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Changing the Question

Daniel Brudney¹

Short summary

Surrogate decision makers are expected to make substituted judgments for patients who are deemed incapable of making their own health care decisions. As such the surrogate decision maker is expected to make a judgement about *what the patient would choose* if they had decisional capacity. However, the answer to that question (if there is one) may not appropriately reflect the patient's situation and circumstances at the given time where the course of treatment is to be decided. In this article Daniel Brudney proposes to change the questions that guide surrogate decision making around the course of treatment to '*What could the patient choose, given her commitments?*'

Introduction

In most cases a single answer to the question 'what would the patient choose' cannot be provided. The surrogate decision maker is expected to decide a treatment course that is in the patient's best interest, and on basis of the patient's values.

Key arguments:

- A person's desires and values may not always provide guidance; desires may be transient; and values may be open to interpretation. Not everything a person values is important to their specific life situation. The question 'What would the patient choose?' may provide an insight into what the patient cares about, but this does not in itself provide the moral foundation to determine treatment course.
- According to Brudney, the question, which the surrogate decision maker is expected to consider, namely '*what would the patient choose?*' has its moral foundation in the Millian Ideal: "To live one's life in one's own way." However, the Millian Ideal may fall short in providing guidance for an SDM in terms of what would be in the patient's best interest.
- Brudney argues that the Millian Ideal is limited:
 - First, the Millian Ideal is only fulfilled if the patient has truly reflected upon their choices in life before deliberately /consciously choosing their path. It may be next to impossible for an SDM to know which of the patient's previous choices are in line with the Millian Ideal.
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¹ Brudney, D. (2019). Changing the Question. *The Hastings Center Report*, Volume 49:2; p. 9-16

- Second, while it may be possible, based on the patient's life story, to identify what the patient would choose, the choice may not be in the patient's best interest. Thus, the question may not provide a useful answer.
- Third, a person's 'story' is rarely coherent. The surrogate decision maker may find themselves in a situation where the patient's previous life story might not provide a definitive answer, but instead point in different directions. Moreover, one's decisions around medical treatment are difficult to anticipate, and may change at the time of decision.
- Having demonstrated the limitations of the Millian Ideal as the moral foundation for guiding surrogate decisions making around a patient's care, Brudney argues that asking the question "What would the patient choose" makes little sense, unless there are good reasons to expect that the answer to this question would reveal something of substantial moral value. This, however, is not a given. Patients may not have reflected sufficiently on their values, and/or there may not be a determinate fact about what the patient would choose. Brudney suggests changing the question to: *What could the patient choose, given her commitments?* This new question takes some of the burden off the surrogate decision maker, as they are no longer expected to *know* what the patient would choose, but to *reflect* on what course of treatment would be in the patient's best interest *given what the patient could choose, given their commitments i.e., the patients projects or their story*. Brudney argues that the new question should be used as a standard rather than a rule.
- Brudney explains the difference between the three key questions: What *did* the patient choose? What *would* the patient choose? What *could* the patient choose?
 - *Did* choose, demonstrates the patient's will in action.
 - *Would* choose, indicates that the patient would consent if they were able to. Yet, this is a hypothetical consent, not an actual consent.
 - *Could* choose, is also about hypothetical consent, but the question about what the patient *could* choose calls for *reflection* around what is in the patient's best interest based on their commitments, their projects, and their story.

Conclusion

Changing the question from *what would the patient do?* to *What could the patient do, given her commitments?* might generate the same treatment choice, but the latter question is, in Brudney's words, "keeping in mind that a large part of what is best for the patient is a function of her commitments and projects."