Legal and Ethical Approaches to Older Lives: Reconciling Rules and Relationships

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Public policy and professional practice regarding older persons grow purposefully out of our fundamental assumptions and convictions about the nature of aging, the characteristics and life circumstances of the aged, and society’s interests and responsibilities toward its aging members. Those underlying value assumptions and convictions are substantially shaped by contemporary legal and ethical approaches to older lives, making those approaches matter deeply. Ideally, gerontological law and ethics, and the policies and practices that they spawn, embrace both the rational application of consistent principles and recognition and respect for the important human relationships that often define and determine the contours of one’s latter stages of life.

The Rules Paradigm

As is true throughout the life span, old age entails many different sorts of personal and financial decisions. Decision making implicates procedural (Who should make the decision?) and substantive (What decision ought to be made?) questions. One central task of the law is to anticipate such questions, endeavor to avoid conflicts among various parties over them, and resolve any disputes about the decision-making process or result that do arise. To pursue accomplishment of this task, the law traditionally and self-consciously has relied upon rules or doctrines that can be rationally, impartially, and dispassionately applied—either before or after the fact—to the requirements of an actual or potential controversy (Bork, 1990).

One of the bedrock legal doctrines applicable to adults in modern America, with no upper age limit, is that of informed consent, which requires those who wish to initiate an intervention into another individual’s life to first obtain voluntary, informed permission from the affected person (Faden & Beauchamp, 1986). The complication that may impede the informed consent process for some older persons is the caveat that only those individuals now possessing sufficient decisional capacity are deemed empowered to make their own decisions and hence to give or withhold informed consent for interventions involving themselves. The law deals in clear dichotomies; either a person presently possesses adequate cognitive and emotional ability to be afforded the right to make personal choices or the person is determined not to possess such ability and is denied exercise of the accompanying rights. In the latter circumstance, the legal system formally empowers someone else to make decisions as a surrogate or proxy for the decisionally incapacitated individual. The doctrine of informed consent recognizes only one authorized decision maker at a time.

This legalistic approach to decision making for the aged (although it affects younger persons also), entailing rational analysis and application of a particular legal doctrine or rule, is nicely illustrated by...
Public Guardianship: In the Best Interests of Incapacitated People? This book is comprised of the report compiled by a prominent team of gerontologists and attorneys about their 2004–2007 Retirement Research Foundation–financed national study of government programs of public guardianship. These programs provide surrogate decision making for adjudicated decisionally incapacitated individuals without relatives or friends willing and able to assume the role of private (i.e., nongovernmental) guardian. Public guardianship programs represent a societal balancing, in the least restrictive or intrusive manner, of two different but related legal doctrines, namely, the right to give or withhold informed consent, on one hand, and the state’s parens patriae authority to protect helpless people from themselves, on the other. The study findings of Pam Teaster and her colleagues are both descriptive (detailing in depth the operational particularities of the various state public guardianship structures) and prescriptive. The shorter prescriptive sections are comprised of recommendations and a Model Public Guardianship Act that rely heavily on enhanced procedural due process protections being written into state statutes and regulations. Such protections would ensure a more accurate and fair application of the informed consent and parens patriae doctrines in specific controversies about decisional authority.

The controlling legal doctrines played out in Public Guardianship and in other interactions between the legal system and older persons and their caregivers all originate in and reflect ethical principles. Modern American ethics, and especially its subfield of bioethics, are built upon an explicit set of fundamental substantive analytic constructs (Evans, 2000). A recitation of these ruling ethical principles must include the following: (a) respect for individual autonomy, or personal self-determination, the first principle among unequals and the underpinning of the legal doctrine of informed consent; (b) beneficence, or doing good, the underlying basis for the legal doctrine of parens patriae (literally, “parent of the land”); (c) nonmaleficence, or avoiding harm; and (d) social or distributive justice (a fair or equitable distribution of essential resources and burdens) (Beauchamp & Childress, 2009).

Principled decision making regarding older persons and others—that is, rational analysis and problem solving predicated on the dispassionate application of clear and distinct ethical and legal rules—has important virtues. Particularly in concrete, discrete controversies or dilemmas, fidelity to an intellectually coherent, analytic application of a priori ethical principles and legal doctrines—in other words, commitment to the rule of law—is likely to yield consistent, reliable, predictable, and stable results that, in the long run, are fairest for the greatest number.

If Not Principled Decision Making, Then What?

The problem with too-heavy reliance on the process of rational analysis and application of agreed-upon principles and doctrines is that frequently the strengths, wishes, and needs of older persons and those around them do not manifest themselves in the form of discrete, individual, immediate dilemmas ripe for definitive resolution. Instead, the kinds of issues that arise in the everyday lives of the aged, in both institutional and home- and community-based settings, often are more mundane, ongoing, subtle, and changing—but crucial nonetheless. In addressing these sorts of issues meaningfully, legal statutes and regulations and a priori ethical principles may be too crude and blunt to be useful instruments.

Ethics, Aging, and Society by Martha Holstein, Jennifer Parks, and Mark Waymack targets the weaknesses of an ethical approach to aging and the aged that is reliant on objective, dispassionate, analytic application of defined principles in the face of challenges commanding more nuance, subtleness, and flexibility than legal doctrine or ethical principles can easily accommodate. As the three philosopher authors straightforwardly announce, “Our purpose in writing this book is to challenge, with the intent of modifying, current thinking and practice about ethics, aging, and old age.” (p. 281). The alternative, largely overlapping and complementary lenses they propose through which to examine and respond to the opportunities and challenges of aging are those of feminist ethics, communicative ethics, and narrative theory. What these lenses all emphasize is the opposite of rational, impartial, dispassionate analysis in the face of actual older persons and caregivers. Instead, the ethical approaches propounded by Holstein and her colleagues push the primary locus of consideration to the real contexts and stories that define and give meaning to the involved older individuals. The central feature that gives substance and texture to these contexts and stories is the presence of various types and configurations of human relationships.

The authors de-emphasize to the point of virtually dismissing the value of the individual autonomy
principle because they hold it to be in contradic-
tion to the debility, vulnerability, exploitation,
and general victimhood with which they elect to
characterize the real lives of today’s elders. This
characterization is particularly true, claim Holstein
and her colleagues, of the many aged whom the
authors label as “marginalized” because of immutable
factors like race and gender; they contrast
this oppressed older majority with the “privileged”
few who, in their view, are undeservedly blessed
with the capacity to experience the joys of a “suc-
cessful aging” and civic engagement and for whom
an array of good, meaningful choices makes truly
informed, autonomous consent something other
than a cruel hoax. For the overwhelming number
of marginalized older persons who are debilitated
and dependent rather than robust and striving
to maximize their independence, Holstein and col-
leagues reject the autonomy principle of authentic
individual decision making in favor of social
responsibilities and responses.

The authors’ unabashed advocacy of social (i.e.,
governmental) solutions to the ethical dilemmas of
aging grows naturally from the vision of the aged
that they draw. In Chapter 6 (“Aging and Public
Policy: A Normative Foundation”), they present
the most direct illustration of the connection
between normative ethics, policy, and practice—
using ethical exposition to promote a frankly political agenda. Although not without validity in
many cases, the authors’ negativity and condescen-
sion regarding the abilities of the older age cohort
as a whole (and especially regarding the very pop-
ulation subgroups that the authors claim to respect
and cherish the most) are overstated and unconv-
vincing to anyone who has had contact with dis-
advantaged elders who proudly strive to exert
opportunities to speak for themselves about impor-
tant life issues.

Reconciling Rules and Relationships

How, then, ought ethics and the law approach
the modern opportunities and challenges offered
by an aging society? On one hand, Holstein and
her colleagues surely are correct that excessive reli-
ance on a hyperrational methodology of objective,
dispassionate application of predetermined legal
doctrines and ethical principles risks creating a
very poor (even potentially inhumane) fit with the
actual, continuous, challenging contexts and sto-
ries that define older persons’ lives. People and
their experiences and surroundings, and most
crucially their relationships with others, are not
cold hypothetical abstractions. Justice Oliver Wend-
dell Holmes correctly observed, “General proposi-
tions do not decide concrete cases” (Lochner v. New
York, 1905), and Judge Richard Posner added,
“Judges expect their pronunciamentos to be read in
context” (Wisehart v. Davis, 2005). A nuanced
approach to the opportunities and challenges that
engage those who care for, and about, the old calls
for a judicious dose of human emotion and intuition.

However, in acknowledging the legitimate role
of emotion and intuition in forging the ethics and
law of aging, we must be careful not to throw out
the baby with the bathwater, jurisprudentially and
deontologically speaking. If legal doctrines and
ethical principles are not always sufficient, they are
hardly irrelevant. Particularism and principlism are
“mutually indispensable” and “synergistic” (Wright,
2008, p. 196). Subjective discourse informed by
emotion and intuition is desirable, but it is not
always enough; sometimes individual, discrete,
time-sensitive controversies involving older people,
their desires, and their interests do develop and
require the kind of definitive resolution that only an
appeal to doctrine and principles can provide.

Good law and ethics demand both a reasoning
brain and a feeling heart, both intellectual and
relational components. The rule of law and principl-
ed ethics are imperative for a civilized society
but only if they account for and honor the unique
life circumstances and narratives of each older
person and those relationships that give each person’s life wholeness and significance.

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