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INTEGRATING LEGAL AND PSYCHOLOGICAL PERSPECTIVES ON THE RIGHT TO PERSONAL AUTONOMY

INTRODUCTION

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RESPECT for the right of the individual to self-determination permeates our legal history. Although there are those who, because of the vagaries of constitutional interpretation would question whether certain decisionmaking rights are “fundamental,” it is not difficult to recognize the importance of these rights. You need only imagine being sterilized against your will, being forcibly administered mind-altering drugs, or having someone other than yourself decide that you are not to be resuscitated if you go into cardiac arrest. Undoubtedly, most of us would see these actions as violations of our liberty or our dignity.

And yet, we are quite ready to tolerate such actions when the person affected is a child or is elderly, mentally ill or mentally retarded. Why? Because people in those groups “lack the capacity to exercise their decisionmaking rights” or because “it’s for their own good.” But do they lack the capacity? And is it for their own good? It was precisely these questions that the Twenty-

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(1563)

Sixth Annual Villanova Law Review Symposium was designed to address.

Because questions regarding decisionmaking capacity and regarding the impact that granting or denying decisionmaking rights has on individuals are psychological in nature, the symposium drew upon the discipline of psychology. Because these questions are to some degree empirical—that is, “capable of being . . . verified or disproved by observation or experiment”¹—the symposium called upon psychological science. Although the ultimate debate is between the competing values of beneficence and autonomy, it was hoped that psychological science could bring a measure of objectivity to the debate. The objectivity of science cannot replace our values, but it can help us determine the degree to which those values are served.

The symposium participants were chosen for their demonstrated commitment to the less powerful members of our society. They also were chosen for their wealth of knowledge of both law and psychology, as well as their extensive practical experience. On October 26, 1991, they came to Villanova Law School and presented their thoughts on integrating legal and psychological perspectives on the right to personal autonomy. The audience was composed of law students, law professors, lawyers, judges, psychologists, psychiatrists, social workers, advocates and consumers of mental health services. The symposium participants have expanded upon the ideas presented on that day in their contributions to this issue of the *Villanova Law Review*.

In his article, Professor Donald Bersoff examines recent United States Supreme Court decisions concerning the rights of the mentally disabled, children and other vulnerable groups to make decisions that directly bear on their own interests. Professor Bersoff argues that the Court has erred in failing to fully weigh autonomy in the balance between beneficence and autonomy. He further argues that the Court has erred in ignoring social science research that supports the capacity of these vulnerable populations to make competent decisions. He contends that both legal and scientific analyses support the idea that autonomy is to be preferred to state-imposed beneficence.

While Professor Bersoff argues that psychological science supports the extension of autonomy rights to children in addition to other vulnerable groups, Professor Elizabeth Scott challenges

1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 743 (1971).

the theory and research supporting the argument for greater autonomy for children. Professor Scott and Professor Bersoff agree that if the decisionmaking capacities of adults and minors are more alike than is typically assumed by the legal system, then the justification for the paternalistic stance of contemporary legal policy toward minors is weakened. Professor Scott, however, asserts that advocates have overstated matters in claiming that research demonstrates that adolescents are indistinguishable from adults in their decisionmaking capacity. She also argues that advocates, in using an informed consent model of decisionmaking, have not considered a broad range of developmental differences between adolescents and adults, most notably, differences in judgment. According to Professor Scott, such developmental differences may support differential treatment of adolescent and adult decisionmaking.

Although Professors Scott and Bersoff disagree to a large extent, they do agree that scientific research can contribute to our understanding of similarities and differences between adolescent and adult decisionmaking. They assert that a better understanding of such similarities and differences may lead in turn to more satisfying treatment of adolescent decisionmaking by our legal system. Both Professor Scott and Professor Bersoff point to contradictions between the treatment of children in civil contexts and the treatment of children in criminal contexts. They agree that greater autonomy should be accompanied by greater accountability; if adolescents are given the power to make decisions for themselves, they must be held responsible for the consequences of their decisions. Perhaps most significantly, as Professor Scott points out, both she and Professor Bersoff are motivated at least in part by “beneficent” concerns for adolescent welfare.

Like Professor Scott, contributors William Altman, Patricia Parmelee and Michael Smyer are critical of traditional informed consent doctrine. They focus specifically on issues surrounding informed consent for medication, for “do not resuscitate” orders and for care planning that arise for elderly persons living in institutional settings. They consider how psychological perspectives on decisionmaking might improve application of the legal doctrine of informed consent. They assert that incorporating psychological perspectives may help the law distinguish between those situations in which an elderly person’s decisions should be implemented and those in which paternalistic intervention is justified. Moreover, they contend that psychology can help identify

intervention techniques that facilitate competent and voluntary decisionmaking in the elderly.

According to Mr. Altman and Doctors Parmelee and Smyer, the elements identified by informed consent doctrine must be viewed as aspects of an ongoing, dynamic process wherein a person's capacity to exercise decisional autonomy depends on a variety of impinging environmental, psychological and social factors. They posit a complex dialectical relationship between the need for self-determination and the need for security through paternalistic intervention, suggesting that both needs must be met for the healthy psychological adjustment of the impaired elderly. Furthermore, they suggest that individuals' "best interests" are inherently idiosyncratic and can be identified and served only through careful examination of each individual and his or her own circumstances.

Like Mr. Altman and Doctors Parmelee and Smyer, Professor Bruce Winick suggests that allowing individuals to make voluntary choices in matters vitally affecting them may be essential to psychological well-being. Professor Winick begins his article by analyzing the treatment of autonomy values in constitutional and legal doctrine, as well as in philosophical and political theory. He examines in detail how several areas of constitutional doctrine reflect autonomy values. He then argues that principles of cognitive and social psychology suggest that self-determination enhances the ability of individuals to set and achieve their goals effectively, and that the alternative—government compulsion of behavior thought to be beneficial—does not work as well. He illustrates the implications of the political and psychological value of choice in a number of important mental health law contexts. In particular, he examines the concepts of competence to make treatment and hospitalization decisions and competence to stand trial in the criminal process. Professor Winick's analysis suggests a narrow definition of incompetence and a strong presumption in favor of competence.

Perhaps with Professor Winick's strong presumption in favor of competence in mind, Professor James Ellis warns against deprivations of liberty that can occur in the name of granting autonomy and under the ruse of consent, when knowing, voluntary assent was not truly given and may not even have been sought. In his article, Professor Ellis attempts to draw a balance between promoting decisionmaking in people with mental retardation and society's interest in protection and habilitation. He discusses the

nature of mental retardation and the social and political world in which persons with mental retardation live. He examines the contexts in which legal issues about decisionmaking arise in the lives of people with mental retardation, and the unique problems presented by persons with mental retardation. With all of this in mind, he analyzes legal doctrine relating to consent, with particular attention to the United States Supreme Court's 1990 decisions. Finally, he examines how this legal doctrine may apply in the practical problem situations that people with mental retardation may confront in their lives.

Professor Ellis concludes that the interest of people with mental retardation in autonomous decisionmaking in important areas of their lives demands greater respect than the law and service delivery system now offer. Professor Bersoff clearly would agree. Like Mr. Altman and Doctors Parmelee and Smyer, Professor Ellis acknowledges that competence varies with the complexity and importance of the subject matter of the proposed decision and that it is possible to *enhance* the ability of individuals to make their own decisions.

Ironically, readers of this issue of the *Villanova Law Review* may find themselves both more enlightened and more confused, because as the contributors to this issue penetrate the surface of the debate between autonomy and beneficence, they reveal greater complexity. Their articles demonstrate that the discipline of psychology can tell us a great deal about decisionmaking and its cognitive, emotional and relational aspects. Also, psychology can inform us about the consequences of granting or denying the power to make decisions in different contexts. It is clear, however, that more empirical research is needed regarding how people make decisions. In particular, as several contributors pointed out, decisions are made in a social context, and there is a need for more research into the social and relational aspects of decisionmaking. Furthermore, there is room for cross-fertilization between researchers focusing on children, on elderly persons and on persons who are mentally retarded or mentally ill.

Even with the limitations of the present state of research, actors within the legal system can begin to acknowledge psychological factors in their determinations regarding decisionmaking rights. These actors could attempt to match more accurately the rights of the individual and the demands placed on the individual with the needs and capacities of the individual. Such ideas should

be found in courtrooms and judicial orders, not simply in classrooms and lawbooks.

Perhaps one of the most intriguing ideas raised by the contributors to the symposium is the idea of enhancing the capacity of individuals to make their own decisions. Although “empowerment” has become a buzz word used by politicians of all stripes to further their own agendas, these contributors suggest concrete methods for empowering some of the most vulnerable individuals in our society to make decisions for themselves. If we are sincere about empowerment, we must attend to the intrapsychic, social, developmental, educational, cultural, environmental and economic forces that prevent individuals from taking control over their own lives. Although this symposium examined factors relevant to empowering children, elderly persons and persons with mental illness or mental retardation, the same principle applies in other contexts. For example, empowerment of the urban poor requires an examination of those factors that impinge on their ability to make decisions for themselves.

The current zeitgeist appears to favor responsibility and community rights over autonomy and individual rights. However, as the symposium contributors pointed out, autonomy is not necessarily incompatible with responsibility. If we give people the power and the tools to make decisions for themselves, we then have greater justification for holding them responsible for the consequences of their decisions. Furthermore, the community good may be served by allowing individuals the ability to make decisions for themselves to the extent they are able, because making decisions for oneself may lead to a higher level of psychosocial functioning and improved emotional well-being. Ideally, the legal system can begin to develop approaches that foster cooperative decisionmaking while still respecting individual rights.