

FEINBERG ON FAILURES OF CONSENT

Ethics: Autonomy & Health (Spring 2014)
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Before We Begin: Case Analyses

Break into groups to discuss cases.

- What decision would you suggest as a clinical ethicist in these cases?
- What is the strongest objection you can think of against your position?

Different Levels and Types of Inquiry

□ At the level of law/policy

- “Yet the law cannot do without rigid line dividing ‘standard persons’” who have capacity from those who do not (326)
- Qualifications can vary according to type of proposal, legal relation, branch of the law, status to be created

□ At the level of case-by-case determinations

- What should be done in **this** case for **this** patient given **this** patient’s **particular** circumstances, beliefs, condition, history, etc. ?
- What leeway exists within the institutional/legal confines?

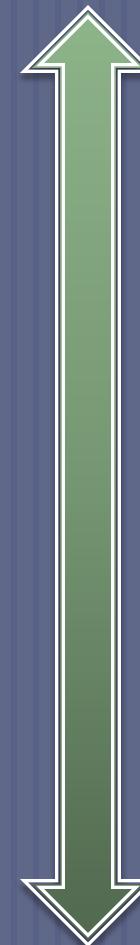
Incapacitation

- Of volition
 - “can’t help it”
 - “against his/her will”
 - “incapable of having a will in respect to some option” due to distortion or defect
- Of cognition
 - mistaken/false belief
 - undeveloped or impaired condition
 - deficits in memory, attention, belief formation
 - inability to care about options or understand communications

Can be permanent, temporary, or episodic

Standards: Voluntariness & Harmfulness

- Standards for voluntariness (i.e., how much incapacity is tolerable) depend on risk to self and others
- Law privileges harm to others (think: Mill)
- Also depend on *type* of harms that are reasonable to expect or experience



More risk
Higher
standards

Less risk
Lower
standards

Parallels in Medical Contexts



□ Minors

- ▣ Insufficient voluntariness and cognition for many tasks
 - Lack of experience, undeveloped capacities, vulnerability, susceptibility to coercion and exploitation
- ▣ “Insofar as children are (or would be) capable of consenting voluntarily, it is indefensible paternalism to prevent them from doing so” (331)
- ▣ Do you agree with Feinberg that there is a duty to promote an “open future” for a child? What might this mean for the limits of parental authority?

Parallels in Medical Contexts

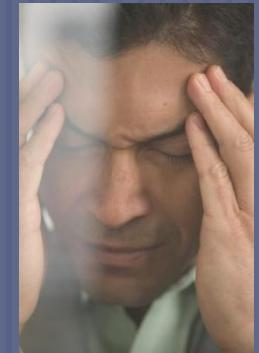
□ Intoxication

- Can lower cognitive capacities and hamper volition, so person acts uncharacteristically
- “if a thoroughly drunk person is presented with a difficult option requiring his careful consideration and likely to bear very heavily on his interests over an extended period, his intoxicated decision would be so far from being voluntary that it would be unfair to hold him to it” (339)
- Case: Medication has side effects of warping patient’s cognition and lucidity, resulting in changed preferences re: organ donation



Illness, Pain, and Emotion

- Can distract attention from options, details, prior preferences and values
- When should the decision nonetheless be respected?
 - Can the decision be postponed?
 - Are the factors from which attention is diverted crucial for the choice at hand?
 - Is the situation presenting the decision causally linked to the decrease in volition or cognition?



Discussion Questions

- Given that incapacity can be permanent, temporary, or episodic, what are some of the practical limitations for respecting autonomy when the patient shows some volitional or cognitive deficits?

- If a patient is suffering from significant, long-term pain, how should physicians and nurses respond to expressed wishes—especially if those wishes are unusual or result in self-harm?



Questions? Comments?