

Book Review

Autonomy, Consent and the Law

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Introduction

The ascendance and dominance of autonomy in bioethics and biolaw seem to be beyond doubt. Certainly as an ethical principle it is widely afforded a supreme status, to the extent that an increasing number of authors now argue that it is too highly valued. However, in *Autonomy, Consent and the Law*, Sheila McLean seeks to interrogate the received wisdom that autonomy really *is* given the reverent protection that so much bioethical literature might have us believe it enjoys. Through a detailed and wide-ranging theoretical, legal, and social analysis, McLean provides a thoughtful and powerful response to those who would argue that English and Scottish medical and healthcare laws have the promotion of patient autonomy at their heart. Her core thesis is that, “no matter what conventional wisdom says, there may be a dissonance between the aims of respect for autonomy on the one hand and the law of consent on the other.” And her scepticism on this point naturally leads her to ask “if it [consent law] is not there to reflect respect for autonomous decisions, what is it for?” (p.5)

Beneath McLean’s analysis are two prominent strands of thought that make her thesis particularly interesting. First, she seems to favour a robust protection of patient autonomy. Whilst she often expresses views that are sympathetic with calls for more constrained understandings of, or respect for, autonomy, her project seems in large part to frame itself within a reading of Millian liberalism that emphasises the good of individuals’ being self-governors. Second, and in interesting contrast, she is at times reluctant to commit to a particular understanding. As I will describe below, McLean presents two dominant clusters of ideas about what autonomy is, and sometimes she tries to reconcile the two camps. In large part, however, her project is to criticise inconsistency of principles within the law itself. I will first provide an overview of the book, and then in a brief discussion explore two analytic points that may be the source of further critical legal analysis.

Autonomy, Consent and the Law: Structure and argument

The book comprises eight chapters. The first three provide the theoretical context and analytic framework. The next four are individual case studies, considering the role of autonomy in the context of particular issues. Finally there is a short but substantive concluding chapter. To structure the book in this way makes eminent sense, allowing for the logical development of its core ideas and the presentation and exploration of an important thesis. As so much has been written on autonomy, some of the discussion falls on fairly ‘standard’ territory. However, given its critical approach, and widely researched argument, the text offers a great deal for those who work in this

area, as well as to more general readers interested to learn about autonomy, consent, and health law.

Chapter 1 begins the contextualisation. It offers a brief history of medicine, describing (in broad terms) three stages “[f]rom Hippocrates to paternalism to autonomy”. (p.6) With autonomy representing the current ideology, McLean suggests that in law and practice distinct conceptual questions necessarily arise, and their happy harmonisation is the goal of contemporary bioethics: “Separating the clinical from the personal or private, or perhaps ideally rendering them complementary, is a necessary goal of the anti-paternalism rhetoric that now permeates bioethics and the law.” (p.12) Noting that “the most powerful language of the 20th and 21st centuries” is that of human rights, McLean concludes a short survey of understandings of autonomy by selecting two conceptions of it that are relevant within human rights analysis. These are “a highly individual account of autonomy” and “one which concerns itself with the person as a part of a community”. Thus she contrasts “an individualistic and a relational account of autonomy.” (p.17)

As already noted, a large part of McLean’s project is directed to emphasising similarities between arguments rooted in these competing means of conceptualising autonomy. For McLean, it does not seem a weakness for ‘autonomy’ that people radically disagree about what it means while widely holding that the word represents something important. In chapter 2 she explores the mechanisms that would help protect different conceptions of autonomy. She considers how the individualistic or communitarian accounts would favour or find problems with different approaches, and—importantly in legal treatment of principle—addresses practical difficulties. It becomes clear that all abstract concerns associated with the attainment and exercise of autonomy can not be addressed by general policy or practices. McLean thus argues, for example, that:

[B]ecause understanding and reasoning cannot be subjected to the kinds of tests that competence and quantity of information can be, I would argue that they are of a different order from the other concepts that are central to the process of obtaining or offering a valid consent. (p.51)

Such points, building on ‘real world’ limitations both to being autonomous and to assessing someone’s autonomy lead to the view that:

The assessment that a person is legally competent, implying that s/he is autonomous and therefore that his or her decisions are worthy of respect, does not in and of itself mean that the ensuing decision will be an autonomous one – which might arguably be the most important consideration. After all, it might be asked, what is the point of valuing (and agonising over) autonomy if it is just a sham – a philosophical concept that has no bearing on the real world? (p.63)

Having provided a theoretical contextualisation, McLean moves in chapter 3 to a general analysis of the law. The aims are twofold: first, to explore the criteria the law

provides to judge whether consent is valid; and second, to establish whether the law on consent can be said to protect autonomy. She believes that the strong reasons to respect patient autonomy derive from the importance people (should) attach to making their lives their own; to making *their own* decisions. Given this, her legal critique leads her to argue that there is a considerable divide between what would be desirable ethically, and what is protected at law through the mechanisms of consent. This contention is based primarily on the argument that the legal tests that establish the validity of consent relate not to the patient him- or herself, but to an abstraction analogous with law's 'reasonable man'. This approach, she argues, is based on 'policy reasons' that should be offensive not only to advocates of individual autonomy, but also to those who champion relational accounts.

Following her presentation of the general groundwork in the first three chapters, McLean then tests the law's protection of autonomy against specific case studies. In some senses at this stage, the reader may feel that the outcome will be quite predictable: if at a general level the law fails, it surely will when considered in specific areas. But McLean's purpose is not just to demonstrate *that* the law fails, it is also to consider *how* and *why* it fails. The discrepancies that are highlighted in chapters 4-7, then, prove interesting reading. This will be particularly so for scholars who, like McLean, have a strong concern for principled consistency within a legal system, and consider that protection of autonomy should hold a prized place within it.

Chapter 4 focuses on autonomy at the end of life. As one might expect, it works through a contrast between fatal *refusals* of consent—where an individualistic autonomy prevails at law—and consent (were it legally possible) to active life-ending measures, where a relational model constrains the scope for choice. An evaluation of the act/omission dispute leads McLean to agree with many others that the distinction carries no *moral* weight whatsoever, and is used to do more by the law than it coherently can. She likewise voices strong scepticism about slippery slope arguments, suggesting that they are used as a cover for ideological reasons to oppose the legalisation of active assisted-dying. This leads, in the chapter's conclusion, to a claim that in the instance of end-of-life law, there is a split rather than a meaningful overlap between individual autonomy and relational autonomy. And in McLean's view, this split can not be justified.

Autonomy and pregnancy is the subject of chapter 5. McLean's interest here rests primarily on state control of pregnant women's lifestyle choices, and refusals of consent to medically-indicated caesarean sections. In some ways, I found this chapter incongruous with McLean's overall project. The moral debates about the 'maternal/fetal conflict' or 'the rights of the unborn' are well known, but they do not translate into autonomy-limiting measures in English or Scottish law. Thus the principal focus of the chapter seems to be on dubious social practices and over-zealous state-actors doing things that are unlawful (and found to be so). Moreover, the worst affronts to autonomy that she describes are found in the United States. Although in itself this makes very interesting reading, and provides a good comparative social analysis, it somehow does not chime with the purposes of McLean's thesis.

Ultimately, and in agreement with the current legal position, her judgment of how the law should be is as follows:

Defending women's freedom in this situation seems to require adherence to the individualistic model; anything else arguably opens the door to coercion. As was seen in the case of assisted dying, the law's ingenuity in simultaneously proclaiming adherence to individual autonomy yet using a more relational account to reject its application in hard cases knows no bounds. (p.152)

Perhaps of most pertinence to readers of *Genomics, Society and Policy* is chapter 6 of McLean's book, which considers autonomy and genetic information. This chapter naturally broadens the scope of analysis: it is still health-related, but no longer just bears on *patients'* autonomy. McLean highlights the normative complications that might arise should an analogy fail between arguments about rights in relation to healthcare and rights that might arise in relation to control and use of genetic information. As she puts it, "genetic information [is] different from most other medical knowledge on two counts; first, because it is not only information about the individual and second because it may also affect reproductive decisions." (p.159) Throughout the chapter, McLean offers an insightful overview, but one that often serves more to present the different arguments than to resolve them. She looks both at the troublesome issues relating to parental autonomy *versus* the interests of children, and to establishing the proper limits of adult's privacy in relation to their own genetic information. In some senses, the chapter considers in closer detail the pros and cons of things that the law *might do*, than give a clear answer about what it *should do*. There is useful discussion of legislation and litigation in the United States, whose position stands in some contrast to that in the United Kingdom, where general norms in relation to confidentiality and privacy apply. McLean seems to favour here the invocation of a more relational autonomy, suggesting that some duties-to-others ought to be enforced at law (or at least considered). This might be seen to undermine her own calls for consistency in legal protections of autonomy, as she has earlier condemned legal failures to use an individualistic conception (though she may respond that the other arguments in the book concern *patient* autonomy). McLean anyway predicts that developments in genetics will force courts or law-makers to consider the issue head-on, and offers a clear account of how controversial any developments (or attachment to the *status quo*) will be.

Chapter 7 looks at autonomy and organ transplantation. In somewhat similar vein to chapter 5, McLean's focus in this chapter in some ways is more about possible policy approaches within her dualist autonomy framework than it is about critiquing current law. She refers throughout to relevant legal positions, but the argument is aimed mainly at an evaluation of different possible means of regulating to increase posthumous organ 'donation'. McLean cautions against too simplistic an appraisal, or too readily accepting the idea that there can be an 'easy fix' response: infrastructure needs to be addressed as much as the policy, whatever ideology underlies it. Furthermore, given the manifest uncertainties and difficulties of successfully increasing transplantation rates through any change in policy, McLean advocates

especial caution against abandoning a commitment to (real) consent. In particular she urges concern about the fashion for supporting ‘opting-out’ systems, suggesting that greater evidence is needed to support adoption of such an approach. Thus, while she accepts that at present the law protects individual autonomy, she fears there is pressure to move away from this. Should that happen, it would be a further inconsistency that she would rather have seen resisted unless very good evidence were produced of its efficacy; evidence that she thinks does not yet exist.

The concluding chapter, naturally enough, restates the key points of analysis and emphasises the core of McLean’s thesis: that it is wrong to assume that the law of consent is based on autonomy; and that the law fails to provide a coherent and consistently principled approach to questions where autonomy is under issue. She says:

[I]t is unclear that the law of consent has precisely the same goals as does the concept of autonomy. Although they are often taken to be equivalent, when reaching decisions and balancing the rights and interests of the parties concerned, courts take account of agendas which reflect a wider spectrum of interests than those directly in front of them, for example the effect on society of reaching one decision or another. (p.217)

She also restates her claim that whilst there seem to be two dominant clusters of autonomy conceptions—individualist and relational—there is often an overlap between them, allowing for “some congruence between the two”, which, she suggests, would be “both feasible and desirable.” (p.225)

Discussion

There is much to recommend McLean’s analysis of autonomy and the law, and her arguments about consent’s detachment from autonomy are persuasive. I would, however, raise a couple of analytic issues, not so much in criticism of McLean’s position, but to add to the debate. First, her categorisations of individualistic *versus* relational autonomy concepts are perfectly reasonable, and her discussion of their potential for reconciliation interesting. It seems, however, that the concepts she addresses do not sit at polar extremes of a continuum from total individualism to strong collectivism. Instead, they already come from somewhere in the ‘middle ground’. As such, much of the scope for meaningful dispute between the concepts’ advocates is already lost. And second, in some sense contrarily, I wonder too if there is an aspect of the concepts (at least in the broad way they are applied) that actually makes them (at least theoretically) irreconcilable. In the remainder of this review I will reflect on each of these points in turn.

McLean takes it as given that there is a legal system, and that there is no principled problem with there being a legal system. Concerning accounts of ‘individual autonomy’, such a position is, of course, very contentious. You need only to consider the anarchism of Robert Paul Wolff² or the literature in political philosophy and jurisprudence on legitimacy and authority to see the potential force of truly *individual*

autonomy. By conceding the validity of law, an analyst is already giving normative endorsement to at least some level of collectivism. Granted this, relational concerns are bound to feature in a discussion of people's legitimate freedom. Similarly, an advocate for relational accounts will rarely (if ever) want to argue that people should have no freedom. Given this, partial reconciliation between what members of each camp would argue for is almost inevitable. Put simply, the individualists that interest McLean necessarily endorse some level of collectivism, and the collectivists that interest her would argue in favour of some level of individualism.

This point is important, and to take it forward, I would be interested to see an equally focused analysis of *liberty*. McLean does discuss this concept, and other important issues such as the public/private distinction. In future discussion I think they both warrant further attention still. I agree with McLean's concerns about practical limitations both to being autonomous, and to assessing autonomy effectively. To say that autonomy is important, and in some instances foundational, is true. But if we are to make a complete assessment of the law, we need to know about the other matters of concern and how to mediate apparent conflicts between them. It is my own view that within the caselaw at least, the confusing or conflating of autonomy and liberty has led to some of the more troublesome aspects of current English medico-legal jurisprudence. An exploration of such issues would shed further light on the problems McLean uncovers, and may also help lead to some of their resolution.

Finally I would just raise a question about whether the two accounts of autonomy are formally reconcilable. At times, individualistic autonomy is described as a concept that is morally hollow. This does not preclude its having a moral foundation, or its being morally important. Rather, it means that there is no role for judgment of the choice that is made; a person's choice is what is privileged, regardless of its content. Thus, people on this count (or some counts included in this count!) would be free—with this freedom legally protected—to make decisions for any reason whatsoever. The relational account, by contrast, seems to have an internal system of morality, meaning that only some choices that might be exercised 'really are' autonomous. McLean often reminds us that endorsing an individualistic model in many instances need not entail a commitment, for example, to selfishness. Nevertheless, where one concept has inherent moral dictates and the other lacks these, it is not clear that they are reconcilable at the level of principle.

Conclusion

Autonomy, Consent and the Law is a wide ranging and thought provoking book. I recommend it to anyone interested in the mechanism of consent in health law, and particularly to people interested in the interplay between law and ethics in healthcare. Its key thesis is argued persuasively, and presents a challenge to courts and law-makers, and also to scholars who would wish to see autonomy protected or enhanced in practice.

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² Robert Paul Wolff, *In Defense of Anarchism (with a new preface)*, (University of California Press, 1998).