-level
principle approach there seems to be no reason for one principle to take precedence over another. Indeed in one of the cases in the book Beauchamp and Childress provide an example where there are good beneficent reasons not fully to inform the patient about all of the relevant information for his case. This choice, justified under the principle of beneficence, conflicts with a choice, justified under the principle of autonomy, to give the patient all the information. The mid-level approach gives no way reasonably to argue for one choice over the other alternatives.

Frankena provides another example of the conflict of principles in a discussion of justice and beneficence. Frankena says he does not see how an ordering and priority among the principles can emerge. But he attempts to avoid the difficulty by holding that conflict in an actual situation is illusory. However, elsewhere Frankena talks about a possible conflict between his two principles of justice and beneficence. Recall that he has specified the meaning of the principle of justice in terms of distributive justice which, in turn, he interprets as equality of treatment. He admits that the principle is prima facie and can be overridden by the principle of beneficence. He seems to give a priority to beneficence over justice though the priority is neither clearly stated nor argued for. Again, by themselves the principles fail to provide a basis for interpreting their relationship.
Frankena does give the appearance of order in that he sees the two principles, indeed the whole of morality, as structured and unified by love. However, it is not clear that love is a prior and independent principle in that he also says that the principle of beneficence includes a principle of love. Aside from this confusing assertion it is not at all clear what holds the two principles together and orders their relationship. To the reader, it may appear that utilitarianism and deontology are two different principles of a single theory. But there is only the facade of coherence and theory as the two principles stand unintelligibly on their own.

One way to resolve conflicts of principles is to have some type of lexical ordering of the principles. Beauchamp and Childress, however, eschew such an ordering. Lacking a way to order the norms, or principles, one seems forced to resort to some form of intuitive balancing of the principles. The weight given to a principle, in relationship to others, seems to be assigned according to the case. Beauchamp and Childress assert that each principle has 'weight' but they do not assign a priority weighting or ranking. However, it seems meaningless to use the language of 'weighting' without developing a common metric by which weights are assigned and measured. Such a metric is never developed in the Beauchamp and Childress model. It would seem that all the principles are equal in moral
decision making. In cases of conflict consequences, rights, and justice all compete equally. In their brief discussion Beauchamp and Childress say that the relative merit of each principle will be determined by the particular case. This seems to involve a covert appeal to intuitionism. The authors say that while their approach might be similar to Ross' intuitionism, they believe they have gone "beyond Ross in offering a procedure of moral reasoning that reduces—but does not eliminate—intuition." Indeed, they see themselves in line with Baruch Brody's theory of intuitionism and casuistry. A crucial difference, however, is that, while Brody employs intuitionism, moral pluralism, and casuistry, he develops these elements in a framework of theory construction which is precisely what Beauchamp and Childress are trying to avoid. For Brody, the process of theory construction provides a way to account for one's moral intuitions and the adequacy and coherence of their relationship. On the Beauchamp and Childress model the intuitive balancing seem ambiguous at best and beyond the realm of public justification. The Beauchamp and Childress account does not provide us with a basis for knowing how to employ the principles in actual cases where more than one principle may be relevant.

Their discussion of paternalism provides a glimpse of the problems inherent within their approach. In their discussion of what 'paternalism' means one of the authors
(Beauchamp) prefers to define paternalism in terms of an action which "necessarily infringes autonomous choices". However, the authors adopt, for reasons not given, a definition from The Oxford English Dictionary in which the father (professional) acts beneficently in accord with his conception of the interests of his children (the patient) and makes decisions for them. In their discussion they distinguish forms of paternalism (strong and weak) and conclude that while strong paternalism is usually wrong, it may, nonetheless, be sometimes justified and that weak paternalism may be justified when the person is not autonomous and is in danger. Paternalism brings the two principles of beneficence and autonomy into direct conflict. Beauchamp and Childress appeal to an equal weighting of the principles and conclude: "It therefore cannot be assumed that even an autonomous choice can never be validly overridden on the grounds of beneficence to the chooser..." What this weighting is, and how it works, however, is never revealed to the reader.

This difficulty may not be obvious because of the adroit way in which Beauchamp and Childress employ cases. They do emphasize the role and place of particular cases in reaching and justifying moral judgments. I think that this is an important methodological ambiguity in their project since they neglect to articulate an understanding of cases and the role they play in moral judgment. We are
given cases which appear appropriate and which seen to illustrate the use of the principles. Yet how ought one select relevant cases? How are cases to be 'read'? Beauchamp and Childress speak as though moral cases interpreted themselves and, in the process, direct us toward the principles to be employed in a case. I will later argue that the very descriptions of cases, along with their selection, is a complex moral task influenced by our moral views and ranking of moral principles. Since we have no methodological way to interpret cases, or principles, the relationship of the principles to one another is subject to any interpretation.

Recent philosophical literature in ethics has suggested an alternative way to resolve conflicts of norms or principles. Henry Richardson suggests a model of "specification". Richardson presents a process of deliberation, when norms are in conflicts, which attempts to specify and respecify the conflicting norms in a particular moral dilemma. The aim is to respecify the norms so that they might cohere with one another and conflict between them can be resolved. He argues that this process allows a flexibility which is not found in a lexical ordering. Furthermore, the specification process is done in a public, discursive way so as to avoid the problems of intuitions. The difficulty for this proposal is that the development of the specifications will depend on one's moral sense and will
only succeed in so far as the moral senses, which drive the specifications, coincide. One can think of examples of moral conflicts in which some of the participants refused to enter the specification process. One might imagine the physician, who thought he had an absolute duty to preserve life, in conflict with a patient who did not wish to aggressively preserve his life. The hope of specifying the moral norms will be thwarted since there are such diverse moral senses. The conceptual difficulty for the specification process is that one can argue that the meaning which is specified is simply built in to, or hidden, in the initial definition.

C. Foundational Questions:

Finally one may ask 'why these principles?'. There are other principles that are often cited in biomedical ethics. Indeed, if one looks at other works in biomedical literature one finds other lists of principles. Some, for example, might cite the principle of the 'sanctity of life' or a principle of patient advocacy as crucial principles for biomedical ethics. Even in examining the work of Frankena with that of Beauchamp and Childress we find two different sets of principles. Some may argue that the differences between Frankena and the Beauchamp and Childress position are not that significant and that one could simply collapse the list of principle in Beauchamp and Childress into
Frankena's list. The difficulty is that Beauchamp and Childress do not share this view. They hold that the principles are different than what a list like Frankena's offers.\textsuperscript{88} It is also important to note that Frankena understands the principles to be grounded in the moral point of view and the principle of "love" while Beauchamp and Childress understand their list to be grounded in ordinary moral discourse.\textsuperscript{89} While they use the same words, they, potentially, speak very different moral languages. The selection of mid-level moral principles will depend on how one defines the moral realm.

Frankena assumes that anyone from 'the moral point of view' would endorse his two principles. But what is the moral point of view? This is something which is far from clear or uncontroversial. The selection of a set of principles is influenced by how one understands the moral point of view. For example, the principles which are selected, as well as their interpretation, will be influenced by whether one views consequences, natural properties, the demands of reason, or the natural law as shaping the moral point of view. The foundational question, about which set of principles are to be deployed, is more completely examined in the discussion which follows about the moral point of view. Beauchamp and Childress appeal, at different times, to "ordinary moral discourse".\textsuperscript{90} Such an appeal seems to have normative moral force for them. It is
fair to ask however whether or not there is "ordinary moral
discourse", or moral "babel", or something between the two
extremes? Furthermore, even if such ordinary discourse does
exist it is not clear what its normative status should be.

In the development of their model of mid-level
principles Beauchamp and Childress, in part, recognize the
historical context of the principles. In the most recent
presentation of the model they endorse a "robust
historicism" of moral standards and principles. While they
recognize the communal, cultural, and historical contexts of
moral standards they nonetheless hope for an overlap of
principles and norms.

**D. Summary:**

It seems clear that the approach to moral judgment
through mid-level moral principles will not give an adequate
understanding of moral judgment. Shorn of their theoretical
moorings it becomes impossible to determine the meaning of
the principles or their relationship one to another. The
appeal to cases to adjudicate between the principles fails
because of an underdeveloped account of what 'cases' are and
a lack of a conceptual machinery to understand our moral
intuitions. Indeed, in the absence of moral theory one has
no way to determine what should count as a moral principle
or why we should accept the list of principles offered by
Beauchamp and Childress or by Frankena.
III. What are Principles?

One way to assess an approach such as that of Beauchamp and Childress’s is to begin by exploring what it is to be a principle. Strangely, this fundamental issue is never made clear or dealt with in the Beauchamp and Childress text. The cost of not addressing this issue is the confusion that arises regarding the hermeneutical and foundational issues. This failure to give an account of the meaning of principles also has as a cost a confusion which arises when distinguishing rules and principles. There are points where ‘principle’ and ‘rules’ are used interchangeably and other points where rules are understood to be derived from one of the four principles.⁹²

A way to understand the problems in the middle level principle approach to judgment is to contrast this use of "principles" with other uses of principles in moral thought. ‘Principle’ comes from the latin principium ["take first"] and its primary meaning is that of "beginning", "commencement" and "fountainhead". A principle is thought to be a foundational source from which thought proceeds. The term ‘first principle’ is employed in the western philosophical tradition in a fairly consistent way. Aristotle speaks of first principle(s) as the first point from which something is or comes to be known.⁹³ St. Thomas followed Aristotle’s understanding of ‘principle’ and further ‘distinguished principles of knowledge and
principles of being.

In his systematic reflections on ethics St. Thomas distinguished between primary principles and secondary principles. Primary principles were understood as a framework for the moral sciences and as so fundamental that there is little room for dispute. Thomas speaks of the precepts of the natural law as analogous to the first principles of speculative reason; that is, they are self-evident. The first indemonstrable principle of reason is that "the same thing cannot be affirmed and denied at the same time, which is based on the notion of being and not-being: on this all others are based." As 'being' is the first principle of speculative reason, "so good is the first thing that falls under the apprehension of the practical reason, which is directed to action." The first principle of practical reason is that "good is that which all things seek after" which leads to the first precept of the natural law that "good is to be done and pursued, and evil is to be avoided". Thomas goes on to set out other primary precepts: the preservation of life, inclination to the truth, faculties and powers are to be used according to their natural function. The secondary principles are particular conclusions concerning types of actions drawn from the primary principles, such as "Adultery is forbidden". The secondary principles are "certain detailed proximate conclusions drawn from the first
principles". While the primary principles are the same for all, the application of the secondary principles must consider the details of particular cases and may be changed in some circumstances.

If one develops an Aristotelian-Thomistic approach to principles the hermeneutical issues of mid-level principles become easier to handle. This is due to the approach providing a theoretical account along with a ranking of principles. Certain principles have a pre-eminent status which informs and shapes the secondary principles. The meaning of the secondary principles is illuminated by their relationship to the primary principles.

The appeal to mid-level principles is an appeal to the secondary principles. However, shorn of the first principles it becomes difficult, if not impossible, to understand the meaning and relationship of the secondary principles with any conceptual clarity. The situation seems further complicated, viewing it from the historical perspective, since the mid-level principle approach, in eschewing the grounding of the mid-level principles in some first principle(s) forces the mid-level principles to do the work of the first principles; that is to ground the rules that follow.

I do not suggest that the scholastic notion of primary and secondary principles is the only model by which to understand the role of principles in moral justification.
However, similar considerations are advanced in other approaches. For example, in Utilitarianism the principle of utility fulfills the function of a single first principle which structures the rules or judgments about acts. This first principle allows one to understand that the central concern is the maximization of utility, however defined, and allows an understanding of the reason for rules, and their relationship to one another. For example, a utilitarian may have a rule about telling the truth which may be understood as maximizing utility for the individual and society. In a Kantian deontological approach one finds a first principle in the categorical imperative. Again, this first principle sets up the theoretical machinery for derived secondary principles and rules.

The historical lesson is that a conceptual understanding of principles and how they function is crucial to any appeal to principles as justifying judgments. In some of the literature concerning mid-level principles one finds attempts to articulate an understanding of moral principles. Childress, for example, notes three characteristics of 'principles': prescriptivity, universalizability, and supremacy. Others, such as R. M. Hare, focuses on similar criteria. But these characteristics, by themselves, will neither disclose the moral content of mid-level principles nor help us understand how the principles should work. The characteristics given
by Childress, will not distinguish moral principles from those of etiquette. So the content and meaning of principles remains unclear. Nor do these characteristics help us to understand how the principles are related to one another. The three characteristics say nothing as to how two universal, supreme and prescriptive principles are to be related. Reliance on formal characteristics such as universalizability, supremacy, and prescriptivity will not solve the difficulties in understanding the meaning of the mid-level principles, their relationship to one another, or their relationship to the moral rules.

Historically first principles have been employed in grounding moral theory with precepts and rules deduced from the first principles. Beauchamp and Childress, however, employ the secondary or mid-level principles as generalizations and summaries of a variety of disparate moral insights. The insights that are put together within any one of the principles do not fit together coherently. Earlier it was pointed out that there are two senses of 'abstraction': 1) identifying the 'essence' of something, or 2) creating a generalization or summary. Beauchamp and Childress opt for the sense of generalization and their principles become like chapter headings which attempt to bring together under one label a number of insights that do not cohere one with another. The lack of a thought about the relationship of the 'principles' one to another and the
lack of reflection on the nature of principles aggravates this incoherence.

Still, Beauchamp and Childress might appeal to an earlier historical example as a precedent for the role of middle level principles. In the first four centuries of Christianity the Christian community was without the complex structures that emerged during the High Middle Ages. Moral life was structured by a set of rules (e.g. the Decalogue and ecclesiastical canons) which were applied to the particular cases brought by individual penitents. This seems to be the type of structure that Beauchamp and Childress are presuppose for the principles of biomedical ethics. There are, however, two significant differences. First, the moral rules of early Christianity had a clear and firm foundation in the Tradition. There was a concrete understanding about which set of rules was to be used. Second, the problems of interpretation were eliminated by the local bishop who held the authority to interpret the rules. So, there was a clear mechanism for interpretation. Finally, there was a mechanism for application in that the bishop set the guidelines for confessional practice and moral advice for the local confessors. In Beauchamp and Childress we have rules but no reason to believe them and no bishop to interpret them. This example from early Christianity is twice instructive. First, it underlies many of the approaches to the moral life in the West. Secondly,
it provides a picture of an actual moral community's use of principles and cases. One understands the role of the principles because there is a well defined moral community in real circumstances with real issues and a flesh and blood content to its moral beliefs. The community Beauchamp and Childress address is ill-defined, pluralistic and contentious regarding its moral beliefs.

IV. The Moral Point of View

It would seem that anyone who puts forward a set of mid-level moral principles should be able to justify one set of principles over another. In a secular world, lacking a canonical notion of the moral good, the identification and content of what it is to be moral, as well as the principles which guide moral conduct and judgment, are areas of controversy. The appeal to mid-level principles by Beauchamp and Childress is designed to offset such theoretical controversy. However, absent some discussion of the 'moral', the meanings of the principles will remain confused as people will read into the language of the principles their own moral sense. Different senses of the 'moral', either from theories or communities, will lead people to different sets of principles. In the end, without a theory or interpretive community, there is no sense of the 'moral' which leads us to adopt one set of principles over another. Without the matrix of theory or community we are
unable to agree on which principles should be adopted. Even if agreement could be reached the principles will be open to an infinite variety of interpretations and rankings. In the end, there seems to be no compelling reason to adopt one set of principles over another.

Frankena does appeal to the 'moral point of view' to justify his two principles of justice and beneficence. The moral point of view is normative, universal, considers the distribution of nonmoral good and evil, and the effects of one's actions on other sentient beings. The moral point of view includes all four conditions. However, it is never made clear what the content for the principles is to be, or why we should think that the content of the moral is contained in the principles of beneficence and justice.

In his discussion of moral principles Childress identifies three formal criteria for moral principles: prescriptivity, universalizability and supremacy. He also has a fourth criterion for "material content, particularly one that relates what are moral and nonmoral principles". The fourth criterion is essential to understanding moral principles qua moral principles. It is characterized by Childress as "otherregardingness".

A utilitarian, in contrast, like Beauchamp, will define the moral point of view in terms of some form of utility (e.g. achieving the greatest good for the greatest number, or satisfying the greatest number of preferences) and moral
rules will have a prima facie standing. They will be interpreted and applied in light of the definition of utility.

It is important to note that Beauchamp nor Childress never clearly identify the type of utilitarianism or deontology to which they appeal. Though Beauchamp and Childress assert that they have agreement on the four mid-level principles we can never be sure of the nature of that agreement. For example, as has been noted, while both Beauchamp and Childress speak of autonomy they should really speak of 'autonomy$_b$' and 'autonomy$_c$'. For as a deontologist, autonomy is involved as an element of "right making". While for Beauchamp, if he is a preference utilitarian, autonomy identifies a condition for satisfying preferences. The problem is that we can never be sure what Beauchamp and Childress mean since they never give us the theoretical matrix within which to interpret and understand their language. Without the matrix it may appear to the reader that Beauchamp and Childress are in agreement on the principles since they use the same language. But if we think through the theoretical frameworks they claim for themselves, then their agreement becomes something like a slight of hand. While using the same words, Beauchamp and Childress are speaking two different languages. Autonomy$_b$ is a condition of preference satisfaction while Autonomy$_c$ is a "right making" characteristic of activities. A
deontological understanding of autonomy (Autonomy_c) is not concerned with preference satisfaction but with the demands of morality. In their use of moral language Beauchamp and Childress are like two scientists from two different eras discussing 'mass'. One is a Newtonian where 'mass' is absolute in space and time while the other is an Einsteinian for whom 'mass' is an alterable part of a relative system of space and time. Though they use the same words, their meanings are incommensurable.

The same type of problem emerges in relating the principles to cases. If one looks at rape it would seem that Beauchamp and Childress should have two very different descriptions of the moral prohibition against rape. The utilitarian may prohibit it because it creates disutilities in the world by going against the preferences of the victims. But since no act is intrinsically wrong for the utilitarian, neither is rape. In contrast the deontologist may argue against rape because it fails to regard, properly, the victim and her autonomy. The act has intrinsic wrong making characteristics. We do have agreement on a prohibition, but the descriptions of the case and the reasons for the prohibition are quite different. They are in different moral worlds. Beauchamp and Childress might respond by saying that the important point is that we have reached agreement in spite of the differences and that is all that matters. But the difficulty remains because
Beauchamp and Childress claim that they have introduced an approach to mid-level principles as a contribution of philosophical normative ethics. One takes that to mean that we should be able to give a rational justification for our judgments. If asked independently about the prohibition against rape, Beauchamp and Childress, as a utilitarian and deontologist, should offer very different sets of reasons. Yet, they may further respond that they have solved the dilemma we faced about the wrongness of rape. But, absent a moral theory, we will not be able to determine if we have indeed reached a satisfactory account if all we have are the mid-level principles. The descriptions and justification of the prohibition against rape are developed from two different phenomenologies of moral experience. The differences are most telling when one raises the question of exceptions. One is hard pressed to imagine that a deontologist, like Childress, would allow exceptions to the prohibition. However, a utilitarian may, although with great regret, allow exceptions to the prohibition. While Beauchamp and Childress may use the same words and, accidentally, hold the same prohibition, the meanings of the words and the prohibition are incommensurable. As it was noted earlier, the practical limitations of this "agreement" is evidenced when one wants to extend the agreement to other moral controversies. For example one might think of trying to extend the prohibition against rape to the area of sexual
harassment. The reasons and principles behind the prohibition will frame how one might extend it to areas that are less clear and it is in such cases that the superficiality of the principles method will be clearest.

V. Principles, Cases and the Moral Point of View: Where to Go?

The appeal to mid-level principles is conceived as a way to develop a content-full understanding of moral judgments in the face of a pluralism of language and moral theories. If successful this method would offset the foundational difficulties which have beset bioethics and moral philosophy. The account has been criticized because of difficulties in understanding the meaning of the principles, their relationship to one another, and their application to cases. These failures can be seen as signs of deep foundational failures to articulate an understanding of principles, and how they work and their relationship to a moral context which clarifies their meaning and orders them in relationship one to another. The moral framework also establishes the framework whereby cases are described and principles are applied.

One can well appreciate these problems in terms of examples of the use of 'principles' in history of moral philosophy. Moral philosophy has often had recourse at the foundational level to first principle(s) of some sort, [e.g. scholasticism, utilitarianism, deontology]. In these cases
a first principle structured the secondary principles or rules. In contrast, the mid-level approach attempts to move on the secondary level without appeal to the level of first principles. When this happens, however, the secondary principles are cut loose from their moorings and lose their relationship to one another. An historical view shows how secondary principles have been used and where they succeed or fail. Generally they function well within concrete moral contexts. Beauchamp and Childress have set out their principles outside of a concrete context. As such the principles have as many meanings as one may wish to attach to them. In the end they are meaningless without a controlling context.

Rawls once wrote of rules, and it applies to principles, that they can be understood in the metaphor of a game. When one plays a game one understands the rules as part of the game. Outside of the game the rules do not have the same meaning as they do within the game. In a similar line of thought Wittgenstein wrote that rules do not interpret themselves and that they are part of a way of life and need to be understood within that context. Rules are part of customs and social institutions and contexts. John Rawls speaks, in his later writing, of the social and political context of the principles of justice. I take this to be true of moral principles. To confront the problems of interpretation one must situate moral principles
within the context of a sphere of meaning in which the rules or principles are developed. Beauchamp and Childress recognize the historical, communal context of moral principles. Yet the whole scheme of the middle level principles lacks any conceptual development of the social, historical context of the principles. What does seem surprising is that people would think that morally content-full principles could be put to use outside the contexts that give them meaning. I would suggest that what often happens is that people, with different moral points of view, reach similar judgments about cases or policy issues. They may even explain the justification of their judgments in languages that have many similarities. However, I suspect that such instances are accidental. In the formulation of the middle level principles such as those of Beauchamp and Childress deep and fundamental difference are glossed into generalities.

Moral language is not one language but compasses many provinces of meaning. The vocabularies and meaning will often overlap, as is the case with Beauchamp and Childress. Such overlapping, however, signifies conceptual confusion rather than moral agreement. The confusion of language may be exacerbated as people will also inhabit more than one moral community; e.g., the communities of their family and friends, business associates, the secular state. This is not to say that we are left in a hopeless state of babel
each isolated from one another by our moral languages. It is to say that we need to develop a shared language that will allow us to proceed together peacefully. It is also to say that the language of principles will not do the job. Our moral terms are not univocal.

Beauchamp and Childress, in trying to elucidate the meaning of the principles appeal to cases as the context in which principles are weighed one against the other. This seems incomplete but it points us in another direction for understanding and justifying moral judgments. Recalling Rawls's game analogy one remembers that within the context of a game certain situations [cases] are held up as paradigmatic. A theory may provide the formal rules of a game [e.g. three strikes make an 'out' and three 'outs' to a side per inning]. But there are also 'informal' rules of a game [e.g. infielders should move in on a 'bunt'] which are just as much an important part of the game. When learning a game one not only learns the formal rules but one learns strategies as well; that is, ways to respond when certain situations present themselves. The boundary conditions are set by the formal rules which form the broad outlines of what situations are possible. Batters, for example, cannot take a base without a hit, a walk, or being hit by a pitch. The judgment of a players, as to how to respond to a situation is shaped by the formal rules and the informal strategies.
By analogy, moral reasoning does not only appeal to principles and formal rules. It often appeals to paradigmatic cases [in certain situations one should do x] whose descriptions are shaped by the moral rules and principles one follows. The role of cases provides a further clue to be explored. I will argue that the contentfull language of a moral community not only involves principles and theoretical accounts but often also involves paradigm cases, virtues and vices, heroes and heroines. But the cases do not interpret themselves, nor do they even present themselves without a moral point of view. Indeed the very presence of a moral dilemma and its description is constituted by the particular moral viewpoint.

Both cases and moral theory to be central to exploring the justification of moral judgment. However, neither theory nor cases, by themselves, will be sufficient to explain moral judgment. They do, however, provide crucial elements which enable us to understand moral judgment as a phenomenon which must be situated within a context.

NOTES


9. See Chapter Four for further development of this point.


13. This position on rule utilitarianism has been criticized by R. Brandt who argues that most ethical theories which are "rule utilitarian" breakdown into act utilitarianism since each judgment entail picking out which rule is to be applied. He proposes an alternative understanding of rule utilitarianism where one adopts a complete set of rules. See, R. Brandt, "Two Concepts of Utility", in The Limits of Utilitarianism, H. Miller and W. Williams (eds.), (Minneapolis: University of Minnesota Press, 1982), pp. 169-185.

14. Frankena, p. 43

15. Frankena, p. 44.

16. Frankena, p. 44.

17. Frankena, p. 45.

18. Frankena, p. 47.


21. Frankena, p. 49.

22. Frankena, p. 49.
23. Frankena, p. 51.
25. Frankena, p. 53.
26. Frankena, p. 44, emphasis added.
27. Frankena, p. 44.
28. Beauchamp and Childress, p. 47. Note this is a shift from earlier editions of the book.
33. Beauchamp and Childress, p. 69.
34. Beauchamp and Childress, p. 69.
35. Beauchamp and Childress, p. 121.
37. Beauchamp and Childress, p. 124.
40. Beauchamp and Childress, p. 194.
42. Beauchamp and Childress, p. 198.
43. Beauchamp and Childress, p. 200.
44. Beauchamp and Childress, p. 201.
45. Beauchamp and Childress, p. 259.
46. Beauchamp and Childress, p. 259.
51. Beauchamp and Childress, p. 308.
52. Beauchamp and Childress, pp. 76-77.
54. Beauchamp and Childress, p. 81.
55. Beauchamp and Childress, Case #10, pp. 412-413.
57. Beauchamp and Childress, p. 72.
58. It should be noted that while Childress is a deontologist he does not endorse a Kantian deontology.
59. Beauchamp and Childress, p. 72.
62. Frankena, p. 47.
64. Frankena, p. 48.
67. Beauchamp and Childress, p. 301.
68. Frankena, p. 51.
70. Beauchamp and Childress, p. 162.

71. Beauchamp and Childress, p. 163.


73. J.F. Childress and C.C. Campbell, "'Who Is a Doctor to Decide Whether a Person Lives or Dies?' Reflections on Dax's Case", in Dax's Case, L. D. Kliever (ed.), pp. 23-41.

74. Case #6, pp. 407-408.

75. Goodpaster, p. 201 ff.

76. Frankena, p. 51.

77. Frankena, p. 44.

78. Frankena, pp. 56-59.


82. Beauchamp and Childress, p. 214.

83. Beauchamp and Childress, p. 212.

84. Beauchamp and Childress, p. 212.


87. Richardson, p. 305.

88. See Beauchamp and Childress, pp. 121-122 and their discussion of non-maleficence.

89. Beauchamp and Childress, p. 121.
90. Beauchamp and Childress, p. 121.


92. Beauchamp and Childress, Early in the book, (e.g. pp. 51-55) they speak of rules and principles interchangeably while in Chapter Seven they speak of rules as derived from principles.


95. I-II, 94, 2.

96. I-II, 94, 2.

97. I-II, 94, 2.

98. I-II, 94, 5.


101. Frankena, p. 113.

102. Childress, p. 41.

103. Childress, p. 58.


CHAPTER THREE

AFTER PARADIGMS: THE CRISIS OF SECULAR CASUISTRY

INTRODUCTION

In general, bioethics has primarily been concerned with the resolution of particular moral controversies and cases. Discussions in bioethics, like all areas of applied ethics, are often framed by using cases of moral controversies to illustrate problems or different arguments and points that people want to make. For example, Beauchamp and Childress employ cases of moral controversy in their work. However, it is not always clear what role cases of moral controversy actually play. At times they seem to be used almost as an after thought to illustrate theoretical points. In much of the literature of bioethics cases function as expository devices; that is, they function to illustrate a theory or principle.

This concern with concrete cases and dilemmas has led, in recent years, to the development of a literature of casuistry in bioethics of casuistry; that is, a case driven reasoning for resolving moral dilemmas. Generally, casuistry is a mode of reasoning which seeks primarily to resolve concrete moral dilemmas. It is not modeled on applying theory to moral dilemmas since casuistry gives primacy to the concrete case. Casuistry assumes cases to be more than illustrative of moral theory. Rather they are a crucial element in moral reflection which aid in the
development of theory. In the contemporary world, with many different moral theories, casuistry's pragmatic focus holds a natural appeal for resolving the dilemmas of bioethics since it offers a hope of resolving actual cases without recourse to theory. Since the practice of medicine itself is case driven, it is not surprising that bioethicists should be attracted to developing a case driven method to resolve moral dilemmas.

However, in reflecting on the notion of a "case" one can begin to outline the difficulties a secular casuistry will encounter. The root of the word "case" is found in the Latin verb "cadre" meaning "to fall". The term conveyed a sense that a case was an instance of a class of things or events. A case fell under a general description. Moral cases are acts which fall under some moral description, (e.g. "This is case of theft.") The resolution of moral dilemmas will depend, for casuistry, on linking the case at hand with a proper description.

In contemporary bioethics discussions of the term "case" is also used to identify instances of moral controversy: that is, instances of opposing descriptions, arguments, and resolutions (e.g. controversies over care of p.v.s. patients, or legal policy on abortion). I will argue that such instances of moral controversy are not easily resolved by casuistry because we often lack a clear way to describe such cases and reach some resolution. Too often
those attracted to casuistry's pragmatism have overlooked the pluralism of casuistries in both the history of casuistry and the contemporary secular world and the important role of the underlying moral intuitions of its practitioners. These moral intuitions and values will influence not only the very selection of cases that need resolution, but also the cases which are understood to be "paradigms". As moral virtues are practiced within the context of a set of moral values so too casuistry needs some moral sense to identify and resolve cases of moral controversy.

Diverse models of casuistry have become prominent in the literature of bioethics. In the work of Jonsen and Toulmin, or Baruch Brody, one finds different approaches to the practice of secular casuistry. The development of case reasoning is not confined, however, to the literature of bioethics nor even to the explicit literature on casuistry itself. In general ethics there are prominent examples of casuistry which focus on the resolution of particular cases. These case analyses, however, do not attempt to develop a general theory of casuistry. To understand the difficulties and possibilities of secular casuistry one needs to move away from such cases to think about the necessary conditions for secular casuistry.

The recent "renaissance" of casuistry and different forms of case reasoning appear to arise out of the perceived
failure of theoretical models of moral reasoning to resolve satisfactorily dilemmas of moral reasoning. Interest in casuistry also comes from reflections on moral "reason". That is, reason what it is for reason to be practical and concerned with resolving particular dilemmas and controversies. Bioethics has been a field marked by controversies which are, at times, intractable. One has only to recall the interminable disputes and disagreements which arise around issues such as abortion or HIV screening. In such difficult issues bioethics, which has often attempted to apply moral theory to moral controversies, has achieved no intellectual resolution of the controversies. Even the appeal to mid-level moral principles does not resolve such controversies (see Chapter two). For example, in questions surrounding HIV testing there are often conflicting appeals to principles of justice, beneficence and autonomy. The hope of secular casuistry is that case reasoning can offset the dilemmas of moral pluralism which have confounded theoretical and principled models of moral justification. It is the pragmatic appeal of casuistry for finding resolutions for cases of controversy, which leads to the hope that the disputes of theory and principles can be sidestepped.

"Casuistry" is, most generally, a reasoning about cases. But, such reasoning stands in need of direction and structure. The practice of casuistry must be guided by some
interpretive structure or shared view of the moral world which allows the identification and resolution of cases. In a secular structure, which lacks authoritative moral structures casuistry will be successful to the extent that those involved share similar rankings of moral values.

In examining the casuistry of Jonsen and Toulmin I will argue that their hope to revive this model is seriously misguided, in part, because they fail to adequately account for the structures of moral authority which were and are a part of the structure of the model they propose. Their difficulties flow in great measure from their seriously flawed historical presentation of medieval casuistry. As one comes to understand the flaws in their history, one can understand the philosophical problems for the practice of this model of casuistry in a secular society. The model they have chosen is one that is highly structured both in terms of its moral sense and its sociological context. Isolated from these casuistry cannot proceed in a secular context that is morally pluralistic, directed by different moral senses and governed by no structure of moral authority beyond the individual person.

It may be argued that my criticisms of Jonsen and Toulmin's model cannot be extended to other models of case reasoning. In part this is true, for the model selected by Jonsen and Toulmin is highly developed in both content and method. Much of my criticism toward them is rooted in the
very particular nature of the model they have chosen. However, in critically examining this model, we can gain important insights about the conditions for a general practice of casuistry. The basic points in my critique of Jonsen and Toulmin hold true in other examples of case reasoning, such as the literature of the "Trolley Problem". Again and again one is led back to the crucial point that casuistry can only be successfully practiced between people if there is a common moral sense or set of common intuitions which enables those participating in the case to identify exemplar cases, share discussions of controversies, and resolve them. When casuistry is successful it is because of a coincidence of moral values. In part the exploration of this chapter will not only set out the limits of casuistry but its possibilities as well.

Casuistry, within the context of a particular community continues to flourish unrepentant of Pascal's criticisms. Such explicitly communal casuistries, however, are not my concern here. My concern is with the problems of secular bioethics which stands outside any particular moral vision and is in fact characterized by a fragmentation of moral visions. In all of this I am assuming that casuistry, such as that of Jonsen and Toulmin, or Brody are trying to resolve moral controversies in a secular, morally pluralistic context. My analyses are directed toward casuistry in the secular context.
I. JONSEN AND TOULMIN AND THE RENAISSANCE OF CASUISTRY

The formative experience of Jonsen and Toulmin with cases and controversies needs the light of the work of the National Commission for the Protection of Human Subjects (U.S.A.). Rather than proceeding "from the top" by applying ethical theory to practical matters the Commission worked "from the bottom" articulating moral maxims and rules in particular cases. Only later did the Commission construct a theoretical framework for its work when it authored the Belmont Report. Jonsen and Toulmin see the deliberation of the National Commission as an example of casuistical reasoning. Such reasoning is more closely identified with how we actually think our way through moral quandaries and reach judgments. It is, for them, a successful example of the resolution of a moral controversy by moral casuistry.

There are at least two goals to their work. The first is the goal of identifying the interplay of principles and cases, within the process of description and redescription of moral quandaries, in order to resolve moral dilemmas. This goal is not controversial for bioethics and other areas of "applied" ethics. There is a second, much more interesting, goal of the book which involves a much stronger claim for casuistry. This goal is to show that there is a primacy of moral cases over moral theory which leads to a primacy of casuistry over theory in ethics. They further argue that casuistry, as seen in the work of the National
Commission, can achieve agreement across theoretical divides -- a feat neither theory or mid-level principles is able to achieve.

A. The Need:

Jonsen and Toulmin argue from a particular model of case reasoning; that of Roman Catholic casuistry of the High Middle Ages and the Renaissance. They present us with two arguments enfolded in one. First they argue that moral philosophy which deploys the tools of theoretical reasoning and analysis to the resolution of concrete moral problems is inadequate. They argue that moral knowledge and justification are particular and concrete in a way that theoretical knowledge is not. The second part of their general argument is that casuistry, modeled on the casuistry of the Roman Catholic High Middle Ages, is a model that can be transferred to the contemporary secular world.

They begin by arguing that moral knowledge is best understood as practical knowledge; that is, as knowledge that is concrete, temporal, and presumptive rather than as a form of theoretical knowledge. From their perspective Western moral philosophy has mistakenly understood moral knowledge as theoretical; that is, as knowledge that is idealized, atemporal and necessary. Theoretical arguments are proofs, which aim at knowing truly, while practical arguments are methods for resolving problems.
out their understanding of the nature of moral knowledge. Jonsen and Toulmin follow an Aristotelian view that moral knowledge is a species of practical knowledge.

While medicine blends both theory and practice, clinical medicine is an example of practical knowledge. It deals with particular individuals, problems, and details of cases and real situations. Jonsen and Toulmin argue that judgments about moral issues involve attention to details and knowledge of particular cases in a process of reasoning analogous to medicine. If moral reasoning is practical reasoning, as Jonsen and Toulmin assume, then casuistry, they argue, is the best form of practical reasoning in the moral life.

Jonsen and Toulmin support their argument for a model of casuistical reasoning by examining two very different public debates about morality: the protection of human subjects and the debate about abortion. They present the discussion of these issues as illustrative of two different approaches to moral judgment. The abortion debate is often held on the level of "high theory and general principle." This approach to moral problems assumes that "an ethical position always consists in a code of general rules and principles." This approach, however, oversimplifies the complexity of moral issues, in their view, and leads, as a result, to a standoff between different theoretical positions which, on their view, is the fate of discussing
abortion at the level of theory. Each theoretical position captures some dimension of moral "truth" but each is incomplete. They argue that a consequence of such theoretical standoffs is ethical relativism. As Jonsen and Toulmin see it, if principles are interpreted absolutely, we end up with relativism since moral theories and principles lead to an intractable conflict in which one theoretical view or set of principles seems as good as another.13

The dilemma, as they present it, is that viewing moral knowledge as theoretical knowledge leads to a choice between absolutism and relativism. How then is bioethics to navigate the scylla and charybdis of absolutism and relativism? They do think there is an alternative, exemplified in the work of The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, which began with concrete cases and problems and not with theories or general principles. The Commission's work, which they see as a form of casuistry, was able to avoid a theoretical impasse and complete relativism.

Jonsen and Toulmin's argument that moral knowledge should be understood as practical knowledge does not, by itself, secure the claim that casuistry, in the model they propose, is the best model for moral knowledge and judgment. Jonsen and Toulmin see casuistry as "a reasonable and effective set of practical procedures for resolving the moral problems that arise in particular real-life
situations." But there is never a clear argument as to why case reasoning is the appropriate model of practical reasoning. They seem to assume, for example, that any type of mid-level principle approach, or an approach to justification through rules, is not a suitable model.

They claim that casuistry redirects moral discourse from the theoretical level to that of concrete cases and to the principles and maxims people invoke as they face moral dilemmas. At the less abstract level we can secure agreement and avoid the endless debates provoked at the level of moral theory. By working at the case level the National Commission was able to reach agreements even though its members held diverse theoretical views. Jonsen and Toulmin continually invoke the work of the National Commission as an example of secular casuistry. There are, however, other ways to describe and explain the agreements reached by the Commission which I will explore later.

One needs to separate the different aspects of their argument. For example, proponents of theoretical or principled models of moral reasoning might question Jonsen and Toulmin's characterization of such approaches. However, the primary focus for this chapter is the model of casuistry which they put forth and whether or not such a model is accurate and can be transferred to a secular context. While Jonsen and Toulmin are inspired by the work of the National Commission they devote the bulk of their book to tracing
casuistry from its ancient Greek and Roman roots to Pascal's
damning critique in the seventeenth century. From this
history the authors speak in generalities about a method of
moral analysis which they endorse for our use. In order to
understand their model, and its flaws, one must turn to
their history.

B. The History:

Jonsen and Toulmin advance their argument by presenting
a history of casuistry. The casuistry of the High Middle
Ages finds its beginnings in Aristotle who distinguished
practical knowledge [techne] and wisdom [phronesis] from
theoretical knowledge [episteme]. Moral judgment is one
kind of practical wisdom. For Jonsen and Toulmin Aristotle
faced the same difficulties in accounting for moral
knowledge that we face today. The Aristotle presented by
Jonsen and Toulmin was trying to avoid the moral absolutism
of Plato and the moral relativism of the Sophists. While
Aristotle does not, in their view, develop a casuistry
nonetheless his thought about the nature of moral knowledge
forms the basis for the development of casuistry in later
ancient thought. Moral deliberation, while not theoretical,
was viewed by Aristotle as rational. Arguments can be
presented which address the moral questions under
consideration in moral controversies. Moral arguments are
in some sense rhetorical in that they address a point at hand; that is, a practical consideration, a moral dilemma.\textsuperscript{17} Moral arguments are not arguments which are like the deductive proofs of the geometer, rather they seek to move people to action.

According to Jonsen and Toulmin practical case reasoning was further developed in the West by the Romans, particularly the Stoics, Cicero and the practices of Roman law. The Stoic tradition sought to reconcile the demands of the natural law of reason with the demands of everyday life. In attempting to reconcile reason and everyday life the Old Stoa used cases to instruct about the moral life; i.e., to live, in the absence of passion, according to the Reason of the universe.\textsuperscript{18} It was in the context of this background of the stoic natural law that Cicero developed a form of casuistry. For Cicero the natural law of reason and the moral claims of social relationships (humanitas) must be worked out in relationship to the particular circumstances of each case.\textsuperscript{19} For Jonsen and Toulmin the third book of \textit{De Officiis} is the cradle of casuistry. It is there that the nature of morality is debated in terms of theoretical arguments and specific cases.\textsuperscript{20} In their view the casuistry of the ancient world concentrated on an issue, introduced maxims and arguments relevant to the issue, and moved towards closure/judgment.\textsuperscript{21}

Jonsen and Toulmin see examples of case reasoning also
present in the early Christian tradition beginning with the letters of St. Paul and the writings Fathers of the Church. The same attraction to case reasoning is present in the penitential books which were gradually developed for use by the clergy in the sacrament of confession. Such books reflected concerns about the particular circumstances of the person and the sin which confronted the confessor. In some of the penitential books one finds the comparison of the confessor to a physician. For example, the Bigotan Penitential, of the late seventh century, suggests that the power of a confessor should increase just as the power of a physician should increase "to the degree the illness of the patient increases." Jonsen and Toulmin describe the penitential books as a "seedbed" for later casuistry. When viewed from the perspective of the casuistry of the High Middle Ages the penitential books certainly were such "seedbeds". Jonsen and Toulmin refrain, however, from seeing the books as a form of casuistry. This is important for their understanding and presentation of the history of casuistry and their hopes for contemporary, secular casuistry. If one saw, in the penitentials, a genuine practice of casuistry, then one would be open to a plurality of casuistries just as there was a variety of casuistries in the penitential practices.

Jonsen and Toulmin sketch out the development of a Christian West in which there was a greater codification of
canonical, legal, and confessional practices in the life of the Church. This centralization began with Pope Gregory VII (1073) and reached its peak with the pontificate of Boniface VIII (1302) who declared that all temporal and spiritual power resided in the Roman Pontiff by divine decree. A prime instrument in the centralization process was the use of a Roman legal model to organize a taxonomy of moral cases. They point out that there was an emphasis on the circumstances of each case and a belief in a common morality founded upon the natural law. There are two points in their historical account which Jonsen and Toulmin seem to pass over very quickly. One is the place of authority in the practice of casuistry and the other is the role of the natural law theology as a background for casuistry. These are points to which I wish to return since I think they are underdeveloped in Jonsen and Toulmin's account and this lack of development leads them to think that this model of casuistry can be transposed to a secular world.

The practice of casuistry was further transformed in the High Middle Ages by the development of the theoretical context which framed casuistry and the sociological context in which it was practiced. Morality became part of the study of theology, which was considered the most prestigious of all intellectual disciplines. The moral theology was shaped by a Christian view of the natural law which sought to guide the moral reasoning by promoting basic human needs
which, it was thought, all persons would acknowledge: self-preservation, preservation of the species, a search for understanding, and social coherence. The medieval understanding of natural law embraced the idea that the law needed to be particularized in order to address the needs of individual human beings; that is, the law must be assessed in light of particular circumstances. It needed casuistry for its completion. Natural law doctrine gave the medievals and Latin Catholics a strong system of principles. These principles, set in an understanding of how the world is structured and known, provided the context for the moral deliberations of casuistry.

Jonsen and Toulmin present the period of "High Casuistry" (1556-1656) in which casuistry developed in response to conflicting principles and obligations in the natural law and with the new problems of the Reformation (e.g., Did a Catholic owe allegiance to a Protestant ruler?). They move to consider three instances of casuistry which show the method responding to the crises of the day. Later I will examine carefully one of their examples. In their generalizations they see six steps in medieval casuistry. First, there is the use of paradigm cases and reasoning by analogy. Second, there is the use of moral "maxims" which specify principles. Third, there is an attentiveness to the details and circumstances of a case. Fourth there was an understanding of the moral opinions that
may and may not be entertained (probabilism). Fifth, arguments were seen as cumulative, that is one looked to the history of the community to learn about a type of case. Finally, there was a resolution of the cases.

It is important to note that in outlining these steps Jonsen and Toullim speak of casuistry in its relationship to the health of the institutions in which it was practiced. This is a point which they leave underdeveloped in that they fail to come to terms with casuistry as part of a way of life.

C. The Hope:

Jonsen and Toullim set out the hope that casuistry can be revived and deployed in a secular age and they claim that it will resemble its medieval counterpart in both substance and method. They highlight several levels on which this resemblance will exist. They write of seven features that characterize the casuistry of the Catholic Middle Ages which will also be found in a contemporary casuistry:

1. Similar type cases ("paradigms") serve as final objects of reference in moral arguments, creating initial "presumptions" that carry conclusive weights, absent "exceptional" circumstances.

2. In particular cases the first task is to decide which paradigms are directly relevant to the issues each raises.

3. Substantive difficulties arise, first, if the paradigms fit current cases only ambiguously, so the presumptions they create are open to serious challenge.
4. Such difficulties arise also if two or more paradigms apply in conflicting ways, which must be mediated.

5. The social and cultural history of moral practice reveals a progressive clarification of the "exceptions" admitted as rebutting the initial presumptions.

6. The same social and cultural history shows a progressive elucidation of the recognized type cases themselves.

7. Finally, cases may arise in which the factual basis of the paradigm is radically changed.31

The paradigm cases establish the boundaries and terrain of moral geography. The resolution of a moral question will depend upon where it is situated in the moral geography.32 But the presumptions created by the cases are open to change, rebuttal and development.33 In some cases more than one paradigm can be applied.34 The moral geography set out by the paradigm cases will have collective, as well as personal, dimensions and the collective aspects will help to clarify the terrain.35

In this context Jonsen and Toulmin offer what seems to be their strongest argument for why casuistry should be the model for moral knowledge. They argue that since moral knowledge is particular in nature, casuistry is unavoidable.36 Jonsen and Toulmin make a number of interesting moves. They present the history of a very particular model of casuistry and they suggest that this model, or one analogous to it, can be deployed in contemporary ethics. They claim that something like this model was at work in the deliberations of the National
Commission. In what follows I argue that their history of the model they have chosen is flawed and that the missing elements give a much different history. This different view of the history also gives a different view of the conditions which are necessary for the model to work. This in turn leads me to a position that the model of casuistry they have chosen cannot be transferred to a secular world. The process of retelling the history of medieval casuistry enables one to see both the limits and the possibilities of casuistry in a secular world.

II. THE CASE AGAINST JONSEN AND TOULMIN

Jonsen and Toulmin adopt a particular model of casuistry and they hold out the hope that this model can provide a way of resolving moral disputes in a secular age. If they were presenting us with the position that moral justification should include case analysis as part of its method, the difficulties would be few. However, Jonsen and Toulmin argue for a much stronger and more provocative claim. They hold that a modern casuistry will resemble its medieval, Catholic counterpart in both substance and method and that such a method allows us to sidestep the problems of moral pluralism.37

However, after examining the elements of casuistry which they highlight, one cannot help but conclude that their hope for the appropriation of medieval casuistry, to a
secular, morally pluralistic world, is ill founded. Jonsen and Toulmin have not recognized the degree to which medieval casuistry was embedded in both the moral vision and the structures of authority of a particular community. They failed to appreciate that absent such a shared moral vision, or the communal structures of authority to interpret and enforce this vision, there is no reason to think that medieval casuistry can be revived in the modern age. Jonsen and Toulmin have failed to grasp the history of medieval casuistry and this failure has led them to a hope that cannot be realized. Borrowing from Beauchamp's writing on controversy resolution, Jonsen and Toulmin present the casuistry of the Catholic Middle Ages as an example of controversy resolution by consensus. However, a more accurate description is that Catholic, medieval casuistry resolved controversies by procedural closure which depended on authority. 38

Jonsen and Toulmin speak of the crucial role of paradigms, cases and taxonomies for medieval casuistry. Their hope is that moral controversies can be resolved by the guidance of a taxonomy of paradigm cases. The crucial difficulty faced by a secular casuistry on the model they have chosen is that there is no way to select the correct taxonomy of paradigmatic cases because we lack a common moral sense, as well as the structures of moral authority which were crucial to the casuistry of the Middle Ages.
While turning to the history of casuistry my goals are philosophical, with implications for secular bioethics. The history of casuistry aids us to think philosophically about what a moral "case" is, and to grasp the implications of moral pluralism for controversy resolution in secular ethics and bioethics. To illustrate the embeddedness of medieval casuistry in the moral sense and social structures I will focus on three elements in Jonsen and Toulmin’s account: paradigms, cases and taxonomies. The first challenge is to determine what the term "paradigm" means for casuistry. The term, as we know, has a wide variety of meanings and Jonsen and Toulmin do not dispel the ambiguities of the term.

A. Confessional Practice as a Disciplinary Matrix:

As the work of Thomas Kuhn\(^\text{39}\) illustrates, and others have shown, the term "paradigm" has a wide variety of meanings.\(^\text{40}\) There are however, at least five general ways in which a paradigm can function and these different functions give rise to the different senses of "paradigm": metaphysical paradigms, construct paradigms, sociological paradigms, exemplars of knowledge, and exemplars for action.\(^\text{41}\) Richard Grandy notes that part of the confusion over paradigms stems from the use of the term to identify both a "disciplinary matrix" and one specific part of the matrix.\(^\text{42}\) A "disciplinary matrix" identifies the web of symbolic, metaphysical, epistemological, axiological, and
practical components that shape the research of a scientific
discipline. One can argue that Catholic confessional
practice, in the Middle Ages, was a disciplinary matrix and
the practice of casuistry was embedded within that matrix.
If this analysis is correct, it makes no sense to talk of
the medieval model of casuistry outside of the disciplinary
matrix of Catholic confessional practice.

One can see in medieval confessional practice different
elements of a disciplinary matrix. While metaphysical
commitments are often implicit in a disciplinary matrix\(^43\)
in Catholic moral theology and confessional practice the
metaphysical commitments were explicit. Aquinas, for
example, speaks of actions in the language of "substance",
"accidents" and "essence".\(^44\) The metaphysical assumptions
of Catholic moral theology were closely related to
epistemological assumptions in terms of which moral
controversies could be identified and understood by
analogical reasoning. The disciplinary matrix of
confessional practice not only had metaphysical and
epistemological presuppositions but it had axiological
dimensions as well. It is within this matrix that casuistry
was practiced. Roman Catholic casuistry relied on both
metaphysical and epistemological presuppositions which
enabled casuistry to compare cases. These assumptions made
the concept of analogous reasoning a central intuition of
the medieval world. Absent these background assumptions it
becomes unclear as to how casuistry is to discover and organize the cases. Jonsen and Toulmin, however, do not seem to draw out the deep connection between casuistry and the disciplinary matrix of Catholic confessional practice, a point to which I will return.

1. Cases and Moral Sense:

Exemplars are an important component of a disciplinary matrix. Shared examples guide those who use a matrix and they bind together the other elements of the matrix.\(^{45}\) A central element to the practice of medieval casuistry is the set of cases which functioned as paradigms (exemplars) for moral reasoning. Jonsen and Toulmin are correct to argue that such paradigmatic cases are crucial to the practice of casuistry in the medieval tradition. In coming to terms with the issues of how paradigms are to be selected and interpreted one comes to understand the problems facing secular casuistry.

In their account of the history of casuistry Jonsen and Toulmin underplay the cultural and social roots of casuistry. For example, in tracing the roots of casuistry in the ancient world they overlook the differences among the casuistries of the ancient world. The moral concerns which paradigm cases sought to resolve, were shaped by the moral sensitivities of each community. Different moral senses, or points of view, led a variety of casuistries. For example,
if one looks at the cases which were of concern to either Paul or Augustine, one can see the influences of social and moral values which raised issues for Christians that were not issues for the casuistry of Roman law. Paul’s concern about dietary laws, or Augustine’s concerns about military service for the Empire, were issues raised by the fundamental value commitments of the Christian religious community.

The dilemma of military service for the ancient Christian was not a moral dilemma for pagan citizens of Rome. One finds in Christianity a strong presupposition against the taking of life. This raised questions and debate about whether or not Christians could be part of the military. In the West, it was not until theologians like Augustine allowed the just use of force, properly exercised only by the state, that Christians could engage in military service. The issue was further complicated by controversies over the participation of those who served in the military in rites of sacrifice and the swearing of oaths.

If one focuses on the paradigm cases which were not shared by the communities of the ancient world one can describe the ancient world as having a pluralism of casuistries. By overlooking the differences in ancient casuistry and medieval casuistry’s embeddedness in a particular cultural and moral context, Jonsen and Toulmin
fail to recognize the embeddedness of casuistry within the moral sense of a community. A secular casuistry, lacking a shared moral sense, will be disabled from the start.

2. Conscience and Cases:

The goal of medieval casuistry was to resolve cases troubling moral conscience. In its most general sense "conscience" is the mind of the one making a moral judgment.\(^47\) The disciplinary matrix of confessional practice enabled one to identify what was a proper case of conscience (and not one of scruples) and how it might be resolved.

Moral controversies arise because of conflicting views of the moral world. One can think of contemporary difficulties in establishing public policy in the areas such as abortion, the use of fetal tissue, or pornography as examples of how the values held by different groups shape what becomes an issue of moral controversy. In the difficult issue of abortion\(^48\) one action is described in a wide variety of ways ranging from the an exercise of a woman's rights to the act of murder. For some, pornography is an important moral issue while others fail to see its moral gravity. Also, cases of moral controversy do not simply announce themselves as moral cases. They become apparent as such against a background of moral assumptions shaped by one's moral sense. One can surely recall times
when a person confides a dilemma of conscience to another
and the confidant responds by saying "So what's the
problem?" One's moral vision shapes not only the decisions
that are reached but the very dilemmas which are experienced
as morally controversial.

There are at least three types of moral dilemmas which
constitute "cases". First there are the intrapersonal
dilemmas engendered by choices which provoke an internal
conflict of moral values. Another type of dilemma is an
interpersonal controversy which involves arguments and
controversies within a moral community. The Roman Catholic
discussion of birth control is an example of such a
controversy. Finally there are moral cases and
controversies which involve agents with differing moral
perspectives. Such differences are one of the
distinguishing characteristics of contemporary secular
society. This third type of controversy is the usual
concern of secular bioethics. The continuing controversy in
civil society over abortion exemplifies this third type of
moral controversy. It is to this type of dispute that
Jonsen and Toulmin hope to bring the practice of casuistry.

The medieval model of casuistry, advanced by Jonsen and
Toulmin, was controlled by a communal moral sense and a
communal authority structure. It addresses cases of the
first and second type. The usual deployment of casuistry
was of the first sort; That is, the intrapersonal conflicts
of penitents and their consciences which were brought to a confessor.

Medieval casuistry relied upon more than a common moral sense. It presupposed structures of communal authority to interpret and implement the moral sense. One's membership in the community, indeed one's salvation, depended on proper resolution of the controversies. For the medieval Christian cases of conscience were resolved by appeal to of the authority of Scripture (e.g. the Decalogue), Tradition (the virtues, commandments of the Church) and the demands of everyday life. There was also the element of procedural closure whereby resolution was reached by the juridical authority of ecclesiastical structures. The practice of casuistry became more and more uniform as the authority which formed conscience became more and more centralized and articulate.

In looking at the three types of cases one can understand the different roles of authority in this model of casuistry. Intrapersonal cases were those often addressed by the authority of the confessor. The confessor, in the role of judge gave advice and penance to bring about both punishment and reform of the sinner. For example, in advising a penitent, who was guilty of theft, the confessor would instruct the penitent to make appropriate restitution for his sin. On this model the confessor is a person in authority by virtue of his ordained office. Like the
policeman the confessor can resolve disputes because of the office he holds.\textsuperscript{49} In other cases the confessor is also an authority. For example, Sister Mary Rita, the Superior of St. Kevin's Orphanage was asked by one of the orphans about the identity of his parents. Sister brought the matter to her confessor. Under one description there is a natural bond which the child should know. On the other hand revealing such knowledge would bring harm to the parents and society.\textsuperscript{50} As an authority the confessor described the case in a new way which led to a different conclusion about what should be done.

One sees the same two roles for authority in interpersonal, or communal disputes, such as the Roman Catholic discussion of marriage annulments or usury. In these case the authority is that of the Magisterium, or theologians functioning as an authority, or the judicial structures of the Church functioning in authority.

3. Authority, Paradigms, and Taxonomies:

Jonsen and Toulmin speak of paradigms as related to one another in a taxonomy or classificatory system. Such systems are often organized around the commandments or the virtues. By use of this system casuistry is able to classify moral disputes and work toward their resolution. Cases of moral controversy are resolved, in part, by situating them in this structure which was embedded both in
moral theology and the juridical authority of the Church.\textsuperscript{51}

The early medieval practice of casuistry took new shape when, in the 13th century, the Fourth Lateran Council declared that penance was to be an annually mandated practice.\textsuperscript{52} In moving to a universal, uniform practice of confession Catholicism moved away from the penitential books, which often reflected a wide variation in penitential practices,\textsuperscript{53} to confessional manuals with accompanying systematic commentaries.\textsuperscript{54} A universally mandated practice, with uniform instruction guides, was supportive of and supported by an encompassing system of social control.\textsuperscript{55} The decrees mandated steps by which the local churches were to make it possible for the faithful to comply with the law. Bishops were to educate and supply suitable priests. They were also to have a Master of Theology at each cathedral. The decree radically reshaped Catholic moral theology and gave birth to the casuistry of the Middle Ages.\textsuperscript{56}

Throughout the Middle Ages one finds three different centers for, and of, moral theology. In the early Middle Ages the dominant institution was the monastery whose principle literary products were the penitential books which were influence by monastic asceticism. Following Lateran IV one finds the development of the Summa Confessorum. These were learned, systematic theological treatises which framed the discussion of cases. They were produced in the
cathedrals and cathedral schools of Europe's new urban centers. The *Summae* were pastoral handbooks which attempted to guide confessors and were quite different from the penitentials. Moral theology's relocation from the monastery to the cathedrals represents at least two important developments. First, there was a shift away from a monastic spirituality of indifference toward the world to a spirituality which reflected an engagement in the world and a responsibility for society. Second, the move towards the Cathedrals represented a move towards the centralization of authority in the episcopacy. The sacrament of confession was more often administered by secular clergy who implemented the more centralized and codified legal structures of the Church and moral theology.

While Jonsen and Toulmin focus on three dramatic cases of casuistry they miss a crucial distinction in medieval casuistry. They miss the distinction between "case casuistry" and "practical casuistry". The phrase "case casuistry" is often used to distinguish the normal practice of casuistry in which confessors were trained by using established examples and was embedded in the context of moral theology. "Practical casuistry" was part of the larger enterprise of moral theology. Practical casuistry was the reflection on the interplay of cases and moral theology in an attempt to realize and refine the ideas of moral theology. Jonsen and Toulmin fail to appreciate the
interplay of casuistry and moral theology. In the High Middle Ages casuistry was both a way to develop and teach moral theology.

The third and final phase in the development of medieval moral philosophy and theology relevant to an account of casuistry emerged in the 13th century with the development of the university and academic theology. The university sought independence from both civil and episcopal authority—thus engendering a tension which still exists today. However, episcopal control of the sacrament of confession and moral theology was continued by the establishment, under episcopal control, of seminaries as schools, to train confessors.\textsuperscript{57} In particular, at the end of the Middle Ages, the Council of Trent established seminaries and their curricula. Simultaneously the Council re-enforced the authority of the confessor over the penitent describing priests, as the proper ministers of the sacrament as vicars of Christ, to whose judgment, in the sacrament, all Christians must submit.\textsuperscript{58}

In understanding the history of moral theology and confessional practice in the Middle Ages it becomes clear that the practice of medieval casuistry was far more embedded in a particular communal context, which was defined by a complex set of moral assumptions, than Jonsen and Toulmin wish to admit. In their hope to develop a modern, secular casuistry they speak of medieval casuistry as if it
was not shaped, or informed by, and reflective of, a principled moral vision.

Casuistry was an attempt to ease the consciences of Christians struggling with the moral demands of the world and the teachings of the Church. It was also a way to control behavior. Indeed it has been suggested that Lateran IV mandated the practice of annual confession in a way to stem the spread of the Albigensian heresy. The moral casuistry of the Middle Ages was part of a communal practice which was embedded in and supported by metaphysical, epistemological and axiological assumptions as well as by the authoritative structure of the episcopacy.

4. Confessors and casuistry:

Jonsen and Toulmin have given short shrift to the important role of confessors in the practice of casuistry, that is, to the role of confessors in selecting and applying paradigms to the cases before them. Lateran IV prescribes:

The priest is to be discerning and careful, so that like

a skillful doctor he can apply wine and oil [Lk 10/34] to the wounds of the injured person, diligently asking for the circumstances of the sinner and of the sin, through which he can prudently understand what advice he ought to give, and what sort of remedy to apply trying various things to heal the sick person.

Jonsen and Toulmin miss the importance of training confessors to be "prudent" men who will properly select the paradigmatic case that will help them address the moral
problems before them.

"Prudence" has a much different meaning for the medieval Christian than for the person of the modern world. Understanding the medieval Christian sense of "prudence" is important for understanding this model of casuistry. In a contemporary understanding "prudence" is frequently seen as rational self interest.

The medieval understanding of prudence was grounded in the Aristotelian virtue of phronesis which was an intellectual virtue required by the other virtues. It was not moral wisdom but the ability to be practically wise. However, to be morally virtuous one needed to be practically wise and the man of practical wisdom is one who is virtuous. Phronesis is the exercise of right choice in particular cases, in light of more universal knowledge. Cicero translated the Aristotelian term "phronesis" as "prudentia" and spoke of it in moral terms. For St. Thomas prudentia was one of the four cardinal virtues. It was "knowledge of what should be done and what avoided" and guided reasoning about what ought to be done. The prudent man, in the world of medieval casuistry had a Christian sense about how one ought to act. This moral sense shaped his judgment about which cases should be considered as paradigmatic in analyzing the cases presented and how new dilemmas and controversies should be resolved.
It is interesting to note that for the Jesuits prudence was one of the most admired virtues. Prudence, in the language of Ignatius, was the virtue of "discerning love". Ignatius uses the language of "prudens caritas" and "discreta carita" interchangeably in the Constitutions of the Society.⁶⁸ His usage of "prudence" and "discretion" connoted the language regarding the discernment of spirits developed in his Spiritual Exercises.⁶⁹ Prudent agents are guided, in making choices, by discrete charity which impels them to choose the better course after all the circumstances have been considered. The root of this discrete charity is the interior law of charity described by St. Paul in his "Letter to the Romans".⁷⁰ The presence of the Holy Spirit gives the agent the grace to carry out what the law requires.⁷¹

As one recovers the notion of prudence, as part of the practice of casuistry, one can grasp the centrality of a particular moral vision and sensibility that was and is crucial to the practice of Catholic casuistry. The contextual embeddedness of medieval casuistry raises the question as to whether or not, in a secular age, fragmented by many different moral senses, and which eschews the guidance of the Holy Spirit, casuistry can be practiced on a medieval model.

6. **Auxiliary Principles:**
One can glimpse, in yet another way, the cultural embeddedness of medieval casuistry by examining two crucial auxiliary principles integral to the practice of casuistry. The principle of double effect and the principle of probabilism. The former reflects casuistry's struggle to deal with difficult cases from within a moral framework while the latter dealt with issues of authority.

The principle of double effect, central to many discussions in bioethics and rooted in Thomas treatment of self defense, is a staple of casuistry. The principle was primarily used in to three kinds of cases: scandal, killing, and sexuality. The development of the principle reflects a particular set of moral assumptions: 1) there are certain acts that are mala in se and 2) the intention of the agent shapes the morality of the action. It is not surprising that if one does not hold these assumptions, the principle of double effect become unnecessary for a consequentialist or a laxist manipulation for a deontologist.

Jonsen and Toulmin note that casuistry has the ability to respond to changing situations, social circumstances and practices. They describe this adaptive process as one of clarification and elucidation. In the medieval practice of casuistry, probabilism emerged as a central way to resolve emerging moral dilemmas. Probabilism holds that, in a case of practical doubt, a probable opinion may be
followed even when the contrary opinion is more probable. It employs the principle that a doubtful law does not oblige, a principle articulated by Bartolomeo Medina in 1577.\textsuperscript{75}

The discussions of probabilism were initiated in areas where opinions concerning cases were in conflict. But most importantly, probabilism developed to relieve the consciences of men and women from the burden of too grave an obligation. In the development of probabilism there emerged three central factors: 1) the role of conscience, 2) the role of authority and 3) their relationship one to the other. In making moral decisions the medieval mind had to reconcile a number of sources of moral authority. There were codes of law and sacred books like the Scriptures. There were individuals who were authorities, in the sense of experts concerning morality (theologians), and those in authority (e.g. confessors, bishops). One can view the discussion of probabilism, so important to medieval casuistry, as a discussion of proper authority.

There were several different approaches to those situations when it seemed as though an obligation might exist, but the matter was not clear. "Probabiliorism" held that when there were arguments in favor of an obligation and those in favor of freedom one ought to follow the obligation. "Equiprobabilism" attempt to effect a compromise in that when obligation and freedom seemed
equally balanced one could morally follow the option of freedom. But where the opinion of freedom seemed to be least likely one ought to follow the more rigorous course.\textsuperscript{76}

Gabriel Vasquez spoke of an opinion being intrinsically probable, one founded on excellent argument, or extrinsically probable founded on an opinion of a wise man.\textsuperscript{77} The authority, learning, prudence of others were taken as proof that the opinion in question was probably a correct opinion. A second element of probabilism came from Suarez who developed what became known as the "practical principles" to help achieve practical certitude. His two principles of possession and promulgation had to do with conscience and authority. They are summarized as: "in doubtful matters, presumption is in favor of the possessor, and a law does not bind unless adequately promulgated."\textsuperscript{78} In cases of genuine doubt about an obligation (where an authoritative magisterial opinion had not been promulgated), a person could arrive at a judgment of conscience. Suarez's principles aided in the exercise of conscience.

The Suarezian principles, along with Vasquez's principles of the extrinsic and intrinsic authority, illustrate the interplay of the structures of communal authority and a theological framework which defined the fabric of medieval casuistry. Returning to distinctions drawn earlier, probabilism sought to address areas where the
extent of one's moral obligations was not clear. Since different "authorities" held different opinions, the doctrine sought to sort out, for members of the community, a justification for following the opinion of one who was an authority.

The importance of the role of authority in the life of the community may be difficult to grasp for those raised in a post-Enlightenment, democratic culture. Just as the findings of the astronomer, discovered through the instrument of the telescope, are taken to be true, so the statements of those in authority and those who are an authority are taken as evidence for a judgment. Against this background one can understand Cardinal Bellarime's refusal to look through the telescope in the Galileo dispute.

B. An Example of Medieval Casuistry:

Jonsen and Toulmin provide three examples of the practice of casuistry (usury, perjury and pride). Their examples, I think, illustrate the difficulties of applying casuistry in a secular age.

Jonsen and Toulmin trace the origins of the Christian prohibition against usury to Scriptural, councilior and canonical prohibitions. Usury was defined as a charge of any interest at all for a loan. Usury was considered a sin because of a Scriptural passage and a theological
interpretation of that passage. The Book of Deuteronomy [Dt. 23:19-20] forbids the lending of anything, for any interest, to one's brother. It does allow loans, at interest, to foreigners. The Western Christian tradition, following St. Jerome, understood all people to be "brothers" since Christ's salvific act was universal. By the 12th century usury was classified by theologians, such as Peter Lombard, under the heading of theft. The casuistical paradigm began from that point and defined usury as "mutuum est quasi de meo tuum", (my property is made yours). This formulation recalled the practice of Roman law in which property was transferred when loaned to a borrower. Again, the cultural heritage of the West was important in the shaping of the moral sensibilities about usury. The roots of the prohibition against usury were found in Roman law and in Christianity.

The agent of the loan had no right to charge for use of the property, since during the time of use, the loaned property did not belong to him because what was loaned had been borrowed by his "brother". Canonists and theologians found the prohibition against usury to be a part of the natural law. Aquinas added yet another premise in the prohibition against usury in that he held that money was not saleable. During this period, however, commercial activity was increasingly recognized as morally licit. People could form partnerships in which money was committed
to a joint enterprise (societas). In such cases, the use of the money was not given over to another as in the case of a loan.

It was understood in the medieval world that all laws of the natural law admitted exceptions (except for the primary precepts). So too, in the case of usury there were exceptions. The most important exception was the obligation of a debtor to fulfill contractual obligations in which the creditor suffers. In such cases the interest was a moral and legal payment described in terms of compensation for damages.

Social circumstances, from the 15th century onward, led to new understandings of "time" and to "new perceptions of the meaning of money and credit". In these new circumstances the casuists brought together the notions of 'risk' and 'damage' to frame a new paradigm for describing usury.

The threads which influenced casuistical thinking on usury were brought together by the Dominican, Johannes Eck, under the model of the "Triple Contract". First, there was a contract of partnership. Second there was a contract of insurance. Third there was a contract for a return rate of interest which was described as insurance in that the investor could have put the capital to more profitable and less risky uses.

'The practice of the triple contract raised questions
which, ironically, were posed by the German Jesuits in Ausburg—home of the Fuggar banking house. The commission which investigated the matter reported to the 4th General Congregation of the Society of Jesus. The Congregation gave what became the authoritative statement on the practice and held the practice to be morally licit since there was a probable opinion which supported the practice and in areas of undefined teaching a probable opinion establishes liceity. Central to the resolution of usury was the notion that in the contract the author of the loan suffered the loss of profit from the capital. By choosing to invest his money the lender had lost the direct benefit of the money during the loan.

In examining the case of usury we discover the importance of the moral vision of the community in identifying the cases that are taken to be paradigmatic. In the inception of the case and its resolution one finds the moral sense of the community and the authority of the community at work. We also see the sociological dimensions of "paradigm". In medieval casuistry it is the definitive statement by a group with proper authority, which in the end defines and settles the moral issue.

The debate illustrates not only the role of authority but it is also an example of a communal tradition responding to changing circumstances.83 Both levels of the authority structure were involved as the theological experts debated
the issue those in juridical authority brought procedural closure to the debate. 

One sees in this historical example how casuistry was practiced in a tradition with a well defined moral sense and the structures of authority to interpret that moral sense. The exercises of authority were not merely exercises of power but ways in which the moral sense of the community was reinterpreted to address the new challenges faced by the community. One can describe this exercise as an effort to maintain a cohesive moral sense in the community.

As one contemplates moving the structure of medieval casuistry, as Jonsen and Toulmin suggest, to the secular world, we will not only have to address the pluralism of moral senses, but also the question of who constitutes moral authority and moral "experts". Given the structures of limited democracy in the secular world, it seems as though most resolutions of moral controversies will be by procedural authority.

One can further the social and moral embeddedness of medieval casuistry by following the development of moral theology in the reform churches. In general casuistry falls out of favor because of the Reformation view of conscience and authority is so different from the Roman, medieval view. In the Reformed churches conscience was asserted to be outside the regulation of any institution. The assertion of the independence of conscience led to a new understanding of
appeals to authority and led to casuistry falling into
disuse in the protestant world. Even in the Anglican
churches, where casuistry continued, it was reshaped by a
view of the importance of autonomy for the individual. In
the Anglican churches casuistry continued to function
primarily as a part of moral education. 85

C. Summary:

For Jonsen and Toulmin one of the virtues of casuistry
is that it changes our understanding of moral knowledge and
allows us to speak of moral knowledge in contrast with
deductive, theoretical knowledge. They argue that
theoretical knowledge can be spoken of in terms of
"necessity" and "validity" as its elements are applied
within a system of concepts. 86 They take practical moral
wisdom to be analogous to the practice of clinical medicine
in that it applies to a world of concrete objects and actual
affairs. 87 In this, Jonsen and Toulmin are correct but
they have failed to supply a sufficient account of moral
knowledge. They are correct insofar as they move away from
a geometrical understanding of moral knowledge, moral
knowledge as theoretical knowledge which can be classified
as "true" or "false". The goal of practical knowledge--be
it moral wisdom or clinical medicine--is primarily to do
something well. It is not the primary goal of practical
knowledge to know truly. Of medical diagnosis Henrik Wulff
has written: "It is meaningless to discuss if the resulting
definition is true or false as all definitions are
arbitrary, but is possible to ask whether or not it serves
practical purpose." On the casuistical account, moral
reasoning resembles the work of the physician more than the
work of the scientist. Indeed, the comparison of confessors
to physicians, as practitioners of therapy, is a very early
image in the Christian literature.

Jonsen and Toulmin, however, fail adequately to
understand the basis of moral knowledge in medieval
casuistry. They have attempted to excise a practice from
its context but without the communal context you no longer
have the substance and glue of the practice. In medieval
casuistry the identification of paradigmatic cases took
place in order to solve the dilemmas of confessors and
penitents. The goal was to enable the confessor to direct
and relieve the conscience of the penitent. The casuistry
they chronicle is set within a defined community which
possesses moral and juridical authority as well as a moral
vision. Indeed the model of casuistry they have chosen is
one historically situated in a highly organized, particular
community which possessed a metaphysical and spiritual view
of the world, a way of knowing the world, and an authority
structure which could interpret the world and identify who
was and was not a member of the community. One does not
have to endorse Engelhardt's extreme view that our world
is populated by moral strangers in order to recognize that a model of casuistry, so embedded in a particular understanding of morality cannot be imported to give like service in a morally pluralistic world.

Jonsen and Toulmin have set out a history and a hope. They have set out a history of medieval casuistry and, with it, the hope of redeploying the practice for the contemporary secular world. However, their account of the history is flawed. They do not appreciate the extent to which casuistry was part of the disciplinary matrix of confessional practice. Nor do they recognize the embeddedness of that matrix in a particular moral point of view and a particular religious faith. The model of casuistry, deployed by Jonsen and Toulmin, cannot be taken out of the axiological, metaphysical, epistemological and sociological elements of the matrix of Roman Catholic confessional practice without changing the character of the practice and removing the original grounds and circumstances for it. It is difficult to prove that the elements of communal authority and moral sense were necessary conditions for the model Jonsen and Toulmin propose since one cannot replay the history of this model without them and see what it would be like. However, it seems clear that there were part of the model and their importance to the model may be argued for when one considers how difficult it is to develop analogies in a secular casuistry which lacks the communal
moral sense and structures of moral authority. One thinks, for example, of cases about treatment at the end of life. For some the analogous relation of these cases is the intention of the agents, while for others the analogous relation is the causal relationship between the physician and the death of the patient, still others would see these cases as the exercise of patient’s rights. While all might agree on the groupings of these cases they are see very different moral realities.

The difficulties in transposing Catholic medieval casuistry to the contemporary secular world are seen in the seven features that Jonsen and Toulmin regard as part of a secular practice of casuistry. As one examines the seven features outlined by Jonsen and Toulmin it becomes clear that their hope is misplaced. Absent a particular content-full moral framework it is impossible to establish the paradigm cases which are to be the "final objects" in moral arguments. Absent the shared moral point of view not only will the paradigm cases be missing, but there will be no common criteria by which to identify and describe the moral controversies for which we seek paradigms. Even if we could somehow establish shared paradigms so as to overcome the problems of incommensurability, from a secular standpoint, we would still lack the common structures of moral authority needed for the ongoing development of casuistry modelled on that of the Middle Ages. The history of medieval, Catholic
casuistry raises philosophical questions about the nature of moral "cases" and what it is to resolve such cases. Jonsen and Toulmin, unfortunately, seem to have missed these issues.

Earlier in the chapter I generalized Jonsen and Toulmin's argument as follows:

1. Moral reasoning, as practical reasoning, is best understood by thinking about practical, concrete moral dilemmas.

2. They present a history of one model of case reasoning.

3. They suggest that such a model can be transferred to contemporary secular culture and they support their claim by highlighting the work of the National Commission.

I have tried to present an alternative account of the history of the model which shows it to be deeply embedded in the values and structures of a particular moral community. The embeddedness in theory and authority is central to the model they propose. On this historical account there is no reason to think that this model can be transferred to a secular world. What are we to make against Jonsen and Toulmin's experience of the National Commission? It is possible to describe the workings of the National Commission in a way which is not at all casuistical. While the Commission had a diverse membership, it is not hard to imagine that the members, nonetheless, shared a common background of moral values. A change in the membership (to include people like Robert Nozick or Paul Ramsey, for
example) might have made for much different outcomes in the "agreements" reached by the Commission. As I will argue in what follows, case agreement can be reached if common moral intuitions exist. The success or failure of secular casuistry will depend on the extent of agreement in moral intuitions. The ability to move from one case to another will also depend on the depth of agreement in the shared moral sense. Some form of casuistry may be possible but it will be in a more limited form that the model for which Jonsen and Toulmin hope.

III. SECULAR CASUISTRY: THE PARADOX OF TROLLEYS AND TRANSPLANTS

Jonsen and Toulmin selected a very particular, well defined model of casuistry in their attempt to offer a response to the dilemma of pluralism in secular bioethics and moral philosophy. It is a model, I have argued, that does not work in a secular world. One might respond to the criticisms I have advanced against the Jonsen and Toulmin account by saying that there are other models of casuistry which have been developed and which could respond to the needs of applied ethics in a secular world. However, I will argue that any model of casuistry will have to establish a set of paradigm cases which in turn define the practice of secular casuistry. The problem confronting a contemporary practice of secular casuistry is how to select the paradigm cases and resolutions. There are two possible ways by which
casuistry could identify paradigm cases. One way would be by some shared moral sense, values, or intuitions. Another way for casuistry to work would be to rely on structures of authority which would identify, articulate and resolve the paradigm cases and link other cases to the paradigms. Legal casuistry is an example of a model of casuistry which relies on a structure of authority. The practice of casuistry in the Roman Catholic community, the Jewish community, and the legal community as well, are marked by casuistry that is shaped and defined either by the moral sensibilities and concerns of the community or by the structure of the community (legal). The Jonsen and Toulmin model is one that has both a particular moral sense and a well developed authority structure to resolve controversies. Casuistry does not necessarily require the structure of the Roman Catholic model, but it does require either a shared moral sense or a process for closure and resolution. In the modern secular context there will be no communal structure to arbitrate and resolve moral cases unless they touch on matters of law.

I do assume that a model of contemporary secular casuistry will not appeal to structures of authority to select paradigms and resolve cases in part because it is not clear who the authority should be. This means that a contemporary secular casuistry will need some common moral sense, a shared set of values, by which to even recognize
moral dilemmas and to select the paradigm cases and their resolution. It is precisely this point which limits the hope of a secular casuistry. The extent to which such casuistry can work will depend on common moral values.

One way to understand some of the difficulties for models of secular casuistry is to examine a set of problems that have been discussed and which is often pointed to as a successful exercise of secular casuistry.91 While the cases are widely referred to as the "Trolley Problem" the problem really involves the paradox created by the resolution of two different cases. The discussion of the cases is important for my argument since they provide a rejoinder to my conclusions that casuistry is not possible in a secular society. Someone may simply point to this literature as a counter example to my conclusions.

Briefly, the cases of the paradox are:

Case One: A trolley comes down the track and as it rounds the bend there are five people in its path ahead who cannot flee. If it continues on its path, the five surely will be killed. It is possible that the path of the trolley can be switched to another track where there is but one person who, of course, cannot move in time to escape the oncoming trolley and will be killed if the switch is made. May you (as the driver, or the switcher) change the direction of the trolley to the second track so that the one will be killed
and the five spared?

Many who have puzzled over this case and its variations, have held that, minimally, one may change the direction of the trolley. The paradox comes when this case is examined along with the second case.

Case Two: You are a transplant surgeon with five patients in need of whole organs in order to live. You are such a successful surgeon that the success of the surgery is assured. Each is about to die when a healthy, young man, who would be a perfect match for each of the five patients, walks into your office. May you kill the one so that you may take his organs and save the five? Most have said that one ought not kill the healthy young man in order to harvest the organs to save the five.

The paradox for those who have thought about these cases has been to explain why it is permissible to turn the trolley in case one and impermissible to kill the healthy patient in the second case.

The literature on these cases is rich, complex, and puzzling. Rather than trace out the details of different authors' reflections, it is more helpful, for my project, to examine what this literature contributes to a theory of casuistry. The writing on this paradox has focused on the cases rather than on an understanding of casuistry. This
literature is instructive in a way the authors may not have intended; that is, as a way to see some of the elements of a secular casuistry. Throughout the discussion of this paradox there are appeals to "intuitions" and a search for moral "rules" and "principles".

A. Shared intuitions:

In the philosophical literature the discussion of the trolley-transplant paradox is cast in the language of "intuitions" and "feeling". Such language points out what is a necessary condition for moral casuistry to work. Those interested in resolving moral cases must have some basis of shared or overlapping intuitions with which to identify and resolve the case. Indeed, F. Kamm speaks of the trolley discussion as going on among "[S]ome moral philosophers with nonconsequentialist leanings...". The general discussion has involved how to explain the intuitions and resolutions of the paradox.

The paradox points out both the possibilities and the limitations of a secular casuistry. The extent to which a secular casuistry will work depends on a coincidence of moral senses. A common moral sense will allow for the identification of the moral controversy. At a second level it will allow for the identification of possible solutions. A third level will allow for the elaboration of reasons and values which are the background for the solutions.
The ability of secular casuistry to resolve moral controversies will depend on the extent of a shared moral sense. For example one can return to the paradox and imagine a consequentialist, with different sets of intuitions, not finding much of a paradox with the two cases. If the consequentialist is a total or average utilitarian he or she might say that the track with the single person should be taken and that the healthy man should be killed. A rule consequentialist might hold that the trolley should go down the track with one man but that the healthy man should not be killed for his organs for the sake of improved overall consequences for the society. The rule utilitarian/consequentialist may find no paradox to speak of and argue that general utility is served by protecting the one man. Each of these utilitarians brings a different set of moral sensibilities to the trolley-transplant paradox.

In the literature on the Trolley-Transplant paradox most of those writing are non-consequentialist philosophers. While we find agreement on the paradox the justifications for the solutions may be very different.

One can redescribe the paradox by telling the story in yet another way; that is, from the point of view of the agent (the driver or the transplant surgeon) and his intentions. If one has an absolute constraint (malum in se) on killing innocent human beings one can arrive at the same
judgment about what ought to be done but for very different reasons. The justification will be different than one who does not hold an absolute constraint. How the story is told and resolved will be influenced by one's moral sense.

One can tease out, from the Trolley-Transplant discussion two possible necessary condition for any type of casuistry; that is, it will need a moral sense or moral authority to pick out the paradigm cases and resolve new cases. Lacking like intuitions those involved in moral controversies will not be able to identify and describe a case. I think that claim is born out in the trolley-transplant paradox. Those who have written on it share basic intuitions about the cases. Yet we can imagine others not holding the same intuitions about these cases.

As A. MacIntyre has pointed out, moral arguments often have an intractable quality to them. It is not that the arguments are invalid, for they often proceed by valid inference from the premises. The intractable quality is in the acceptance or rejection of the initial premises. One can see the possibilities and limits of secular casuistry if one recalls, in the literature on abortion, the famous case in which J. J. Thompson suggested one could talk of the relationship of the fetus and mother as analogous to a violinist attached/dependent on oneself for life. Thompson's analysis of abortion, by use of this case analogy, did not achieve the type of agreement we find in
the trolley-transplant paradox. Just as initial premises set the framework for arguments, so too initial intuitions set out the groundwork for casuistical reasoning. The violinist is but one example of a case where people respond with differing intuitions. Regularly the Hastings Center Report discusses cases of bioethics with commentaries on the case(s). It is striking as to how different the commentaries often are. One sees how moral perspectives shape the way the facts are arranged. Some facts are highlighted, while others are downplayed and others still, disappear. Our moral perspectives are important to the way we understand and act in the world. Is for example, the removal of artificial feeding and hydration from persistently vegetative patients a case of "starvation" or the cessation of useless medical treatment? It seems clear from the general literature of ethics, as well as the literature of bioethics, that one's moral perspective will shape the way cases are seen, described, and resolved. Those intuitions must be shared if casuistry is to work.

If, as I have argued, casuistry depends on moral sense or set of intuitions then it seems, given disagreements over issues such as abortion, the treatment of persistently vegetative patients, the use of fetal tissue, or the distribution of health care resources, we are likely to have as much disagreement as agreement about what are cases of moral concern and the paradigms for resolving them. Secular
casuistry will be successful to the extent that there is a shared moral sense to allow the identification of cases and their resolution. Again, however, we return to an earlier theme of what it is to have "agreement". The Trolley-Transplant discussions illustrate how people with diverse moral intuitions can reach agreement on a particular case. The extent of agreement, however, will be crucial for the ability of secular casuistry not only to resolve the case but to extend resolution to other cases.

There is, however, a more profound question about shared intuitions or moral sense. Even if we found that we were in a situation where there were common moral intuitions about cases we are still left with the questions of why should we take these intuitions to be normative? Are our intuitions expressions of ontological realities about the moral qualities of the world? The past four centuries of philosophy remind us of how difficult it is to make out such claims. While moral facts may exist, the difficulty, for humans at least, is knowing what they are. If our intuitions are not rooted in real moral "facts", and rest on social practices, why should we give them normative weight? Our intuitions may be distorted by ignorance, prejudice, power, or a host of other influences. We must be cautious in deciding the extent to which our intuitions such normative force.
B. Summary: Trolleys, Transplants and Disagreement:

It is clear that there are cases about which there is common agreement (e.g. the trolley-transplant paradox). However, there exists a wide array of cases, in bioethics for example, which elude paradigms or even common description (e.g., abortion, fetal tissue). The cases of agreement give rise to the hope that, absent theoretical agreement in ethics, moral agreement can be reached through some form of case reasoning. The cases of disagreement, however, give one pause. Those cases are unclear because we lack common descriptions of the case and the cases will remain unsettled at least until we can reach common descriptions.\textsuperscript{100}

The practice of secular casuistry will be difficult in a world of moral pluralism. Secular casuistry will only work in cases when there is a coincidence of like-minded moral intuitions. The resolution of cases can also be achieved when the lines of decision making authority have been delineated and the decision maker(s) can be identified (e.g. free and informed consent). While a religious casuistry relied on the authority of apostolic succession, a secular casuistry may rely more and more on the authority of procedures.
IV. CONCLUSIONS

Jonsen and Toulmin announced a hope that casuistry could provide a model of moral reasoning for bioethics in a secular context. The model of casuistry they selected, however, is ill suited to a secular context given its place in a defined moral sense and social structures. However, even a less structured model of casuistry will have severe limitations in a secular context.

The principal limitation will center on a moral sense. That is, without shared moral values, sensibilities, or intuitions, we will not be able to resolve moral controversies or develop principles and rules. Moreover, however, we will not be able even to even identify which the cases are candidates for moral controversy without a shared moral sense. Developing a common description of a case will depend, in part, on common moral sensibilities. This, one might say, is a variant on the ethical problem of the fact-value distinction. Just as "facts" are not independent of linguistic expression, neither are "cases", nor their descriptions, independent of moral sensibilities and values. The descriptions of the facts about the world are influenced by our values and vision of the world. What we see, as important, unimportant, or troublesome will be influenced by our values. So too our descriptions of moral cases, in need of resolution, will be shaped by our moral values and intuitions. The possibility that any form of casuistry can
resolve moral dilemmas will depend on the extent to which individuals share moral descriptions. One way to describe the "success" of the National Commission is simply to say that the members of the commission shared similar intuitions. Again one has only to reflect on the controversies surrounding abortion, fetal tissue, HIV screening, to realize both the importance of our moral intuitions and the difficulties or resolving dilemmas when basic intuitions are not shared.

One's assessment of the use of casuistry in secular bioethics will depend, in part, on one's view of the extent to which we have common moral intuitions. The success of casuistry will depend upon to the degree to which we have shared moral values. If one sees contemporary society as the fragmentation of a once powerful moral vision, then a secular casuistry will be a limited endeavor. But this view can help us to understand why casuistry worked in some cases and not in others. When it works there is a coincidence of fragments and when it does not we see the extent of the shudders.

While one may find paradigms that are shared within particular communities, the difficulty for a modern casuistry is that there is no way to determine, absent a shared moral sense, what the relevant paradigms for moral action are to be. With the gradual devolution of the hegemony of Judeo-Christian culture in the West, secular
casuistry faces the possibility a constant state of crisis in that there is no way to identify and order the paradigms on the model offered by Jonsen and Toulmin. Indeed there is no way unambiguously or uncontroversially to characterize the moral controversies we seek to solve. Like the appeal to virtues; absent a shared context, paradigm cases will be impossible to define or understand. An attempt to implement a secular casuistry will lead us only to discover our variety of moral views. Like the ancient world and the confessional practices of the early Middle Ages, there is a plurality of casuistries in the contemporary world. Indeed, the history of medieval casuistry can be told in a different way than Jonsen and Toulmin have offered it. One can argue that medieval casuistry was pluralistic in at least two respects. First, in the Middle Ages casuistry was certainly practiced in other communities, with different sensibilities and mechanisms than Latin, Catholic casuistry. Second, in the early Middle Ages there was a variety of casuistries practiced in the administration of the penitential books. Such a history of casuistry is more helpful for understanding case reasoning in ethics today where one will find, most likely, a variety of casuistries with agreements and disagreements about cases.

The Greek root of "crisis", (krinein) means to separate, decide, or to know how to turn. Catholic medieval casuistry was able to separate and decide moral
controversies because it was grounded in common shared structures of authority and religious vision. A world which lacks a common, authoritative moral sense, and which grounds authority in the individual, will lack the structures needed for the practice of secular communal casuistry. A secular culture, devoid of common moral commitments and communal moral structures, will be unable either to identify the paradigmatic cases or separate and judge moral controversies or dilemmas.

NOTES


6. Jonsen and Toulmin, p. 27.

8. Jonsen and Toulmin, p. 34.


33. Jonsen and Toulmin, pp. 311-312.
34. Jonsen and Toulmin, pp. 312-313.
44. Summa Theologica, II-II, Q. 64, a. 7, in his discussion of self defense Aquinas speaks of actions being identified in species, according to the intention of the agent. In I-II, Q. 7, a. 1 Thomas speaks of circumstances of an act as the accidents of an act and being outside its substance.
46. Augustine writes: "I do not agree with the opinion that one may kill a man if one may be killed by him; unless one be a soldier, exercising a public office, so that one dies it not for oneself but for others, having the power to do so,..." Letter to Publicola, #48.


55. See, Tentler.


58. Denzinger & Schonmetzer, #1688.

59. Mahoney, p. 19.

60. Denzinger & Schonmetzer, #813, emphasis added.

61. NE 6.13, 1144b17-1145a6; 10.8, 1178a16-19.


64. NE 6.12, 1144a22-b1.

65. NE, 6.1. It is such knowledge that Jonsen and Toulmin's account ignores.


67. Summa Theologica, II-II, 47, 5.; I-II q. 47, aa. 1-16.


70. "They show that what the law requires is written on their hearts...", Romans 2:15.

71. Ignatius, Constitutions, #134, St. Thomas, ST, I-II, q. 90; 92 a. 1.


77. G. Vasquez, Commentaria, II-II, LXII, iv.

79. Deut. 23: 19-20; St. Ambrose, De Tobia, XV, 15; First Council of Nicea, Canon 15; Gratian's Decretum II, c. 14, 4.


84. T. Beauchamp, pp. 30-31.


86. Jonsen and Toulmin, p. 327.


91. See Thompson, Foot, Kamm.

92. See Kamm, p. 227, Thompson, p. 103.

93. Kamm, p. 227, emphasis added.


96. See, for example, Baruch Brody, Abortion and the Sanctity of Life: A Philosophical View, (Cambridge, MA: MIT Press, 1975), pp. 26 ff.

98. While I do think that objective moral standards do exist I also think there are profound epistemological difficulties in knowing what these standards are.


101. See Gass, pp. 193-204.


CHAPTER FOUR
UNDERSTANDING MORAL JUDGMENTS

Introduction

Bioethics has developed as an area of intellectual investigation and public debate. In part the development of bioethics has been fostered by controversies surrounding moral judgments made in clinical cases and in areas of health care policy. Bioethics is a discipline often involved in the evaluation of possibilities in actual clinical cases and at times practitioners of the discipline have been called upon to make recommendations which would resolve moral disputes. Bioethicists have also been asked to help formulate the development of health care policy for institutions and governments. Moral judgment plays such a crucial role in bioethics that it provides a lens through which the enterprise —and its assumptions— can be investigated and understood. Moral judgment enables one to explore the epistemological basis of bioethics —and moral philosophy.¹ In this investigation one comes to understand the importance of the background assumptions about the nature of moral reason and moral values. These assumptions form the context of moral judgments.

Our understanding of moral judgment in bioethics can illuminate moral judgment in other areas. Because health care is practiced as a public, cooperative venture bioethics is practiced in this public context as well. It is a
context in which traditional moralities have weakened and opened the way for a plurality of moral visions. Indeed the public forum is often a context in which the underlying assumptions about moral values and moral reason can be drawn out sharply. As such bioethics provides a sharper, perhaps more focused, example of the phenomena of moral judgment than similar judgements made in other settings.

The first section of this chapter reviews the conclusions of the three preceding chapters and examine the ability of each of the three models to explain a moral judgment; that is, to lay out the assumptions about moral reason and moral values which enable the judgment to be understood within each model. In looking at each of the models it becomes clear that one’s understanding of moral commitment -and moral judgment- are tied to the basic assumptions made about moral "rationality". These commitments about rationality and values are important since they lie behind any model of judgment and they are crucial for explaining moral judgments and for the justificatory power of a moral judgment.

The second section goes on to explore further the necessary assumptions one must make about moral reason and moral values in any moral judgment. Understanding these assumptions enables one to understand the judgments made by others. However, the justificatory power of any judgment will only extend as far the acceptance of these basic
assumptions by others. Indeed, the third section of the chapter underscores the embeddedness of any particular moral judgment within the context of a number of other judgments made prior to the particular judgment. Again the justificatory power of any particular judgment, or model of moral choices, will depend in the main on the extent to which men and women share in these prior judgments.

The fourth section moves to build on this understanding of these different judgments to help map the geography of moral pluralism. In understanding the different judgments and assumptions which underlie a particular judgment one can come to grasp more clearly the ways in which both "agreement" and "disagreement" can take place in moral judgment. Agreement in moral judgments about particular cases may be very weak in that the agreement is only about the case at hand but not about the reasons for the decision. Such agreements may be comforting to some, but these agreements cannot necessarily be extended beyond the case at hand. In setting forth the prior judgments, about moral values and moral reason, which shape particular judgments about cases, one comes to understand the strength or weakness of a particular judgment.

The fifth section returns to bioethics itself. As one clarifies the assumptions about moral rationality and moral values which underlie a moral judgment one can come to understand how bioethics can [is] influenced by these same
assumptions which shape our notion of moral judgment.

Moral commitments are often expressed in the languages of values, principles, rules, virtues and incarnated in moral judgment. When a moral judgment is made people often explain judgment when we say something like "I ought to do x because....". The explanation "makes plain" the reasons which guide the judgment. The justificatory power of the explanation will depend on people's acceptance of the assumptions and reasons. Throughout this chapter a distinction will be drawn between explanation and justification in that people may understand the moral judgments made by others but not accept them as excusing or justifying the choice.

In some circumstances the reasons will be opaque to others. In his discussion of "taboo", Alasdair MacIntyre recalls the example of the encounter between Captain Cook's expedition and the indigenous Polynesians. Cook's party was unable to obtain any reply, which made sense to them, as to the meaning of the Polynesian taboos. At times moral judgments will also be opaque to those who make them. MacIntyre raises the possibility that people, or a community, may reach a point in time in its development when it fails to understand its own taboos. An intellectual challenge for the bioethicist is to explain the judgments that are made and, at times, in moral controversies, create a map or geography of moral judgments. However, to explain
a judgement one must be aware of the moral commitments, and understanding of rationality, which inform the judgment.

I. Theories, Cases, Principles, and Judgment

The three models of theories, casuistry and principles have dominated the field of bioethics as ways of providing explanations and justifications for moral judgment. Each of the three is a model in the sense that each provides a basic structure or design for moral judgment. One way to capture the strengths and weaknesses of each of the models is to study the different accounts of judgment. In the analysis which follows of the relationship of judgment to each of the models it will be argued that the models of casuistry and theory can give an account of moral judgment in a secular context. The model of middle level principles, in contrast, is incapable of providing an explanation of judgments because of the deep ambiguities about the meaning and relationship of the principles.

While the theoretical and casuistical models are very different they, nonetheless, can have a range of success, at the very least, in explaining moral judgments and, at times, justifying them. These two models work very differently in that one begins with the general while the other begins with the concrete. In a sense the models "move" in different directions. Yet each model, with content-full commitments, is able to explain why certain principles, or cases, are
ranked the way they are and why certain judgments are acceptable while others are not.

For the appeal to theories or cases to explain and successfully justify moral judgments, each model requires a commitment to some moral content or the ranking of values. The operative moral commitment for any theory gives content to the theory. The general structure of the theory alone, (e.g. an appeal to utility, natural law, rational duty) is insufficient to make particular judgments. Each type of theory requires some content if it is to develop answers to moral quandaries. A theory, with content, provides way of understanding the moral world and recognizing moral dilemmas. A content-full theory also provides a way of knowing in that moral controversies can be identified, understood, and resolved according to the criteria given by the theory.

As moral theories will vary in their structure they will also vary in the degree of specificity they have toward a particular dilemma. A theory of preference utilitarianism will have a wider range of possible solutions for any given dilemma than most other theories. The process of specifying a moral theory to a particular moral dilemma or controversy will be internal to the theory itself; that is, the theory will have to provide an account of the method by which it should be specified. One way to do this is to include within the theory an understanding of moral reasoning which,
in turns, governs specification. Aristotelian and
Scholastic moral theory relied in part on and understanding
of the virtue of "prudence" as central to the method of
specification.

Just as theories provide possible resolutions they can
also provide ways to explain moral judgments in that a
theory provides criteria for what constitutes a good moral
reason. It is in principle possible in theoretical models to
offer an explanation of a particular judgment. In some
cases explanations can provide a justification for a choice,
or a range of choices, for those who share the basic moral
commitment of the given theory. It is possible that the
explanation may be understood by those who do not share the
same theoretical or moral commitments. But understanding
alone does not necessarily suffice as a basis for
justification (i.e. reasons one would accept) or even as an
adequate explanation. Understanding alone does not mean
that others will see the adequacy or appropriateness of the
judgment insofar as people with different moral commitments
might see others' explanations as inadequate.

A model of casuistry can also provide a way of
explaining moral judgments. As a case driven form of
reasoning, casuistry focuses on the resolution of moral
dilemmas by using past moral dilemmas as a guide to moral
reasoning and judgment. Like the model of theories,
casuistry requires some basic moral commitments which give
content to the reasoning process. Such commitments are not articulated in the same way as the commitments of theoretical models but they are reflected in the paradigmatic cases which structure the casuistry and allow the practice to recognize moral dilemmas and interpret them. The articulation of the moral commitments which structure a practice of casuistry may vary from casuistry to casuistry. One finds, even within the history of a particular tradition how the articulation of the basic commitments can vary over time. By understanding the moral commitments of paradigmatic cases, which underlie a practice of casuistry, one becomes equipped to understand the judgments that are made. Again, as with the theoretical model, if two discussants in a moral controversy understand the basic moral commitments and the paradigm cases they can explain moral judgments to one another. The degree to which an explanation is adequate will depend upon shared moral commitments. As with the theoretical model one can understand another's casuistry but not accept either the adequacy or the appropriateness of the judgment. Finally, the degree to which casuistry can develop not only an adequate explanation, but one that justifies, will depend directly on the degree of shared moral commitments.

There are two general commitments involved in both model: a commitment to a particular set of moral values and a commitment to a particular view of moral reason. When
people do not share the same moral framework the two models of theory and casuistry lose their justifying force. For each of the models to develop a judgment both require "premises" with moral content (i.e. particular moral commitments). The theoretical model also requires an additional choice about which type of theory to deploy. These premises, however, are open to rejection, In such instances, justification of a judgment, to those who do not share the premises, is impossible.

The theoretical model has a potential to offer an explanation as this type of moral reasoning is able to lay out a moral world view. A theory is able to identify a set of primary moral values and articulate a ranking of them. A common weakness of the theoretical models is, often, their lack of specification in regards to a particular case. The model of casuistry, however, finds its strength in specificity. The weakness of casuistry is that one needs more than cases alone if one is to tie together a set of cases. Both models involve particular views of moral reason. For a moral judgment to have justificatory power people will have to share a common view of moral reason.

Unlike the other two models the model of the middle level principles is handicapped in its ability to provide an adequate explanation or justification of moral judgment. To reach a judgment the principles need greater definition than the model allows. We need to understand the meaning of the
principles and the moral commitments they represent as well as their relationship to one another. But such development is precluded from this model. The model was developed, in part, to guide moral judgments while avoiding the intractable discussion which have so entangled moral theory. The effort to avoid such difficulties, however, present the middle level principles model with great ambiguities. To eliminate the ambiguities and define further the meaning of the principles and their relationship is to embed them in a theoretical context as the principles of the natural law are embedded in a wider theoretical context.\textsuperscript{5}

Another way to remedy the ambiguity and meaninglessness of principles would be to tie them to a practice of casuistry in which case the principles would articulate the moral commitment(s) represented in the cases. Either solution reduces the middle level principle approach to one of the other two models. Yet absent such development the principles seem ineffective in guiding judgments or to explain them.

In the models which exist both theory and casuistry provide a way to explain moral judgments. The questions of justification, however, poses a different set of issues. Unless people share the basic moral commitments, there will be no satisfactory response to questions about justification.
II. Moral Judgments: Commitments to Reason and Content

To offer a justification of a moral judgment is to situate the particular judgment within the context of acceptable reasons. The task of justification faces the difficulty of agreeing upon what constitutes the field of acceptable reasons; that is, what are the criteria or the measure for moral judgments. Justification for a particular judgment, in any field of inquiry, is guided by what is taken as acceptable rules of evidence.6 Cardinal Bellarmine's refusal to look through Galileo's telescope was driven, in part, by an understanding of what constituted good evidence. The Scriptures, not the telescope, were the norm of evidence for Bellarmine, and his judgments about Galileo's science were made in accord with the accepted rules of evidence.

The conceptual problem for justifying moral judgment is really twofold. First there is the need to establish a shared concept of moral "reasons". This problem is, in part, evident in the different moral appeals. Second there is the difficulty to agree upon the moral commitments to server as a standard for justification. These two problems are crucial for clarifying what is to be accepted as the rules of evidence for moral judgments. However, even when criteria are understood, the next step is to determine whether or not the criteria are accepted. These requirements, however, are not unique to moral judgments.
When we use descriptive terms are used in judging empirical realities they are deployed within the context of a shared language. The practice of a language as a whole rests on a general agreement on the use of the terms and such agreement is presupposed in learning the language. This shared agreement of the language provides the users of a language a mutual basis for judgments about the correct use of descriptions and the correct use of the language in general. Both judgments in science and the use of language depend upon certain background assumptions which form the rules of evidence or the rules of proper usage and meaning. These types of background assumptions and rules are also present in moral discourse and they are often the most troubling dimensions for discussion of moral issues in a pluralistic world.

Moral judgments are structured in the context of a language which rests, in turn, on shared substantive commitments. It is difficult, in any precise manner, to say what a moral commitment is. In general it seems that such commitments are to be concerned with a criteria for deciding and judging those actions, conceived as freely undertaken, towards others. There is dispute about the range to which the moral life extends (i.e. to animals, trees, etc.). But, at a minimum the idea of moral commitment has to do with one’s actions qua free and responsible agent towards other agents. Of course the difficulty is that even in trying to
define the realm of moral commitments one must give content to such general notions.

Moral commitments involve seeing the world in a certain way; that is, such commitments entail reactions and choices which accord with the vision they instantiate. Such commitments usually entail that those who make them hold that to believe an action to be wrong, if they wish to avoid being judged "inconsistent" or "hypocritical", involves a commitment to avoid the action, discouraging others from doing it, and regretting it when it is done. Moral commitments also involve an understanding of moral rationality in that certain "reasons" are taken to be comparatively better or worse. The reasons one offers for holding that a particular action is wrong may be rejected by another and the judgment evaluated as incorrect. However, unlike descriptive, empirical languages it is notoriously difficult for moral language to identify an objective referent which forms the basis for evaluating the use of moral language.

The language of ethics is tied, particularly at the level of moral judgment, to the context of the choice of an action. But actions, and/or their consequences, can be described in many ways depending on one's moral commitments and values. G.E.M. Anscombe has argued that actions are not "bare particulars" which can have a single description. Rather they are the subject of many descriptions. A
physical action of "killing" can be described morally as "murder", or "self-defense", "righteous retribution", or an "unintended side-effect". As long as people share a common moral framework and language, the resolution of a moral controversy is usually straightforward. The common commitments allow those who share them to identify a description for an action. But even within a particular tradition there can be disputes about the application of moral criteria. Many of the disputes in the history of casuistry, for example, have centered on the description of cases. Among those who share a particular theoretical model one can find instances where different principles may be applied. For example, while at the general level, telling the truth may be 'good', at the level of judgment it is always possible to ask if truth telling is the best choice, or how it is that the truth should be "told". The context influences the interpretation and description of the dilemma and its resolution. Such contextual influences is what I take to be Wittgenstein's point when he says that "in ethics the meaning of the word 'good' is bound up with the object it modifies".9

In disagreements about descriptions parties can attempt to resolve the disagreement by appealing to some moral criteria or a procedural mechanism. Put another way, in the face of such controversies people can appeal to someone who is an authority (e.g. theologian, rabbi, counsellor) to
offer opinions about how the case should be interpreted or they can appeal to someone who is in authority (e.g., confessor, popes, judge) to give a judgment to which they must submit. The enterprise of understanding the language of moral description and evaluation becomes even more difficult when the basic moral commitments are not shared. In turn this means that the explanation and justification of moral judgements, outside of particular frameworks, becomes a very difficult task.

Substantive moral commitments can be articulated in numerous ways. Each articulation of a moral commitment contains within it a particular commitment to a particular view of reason. Indeed, one way to talk about the different models of theory, casuistry, and middle-level principles is to speak of each as a different way to articulate moral commitments. Casuistry, as an articulation of a moral commitment, must be listened to through the cases which are judged as paradigmatic. One can develop a casuistry based on substantive moral commitments which identify certain cases as central. No matter how simple the casuistry may be the cases, nonetheless, represent basic moral commitments. A moral theory reflects a substantive moral point of view in the structure of moral reasoning it deploys and in the operative moral sense it deploys. As was argued in chapter two, for a theory to reach moral judgment, it not only requires a particular appeal (consequences, the
natural law, agreement, duty) but each theory requires a moral sense if there is to be content to the theory. This second point is a revisitation of Hegel's criticism of Kant's categorical imperative. The good to be done, the evil avoided, the consequences to be promoted all must have some meaning theories are to yield concrete judgments. If one understands moral theories as language-games based in a substantive moral commitment, then one can see the relationship of theory to moral judgment. The substantive moral commitment will shape the theory and the way in which the moral world is viewed as well as one deports one's self within it. The theory will provide the basis to articulate what is or is not a moral dilemma. Of course, even the most developed and specified of theories will, in some dilemmas, provide a range of acceptable judgments.

The explanation and justification of a moral judgment demonstrates, in some way, how the judgment conforms to a particular set of commitments about moral values and moral reason. In understanding these two commitments one can understand the difficulties for understanding moral judgment and the possibilities for disagreement about the judgment itself or the grounds on which it was made. Bioethics, set in the collaborative enterprise of health care is filled with issues which exemplify the possibilities of disagreement. It is, however, often filled with agreement as well. An account of judgment needs to address the second
possibility as well as the first.

III. Types of Judgment

In examining the different models for explaining and justifying moral judgments one becomes aware of the number of different judgments that are implicit in any particular moral judgment: about rationality, moral appeals, moral values. Each particular judgment contains within it a number of possible agreements and disagreements. In bioethics, because of the context in which health care is practiced, the disagreements in judgment have been very public leading some philosophers to focus on the disagreements.\(^\text{13}\)

Much of the work which has been done on the topic of moral pluralism has focused on the often intractable disagreements which have often dominated discussions of bioethics. By approaching pluralism in this way one runs the risk of underplaying those areas of controversy which can be resolved and failing to understand what such resolutions can mean. At the same time others have focused on the achievement of agreement in judgment and how it might be understood.\(^\text{14}\) One way to pull together, in a more balanced fashion, both agreement and disagreement in moral controversies, is to understand that any moral controversy involves at least two judgments. First, there are those judgments which are "object-level" judgments: judgments
about what one ought, or ought not, to do in a given case. This level of judgment is about a course of action which is to be pursued. Second there are "justificatory" judgments which are judgments about the reasons and moral values which should apply to a particular moral case. There is yet a third level of judgment which provides the foundation for the first two types. This is the judgment about what constitutes acceptable moral reasons.

At the object level the agent may choose between a set of possible actions while at the justificatory level one chooses which set of reasons/commitments is most compelling for the particular controversy at hand. Separating out these different levels of judgment recalls the earlier discussion of "agreement". In examining the use of the middle-level principle Beauchamp and Childress speak of the agreement which they have reached on the four principles. Previously I argued that without further explanation, it seemed likely that, absent a theoretical matrix in which to interpret the principles, it is difficult to understand what they actually mean. I also argued that it is also difficult to determine what Beauchamp and Childress actually mean by 'agreement'. One can now return to this earlier discussion of agreement through the lens of judgment.

As judgment comes in different denominations so too "agreement" will have different forms. One way to understand the extent of agreement is through the
explanatory, justificatory and generalizing power which agreement about a judgment has. For example, intersubjective agreement at the object level is a weak sense of agreement in that it is limited to the particular case at hand while agreement on the level of justification provides a much more powerful sense of agreement in that it allows people to think beyond the particular case and judgement at hand to new cases as well as older ones. One can imagine cases where people agree on the particular object level judgment (e.g. that the treatment of a patient should be withdrawn) but disagree on the reasons for the justification of the object level judgment (e.g., to continue treatment violates autonomy, or continuation of treatment is a misappropriation of medical resources, or violates a principle of justice). The reasons which guide choices on the object level allow comparisons with other moral controversies.

It becomes clear that people can agree at the object level of a particular moral controversy while disagreeing at the level of justification or the level which establishes the criteria for moral reasons. Agreement at the level of justification provides a much more powerful sense of agreement in that it allows people to think beyond the particular case and judgment to both new and old cases. It also seems that agreement on the level of justification is more difficult to achieve than on the object level. The
level of explanation involves a substantial moral commitment which in turn delineates what counts as legitimate reasons for a moral choice. If one takes seriously the reality of moral pluralism, one comes to see that there are many ways one can construct the categories of the moral world. By separating out the different layers of judgement (object, reasons, meta-rational) one can see a whole spectrum of agreement and disagreement. The spectrum ranges from a very strong sense of agreement, that of being one mind on how and why to proceed, to that of a weaker sense of proceeding together in a limited venture.

There are a number of relationships which lie between complete concurrence at the level of object and justification to complete disagreement at the object level and the level of justification. At one end of the spectrum one can have agreement on the object level and the justificatory reasons. This is perhaps the strongest sense of agreement. One could then imagine agreement on the object level with disagreement on the justificatory level. Then one could imagine agreement on the object level with agreement in part and disagreement in part on the level of justification. There could also be disagreement on both the object level and the justificatory level. Finally there could be disagreement on the object level and agreement on the justificatory level. The scheme of judgments is as follows:
1. Object level agreement and justificatory agreement.
2. Object level agreement and justificatory disagreement.
3. Object level agreement and justificatory agreement/disagreement in part.
4. Object level disagreement and justificatory agreement.
5. Object level disagreement and justificatory agreement/disagreement in part.
6. Object level disagreement and justificatory disagreement.

Both the possibilities and the limits of each of the models of judgment—theory, casuistry, mid-level principles—used in bioethics can be understood through this scale. To reach agreement on justification there would need to be prior agreement on what was justified as a moral appeal and proper set of moral reasons to which one could turn. Even within a model there is the need for a particular moral sense, or set of values, to provide the content for the appeal. Unless moral agents stand within the same meta-rational framework they will not reach agreement on the justificatory level of moral judgment.

In the theoretical model for moral judgment people can share the same substantial moral commitments and theoretical matrix and not reach agreement in judgment on the object level. One can easily imagine two people sharing the same moral commitments and theoretical language-game who come to a range of possible responses but judge differently about which response is most appropriate. One could imagine there being disagreement on the justificatory level; that is,
disagreement about which reasons, accepted within the framework, applied to this particular dilemma. Yet, in the midst of many possible disagreements those who share a basic theoretical model and value commitments would be able to speak, argue, and express disagreements. The difficulty, in a secular context, comes when people differ in commitments or frameworks. In the first case people may share the same theoretical framework, but hold different value commitments. Two natural law ethicists may have very different interpretations of what is "natural". At the same time people can seemingly share similar value commitments while standing in very different theoretical frameworks. One can imagine a utilitarian and deontologist who seem to share a commitment to the value of protecting innocent human life. Yet it is also quite easy to imagine the deontologist having a more absolute commitment to the value than the utilitarian. The theoretical matrix of the deontologist may constrain in such ways that their "values" are really quite different.

The middle level principles approach seeks to circumvent deep theoretical disagreements by focusing on the principles independent of theory. In the Beauchamp and Childress account it seems that the middle level principles are operative on the level of both explaining and justifying judgements. The difficulties here are many but I want to recall how in using the middle level principles one faces
the crucial difficulty of determining the meaning of the principles. While the words may be the same their meaning and implications are different. Earlier it was suggested that one should think of "autonomy", for example, not as one principle but as at least two ($\text{autonomy}_c$ and $\text{autonomy}_b$). Meanings are determined and nuanced by the content-full moral commitment which shapes their use. It becomes difficult then to determine what the nature of agreement is in such situations. The middle level principles are put forward as a model for both object judgments and judgments about explanations. They seem to succeed in offering arguments at both levels of judgment. However, judgment on the justificatory level carries the strong possibility of being a charade in which people use the same words but with very different meanings. For there to be agreement on the justificatory level disputants must share basic moral commitments and understandings.

In separating the levels of judgment one can come to understand both the success and limitations of secular casuistry. As case driven reasoning casuistry begins with a particular moral dilemma or controversy at the object level of judgment. In facing the particular case, one can come to judgments about that case. The limitations to casuistry will be more apparent if one understands moral "judgment" as multidimensional; judgments about objects and justification. While people with diverse moral appeals, theories, and
senses may agree on particular cases (objects) they many have strong disagreements at the level of explanatory judgment. Achieving agreement on the object level does not entail the ability to generalize beyond the particular case. One can call to mind again the question about the treatment of PVS patients. One can find any number of moral points of view which may agree that treatment should be withdrawn. Agreement on the course of action does not mean agreement on the level of justification. The different justifications give very different descriptions of the case. For some the withdrawal of treatment "causes" the death for which there is moral culpability. For others the death is an unintended side effect of withdrawing useless treatment. For others, there may be no significant moral dilemma. The Trolley-Transplant paradox provides an illustrative body of literature on this point. There is general agreement at the object level (one should turn the trolley to save the five but not take the organs of the healthy person in order to save the five sick patients). However, the literature is filled with a variety of explanations and diverse judgments about what constitutes acceptable reasons in the paradox. Indeed as the paradox is redescribed there is often more and more disagreement.

Because moral judgments reflect a relationship between moral commitments and reasons, it would be too hasty to think that moral judgments which arrive at similar
conclusions by different paths, should count as the "same" moral judgments. If a judgment is about the relationship of situations, actions, consequences, motives, and reasons, then different moral reasons lead to different moral judgments—no matter how similar they may appear.\textsuperscript{16} For example, many of the discussions about care of the obligations and extent of treatment for those who at "the end of life" have seen people from different moral perspectives reach very similar conclusions. However, as their reasoning to the conclusion is often very different, it would seem that one should not see the two parties as in "agreement". One party may seek to withdraw treatment in order to hasten death while another party may seek the withdrawal of treatment so as to alleviate a grave burden on the patient. While the difference in the lines of reasoning may seem inconsequential, the differences will sharpen with new cases. For example, the one party may see no problem in hastening death in assisted suicide while the other would see such practices as immoral and in se evil.

The expression of a moral judgment carries a number of judgments within it. There are judgments about the particular dilemma, about the reasons which justify the choice(s) made, as well as judgments about moral commitments and criteria. Each of these levels provides an area for possible agreement and disagreement.
IV. The Context of Secular Pluralism

Moral judgments are often made in contexts in which people share a common moral language and set of basic moral values. Judgments made in familiar contexts can often be easily understood and argued about. The practice of health care, however, frequently pushes moral judgments beyond the context of familiar settings in which moral commitments are shared by men and women. The concepts of "health" and "disease" are set within a matrix of value commitments and life projects. Health involves a description of phenomena ("I feel ill." "John has a fever.") to which we attempt to give a causal explanation according to nomological, lawlike regularities which are imposed on the phenomenon ("John has a fever because________."). Our understandings of what is to be counted as a disease are often tied to cultural views of human functioning. Health care raises basic moral issues because it is tied to human concerns regarding the avoidance of pain and suffering and the achievement of health. Yet the human condition is one marked by disease, disability and limited resources. Health care is practiced in a "public" realm and often involves people of diverse moral points of view. Health care also often involves the use of public resources. As an endeavor created from common resources, health care is the subject of public debate, discussion, and judgment.

Some have argued that the moral pluralism of
contemporary Western culture is the result of the unraveling of the moral narrative which has dominated the West in the past twenty centuries. What is left are bits and shards of an earlier tradition. Many have gone on to argue that reason, outside a communal or particular context is impotent to resolve moral disputes. Another approach to the context of pluralism explains the moral pluralism by the variety of moral appeals.

In trying to understand moral judgment in the secular context at least two points become crucial. One is to determine, in some way, how one is to understand moral pluralism. Is the moral pluralism simply a sociological fact or does it reveal a conceptual problem for moral philosophy? involve something else? It certainly is a sociological fact in that many people have come to conceive Western culture as morally pluralistic. It has also been argued in the previous chapters that moral pluralism presents an epistemological problem: we do not have a "view from nowhere" which allows us to know how to choose between the different moral commitments or different understandings of moral rationality. There are no criteria which enable us to know how to choose between the various possible moral commitments. This problem is an epistemological one in that we do not know how to rank the different moral commitments; that is, it is a claim rather about the limits of our knowledge. We have no knowledge of the vantage point which
would allow us to assess the different moral viewpoints or enable us to establish the rules of evidence for evaluating moral judgments.¹⁹ The epistemological dilemma creates a very serious problem for moral judgment in health care in that to judge is to choose according to some criteria. Health care, however, because it is a collaborative enterprise, is often set in a context which has many different moral criteria. A secular, morally neutral society, will lack all but the most minimal criteria. In turn this means that it may often be difficult to explain moral judgements to others and often impossible to justify them to those who do not share the same basic commitments.

One cautionary note needs to be made very clear at this point. The arguments and claims about the epistemological dilemmas of moral pluralism should not be made into metaphysical claims about the structure of the moral world. Such claims are too strong because we lack the knowledge to make them. They are more than we can argue to and they are more than we need. A more modest claim is the epistemological one that reason alone simply cannot determine what is morally proper. Reason by itself is empty of content and is an inadequate tool for moral judgment. To argue to this more modest epistemological position is not to deny that there may be moral facts which we cannot know by reason alone. The context of the secular state and society is one that is morally "neutral". Moral judgments must be
expressed, in the secular state, in persuasive, rhetorical style rather than in a didactic one. In turn, this means that moral communities, absent persuasion, must live together in tolerance.\textsuperscript{20}

Moral pluralism, and its epistemological roots, pose very important phenomena for developing a coherent account of moral judgement. In turn, an account of moral judgment must also speak to the existence of moral agreement in a secular, morally pluralistic society. How pluralism, agreement, disagreement are understood influences, in turn, how bioethics is understood.

V. The Bioethics of Friends, Strangers, and Acquaintances

The different possible types of agreement or disagreement makes it difficult to understand moral judgment—and the languages of judgment—in the secular context. Health care, because of its public context brings together diverse moral viewpoints, the reality of agreement and disagreement, in the attempts to resolve the moral issues of bioethics. The issues of bioethics introduce concrete examples of moral pluralism in a secular society and in doing so raises philosophical questions of how different, some times opposing views, are to be negotiated in resolving moral dilemmas. Furthermore because health care is a public concern and utilizes resources of the common good bioethics introduces questions regarding the role of the state,
regulation and the law. Issues in bioethics often involve issues of public policy and the role of the state. The place of government has been shaped by (1) traditional concerns of the state for the protection of "life" and "incompetents", (2) the deployment of common resources in health care as well as in biomedical research and education, (3) the role of the state as the principal agent of society in regulating the health care professions. Bioethics, as a discipline, has been involved in making judgments in both the general secular context as well as in the context of public policy.\(^2\)

Discussions of "moral judgments" in bioethics have come to include not only judgments about what should or should not be done in particular cases but what the state should or should not allow in terms of health care policy and law (e.g. prohibitions of interstate commerce in organ sales, or assisted suicide). Health care, unlike many areas of the moral life, often involves the state. The state frequently acts a resource for common health care projects. Because issues of health care often involve issues of life and death, populations which are particularly vulnerable, the state, traditionally understood in the West, has important interests. At the same time health care is very personal and it often reflects particular moral views of human life and obligations. It is at once very personal and very public. The mixing of these very different discussions often
has led to unnecessary confusions in that judgments about what one holds to be morally permissible in particular cases is often confused with judgments about what the state ought or ought not allow. In general the libertarian position seems to win by default in that there seems to be little justification for coercive state authority beyond minimal considerations. The broad and general secular health care law and policy level becomes, by in large, empty and content-less. There is, however, the level of particular communities, with particular moral visions. The general interchange between citizens of a secular state, even though they may have particular moral commitments and visions, is guided by toleration. However, it does not preclude the possibility that individuals, with different moral perspectives, can meet, exchange views, and understand moral judgments at the object level. Such agreements will, however, be limited in their justificatory power and one should not conclude that content-full discussions can be shared in the forum of the large scale state. Just as different degrees of "agreement" help to understand moral judgment, so too the different degrees of communal relationships can further clarify judgments and the language of judgments.
a. Moral Strangers:

Some have focused on the questions of morality and public policy and the interchange between "moral strangers" in a secular state. One of the best known explorations of this area is that of H. Tristram Engelhardt, Jr. who convincingly argues that the cardinal moral principle in a secular state and a morally pluralistic culture is the principle of permission.\textsuperscript{24} Engelhardt argues that there are two tiers of moral discourse. There is the tier of the broad secular state in which there can only be discourse that is empty of content. There is also the tier of particular moral communities in which people share contentful understandings of the moral life; that is, goods to be pursued and ways they can be pursued. At the secular level men and women meet as moral strangers who do not share a common moral commitment and language while at the communal level they meet as moral friends who do share common value commitments and rankings. The state is morally limited in the policies and laws it can enact bearing on health care or other areas of life.

On the secular level Engelhardt stresses that the principle of permission is the cardinal principle for interchanges between health care providers and recipients. All (providers, patients, institutions), are free to act according to their own moral lights/values as long as they do not intrude on the freedom of others and act by
agreement. We are, the argument goes, moral libertarians by default at the level of secular discourse. If people truly meet as moral strangers they will find it difficult to understand the moral judgements made by one another. A stranger is an alien, one who is from another place. In the case of moral strangers, there will be unfamiliarity with the moral commitments and reasons of the stranger.

b. Moral Friends:

Engelhardt sets strangers in contrast with moral friends. Friends are those who share common moral commitments and views of the moral world. It seems a prerequisite that they would also share a common moral language. Friends are able to understand the explanations of judgments made by one another. Indeed, in such familiar contexts moral judgments may need little explanation. Friendship would not seem to preclude disagreement in that friends may agree on a range of possible actions but disagree on a particular choice. While the secular ties may be very limited, those limitations do not preclude the possibility of rich, content-full moral life within particular communities. As "health" is a moral concept as well as an empirical one, a person's understanding of health will be shaped by one's moral community. Indeed much of the history of the West has been shaped by institutions with particular moral visions.
c. Moral Acquaintances:

There is, also, a grey area underdeveloped by Engelhardt that one can see illustrated in the exchanges of men and women in the object level of judgment. This is the tier which can be characterized as the exchange between "moral acquaintances". At this tier I want to suggest that it is possible for those whose substantive moral commitments do not coincide to reach agreement at least on the object level of moral judgment and to understand explanations given by others for the judgments reached. Indeed, Engelhardt's own work on the allocation of public resources through democratic processes, leads one to re-think the strong dichotomy between notions of moral strangers and friends. In a number of places Engelhardt characterizes the moral life as being concerned with "beneficence"—doing the good. The dilemma of going the good in a secular age is the pluralism of views of the good with no way to arbitrate between them.

In speaking of friendship Aristotle describes many forms of friendship and the necessary conditions for each form. One general condition is mutual recognition and the bearing of good will. Aristotle's insights lead us to explore the possibilities that between strangers and friends there is the possibility of moral acquaintanceship when people those who share the conditions of recognition and
peaceable negotiation. People may come from different communities, speak different languages, yet just as men and women can come to share some understandings of others' natural languages so too people may be able to arrive at certain understandings and insights of different moral languages.

Jeffrey Stout has proposed a model of moral discourse centered on finding ways which allow diverse moral languages and traditions to speak with one another. He speaks of moral thought as "bricolage" (a term he borrows from Levi-Strauss) by which he means an eclectic borrowing and working with the language at hand. Stout believes that a pluralistic society can achieve a common moral discourse and from it create a tradition. His hope, however like Beauchamp and Childress, misses the difficulties of moral language where the same word can have many different meanings. While I think it is possible to achieve some common agreement on the object-level and understanding on the level of reasons, it nonetheless goes too far to think that such eclectic borrowing can create a common moral discussion. The extent to which the meanings of the moral terms can be shared will be a matter of degree.

The possibilities of acquaintanceship are both limited and tenuous. In the geography of moral judgment moral friends, acquaintanceship and strangers may meet and argue on the level of judgments about objects. But that agreement
may be nothing more than accidental. The strength of agreement can be tested by turning to the judgments about justificatory reasons. Here it is possible for acquaintances to understand the explanations of one another—while not sharing a commitment to the justificatory power of the explanation(s). The ability to understand, at least in some limited way, the explanations of others will be a necessary condition for moral acquaintances to meet and negotiate resolutions to moral controversies. Agreement among moral strangers, who desire to live together peacefully, will in the end depend on a procedural morality and not on the explanations of judgments.

VI. Conclusions

When one makes a moral judgment, one speaks in a language. Judgments are expressed in is a language which conveys certain views of the moral world: its values and rationality. Judgments about the choice of action reflect one's view of the moral world and moral rationality. The enterprise of bioethics is conceived as a secular enterprise—one without allegiance to a particular moral "faith". A secular context, which is morally "neutral", is a context with the possibility of many different moral worlds and languages co-existing. Just as there are a variety of moral points of view, and views of moral reason, so too there will
be a variety of understandings of "bioethics".

Such diversity will often be masked by the many different moral words and expressions which are used interchangeably in the moral judgments of bioethics. Such usage often conveys the impression of agreement in the context of diversity. One must resist the temptation to fail to examine the depth of such agreement and interchangeability of language. For any moral judgment carries implicitly other judgments. For any moral judgment there are judgements about what constitutes good moral reasons, what is the proper ranking of moral values, and what rules of inference apply. One needs then, to examine the extent and depth of agreement. Agreements and disagreements occur at different levels. They must be carefully examined if one is to extend the object agreement beyond a particular judgment to develop wider areas of agreement.

In the midst of such overlapping of moral language and values it is possible to understand a moral judgment yet understanding does not constitute agreement. One can argue that the evidence used to support the judgment is too broad, too narrow, or irrelevant. Justifying moral judgements at the level of explanation looks like question begging in that one builds into the theory, principles or descriptions of the case, moral concepts or values. Moral standards involve substantive commitments which shape the way we understand
moral dilemmas. They convey the goodness or badness of agents or the rightness or wrongness of actions which do not depend on our thinking them so or our preferences.

The temptation for philosophy is to look either for a place in which to stand whereby one can evaluate the different views of moral reason and substantive moral standards or to treat standards as arbitrary; that is, chosen capriciously. Throughout I have tried to argue that the epistemic problem is that there is no view from nowhere which allows us to compare and evaluate the different substantive moral standards or views of rationality. But the absence of independent evaluative criteria does not mean that commitments to such standards is "arbitrary". The incommensurability only reflects the logical possibility of different reactions to moral dilemmas. The work of moral philosophy then becomes the work of translation, elucidation and geography.

Notes


2. This point has been made, in a far more developed way, by a number of feminist writers. See, for example, A.L. Carse, "The Voice of 'Care': Implications for Bioethical Education", The Journal of Medicine and Philosophy, (16), 1991, pp. 5-28; C. Gilligan, In A Different Voice: Psychological Theory and Women's Development, (Cambridge: Harvard University Press), 1982; E.F.


5. See chapter two


11. For example, see Pierre J. Payer, *Sex and the Penitentials*, (Toronto: University of Toronto Press, 1984).


15. See discussion in Chapter Two.


19. See McMullin.


24. One can see an important shift in Engelhardt's language. In The Foundations he speaks of "autonomy" while in later works, such as the Brookings Institution paper, "Why A Two-Tier System of Health Care Delivery is Unavoidable", he speaks of the "permission". The shift in language is, I think, for sake of clarity; that is, he wants to make clear in appealing to autonomy he is not beginning with a particular moral sense.

25. See, for example, his discussion of "limited" solidarity in the paper "Why A Two-Tier System of Health Care Delivery is Unavoidable".


29. Stout, p. 74.

30. Stout, pp. 74-77.

31. It is a matter of dispute as to whether or not contemporary Western society speaks in a coherent moral language. Beauchamp, Childress, Jonsen, Toulmin, and Donagan all assume some form of
"common morality" and, presumably some common language. MacIntyre and Engelhardt argue to the contrary. The more troubling point, raised by MacIntyre and Engelhardt, is that individuals often fail to speak a coherent moral language and are unaware they are speaking incoherently. If this is the case then it will be very difficult to understand a moral judgment. Perhaps the best a bioethicists, or philosopher, can do is such situations is point out the incoherence.
BIBLIOGRAPHY


"Shabbat," *Babylonian Talmud*.


