

Withdrawing artificial nutrition and patients' interests

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Abstract I argue that the arguments brought by Counsel for M to the English Court of Protection are morally problematic in prioritising subjective interests which are the result of 'consistent autonomous thought' over subjective interests which are the result of a more limited cognitive perspective.

Sheather (1) discusses the 2011 ruling of the English Court of Protection against withdrawing artificial nutrition and hydration (ANH) from M, a woman who had been in a minimally conscious state for 8 years at the time of the ruling. Here I comment on a particular aspect of this case: the position taken and argued for by M's Counsel. Sheather writes:

Counsel for M addressed the critical question of whether M's current wishes and feelings might be different from her wishes and feelings when she had capacity. Now that she was in a MCS, her wishes may be very different from those informally expressed before the encephalitis. Counsel held, however, that because her disability is so extreme and that 'her world has shrunk so much; her interests (from her perspective) are now so marginal; and her present self is so fundamentally incapable of

sustained or consistent autonomous thought and direction even on the most basic level’, her previous wishes should obtain. Her contemporaneous interests, according to her Counsel, are too slight to be preferred to the interests she expressed prior to her illness.

Counsel distinguishes between the present interests of M and her past interests, arguing that her past interests should be prioritised (as the quote specifies that when talking of interests we are talking about interests from M’s perspective, I will endorse this terminology and talk of ‘interests’ when I mean ‘interests from M’s perspective’, namely *subjective* interests as opposed to *objective* interests – more on this later). What is interesting here is that Counsel does not argue that it is in M’s current interest for her ANH to be withdrawn. This is important as it raises the possibility that withdrawing ANH may be justifiable despite not being in M’s current interest. The argument appears to be that one should distinguish between the content of M’s present interests and their quality: while the content of M’s present interests may be ‘very different’ from the content of her past interests, that should not count against withdrawing ANH because of the quality of M’s present interests. M’s current interests ought to be given a lower priority than her past interests because they are, in Sheather’s words, “too slight” (1): M’s current interests should be given lower priority because, according to Counsel, “her present self is so fundamentally incapable of sustained or consistent autonomous thought and direction even on the most basic level” (1).

This distinction isn’t new: John Stuart Mill famously distinguishes between higher and lower pleasures, remarking that “It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied” (2). Importantly, in the citation above Mill himself employs his distinction not only by distinguishing between human animals and

non-human animals (human beings and pigs), but also by distinguishing between different human animals, Socrates and the fool. While Mill's first application (human beings and pigs) may be found by some to be defensible, Mill's second application (Socrates and the fool) is obviously in violation of the principle of equality. Prioritising Socrates' interests over the interests of the fool is just elitism: we may rather think that our duty of care towards the fool should take priority over our duty of care towards Socrates exactly because the fool's capacity to care over herself is limited.

A note of clarification: Mill talks of higher and lower *pleasures* while Counsel, in the argument I am criticising, talks of *interests*. Interests are not analogous to pleasures: indeed, even within the utilitarian tradition it is common to distinguish between edonistic utilitarianism and other forms of utilitarianism, where sometimes *pleasures* identify the former while *interests* identify the latter. One may object that the disanalogy between pleasures and interests undermines my argument. But I don't think that anything hangs on this point because on the one hand, as already stated, Counsel is explicitly talking about interests from the subject's point of view – subjective interests; and, on the other hand, Mill, as quoted, talks about subjects being satisfied or dissatisfied, which can be easily cashed out in terms of interests. Having clarified the talk of interests, let us go back to the argument.

The problem with Counsel's argument is that Counsel concedes that M has present interests; Counsel further concedes that M's present interests may not coincide with her past interests; Counsel goes on to argue that M's past interests should be given priority over her present interests because of M's current intellectual state: "fundamentally incapable of sustained or consistent autonomous thought and direction even on the most basic level" (1). Counsel draws a plausible distinction between the intellectual capacities for autonomous thought of M prior

to her encephalitis and her intellectual capacities for autonomous thought after the encephalitis. Implausibly, though, Counsel derives from this plausible difference in cognitive capacities a moral difference, according to which the interests of someone with intellectual capacities for autonomous thought should be given priority over the interests of someone without or with lower capacities for autonomous thought. Obviously in this case both higher and lower interests are attributed to the same person (albeit at two very different stages of her life, such that one may even dispute whether the individual in question, in the latter stage, would actually count as a person); but the distinction between two qualitatively different kinds of interests, one of which may be given moral priority over the other, is one that we cannot endorse without abandoning the principle of equality (3, 4).

It may be objected that exactly because we are talking about different interests of the same person, then there is no place for a worry about equality because there is no one who is being discriminated against. I don't even think that's true, as it could be easily said that, since the present interests of M are being disregarded in favour of her past interests, then M is being, now, discriminated against. That's why I am not persuaded by this objection. But even if one was persuaded by this objection to my argument on the grounds that it is still the interests of M (albeit not her present interests) that are being followed, this would still not be a problem for my objections to Counsel's argument, as the objection has to do with the general implications of Counsel's argument: in short, it is not about equality in the case of M, it is rather about the implications of Counsel's distinction between two qualitatively different kinds of interests for the principle of equality in general which, I have argued, cannot be done justice to by distinguishing between Socratic interests and foolish interests.

My argument should not be overestimated: it does not say nor imply that all interests must be equal. Subjects themselves, for example, can discriminate between different interests of their own, prioritising some of them over others. Similarly nothing in my argument implies equality between human interests and non-human interests (on the lines of what Peter Singer argues for in *Animal Liberation*, say (5)).

I have argued that Counsel's argument appeals to a very problematic principle. In this respect I am neither surprised nor outraged by the Court's decision. But what about M? What should happen to her? I do think that there are important reasons in favour of withdrawing her ANH, but they have little to do with Counsel's argument and are much closer to what M's sister says in her testimony: "What can she possibly get out of life?... It's not a life" (1).

Two possible ways to go here: (A) we should consider the plausible possibility that her current interests do indeed coincide with her past interests; this possibility may be legally problematic because of epistemological worries, but it is theoretically not implausible. (B) We should in our theoretical arguments be as brave as M's sister and also consider judgments that are independent of M's subjective perspective: what can she possibly get out of life? This latter option also has the advantage of being immune to a plausible objection that I can't get into here in much detail: according to this objection M, in her current state, cannot be ascribed any subjective interests.

This is not the right place to develop my positive view, but I rather tend towards B. Notice that M's sister's testimony does not appeal to M's own perspective: it is rather her own value judgement about M's life that her sister is brave enough to formulate to the Court. And in order to endorse this perspective we mustn't abandon the talk of interests either: we need only recognise that there are not just subjective interests but also objective ones. Her sister's "It's

not a life” is a judgment that M herself is no longer able to think, but that does not make it any less true.

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References

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