THE DOCTRINE OF SUBSTITUTED JUDGMENT: DECIDING FOR THE INCOMPETENT

by

Cathy Lowy

The problems I am about to consider arise out of some fairly recent American cases; cases in which the doctrine of substituted judgment, which I shall explain in a moment, is applied. I was particularly disturbed by one of these cases and the legal and moral implications of its outcome, all the more so since, it seems to me, it creates difficulties for a promising general theoretical position concerning the justification of paternalistic interference. (The doctrine of substituted judgment seems to me to be an application in the law of a "hypothetical consent" account of justified paternalistic interference, an account which is an articulation of a weak paternalistic position to which I am generally sympathetic. Problems regarding the application of the doctrine, then, are problems for the related account of justified paternalistic interference.) More of this later. For the moment, let us consider the following cases:

(1) A woman suffering from serious brain damage is connected to a life-preserving mechanism (a respirator); there is no hope of recovery - should the life-support mechanism be unplugged even though the fully fledged consent of the patient cannot be had?

(2) A severely mentally retarded man is suffering from leukemia. Some rather drastic chemotherapy is proposed to allow him to live a little longer, should he be given or denied the therapy? His fully fledged consent is unavailable.

(3) A man is suffering from a kidney disease to such an extent that his only chance of staying alive is to be regularly connected to a dialysis machine. Some time after the onset of his illness he becomes senile and demented. Should he be given, (questions of the distribution of scarce resources apart) indefinite treatment by dialysis? His fully fleged consent is not available.

Each of these is an actual American case and each is the subject of a judicial decision. Clearly, the general problem here is that of making decisions on behalf of incompetents; a kind of paternalistic intervention. We may call the judicial process of making decisions for such people, however it is done and in whatever context, the process of 'substituted consent'. Here, I shall only be concerned with one form of such procedures, namely, that made under the dictates of the doctrine of *substituted judgment*.

In what follows, then, I'll indicate how reliance on the doctrine of substituted judgment affected the outcome of each of these cases, and suggest what I think is the broader theoretical position to which the doctrine is related. Then, I'll look at some objections to the doctrine, as well as some difficulties which are related by it for that theoretical position.

The Doctrine of Substituted Judgment

Briefly, and somewhat inaccurately, the doctrine of substituted judgment enjoins the court to ask about the incompetent how he or she would choose if competent and then act in accordance. The applications I shall be considering here are fairly recent; the latest case was heard in 1980. A more common application of the doctrine both in the British/Australian and American system relates to claims on the estates of incompetents by, usually, family members in financial difficulties. (This use can be traced back to *Ex parte Whitebread, A Lunatic*, [2 Mer. Rep. 94 (1816)].) There, under the substituted

judgment doctrine evidence is marshalled to decide whether or not the incompetent would have helped out that impecunious relative had he or she been competent.

In the cases I am examining there is quite a drastic extension of the application of the doctrine to life and death matters, concerning the incompetents themselves; cases in which decisions have to be made on behalf of the incompetents as to whether to accept life-prolonging treatment. So, let us now consider whether an application of the doctrine of substituted judgment can give us a satisfactory answer in any of the cases with which I began. I shall start with the one that disturbs me most; the case of Earle Spring.[1]

Earle Spring contracted a disease of the kidneys and required regular dialysis to keep alive. He consented to the treatment which was continued while he became increasingly and rapidly demented. His son was appointed guardian and eventually applied to the courts to have the treatment discontinued. The case was the subject of a number of appeals until the Supreme Court of Massachusetts decided in favour of the son's request. In the course of the proceedings the father died of causes other than kidney failure. The section of the eventual judgment which concerns us here is this;

> ". . . a competent person has a general right to refuse medical treatment in appropriate circumstances, to be determined by balancing the individual interest against state interests, particularly the state interest in the preservation of life. In stating that balance, account should be taken of the prognosis and of the magnitude of the proposed invasion. The same right is also extended to an incompetent person, to be exercised through a 'substituted judment' on his behalf. *The decision should be that which would be made by the incompetent person, if he were competent, taking into account his actual interests and preferences and also his present and future incompetency.* (my italics) [p. 119]

In the case of Earle Spring the application of the doctrine by the Supreme Court of Massachusetts resulted in the decision that Earle

Spring should not be given any further hemodialysis treatment - that is, that the patient would himself if competent have come to that decision. The evidence for the contention that Earle Spring would have chosen to have his treatment discontinued was the testimony of his family, and in particular his wife's evidence as to Earle Spring's general pattern of desires and proclivities. The court explicitly rejected the opinion that an expression of the views of the ward while competent which would cover the situation at hand was necessary. (It was added that there was clear evidence that the family was a close group, that the wife and son had the father's best interests at heart and that there was no straightforwardly financial considerations involved). Reference was made in the course of the application of the substituted judgment doctrine, to the discomfort suffered by the patient on each occasion of hemodialysis and the clear prognosis that he would have no chance of returning to, in the words of the judgment, 'full cognitive capacity'. As I have remarked, I find the decision in this case intuitively disturbing and later on I shall try to give some systematic explanation of this intuition.

The substituted judgement doctrine was also applied in the case of Saikewicz,[2] a 67-year-old severely intellectually handicapped, (mental age of about 3 years), inmate of an institution for the retarded who contracted leukemia - an incurable condition for which the standard treatment is chemotherapy. This treatment gives some hope of extension of life and the possibility of limited remission from the disease, but it is an unpleasant treatment associated with significant side effects and discomfort. It was clear to expert opinion that Saikewicz would not understand the purpose of the treatment and would be bewildered by it. The Supreme Court of Massachusetts again decided that:

> the decision in cases such as this should be that which would be made by the incompetent person, if the person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the

> competent person. Having recognized the right of a competent person to make for himself the same decision as the court made in this case, the question is, do the facts on the record support the proposition that Saikewicz himself would have made the decision under the standard set forth. We believe they do. [p. 431]

The court gave as reasons for its opinion the following: although most (competent) people *would* opt for chemotherapy given a similar prognosis rather than allow the disease to take its course there are particular circumstances in the Saikewicz case, suggesting that Saikewicz would *not* have, if competent, opted for chemotherapy. The court rejected the lower court's reasoning that Mr. Saikewicz would have refused treatment on the grounds of the expected 'quality of life' he might enjoy even if he were to go into remission *qua* severely retarded person. The court rejected the view because it equated the value of life with some measure of the quality of life - a procedure which endangers respect for the dignity and worth of the lives of such people as Saikewicz. Nevertheless, the court found that when coupled with the negative factors that competent people tend to weigh less heavily in the decision to accept treatment (*e.g.* age, probable side effects, low probability of remission), the fact that Mr. Saikewicz would be unable to understand and co-operate with the treatment justifies the conclusion that he would, if competent, have refused it.

I find this result less disturbing - but I would be even less disturbed if I knew more about the details of the case than is available from the report. Again, I shall try to give some more systematic explanation of this response a little later.

Let us now turn to the famous case of Karen Quinlan.[3] Karen Quinlan fell into a deep coma after having had a combination of drugs and alcohol at a party. She suffered severe brain damage to the extent that medical experts characterized her as being in a 'chronic persistent vegetative state'. She was capable of some

reflex-level functioning, but she had no cognitive function or awareness of her surroundings. Although she was not in a state identified as 'brain death', expert opinion was unanimous that she could not regain normal cognitive functioning. She was maintained in a comatose condition by the use of a respirator without which she was thought incapable of continued life. [It is an irony, and a relevant one, thought I shall not pursue it, that she is still alive without mechanical assistance]. Her father, as guardian, applied for permission to have mechanical intervention discontinued.

The Supreme Court of New Jersey held that the father as guardian, could, subject to qualification act on his daughter's behalf in exercising her right to authorize the removal of the artificial life-support system. In the words of the judgment,

> The only way to prevent destruction of her right [to privacy] is to permit the guardian and family of Karen to render their best judgment, subject to the qualifications regarding consultation in attending physicians and hospital 'Ethics Committees'. . . as to whether she would exercise it in these circumstances. If their conclusion is in the affirmative this decision should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them. It is for this reason that we determine that Karen's right of privacy may be asserted in her behalf, in this respect, by her guardian and family under the particular circumstances presented by this record. [p. 664]

An interesting point which emerges from the quotation is the assumption that everyone would choose as Mr. Quinlan had done on behalf of his daughter - and although the implication is not pursued it is there - hence, Karen too would so have chosen, hence on those grounds the requirements of the substituted judgment doctrine are fulfilled without too much investigation of any of the projected preferences Karen herself might have expressed, or

what her general dispositions might have led one to believe her choice would have been if confronted with the situation. Of the three cases I am least disturbed by the outcome of this one.

So much for the actual application of the doctrine of substituted judgment in some fairly recent cases. These applications have come under some critical scrutiny, but I shall, for a moment reserve those critical points and the promised explanation of my reactions to the cases and take some time at a higher level of abstraction. What I want to do here is to indicate what seems to me to be the theoretical foundation for the substituted judgment doctrine - a hypothetical consent account of justified paternalistic interference.

Substituted Judgment and the Justification of Paternalistic Interference

The doctrine of substituted judgment is very closely related to a set of views about what forms, in general, of paternalistic interference are justified. What does and does not count as paternalistic interference is a contentious issue in its detailed articulation. For my purposes here though, I think it is sufficient just to accept that the interventions with which we are concerned are clear cases of paternalism.

In this context, I am more concerned with the search for general criteria for justified paternalistic interference and in particular, with weak paternalist forms of justification, than with definitional issues. 'Weak paternalists' will allow as justified only those cases of paternalistic interference which are consistent with a relevantly incapacitated subject's own conception of the good. (The weak paternalist will not, for instance, except in unusual circumstances to which I shall return, take into account in deciding whether or not a paternalistic intervention is justified, what a rational person or people in general may be presumed to want as opposed to what the individual who is the subject of the intervention does, or is likely to want.) The weak paternalist's position here

may be captured by a reference of some kind to what the incapacitated subject *would* want given certain conditions. It is this approach which is reflected in the doctrine of substituted judgment. This position might be and is, expressed in a number of ways by different philosophers in a precise set of conditions for justified paternalistic interference. My version of these conditions, is the following:

A paternalistic intervention is justified if:

(i) There is good evidence that the decisions with respect to which the person is to be interfered with are encumbered (encumbrance condition);

(ii) There is no known and available means of removing the relevant encumbrance (removal condition);

(iii) There is good evidence that this person's decision would be supportive of the paternalistic intervention if they were not encumbered (hypothetical consent condition);

(iv) There is a threat of harm to the subject of the intervention (harm condition);

(v) There is no other known and available course of (possibly paternalistic) intervention which would also protect the subject of the intervention from harm, but which preserves a greater range of freedom for him (greater range of freedom condition).[5]

The notion of encumbrance used in the first and third conditions might require some explanation. What is important from the point of view of capturing the position of the weak paternalist is the fact that it conveys the required sense of unusual burdens of a variety of kinds: A person who is blinkered is encumbered with respect to seeing,

someone who dislikes foreigners is encumbered with respect to making friends on a journey, someone who lacks information, is in a highly emotional state, under compulsion or suffers from weakness of will is encumbered with respect to decision making. More precisely, I want to say that a person's decision is encumbered if,

(i) that person is incapable of taking into account salient features of the world relevant for that decision, and/or

(ii) that person is incapable of acting on the decision, (weakness of will is an example here).

The notion of encumbrance although not entirely alien to everyday use is not immediately perspicuous. In the kinds of cases I'm discussing of course, the degree of incompetence of the subjects makes the application of the encumbrance condition entirely clear.

Viewed from this perspective, then, the doctrine of substituted judgment might be seen as a version of the *hypothetical consent condition*. Certainly, it has behind it the kind of thinking that is more precisely exhibited in the conditions for justified paternalistic interference I have just set out. Thus, if the criticisms of the substituted judgment doctrine I have foreshadowed have force there, then they are also to be taken notice of in the more general attempt to find conditions for justified paternalistic interference. Certainly, they count as criticisms of the set of conditions I have just sketched.

Objections to the Substituted Judgment Doctrine

I now want to return to the cases with which we began - and to the criticism of the application of the doctrine of substituted judgment to them; criticisms, which as I have remarked, will have bearing on the general validity of the hypothetical consent account of justified

paternalistic interference. The first line of criticism which I want, on the whole, to reject, is this: in many cases there is not sufficient reliable indication of the incompetent's relevant preferences, for us to be able to surmise what their decision would be if competent.

Indeed, in some cases, those of the young and the congenitally incompetent there *cannot* be any indications (from some earlier part of the life-span) either of an expressed preference, or of a general system of desires and preferences from which it might be surmised what the incompetent's preferences would be if competent. The general answer here is that where no information is available about the prior preferences of a once-competent incompetent, a congenital incompetent or child, we are justified in taking into account generalizations about what people would be likely to want. The most powerful of these will be generalizations which concern primary goods, that is, loosely (very loosely) speaking, those goods which most people can be presumed to want. Thus, if an accident victim in a coma requires surgery to avoid death, the hypothesis that surgery would be decided on by the person if competent, must be framed in the absence of any personal information about him or her.

We may say about Saikewicz, the congenital incompetent, that it is along these lines that the doctrine of substituted judgment is applied to him. We don't find the outcome of the application of the doctrine entirely unacceptable in his case, given the information at hand, because it seems plausible that people in general would choose in his situation as the court chooses on his behalf - and in the case of the never-competent, as I have just suggested, this is the question at issue. (There is of course the further consideration that people who are mentally retarded should not be too easily lumped into a large category of never competent: that their decision making capacities should be carefully recognized and nurtured. Indeed, the doctrine of substituted judgment draws attention to those capacities and what can relevantly be extrapolated from them.)

Some critics make the point that whereas the doctrine of substituted judgment is supposed to ensure respect for the individual, it may, because of the kinds of difficulties involved in its application I have just outlined, be counter-productive in this respect; that in the absence of a clear indication of preference, decisions become, under the guise of an application of the doctrine, saturated with the court's or the guardian's view of what life is worth living - with views about the quality of life. Another way of putting this would be to say that whereas there is an uncontested push amongst law reformers for the equal consideration (in relevant respects) of the incompetent, there might be a danger of undermining that effort by smuggling in pre-conceptions about the quality of the life of (at least some) incompetents. For instance, according to George J. Annas who acted as *amicus curiae* in the case of Spring on behalf of the American Society of Law and Medicine, Spring himself had never expressed an opinion about the kind of contingency about which a decision had now to be made. The court attributed to Spring, if competent, a view of its own of what life is worth living: "The Court's conclusion that Mr. Spring need not be continued on dialysis seems to be based largely on its view that senility is an 'incurable permanent and irreversible illness', and its conclusion that no treatment could restore Mr. Spring to a 'normal cognitive, integrated, functioning existence'."[4] This, argues Annas, smuggles in assumptions about the quality of a life worth living which procedure is counter to the principle of equal treatment of incompetents. (He even fears that medical treatment may be denied to inmates of nursing homes on the sheer grounds that their senility is an incurable condition.) The relevant question here I think is whether the application of the doctrine of substituted judgment makes the consequences Annas is talking about a greater possibility than would other procedures for deciding for incompetents. Annas argues 'yes', but I don't see why this is the case. The alternative methods of decision making *e.g.* a 'straight forward' calculation of the best interests of the patient or an overall utilitarian calculation, (*i.e.* taking into account the welfare of others, such as relatives), are similarly open to difficulties of this kind in establishing in each case *what* the

interests of the patient are.

The criticisms I have canvassed so far relate to the difficulty of cashing the 'if competent' hypothesis where we have insufficient information about the once-competent, and no information about the never-competent. These objections to the application of the doctrine of substituted judgment seem to me not to be insuperable. I want now to raise a problem which concerns a difficulty, for the application of the doctrine to the once-competent incompetent *where there is no lack of information.* (And in fact that is the point that concerns me most in this paper.) Even in a situation where we have excellent evidence of what a person might prefer when competent - do we necessarily want to follow the course indicated by such evidence?

Restrictions on the Application of the Doctrine of Substituted Judgment to the Once-Competent Incompetent

Let us take a hypothetical situation in which our hesitations will become clearer: Benedict who is an excellent mathematician, a mountain-climber and fond father often expresses a horror of the possibility of a life in which his mental and physical powers might be reduced and in which he may not provide the kind of stimulating companionship and wise guidance he now does for his children. Benedict suffers brain damage in a mountaineering accident and his mental capacities are substantially reduced. His wife and children are upset by his new state although he seems to take pleasure in some basic everyday activities like eating, and is capable of warm and friendly relationships (though childlike ones) with other people in the institution in which he now lives. His wife is constantly aware of Benedict's earlier horror of the situation of people similar to his now reduced self. When he contracts a disease requiring substantial and somewhat uncomfortable treatment she applies to the court for his medication to be stopped - a procedure which will lead to his painless but certain death. Taking the doctrine of substituted judgment seriously, on her evidence the court will decide in favour of the application.

Why do I want to resist this outcome as, given the available information, I want to resist the outcome of Spring? Here, I shall give only a summary of an answer. First of all, I resist it not because I think it likely that Benedict has changed his mind, or because there has been a break in Benedict's personal identity at the point of the accident: I want to resist the view that Benedict has changed his mind because it seems to me that that involves having in some sense the same mind to change - and *that* is what Benedict has not got after the accident. One might say that his mind has *changed*, but *he* has not changed his mind. It might, then, be suggested that the reason we resist the application of the substituted judgment doctrine here is just that we now have, after the accident, a person [Benedict 2], to whom the choices and preferences of the spatio-temporally continuous, but different person [Benedict 1], do not apply. I don't now want to go into the difficult question of whether or not this view is in itself acceptable. It is sufficient for my purposes here to say that even if there is such an element in our reaction to the Spring and Benedict cases it cannot be decisive. It cannot be decisive because if there is a break in personal identity in these cases, then, *a fortiori* there is a break in personal identity in the case of Karen Quinlan and cases like it - and I *do* want to say that in those cases the doctrine of substituted judgment is applicable. What distinguishes the two sets of cases relevantly here is rather that in the case of Benedict as he now is, it is proper to speak of *a change in the projects appropriate to his new condition.*

A set of projects which centres around the simple activities of which Benedict is now capable, is still a set of projects although he is neither capable of articulating them or even of making them conscious to himself in the way that he earlier did. And of course, they are nowhere near as complex or long-term goal directed, as the projects which constituted his life-plan before the accident. (A project at least involves a structure of related expectations determined by a set of positive interests; an interest in, for example, freedom from pain, is not enough.) It is clear that on various scales of valuation the new projects suffer by comparison

with the old - nevertheless, there is one dimension on which they are distinctly superior; whereas the old are not appropriate to his current circumstances the new are clearly appropriate. And this I want to say is the crucial feature responsible for our reluctance to apply the substituted judgment doctrine here.

This way of thinking, it seems to me, helps us distinguish between the life and death situations for the once-competent to which the doctrine of substituted judgment is and is not applicable. I think we would want to say that in the case of Benedict it is clearly inapplicable because we can speak, as I have just argued, of a newly appropriate set of projects. In the case of Karen Quinlan and cases like it, it is clear that *no* such thing holds, since there is no possibility of any goal-directed activity or any other source of pleasure or satisfaction available to a person in that kind of state. Constant pain and discomfort, as well as brevity of life-expectation, will militate against the formation of projects of even a simple kind. Hence, we would need to know more about the situation of Spring, another once-competent incompetent, including more detailed accounts of the treatments involved, in order to make a reliable decision about the applicability of the doctrine of substituted judgment in that case on the grounds I have just advanced. My suspicion is that the decision we would arrive at will be that it is *not* applicable in the case of Spring.

So, what I am suggesting is an examination of the situation of the once-competent incompetent to see whether it is possible for the person to have (at least in some attenuated sense, yet to be analysed in detail) a set of projects appropriate to his/her circumstances, where the expressed views or implied preferences of their once competent selves suggest that they would not consent to life preserving treatment. One way of putting this is to say that within the doctrine of substituted judgment which is designed to preserve the integrity of the person, the dignity of the incompetent is protected even from his/her once competent self.

Thus, I want to defend the doctrine of substituted judgment from some standard lines of criticism of its application to the never-competent and to the once-competent about whom there is insufficient evidence to go on in deciding how they would have chosen if competent. Instead, I want to raise an objection to the unrestricted application of the doctrine to the once-competent incompetent in those situations where the question whether their lives should continue with the aid of substantial medical intervention arises.

Does this conclusion have any effect on the general conditions for justified paternalistic interference, and in particular, the hypothetical consent condition of which the doctrine of substituted judgment is a special case? It would seem to follow from what I have been saying about the doctrine that I require a kind of rider to the condition. Something (roughly) like this; evidence of hypothetical consent if it concerns termination of life might be annulled by evidence of a newly appropriate set of projects. But this affects the generality of the condition and it seems to me to be a substantial enough reason for a re-thinking of the condition(s). The difficulties raised here illustrate one of the ways in which the hypothetical consent condition is problematic; more intractably so because of lack of evidence. The cases I have discussed illustrate the fact that continuities in the preference structures of persons are a problematic matter. In most cases we can settle these problems by reference to changes of mind; here and in other interesting cases, for instance those where there is a supposed conflict between "settled" and "transitory" preferences, we cannot do so in any straightforward way.

So far as the law is concerned, it seems to me that the doctrines of substituted judgment is a useful tool in various areas of application, some of which I have not mentioned, such as in the determination of whether organs should be transplanted from the incompetent. This is especially so for those who wish to see such

arrangements accord with a central concern for respect for persons and their autonomy. Nonetheless, it is problematic, and in particular, as I have been at pains to argue, care needs to be taken in the application of the doctrine to "life-and-death" decisions for the *once-competent* incompetent.

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FOOTNOTES

1. *In the Matter of Earle Spring,* 405 N.E. 2d. 115 Mass., 115 (1980).

2. *Superintendent of Belchertown State School et. al. v. Joseph Saikewicz,* Mass. 370 N.E. 2d. 417 (1977).

3. *In the Matter of Karen Quinlan, An Alleged Incompetent,* 335 A. 2d. 647 (1976).

4. George J. Annas, "Quality of Life in the Courts: Earle Spring in Fantasyland," *The Hastings Center Report,* 10, 1980 pp. 9-10.

5. I am indebted to John J. Hodson's paper "the Principle of Paternalism", *American Philosophical Quarterly,* 14, 1977 for the phrasing of both the encumbrance and the hypothetical consent conditions.