

G. DWORKIN ON CONSENT & REPRESENTATION

BIOETHICS: AUTONOMY & HEALTH (FALL 2012)

LAURA GUIDRY-GRIMES

ANALOGY: THE POLITICAL CONTEXT

- ✗ When is it rational or pragmatic to hand over decisional authority to a representative?
- ✗ What are the obligations of a representative?
- ✗ What are the standards of consent for authorizing someone as a proxy decision-maker?
 - + Explicit vs. tacit vs. inferred vs. hypothetical ?
 - + “Consent serves as a check on the power of those agents (political or medical) who are making decisions that affect one’s interests in significant ways” (90)
 - + Legitimate representation does not always require consent



ANALOGY: THE POLITICAL CONTEXT

✘ Views of the role of representatives

+ Descriptive

+ Symbolic

+ Ascriptive

+ Interest

Similar positions in
medical contexts



PROXY CONSENT

- × Crucial questions:
 - + *Who* should be the representative?
 - + *What criteria* should the representative use to make decisions for another?
- × Can explicitly authorize someone as proxy/surrogate through advance directive
- × In the case of a never-competent patient (child, profound developmental disability), there has been no *consent* to authorize the proxy

PROXY/SURROGATE STANDARDS

× Best interest standard

+ Which of the viable options would promote the most net benefit for the patient when we subtract net costs

+ Difficulties

- × What counts as a benefit?
- × Which interests should be prioritized?
- × How should benefits and costs be weighed?
- × Should third-party interests be considered?



PROXY/SURROGATE STANDARDS

✘ Substituted judgment standard

- + What the patient would have consented to if the patient had capacity
- + Requires empathic engagement, knowledge of previously expressed wishes or life plans, and consideration of past, current, and projected interests
- + Tricky when patient has never been competent or will never be competent again (“would have consented to”...given what condition?)

Terri Schiavo



AUTONOMY & LIBERTY: REFRESHER

- ✘ Can have limited liberty without being limited autonomously and *vice versa*
- ✘ **Liberty** “focuses on what a person wants to do at the level of action [first order]” (106)
- ✘ **Autonomy** is the “capacity to reflect upon and adopt attitudes toward desires, wishes, and values [second order]” and considers how the person came to have those preferences (106)



AUTONOMY & LIBERTY: REFRESHER

- ✘ “Autonomy is a richer notion than liberty, which is conceived either as mere absence of interference or as the presence of alternatives” (107)
- ✘ Paternalism undermines autonomy, not liberty
 - + Substitution of one person’s judgment for another’s
 - + Undermines active agency and inquiry
 - + When morally problematic, it disrespects the person as a person

OVERRIDING AUTONOMY OR TURNING TO A PROXY

× Contractualist test:

+ “act in such a fashion that our actions are both understandable to ourselves and acceptable to others” (115)

× Emergency



× Incompetence



× Waiver



× Therapeutic privilege

+ Weak version: Promote long-term autonomy



+ Strong version: Prevent harmful physical or emotional state or mistaken treatment decision



Does it pass the contractualist test?

THE CASE OF JOSEPH SAIKEWICZ

✘ 67 year-old man with profound cognitive disability (IQ of 10) is diagnosed with leukemia. He has been institutionalized almost his entire life, and the nursing staff know him best. He is known to have an extreme aversion to pain.

+ If you were his proxy:

- ✘ Would you consent to painful treatment?
- ✘ What standard would you use to make this decision?
- ✘ What considerations would guide your decision?

QUESTIONS? COMMENTS?