**BIET 65: Advanced Seminar in Bioethics**

**Course Syllabus: Winter, 2001**

**9 Tu Th in Briggs Hall 224**

**Instructors:**
- David S. Hathaway, M.D.
- William S. Boardman

**Phone:**
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**Office/Contact Information:**
- 213 Main Hall

**Required Texts:**

**Course Description and Plan:**

This course will undertake an in-depth examination of a selection of issues in biomedical ethics. The issues we will focus on have been prominent in recent years and will likely continue to occupy a prominent place in the field over the next decade. The course will include careful examination of the philosophical theories of ethics which have guided medical ethics since its inception, case-based analysis and historical contextualization of the issues.

The course is divided into six modules:

1. Theories of Medical Ethics
2. Rationing, Managed Care and Health Care Policy
4. Ethical Issues in Reproductive Technology and Prenatal Genetic Testing
5. Genetics
6. Reforming the American Medical System

See the schedule of topics and readings beginning on p. 2 for specific dates.

Requirements:

The final course grade is determined by:

1. Papers There will be three papers, of approximately 4-8 pages; each paper will count for at least 20% of the course grade.

2. Participation in classroom discussion This will count for 10% of class grade.

3. Final Exam There will be a final exam which will count for about 30% of the course grade. We will give further information about the exam in the last week of class.

Schedule of Topics and Readings:

The readings will correspond as much as possible with the specified class schedule. Variations will occur as we get ahead or fall behind the listed schedule. An asterisk indicates reading materials that are available on reserve in the library, or are available on the internet under

Referenced textbooks will be:
Pence, Gregory E., Classic Cases in Medical Ethics (McGrawHill, 2000); Monagle, John F. and Thomasma, David C., Health Care Ethics (Aspen, 1998);
*Arras, John D. and Steinbock, Bonnie, Ethical issues in Modern Medicine (Mayfield Publishing Company, 1999)-on reserve; and

Under each MODULE heading is listed the entire reading list for that section, but we will attempt at the conclusion of each class to indicate the "must" reading for the following class. If we fail to do so, please call our attention to it. Our objective is to make the course as "user friendly" as possible and thus maximize your opportunity to learn without communication obstacles.

January 9 [first day of class] Topic: The Course Syllabus, Comments, and a Case History

Reading List for January 9-16:
Pence, *Classic Cases in Medical Ethics*, pp. 1-25.
*Arras and Steinbock, *Ethical Issues in Modern Medicine*, Emanuels, pp. 67-76.

January 11 [end of 1st week] Module 1: Theory

Topic: The Variety of Philosophical Theories in Medical Ethics

January 16 [beginning of 2nd week] The same topics continued.

January 18 [end of 2nd week] Module 5: Genetics

Reading list:

Pence, *Classic Cases in Medical Ethics*, pp. 417-446.
Pence, pp. 138-141; 388-416; and 417-432;
*Arras and Steinbock, pp. 481-496 (National Bioethics Advisory Committee).

January 22 Monday 8:30 p.m. in 102 New Science Hall
PUBLIC LECTURE:
Gregory Pence, Ph.D., "Who's Afraid of Cloning? (Most of What You Believe about Cloning is False or Prejudiced.)"
(Professor, University of Alabama Medical School at Birmingham; author of our text, *Classic Cases in Medical Ethics*)


Guest Speaker: Gregory Pence

Reading list Jan. 23 & Jan 25:

Monagle and Thomasma, *Health Care Ethics*, Beeson and Jennings, pp. 29-41
Pence, *Classic Cases in Medical Ethics*, pp. 196-217
Pence, *Classic Cases in Medical Ethics*, pp. 169-195

January 25 [end of 3d week] Module 4 continued from Thursday.
January 30 [beginning of 4th week] Module 2: Rationing, Managed Care, and Health Care Policy

Reading List Jan. 30-Feb. 13:

Pence, *Classic Cases in Medical Ethics*, pp. 320-338
Monagle and Thomasma, *Health Care Ethics*, pp. 442-448 OR

February 1 [end of 4th week] Rationale and Theory of Managed Care and Rationing


February 6 [beginning of 5th week] Dialysis, Selection Criteria, and The God Committee

Pence, *Classic Cases in Medical Ethics*, pp. 320-338.

February 8 [end of 5th week] Healthcare As a Business

Monagle and Thomasma, *Health Care Ethics*, pp. 442-448 OR

February 13 [beginning of 6th week] Topic continued

February 15 [end of 6th week] Mid Term Reading Period  No class today.

February 20 [beginning of 7th week] Case History and Model Ethics Committee

Guest Speaker: Representative Gregg Underheim (It is confirmed that Mr. Underheim will join our class for discussion.)
February 20, Tuesday, 7:30 p.m. in the Art Center Auditorium (NOT in 102 New Science Hall)
PUBLIC LECTURE:
Gregg Underheim, "Tensions in Health Care."
(Representative of the 54th District in the Wisconsin State Assembly since 1987 from Oshkosh; Chair of State Assembly Committee on Health Care)

February 22 [end of 7th week]

Guest Speaker: Attorney Paul Grimstad, Specialist in Medical Litigation Cases
Topic:

February 27 [beginning of 8th week] MODULE 3: End-Of-Life Issues: Euthanasia, Futility, and Physician-Assisted Suicide

Reading List March 1-March 6:

*Arras and Steinbock, Ethical issues in Modern Medicine, U.S. Bishops Pro-life Committee, pp. 224-31
Monagle and Thomasma, Health Care Ethics, Hill, pp. 279-287.

March 1 [end of 8th week] End-Of-Life Issues

Pence, Classic Cases in Medical Ethics, 29-51

March 5, Monday, 7:30 p.m. in 102 New Science Hall
PUBLIC LECTURE:
Nancy Cummings, M.D., "Autonomy in End of Life Decisions."
(Senior Biomedical Advisor, National Institute of Diabetes and Digestive Diseases and Kidney Diseases, National Institute of Health, Bethesda, Maryland; extensive publications include the chapter on “Ethical and Legal Considerations in End-Stage Renal Disease" in Diseases of the Kidney, Vol. III, Schrier and Gottschalk)
March 6 [beginning of 9th week] **End-Of-Life Issues**

Guest Speaker: Nancy Cummings

March 8 [end of 9th week] **Module 6: Reforming the American Medical System**

Reading list:

Pence, *Classic Cases in Medical Ethics*, pp. 447-473
See excerpt on problems with the doctrine of substituted judgment

March 13 [beginning of 10th week] **Case History and Model Ethics Committee**

March 15 [end of 10th week and last day of class] **Review**

March? [time & date to be announced) final exam (three hours)

**Links:**

- Two sites with information on Human Cloning (taken from Professor Pence's web site):
  - www.humancloning.org/
  - www.biospace.com/b2/whats_new/dolly.cfm
- LINKS to U.S. Case Law on Abortion
- FURTHER READING:
  - Jeff McMahan, "Killing, Letting Die, and Withdrawing Aid," *103 Ethics* 250-79 (1993) [In the Lawrence library: the best discussion of these distinctions which Boardman has had the pleasure to read.]
Lexis-Nexis Universe

The Lexis-Nexis link is available from the Lawrence campus only; it is very useful for finding historical cases in state law, federal cases which are difficult to find elsewhere, and law journal articles. Note that Lawrence's site license allows one to read, and to make a printed copy of, whatever one finds, but to copy electronically only "insubstantial portions." Because there is often no other way to look at these cases without driving to Madison or waiting for weeks for a copy through inter-library loan, this is very convenient despite its limitations. See an example of how to use the Lexis-Nexis site.

Sanford H. Kadish, "Letting Patients Die: Legal and Moral Reflections," 80 California Law Review 857 (1992) (advance directives lack the full moral force of contemporary choices and should yield to the current compassionate interests of the patient, as well as to the patient's choice to live even if less than fully competent; courts have gone astray by invoking the principle of autonomy in substituted judgment situations, because autonomy cannot be at issue when the patient has made no choice; preferable would be a decision based on the best interests of the patient, taken to mean a decision in conformity with the values and commitments that guided the patient's competent life, and one regardful of the quality of the experiences of the present patient.) [available via Lawrence's Lexis-Nexis site]

Louise Harmon, "Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment," 100 Yale Law Journal 1 (1990) (discussing substituted judgment--as developed in 19th century England to govern expenditures of lunatics' income--as an instance of a legal fiction) [available via Lawrence's Lexis-Nexis site, and also in our library, which subscribes to the Yale Law Journal]

Excerpt from Harmon's article, pp. 65-68:

"There are two aspects of the borrowing of Lord Eldon's legal fiction ['the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.' Ex parte Whitbread, 35 Eng. Rep. 879 (Ch. 1816)] that strike me as irresponsible. The first has to do with the application of the doctrine of substituted judgment to idiots.

Anyone who understood the structure of Lord Eldon's legal fiction, and how its application came to be limited by the imposition of the evidentiary constraints, should have seen that it would not work for an idiot; for that matter, it would not work for a lunatic who left no evidentiary trail of his intent. The first pretense of Lord Eldon's legal fiction, that the idiot has the capacity to possess intentional states, flies in the face of reason. Of course, that might be true for a lunatic as well, but we put up with that pretense if there is sufficient evidence of his former intentional states. But someone like Joseph Saikewicz never had any former intentional states. He came into the
world with a deficient mental apparatus, and he was going to leave it in the same way. How could we ever put up with a pretense that an equity court had access to what the idiot was thinking, when the idiot had never thought before? After all, the common law had treated the lunatic and the idiot differently since the twelfth century, and for good reason. The lunatic had a past and potential future as a rational agent; the idiot did not. To treat them suddenly the same should have been too far from the truth to be acceptable, too false to tolerate. [fn. 261 omitted]

"If we take the evidentiary constraints seriously, then the doctrine of substituted judgment should not apply in certain situations. It should not be used for the donation of an organ from a mentally retarded person, for example. Or for the sterilization of a mentally retarded person. Or for the termination of life-support systems from either a mentally retarded person, or from a formerly competent person who left us no inkling of his intent. On the other hand, it could be used for the termination of life-support systems from a formerly competent person, provided there is a sufficient residue of words and actions from which to infer his probable intent. But many of the decisions do not take the evidentiary constraints seriously. Lord Eldon's legal fiction was lifted from Whitbread without any sensitivity to its subsequent history. In this way, it was borrowed irresponsibly.

"The second aspect of the borrowing of Lord Eldon's legal fiction that strikes me as irresponsible has to do with the analogy made between the body of the incompetent and property. It is true that there are many characteristics of the human body that make it seem like a suitable subject of property. It is a tangible thing; the possessor of the body does exercise over it some of the absolute dominion and control of which Blackstone was so fond. Labeling a thing as property also marks the limits of state power with respect to that thing. As Blackstone and Montesquieu would have it, the state should not tamper with a person's property, for no public good is greater than a person's right to hold onto his own. If the goal were to assure that the state does not have the power to interfere with a person's body, this could be achieved by attaching the label of property to it.

"By attaching the label of property to the body, however, we also create a relation between the property owner and all others with respect to that body. If we consider the body as property, then certain rights flow from this ownership, among them the right to sell, the right to squander, the right to rent, and the right to give the body away. It is tempting to carry the analogy to its ultimate conclusion, to grant the full panoply of property rights to all possessors of bodies, incompetent or not. And at least with respect to competent persons, we have sometimes yielded to that temptation. The law of gifts, for example, has been heavily relied upon in providing a means of procuring vital tissue for transplantation. [fn. 262 omitted] It is easy to see how this could happen. Gifts are defined as voluntary transfers of property to another without consideration. [fn. 263 omitted] Consenting to the removal of an organ is, under normal circumstances, voluntary and the transferor is not paid for giving his consent. The only significant departure from the definition is the subject of the transfer. A gift is a transfer of property, and a transplantation is a transfer of vital tissue, a transfer of a body part. The law also sanctions the sale of certain regenerative fluids, blood being the most obvious. [fn. 264 omitted] Other vital tissues have been bought and sold, for example, a rare antibody [fn. 265 omitted] or a piece of a student's upper leg. [fn. 266 omitted] The possessor of the vital tissue has something that someone else desperately wants. It therefore seems natural to attach the label of property to that thing, and to grant its possessor the right to sell or give it away.

"There are arguments both in favor of and against the recognition of property rights in the human body. [fn. 267 omitted] My own intuition is that the analogy of body as property, carried to its ultimate conclusion, will result in the exploitation of the poor, the sick, and the vulnerable. There are, after all, other ways to use the law to assure that the state keeps its hands, and the hands of others, off a person's body. This is what the law of
informed consent is designed to do, and that body of legal doctrine is rooted not in an individual's property interest, but in his liberty interest of self-determination. [fn. 268 omitted] We also have the ancient arsenal of criminal law. The state will prosecute individuals who offensively touch or threaten to touch the body of another. We do not really need the law of property to protect our bodily integrity. At the very least, before applying the law of property to the body of the incompetent, we should carefully consider what such an analogy might mean. [fn. 269 omitted]

" [Legal theorists] Gray and Fuller were undoubtedly right: there is virtue in reminding the user of a legal fiction that he is not in fact speaking the truth. The original formulation of Lord Eldon's legal fiction was to do 'that which it is probable the lunatic himself would have done.' That at least is a statement made in terms of probability. Such statements assume the presence of a conditional, regardless of whether the conditional is expressed; they usually take the form: 'If conditions X and Y are assumed to be true, it is probable that event Z would happen.' So, for example, if the judge were considering an allowance from the lunatic's surplus income, he would reason, 'If the lunatic had been closely related to the petitioner, and if he had been fond of the petitioner, and if he had made gifts in the past to the petitioner, it is probable that the lunatic himself would have granted the petition.' The evidentiary constraints imposed on the use of Lord Eldon's legal fiction would force the judge to provide a factual basis to support his probability assertion. It would need to be justified. And while verification of the assumptions made in the conditional might make the probability assertion more likely than not, we would still have to regard such statements with circumspection, to recognize that 'probable' does not mean certain.

" But once the judge stops using the original formulation of Lord Eldon's legal fiction and instead characterizes his determination as a 'substituted judgment,' he is no longer reminded of the probable nature of his assertion. Without uttering the incantation of doing 'that which it is probable the lunatic himself would have done,' the judge may forget that he must justify his statement. He may even forget that he is not himself the lunatic. And once he has forgotten that, there is no longer any need for the presence of a conditional. When we make donative decisions for ourselves, we do not have to utter statements like, 'If I were closely related to the petitioner, and if I had been fond of him, and if I had made gifts to him in the past, then I would want to make a gift.' We just make the gift; there is no need to say why. Once the judge steps into the Alice in Wonderland agency relationship created by the doctrine of substituted judgment, attempting to determine what 'X would desire if X were still a being capable of having beliefs and desires,' he runs the risk of becoming X, of confusing the probable donative intent of another with his own intent. It is no wonder that he might merge his identity with the lunatic. No wonder indeed. [fn. 270 omitted]"

• The Appleton International Conference: DEVELOPING GUIDELINES FOR DECISIONS TO FORGO LIFE-PROLONGING MEDICAL TREATMENT; the final report from the September 1992 edition of the Journal of Medical Ethics, Volume 18: Supplement.
• The Appleton Consensus: Suggested International Guidelines for Decisions to Forgo Medical Treatment, Study Edition (1990) edited by John M. Stanley. This is an interim report; the final, 1992, report is listed above.
• Text of Wisconsin's Declaration to Physicians. Living Will form.
• Text of Wisconsin's Power of Attorney for Health Care form.
• American Medical Association: help on Advance Directives
• Partnership for Caring: Advance Directives for a variety of states.
• Biomedical Ethics in the NEWS
Home Page for Interdisciplinary Area in Biomedical Ethics.

Boardman's OFFICE HOURS.

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