



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 65 | Number 2

Article 3

1-1-1987

Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy

Marcy Strauss

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987).
Available at: <http://scholarship.law.unc.edu/nclr/vol65/iss2/3>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

ESSAY

TOWARD A REVISED MODEL OF ATTORNEY-CLIENT RELATIONSHIP: THE ARGUMENT FOR AUTONOMY

MARCY STRAUSS†

*To manipulate human beings even though for their own good is to deny their human essence, to treat them as objects without wills of their own and therefore to degrade them.*¹

In any legal proceeding the relationship between a client and his or her attorney is of great importance. In this Essay Professor Strauss examines the nature of the attorney-client relationship in today's society. Professor Strauss notes that despite the integral role played by attorneys in the development of an informed consent model in the medical profession, no such model has been applied to the legal profession. Professor Strauss argues that the current allocation of decisionmaking authority between attorney and client is inappropriate; on too many matters the attorney is granted exclusive decisionmaking authority. She challenges this current allocation of decisionmaking authority and argues for an alternative allocation based on the informed consent model. Professor Strauss explores the principle of autonomy as the basis for shifting increased decisionmaking authority to the client. She concludes by considering—and rejecting—various arguments against applying an informed consent model to the legal profession.

INTRODUCTION

Beginning in the 1950s attorneys were instrumental in structuring a significant change in the relationship between doctors and patients. Traditionally, a doctor was neither required nor expected to provide the patient full, if any, information regarding the patient's ailment or possible treatment.² Patients were

† Associate Professor of Law, Loyola Law School. J.D. 1981, Georgetown University Law Center; B.S. 1978, Northwestern University. I wish to thank Erwin Chemerinsky for his helpful comments on a previous draft of this manuscript. Thanks are also owed to Lisa K. Rozzano and Barbara A. Horowitz for their excellent research assistance.

1. I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 138 (1969).

2. See Burt, *Attorney-Client Trust*, 69 *GEO. L.J.* 1015, 1045 (1981). The Hippocratic writings, for example, advocated concealing information about the patient's future or present condition:

Perform [these duties calmly] and adroitly, concealing most things from the patient while you are attending to him. Give necessary orders with cheerfulness and serenity, turning his attention away from what is being done to him; sometimes reprove sharply and emphatically, and sometimes comfort with solicitude and attention, revealing nothing of the patient's future or present condition.

HIPPOCRATES, *Decorum*, in *HIPPOCRATES* 297, 299 (W.H.S. Jones trans. 2d ed. 1967), quoted in

discouraged from challenging their doctors' orders and instead were expected to "trust" the physicians' professional "expertise."³ The judicial acceptance of an "informed consent" doctrine, however, changed the traditional doctor-patient relationship.⁴ Today, before a physician administers any treatment, the patient must be adequately informed about the proposed treatment and its potential effects, and the patient must consent to the treatment.⁵

The notion of informed consent is historically rooted in the principle of self-determination. Self-determination necessarily includes the right to make decisions about one's body. As one court noted:

[E]ach man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient⁶

Ironically, despite the legal profession's commitment to the concept of self-

Katz, *Disclosure and Consent, Search of Their Roots*, in *GENETICS AND THE LAW II* 124 (1980); accord Callahan, *Morality and Contemporary Culture: The President's Commission & Beyond*, 6 CARDOZO L. REV. 347, 349 (1984) ("Throughout most of the history of medicine, the doctor/patient relationship was marked by paternalism on the part of physicians and unquestioning passivity on the part of patients.").

3. That patients historically trusted their doctors' "expertise" is amazing given that as late as the nineteenth century anyone could enroll in medical school, and many who did could barely read and write. It was only in 1910 that Columbia University became the first school to require that entering medical students be high school graduates. See J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 35 (1984).

Ironically, now that there is a high level of skill, education, and expertise required of doctors, decisions made by these professionals are being challenged.

4. The first judicial opinion to use the phrase "informed consent" was *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957). In *Salgo* the court held that a doctor must disclose all facts necessary for the patient's intelligent consent. *Id.* at 578, 317 P.2d at 181. Given the criticism of the concept of informed consent by much of the medical profession, it is ironic that the paragraph discussing informed consent in *Salgo* was taken verbatim from the amicus brief submitted by the American College of Surgeons. *Id.*; see J. KATZ, *supra* note 3, at 35; Pernick, *The Patient's Role in Medical Decision-Making: A Social History of Informed Consent in Medical Therapy*, in 3 *MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP I* (1982) (President's Comm'n for the Study of Ethical Problems in Medicine & Biomedical & Behavioral Research) [hereinafter *MAKING HEALTH CARE DECISIONS*].

5. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). *Canterbury* is a landmark case in which the court discussed in detail all facets of the informed consent doctrine. The court noted that

[t]rue consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement of a reasonable divulgence by physician to patient to make such a decision possible.

Id. at 780.

Numerous authors have explored the concept of informed consent in medicine. See, e.g., R. FADEN & T. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* (1986); J. KATZ, *supra* note 3; J. LUDLAM, *INFORMED CONSENT* (1978); A. ROSOFF, *INFORMED CONSENT: A GUIDE FOR HEALTH CARE PROVIDERS* (1981).

6. *Nathanson v. Kline*, 186 Kan. 393, 406-07, 350 P.2d 1093, 1104 (1960).

determination, and despite the integral role played by attorneys in the development of an informed consent doctrine for the medical profession, the informed consent model has not been applied to the legal profession. Although rhetoric supporting full communication between attorney and client, and client consent to "important" decisions in the lawsuit exists,⁷ in practice the allocation of decisionmaking authority is quite different from that envisioned under an informed consent doctrine. Given that "[l]awyers seem to be the chief protagonists of 'consumer-oriented' informed consent in medicine, . . . it is startling how small a part informed consent plays in legal practice."⁸ In short, attorneys retain significant control over much of the lawsuit, reserving few decisions for the client.

Although informed consent has existed in the medical field for over twenty years, only in recent years has it been suggested that attorneys should "heal thyselfes" and adopt such a model.⁹ A systematic study of the desirability of such a change is necessary because the allocation of decisionmaking authority between client and attorney raises profound practical and philosophical questions. On a practical level, it is difficult to imagine an issue having a more significant impact on an attorney's day-to-day practice, regardless of specialty or areas of interest. Quite simply, every aspect of every type of legal practice involves numerous decisions; from the moment attorneys receive their first client, they need to know who makes what decisions. Moreover, the question "who decides" raises fundamental philosophical questions concerning the proper role of a professional in society and the appropriate use of expertise. Finally, and most significantly, the issue of decisionmaking authority tests the legal community's commitment to the principles of autonomy and self-determination. Should attorneys conduct themselves in a way that fosters or frustrates these basic maxims of Anglo-American law?

This Essay challenges the current allocation of decisionmaking authority between attorney and client and argues for an alternative allocation modeled on an informed consent doctrine. Section I of this Essay describes the traditional attorney-client relationship and sets forth the arguments typically used to justify exclusive attorney decisionmaking. The Essay concludes in section II that the current allocation of authority does not make sense, and that the asserted justifications for the current allocation are neither supportable nor desirable. Section III then discusses informed consent as an alternative to the current model and explores the principle of autonomy as the basis for shifting increased authority to the client. Finally, section IV considers, and rejects, various arguments that can be raised against an informed consent model for the legal profession.

7. See *infra* notes 25-29 and accompanying text.

8. Stone, *Foreward* to C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, *INFORMED CONSENT* at ix-x (1984).

9. The first major article advocating informed consent for the legal profession appeared in 1979. See Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

I. THE CURRENT ALLOCATION OF DECISIONMAKING AUTHORITY

A. The "Means-Ends" Paradigm

Many excellent articles have described in detail the current approach to decisionmaking authority reflected in case law, practice, and the professional codes.¹⁰ This Essay does not intend to repeat such established grounds. Nonetheless, a brief description of the traditional "model" of decisionmaking is necessary to provide a framework for the remainder of this Essay.

The traditional allocation of decisionmaking authority is one in which the client decides the "ends" of the lawsuit while the attorney controls the "means."¹¹ Thus, the client determines such "ends" as whether to settle a civil suit¹² or to plead guilty in a criminal case,¹³ and the attorney decides, even contrary to the client's express wishes, what legal and constitutional arguments or defenses to raise.¹⁴ Although the right to waive a jury trial is the defendant's,¹⁵ the attorney retains control over which jurors to select or strike.¹⁶ The right to appeal rests with the client,¹⁷ however, the attorney alone may decide

10. See Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003 [hereinafter Spiegel, *New Model Rules*]; Spiegel, *supra* note 9; see also Anderson, *Informed Decisionmaking in an Office Practice*, 28 B.C.L. REV. (Issue 2 1987) (advocating informed consent in an estate practice context).

11. Spiegel, *New Model Rules*, *supra* note 10, at 1003-04.

12. See *Whittier Union High School Dist. v. Superior Court*, 66 Cal. App. 3d 504, 508, 136 Cal. Rptr. 86, 89 (1977) (attorney has no authority to bind client to settlement); see also D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 157 (1974); cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) (decision whether to accept a settlement offer should be the client's).

13. See generally 1 STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4-5.2(a)(i) (2d ed. 1980) [hereinafter STANDARDS] (decision whether to plead guilty rests with the accused); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1306-07 (1975) (although client must decide whether to plead guilty, this is adhered to only in technical sense; many attorneys feel their advice as to plea should prevail and that client is free to seek new attorney if dissatisfied with attorney's choice of plea).

14. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (decision to assert constitutional rights is necessarily entrusted to the attorney); *Moreno v. Estelle*, 717 F.2d 171, 177 (5th Cir. 1983) (attorney must make professional judgment as to plausibility of a defense), *cert. denied*, 466 U.S. 975 (1984); *Ennis v. Lefeure*, 560 F.2d 1072, 1075 (2d Cir. 1977) (attorney's decision can bind client even though constitutional rights may be lost), *cert. denied*, 435 U.S. 976 (1978); *Winters v. Cook*, 489 F.2d 174, 176-77 (5th Cir. 1973) (counsel can waive right to object to racial composition of grand jury without client's consent; attorney's duty does not include informing defendant of every possible constitutional claim).

15. See *Blanton v. Womancare Inc.*, 38 Cal. 3d 396, 407, 696 P.2d 645, 653, 212 Cal. Rptr. 151, 158 (1985) (en banc) (attorney has no authority to enter into binding arbitration agreement against client's consent); *Graves v. P.J. Taggares Co.*, 94 Wash. 2d 298, 305, 616 P.2d 1223, 1228 (1980) (en banc) (client must consent to the withdrawal of a jury demand); STANDARDS, *supra* note 13, § 4-5.2(a) (decision to waive jury is for accused to make).

16. See STANDARDS, *supra* note 13, § 4-5.2(b) (decision regarding which jurors to strike is exclusive province of attorney after consultation with client); Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CALIF. L. REV. 636, 652 (1977) (even relatively innocuous requests by the defendant to aid in selecting jury have been routinely denied).

17. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (the defendant has authority to decide certain fundamental issues, such as whether to appeal, but defense counsel is not required to raise on appeal every nonfrivolous issue the defendant requests); *Doyle v. United States*, 721 F.2d 1195, 1198 (9th

what issues to raise on appeal.¹⁸ Similarly, such trial tactics as whether to call a witness (except a criminal defendant), whether and how to cross-examine a witness, and whether to object to evidence or testimony at trial, are all "means" decisions resting with the attorney.¹⁹

Numerous courts have held that exclusive attorney decisionmaking over the "means" of the lawsuit is appropriate.²⁰ For example, in *Jones v. Estelle*²¹ the United States Court of Appeals for the Fifth Circuit recently noted:

Criminal defendants daily entrust their liberty to the skill of their lawyers. The consequences of the lawyer's decisions fall squarely upon the defendant. There is nothing untoward in this circumstance Whether to call a particular witness, object to evidence, offer additional evidence or rest, or indeed advance a particular defense at all often has immediate and grave impact upon the liberty or even the life of a defendant. So long as the lawyer was competent, the representative character of the relationship between a lawyer and his client will tolerate no other result [than the attorney's deciding such questions]. In this sense we have consistently held defendants to the decision of their lawyers.²²

Similarly, in *Gustave v. United States*²³ the United States Court of Appeals for the Ninth Circuit upheld an attorney's decisions not to move to suppress evidence of a line-up, not to subpoena certain witnesses, and not to question potential jurors about racial bias: "[Such decisions rest] upon the sound professional judgment of the trial lawyer . . . and the failure to [act] even against his client's wishes, is not ineffective representation."²⁴

In practice, attorneys are governed not only by case law defining acceptable conduct, but also by the codes of ethics promulgated by bar associations. The ABA Code of Professional Responsibility,²⁵ however, "is at best ambiguous in resolving this question of allocation of authority."²⁶ A non-binding "ethical

Cir. 1983) (defense counsel's failure to prosecute defendant's appeal constituted ineffective assistance of counsel even when no prejudice to defendant resulted).

18. See *Jones*, 463 U.S. at 750-54.

19. See, e.g., *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983) (matters of trial strategy are for counsel to decide); *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir.) (per curiam) (decision to subpoena witnesses and nature of closing argument are strategic decisions for counsel to make), *cert. denied*, 454 U.S. 1127 (1981); *Peterson v. Kennedy*, 532 F. Supp. 113, 116 (N.D.N.Y. 1982) (decision whether to introduce forensic evidence is strategic choice for attorney); *State v. Marquez*, 127 Ariz. 98, 103, 618 P.2d 592, 598 (1980) (counsel decides matters of trial strategy); *State v. Rodriguez*, 126 Ariz. 28, 34-35, 612 P.2d 484, 490-91 (1980) (en banc) (decision whether to call witnesses is strategic decision for counsel).

20. See *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring).

21. 722 F.2d 159 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984).

22. *Id.* at 165.

23. 627 F.2d 901 (9th Cir. 1980).

24. *Id.* at 904, 906.

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970). The Model Rules of Professional Conduct, although ostensibly favoring client control, also are ambiguous, and do not resolve the question of decisionmaking authority. See Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 253-54 (1985); Spiegel, *New Model Rules*, *supra* note 10, at 1005. As of July 1986, only 15 states had adopted versions of the Model Rules. LAWYERS MANUAL ON PROFESSIONAL CONDUCT 249 (ABA-BNA July 23, 1986).

26. Spiegel, *New Model Rules*, *supra* note 10, at 1004; see Spiegel, *supra* note 9, at 65-73.

consideration" speaks broadly, and vaguely, about the client deciding issues "affecting the merits of the cause."²⁷ Disciplinary Rule 7-101(b)(1), the only disciplinary rule on the topic of decisionmaking, similarly provides little guidance on the issue: "[w]here permissible, [an attorney may] exercise his professional judgment to waive or fail to assert a right or position of his client."²⁸ What is "permissible," however, is nowhere defined. Not surprisingly, the Annotated Code of Professional Responsibility describes this provision as "troublesome."²⁹

Given the vagueness of the code, attorneys may conform their behavior, free from professional discipline, to the "means-ends" distinction. There is little doubt that they do just that. Few trial or appellate attorneys explain legal strategies and possible alternatives to their clients.³⁰ The "conventional wisdom" among attorneys and jurists clearly supports the view that the attorney should decide the means of the lawsuit. For example, Judge Clemant Haynsworth remarked: "[A] lawyer must never forget that he is the master. He is not there to do the client's bidding The lawyer must serve clients' legal needs as the lawyer sees them not as the client sees them."³¹ F. Lee Bailey was no less direct in his book, *Fundamentals of Criminal Advocacy*: "As to your position as his attorney, make it clear [to the defendant] that you alone will control the strategy of the defense, decide what legal points are to be raised, determine what witnesses to call, engage in whatever discussions you deem necessary with the prosecution."³²

Certainly many attorneys consult with their clients when making decisions. However, no obligation requires that an attorney do so, nor is there a requirement that "full" disclosure of risks or alternatives be made.³³ In the final analysis, the decision is for the attorney to make, and neither courts nor bar associations interfere with the attorney's prerogative.

Is this model of decisionmaking, which encourages attorney control over many fundamental aspects of the lawsuit, desirable? To answer that question, it is necessary first to consider the justifications offered for this model.

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

28. *Id.* DR 7-101(b)(1).

29. ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 299 (1979); *see also* Maute, *supra* note 10, at 1056 (noting that Disciplinary Rule 7-101 is "cryptic at best").

30. Stone, *supra* note 8, at x.

31. Haynsworth, *Professionalism in Lawyering*, 27 S.C.L. REV. 627, 628 (1976); *see* Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120 (1968).

32. F. BAILEY & H. ROTHBLATT, *FUNDAMENTALS OF CRIMINAL ADVOCACY* 44 (1974). Interestingly, Bailey later was sued by his celebrated client, Patty Hearst, on the ground that Hearst was denied effective assistance of counsel because "she was not privy to certain aspects of the trial and pretrial decision-making process" and that numerous decisions, such as venue, were made without her consent. *United States v. Hearst*, 466 F. Supp. 1068, 1087 (N.D. Cal. 1978). Perhaps taking note of the advice in Bailey's book, the court denied the claim of ineffective assistance, stating that the power to control strategic decisions rests with the attorney. *Id.* at 1088.

33. *See* Spiegel, *supra* note 9, at 67-72. Essentially, the only obligation imposed by case law is that the attorney inform his or her client on those issues the client must resolve. *Id.* at 68; *see also supra* notes 25-29 and accompanying text (discussing allocation of decisionmaking under codes of ethics promulgated by bar associations).

B. *Justifications for Attorney Decisionmaking*

The allocation of decisionmaking authority to the attorney for the "means" of a lawsuit is rooted in notions of paternalism, professional autonomy, and efficiency.

1. Paternalism (Parentalism)³⁴

The main justification offered for attorney decisionmaking is based on parentalistic assumptions. Parentalism is roughly defined as "interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced."³⁵ Thus, the attorney, as parentalist, "claims to act on the (client's) behalf, but not at that person's behest; indeed, the 'beneficiary' of paternalist action may even explicitly repudiate those actions on his behalf."³⁶ Parentalism in the legal profession is based on a belief that nonattorneys are inherently incapable of making informed judgments, and thus need a professional to decide what legal alternatives are best for them. The attorney may even override the client's wishes for what the attorney believes is in the client's benefit.

The parentalistic justification for attorney decisionmaking is often embraced explicitly by courts. For example, in *Nelson v. State*³⁷ the attorney made a strategic decision, against his client's wishes, to forego a challenge to evidence based on the fourth amendment. Defendant was subsequently convicted. On appeal defendant raised as error the fact his attorney acted against defendant's instruction. The court rejected the argument that the attorney was bound to follow the client's desires:

[O]nly counsel is competent to make such a decision [C]ounsel must be the manager of the law-suit [I]f such decisions are to be made by the defendant he is likely to do himself more harm than good One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial.³⁸

Similarly, the Alaska Supreme Court has noted:

[T]he attorney acts on behalf of his client, and his actions are calculated to achieve the result which his client seeks. The attorney, moreover, is the expert—not the client. Short of outright incompetence, the attorney's actions must be considered as being in the best interests of his client.³⁹

Likewise, the United States Supreme Court in *Jones v. Barnes*⁴⁰ implicitly

34. The term paternalism is sex-linked; it is drawn from the role of the father in the family. Parentalism reflects, in a more egalitarian fashion, the same principles.

35. Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 108 (R. Wasserstrom ed. 1971).

36. See J. CHILDRESS, *WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE* 4 (1982).

37. 346 F.2d 73 (9th Cir.), cert. denied, 382 U.S. 964 (1965).

38. *Id.* at 81.

39. *Lanier v. State*, 486 P.2d 981, 986 (Alaska 1971); accord *State v. Rodriguez*, 126 Ariz. 28, 33-34, 612 P.2d 484, 489-90 (1980) (power to control trial strategy belongs to counsel because counsel's expertise is directed to achieve results in client's best interests).

40. 463 U.S. 745 (1983).

relied on the "superior skills" of the attorney to justify attorney decisionmaking. In that case defendant had asked his attorney to raise several arguments on appeal. The attorney refused, and instead raised different arguments in his appellate brief. The Court held that it was not ineffective assistance of counsel for the attorney to reject even colorable claims suggested by the client.⁴¹ Writing for the court, Justice Burger noted the importance of winnowing out weak arguments on appeal and focusing on a few key issues and he assumed that an attorney's expertise is necessary to achieve this objective.⁴² Accordingly, the choice of argument on appeal is a strategic decision for the attorney alone to make.

2. Professional Autonomy

Besides parentalism, a second justification for attorney control over the means or tactics of the lawsuit can be termed loosely "professional autonomy." Simply stated, attorneys have an interest in their craft and reputation that may require them to act contrary to their clients' instructions. For example, the client may request that the attorney raise numerous arguments, including ones the lawyer believes to be weak (but not frivolous). Being compelled to articulate weak positions at a minimum jeopardizes an attorney's reputation. More importantly, it forces the attorney to act contrary to his or her best professional judgment. Attorneys are trained and expected to exercise such judgment; to follow every whim of their clients would make them little more than "mouthpieces."⁴³

A related concern is that the client would force the attorney to abrogate the duties owed to the court and to society. In other words, the fear is that counsel would be compelled to act "unethically"—to engage in "dubious" tactics—at the client's request.⁴⁴ More subtly, attorneys may act unethically not merely due to client pressure, but because they no longer feel responsibility for the decisions being made. This argument suggests that once stripped of the power of choice, attorneys will become like soldiers, compelled to adhere to the orders of

41. *Id.* at 754.

42. *Id.* at 752-54; see also *Stricklan v. Koella*, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1976) (clients do not know "when to stop"; to them, brevity indicates incompetence) (quoting English case of *Rondel v. Worsley*, (1966) 1 All E.R. 467, 480, *aff'd*, (1967) 1 Q.B. 443, *aff'd*, (1969) 1 A.C. 191).

43. Former Chief Justice Burger graphically stated this concern, using a medical analogy:

Very quickly we come to the question [of] . . . who controls the case. . . . These distinguished criminal defense lawyers were very firm in the proposition that the lawyer must control the case—the lawyer as a professional must control the case. I remember one of these lawyers using as an analogy, that any other standard would be as ridiculous as having a man go into the hospital, to have his appendix taken out by local anesthetic, telling the doctor, "No, don't cut there, cut here. Don't clamp that vein, clamp this one."

Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 4-5 (1969).

Some courts apparently are concerned with the attorney's freedom to exercise his or her craft. See, e.g., *Nelson v. State*, 346 F.2d 73, 81 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965) (No competent attorney would accept the case if he or she had to defer to the wishes of the client.); see also *Mazor*, *supra* note 31, at 1134 (Many cases "show greater solicitude for the plight of the lawyer than for the predicament of the client. The lawyer's freedom to exercise his craftsmanship is emphasized, not the defendant's freedom to make choices in matters affecting his fate.").

44. Judge Haynsworth has expressed concern about this possibility: "[the lawyer] owes a duty of loyalty to his client, but he has a higher duty as an officer of the court." Haynsworth, *supra* note 31, at 628.

another. The attorney's reaction may be a form of the "ours is not to question why" mentality.⁴⁵

3. Efficiency

Finally, attorney control over the "means" of a lawsuit is justified by a myriad of efficiency concerns. Most typically, proponents of this argument raise the spectre of a never-ending trial punctuated by frequent interruptions and objections by the client and lengthened by constant recesses for attorney-client conferences.⁴⁶ The notion of requiring client consent to every objection raised and every question asked of a witness quickly would go from cumbersome to inconceivable.

These external costs to the system, it is argued, mitigate against client participation. As the Alaska Supreme Court noted:

It might be feared that a rule requiring an attorney to consult with his client . . . would unduly interfere with trials. Not only would it hamper the attorney, it might force the trial judge to interrupt the proceedings whenever a waiver might be occurring in order to protect the record on appeal. . . . If carried far enough, it could . . . slow a trial to a snail's pace⁴⁷

Also, there is a fear that even out of the courtroom the time necessary to explain

45. Numerous psychological studies were undertaken, particularly after the Nazi era, to determine why seemingly rational individuals pursue irrational or antisocial ends under the guise of submitting to authority. Perhaps the most famous study was that conducted by Stanley Milgram. Milgram's experimental program at Yale University investigated the triad of authority, executant, and victim to determine under what conditions submission to authority is most probable. Milgram, *Some Conditions Of Obedience and Disobedience to Authority*, 18 HUM. REL. 57 (1965). Almost 1000 male adults between 20 to 50 years old, with a balanced occupational composition of skilled and unskilled workers, professionals and businesspersons, were told that it was their task as subjects to administer punishment to a "learner," to help determine the effects of punishment on memory. The "learner," or victim (actually a lab assistant) was asked questions, and the subject was instructed to give increasingly intense electric shocks to the learner for wrong answers. As the intensity of the shocks increased, the victim demanded that the experiment stop. *Id.* at 59. However, the experimenter would order the subjects to continue the shocks and disregard the victim's increasingly insistent protests. *Id.* at 60. Although subjects often expressed deep disapproval of shocking a person in the face of objections, many nonetheless complied. *Id.* at 72-73. Milgram explained that this disregard for others demonstrates the extent to which obedient dispositions were ingrained in some of the subjects. *Id.* at 73. The disturbing results indicated that "a substantial proportion of people do what they are told to do irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority." *Id.* at 75.

46. Former Chief Justice Burger, concurring in *Wainwright v. Sykes*, 433 U.S. 72 (1977), noted:

Not only do . . . decisions [such as deciding if and when to object, which witnesses to call, and what defenses to develop] rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.

Id. at 93 (Burger, C.J., concurring). See generally Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. REV. 454, 454-59 & n.9 (lawyer may be required to use tactics that client objects to in order to further client's best interests).

47. *Lanier v. State*, 486 P.2d 981, 987 (Alaska 1971); accord *United States v. Zylstra*, 713 F.2d 1332, 1339 (7th Cir.) ("To allow the defendant to repeatedly interfere with the trial strategy of his counsel would disrupt the proper functioning of the trial court during trial and create havoc."), *cert. denied*, 464 U.S. 965 (1983); *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 404, 696 P.2d 645, 650,

the legal proceedings to obtain client consent would be prohibitively costly for both attorney and client.

II. THE LIMITS OF THE CURRENT ALLOCATION OF DECISIONMAKING AUTHORITY

The allocation of decisionmaking authority in which "means" decisions rest with the attorney and the client decides only the ends of the lawsuit can be challenged along two lines. First, this Essay argues that the distinction between means and ends makes little sense because no principle distinguishes means decisions from end decisions. And even assuming it is possible to define the difference between means and ends, there is no persuasive justification for letting the client decide one but not the other.

A description of the weaknesses in the means-ends distinction does not, by itself, invalidate the concept of attorney decisionmaking. It simply illustrates that the current division of authority is suspect. It does not determine whether there should be more, or less, attorney decisionmaking or where to redraw the boundaries. Thus, this Essay's second argument attempts to challenge on normative grounds the allocation of decisionmaking authority to the attorney. The Essay contends that the three justifications for attorneys making even "means" decisions—parentalism, lawyer autonomy, and efficiency—are unproven and unpersuasive. Section III of this Essay then examines an alternative value in *favor* of client decisionmaking: autonomy.

A. *The Means-Ends Distinction: A False Dichotomy*

The current allocation of decisionmaking authority assumes that it is possible to draw a workable distinction between means and ends. Absent a clear distinction, it is difficult to understand why the client gets "ends" decisions but not "means," and it is impossible to predict which decisions belong to the client and which to counsel.

The means-ends distinction rests on the assumption that there exists certain determinable decisions that can be classified as means or ends. Means are merely strategic decisions that are separate and independent from the ends, or the objectives, of the lawsuit. This assumed dichotomy between means and ends does not survive close analysis. In many cases what the attorney assumes to be mere means really are part of the client's ultimate objectives. Thus, "the client may want to win acquittal *by* asserting a certain right, because it vindicates him in a way that matters to him, or he may wish to obtain a settlement without using a certain tactic because he disapproves of the tactic."⁴⁸ In other words, that which is often thought to be an end might really be a means; that which is assumed to be just a means could be an end to a particular client. For instance, "winning" is assumed to be an end of any lawsuit. As a result, criminal defend-

212 Cal. Rptr. 151, 147 (1985) ("Considerations of procedural efficiency require . . . that in the course of a trial there be but one captain per ship.").

48. Luban, *supra* note 46, at 459 n.9.

ants are allowed to decide whether to plead guilty. But why assume that winning acquittal is the end? It could be that receiving the lightest possible sentence is the true end of many criminal defendants. From that perspective, pleading guilty is a means—a strategic decision—to the end of sentence reduction.

Perhaps this problem in the means-ends distinction can best be illustrated by a medical analogy. A woman diagnosed as having breast cancer obviously desires to be cured. That is the end result she wants. However, it would be difficult to accept that the only decision to be made by the woman is to choose life and that the means of a cure should be left to the discretion of others. The assumption that the woman has no legitimate interest in the type of treatment she receives—that the treatment is merely a tactical decision that can be viewed separately and independently from the end—would be repugnant to most of us.

Professor David Luban provides numerous hypothetical examples from law in which mere “tactical” decisions matter as much, if not more, to the client than the end result.⁴⁹ In one hypothetical, which Luban calls the “Long Black Veil case,”⁵⁰ an innocent client, accused of murder, forbids his attorney from calling an alibi witness, even if it means losing the case. At the time of the murder defendant was in the arms of his best friend’s wife, and his personal honor requires that this incident be kept secret. Despite the fact the client clearly views protecting his lover as an “end” of the lawsuit, his attorney, under the current allocation of authority, may override the client and call the witness—in the client’s own best interest. Such a decision is viewed as a means decision within the sole power of the attorney.

There are, of course, many less dramatic examples of means decisions that are difficult to distinguish from the ends. A client may not want his or her attorney to argue an insanity defense; the client’s “pride” may be more important than succeeding on this argument. Or a client may not want any more continuances in a civil case because stress from the uncertainty outweighs the possible benefits of delay. Or a client may want a certain argument raised because it might establish a long sought after legal principle, even though the chance of success is low.

In sum, the line between means and ends is imprecise at best. At a minimum, clients have a legitimate, and at times, overriding interest in what many characterize as the “means” of the lawsuit.

Although never expressly articulated, the argument that ends decisions implicate fundamental constitutional rights and means decisions do not perhaps underlies the position of those favoring the traditional allocation of attorney-client decisionmaking. However, this distinction does not explain the difference

49. Luban, *supra* note 46, at 456.

50. Luban, *supra* note 46, at 456. This hypothetical is derived from a song written by M.J. Wilkin & D. Dill. The song goes, in part:

The judge said “Son, what is your alibi?
If you were somewhere else then you won’t have to die.”
I spoke not a word, though it meant my life
For I had been in the arms of my best friend’s wife.

adequately. For example, the right to have a jury free from racial prejudice is a fundamental right;⁵¹ nonetheless, clients do not have the right to force their attorneys to question jurors with respect to their racial prejudices.⁵² A person has a constitutional right to be free from unreasonable searches and seizures, but clients cannot force their attorneys to challenge the admission of evidence on fourth amendment grounds.⁵³ Settlement of a civil suit is an ends decision belonging to the client; however, it involves no constitutional rights.

Finally, in many ways the current allocation of decisionmaking authority is paradoxical. On the one hand, ends decisions are so important, so fundamental, that only the client can decide them. On the other hand, means decisions, although merely tactical, belong to the expert because, among other reasons, attorneys make more learned decisions. Thus, the current allocation of decision-making authority reserves to the client—the poorer decisionmaker—the most critical choices in the lawsuit.⁵⁴

Not only is the distinction between “means” and “ends” unworkable, but also the justifications for attorneys’ deciding even the “means” of the lawsuit do not withstand scrutiny. Those justifications—parentalism, professional autonomy, and efficiency—are considered in the following sections.

B. *Parentalism*

Parentalistic intervention typically occurs in one of two situations. First, intervention may occur when an individual is incapable of rational decisionmaking because of some defect or limit in capability due to ignorance, youth, or mental incapacity.⁵⁵ Intervention on grounds of ignorance or incapacity is what James Childress terms “weak paternalism” because it ostensibly does not interfere with a person’s voluntary choice.⁵⁶ John Stuart Mill provided an example of such parentalistic action:

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.⁵⁷

51. See *Ristaino v. Ross*, 424 U.S. 589, 595 & n.6 (1976) (criminal defendant has constitutional right under sixth and fourteenth amendments to impartial jury).

52. See *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980) (although defendant must have opportunity to ask about bias, whether defense will avail itself of such opportunity will in most instances involve exercise of judgment that should be left to counsel).

53. See, e.g., *United States v. Aulet*, 618 F.2d 182, 189 (2d Cir. 1980) (decision to move to suppress evidence discovered in body search of client strategic decision for attorney); *Nelson v. State*, 346 F.2d 73, 80 (9th Cir.) (attorney may decide, contrary to client’s wishes, to forego a challenge to evidence even when there exists a possible challenge to evidence based on fourth amendment), *cert. denied*, 382 U.S. 964 (1965).

54. See Chused, *supra* note 16, at 668-72.

55. J. CHILDRESS, *supra* note 36, at 102.

56. J. CHILDRESS, *supra* note 36 at 17, 102.

57. J. MILL, *ON LIBERTY* 95 (1978).

The second type of paternalistic intervention occurs when a person's risk-benefit analysis is unreasonable according to the intervenor's standards. Intervention because a person's decision is believed to be wrong is what Childress calls "strong paternalism." Under this theory paternalism is justified even when the individual is an adult, is otherwise rational, and possesses full information, because the decision is considered unreasonable.⁵⁸

Paternalism in legal decisionmaking can occur in either situation. Consider, for example, the decision whether to call an alibi witness. The client wants the attorney to call the witness; the attorney refuses. The attorney, knowing the rules of evidence, realizes that the alibi witness' prior criminal record can be introduced; a result the attorney believes would be extremely damaging to the client. Furthermore, the attorney, knowing from experience something about the psychology of juries, believes that the alibi witness will reflect poorly on the client. The attorney's refusal to call the witness on the grounds of the client's ignorance of the rules of evidence and courtroom dynamics would be an example of weak paternalism. The attorney believes that he or she is implementing the decision the client would choose were the client knowledgeable about legal strategy.

Assume now that the attorney explained to the client the reasons for refusing to call the witness. The client still vehemently wants the alibi witness to testify. The attorney's refusal to call the witness, believing the client's assessment of risks and benefits to be irrational, is an example of strong paternalism. In this case the attorney also feels he or she is acting benevolently; the decision implements what the attorney believes is in the client's best interests.

In one sense, weak paternalism is less troubling than strong paternalism because the attorney ostensibly implements what the client wants. However, this form of paternalism really raises more questions than it answers. How do we know what the client wants? More fundamentally, should we require that an attorney first try to educate the individual to relieve the state of ignorance?⁵⁹ Mill's example is the quintessentially easy case: an emergency situation, life "hanging in the balance," and presumably no time to explain the danger. In the courtroom it may, by analogy, justify paternalism in those few circumstances when discussion is truly infeasible.⁶⁰ In other words, efficiency may, in limited circumstances, explain why paternalistic action rather than information should be forthcoming. But what about the vast majority of situations in which time is not of the essence? There must be an assumption of inherent incapability; that is, that explanations would be pointless because the client can never understand the factors sufficiently to make an informed choice. This Essay discusses this issue in detail shortly. For now, it merely should be noted that this basic precept has never been proven empirically. There is no evidence that legal decisions rest

58. J. CHILDRESS, *supra* note 36, at 17, 102.

59. See J. CHILDRESS, *supra* note 36, at 105-06 ("[L]ack of understanding cannot be used as an excuse for paternalistic intervention unless efforts have been made—time permitting—to increase the patient's understanding by disclosure of information.").

60. See *infra* notes 84-85 and accompanying text.

on factors so complex that clients cannot understand them after receiving an attorney's explanation. To the contrary, studies have demonstrated the ability of people to understand technical information when such information is presented appropriately.⁶¹

In the final analysis, both weak and strong parentalism assume that attorneys will make decisions in the best interest of their clients and that these decisions will be "better" than those their clients could make. In essence, the justification for parentalistic intervention rests on three explicit assumptions:

- (1) The lawyer understands the needs and interests of the client;
- (2) The lawyer will act to satisfy those needs; and

(3) The lawyer is uniquely equipped by education and experience to make the decision in the best interests of the client. Because the client does not possess the professional's esoteric knowledge, the client cannot choose the best course of action.

Assumptions (1) and (2) are necessary, but not sufficient to justify parentalism. For example, merely knowing the client's needs is irrelevant if the attorney's personal motivations prevent the attorney from attempting to meet those needs. In such a case the attorney is not acting truly in the best interests of the client, a cardinal precept of parentalism. On the other hand, an attorney motivated to meet the needs of a client must also be capable of understanding what those needs are and how best to meet them.

Assumption (3), which is both necessary and sufficient to justify at least the strong parentalistic approach, cannot be true unless (1) and (2) are true. Parentalism, after all, attempts to be benevolent; it tries to recognize and respond to the individual's needs. In addition, assumption (3), like strong parentalism generally, assumes that there is such a thing as the most rational or "best decision." This Essay contends that none of these three justifications for parentalism are valid.

First, can the attorney truly recognize the client's needs and interests? There is significant reason to question the attorney's ability to identify the client's concerns accurately.⁶² Even with the purest of motives, attorneys often ascribe certain standard, imputed ends to their clients, rather than acknowledge the actual ends and desires of clients. For example, many persons consider pleading the statute of limitations as unfair; nonetheless, attorneys routinely will plead it, responding to a particular theory of human nature.⁶³ Similarly, the maxim of legal strategy, that any "lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circum-

61. See *infra* notes 124-129 and accompanying text.

62. See W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, *DOING GOOD: THE LIMITS OF BENEVOLENCE* 93-95 (1978); *infra* text accompanying notes 63-69.

63. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 56-57; see also Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979) (discussing conflict between what attorneys assume to be clients' needs and actual needs of clients); Luban, *supra* note 46, at 459 n.9 (client may want to vindicate a certain right without using a certain tactic because he or she disapproves of it; client's ends may be mistaken as only means by the attorney).

stances," imputes to all criminal defendants the same end: escaping punishment. Although such an end may be widespread, it ignores the possibility that for some defendants, confession may be cathartic and prolonging the ordeal may be more terrible than the punishment.⁶⁴

The attorney's inability to recognize the client's interests accurately is particularly acute when the client is a criminal defendant. Attorneys and clients in criminal cases often are separated by vast differences in social, economic, or racial status.⁶⁵ In these circumstances it is difficult for the attorney to understand fully the underlying wishes and goals of the client. Communication, which might help minimize certain cultural differences, is typically not forthcoming.

Even assuming attorneys adequately recognize their clients' interests and concerns, attorneys still may not act in their clients' best interests. Theoretically, the duty of loyalty owed by the attorney to the client ensures that the attorney reaches a decision considering only the needs of the client. In reality, however, attorneys' self-interests influence the choices they make for their clients.⁶⁶ These interests often conflict with those of the client. As Professor Mark Spiegel describes:

the decision not to seek out a witness may involve a trade-off between the lawyer's use of time and the client's desire for that witnesses' testimony. The choice of the forum may involve a trade-off between the lawyer's convenience and the client. The lawyer's decision to present a novel legal argument or his decision not to offer a foolish one also may involve a tradeoff between the lawyer's and client's needs.⁶⁷

Moreover, significant economic conflicts of interest arise between lawyer and client, regardless of whether the attorney is paid an hourly rate or a contingent fee. An attorney charging a set hourly rate has no direct economic incentive to work the particular number of hours that results in the largest net recovery to the client. The attorney's incentive is to work the maximum number of hours even though a smaller number would be better for the client. As Professors Clermont and Currihan explain:

No matter how many hours the lawyer devotes to the case before he ceases work and shifts his efforts to other cases, his economic position

64. See Simon, *supra* note 63, at 57 n.65, 58.

65. See Burt, *supra* note 2, at 1035-36.

66. See D. ROSENTHAL, *supra* note 12, at 106. Similar concerns influenced the development of informed consent in the medical profession. As Professor Katz explains:

To be sure, physicians and patients are united in the common pursuit of restoring patients to "healthy" life. Since that objective rarely can be fully achieved, however, it remains an ambiguous one. . . . In the absence of any one clear road to well being, identity of interest cannot be assumed and consensus on goals, let alone on which paths to follow can only be accomplished through conversation.

J. KATZ, *supra* note 3, at xvii-xviii; accord Thompson, *Psychological Issues in Informed Consent*, in 3 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 83, 114-15 (Doctors may have ulterior motives that influence the choices they make for patients. Even if the doctor decides in good faith, the decision may not be optimal from the patient's perspective, because the doctor's view of what is best may differ from that of the patient.)

67. See Spiegel, *supra* note 9, at 88-89.

will be unaffected, because he is being paid at his normal hourly rate and the fee is unconditional. If his workload happens to be light, the lawyer would tend to work more than the particular number of hours required to maximize his client's net recovery—a strategy obviously to his client's disadvantage. The overworked attorney would tend to work fewer than that particular number of hours, also to the client's detriment.⁶⁸

Likewise, in the case of a contingent fee the attorney optimizes his or her economic position by working a small number of hours to obtain a respectable settlement. In either case the "lawyer's economic interests do not align with those of his client."⁶⁹ The attorney's concern about his or her time, profit, and other personal interests affect, perhaps subconsciously, the choices made for the client. Thus, the parentalistic assumption—that lawyers act in the best interest of their clients—is at least suspect.

Finally, the assumption that lawyers are better decisionmakers with respect to the means of litigation is unsupportable. Proponents of parentalism argue that attorneys' technical knowledge equips them to make "better decisions" that maximize their clients' goals.⁷⁰ The argument that attorneys make better decisions appears weak from the outset. As indicated earlier, attorneys often do not recognize their clients' actual needs and interests, and even if they do, they often are subverted from acting in the best interests of their client by personal motivations.⁷¹ More fundamentally, what is a better decision? And assuming that it is clear what a "better decision" is, why believe that the attorney's professional knowledge necessarily yields better results than client decisionmaking?

What is a "better decision" is not an easy question to answer. At a simple level, a better decision is one more likely to result in the client winning the lawsuit, or achieving his or her ultimate goal. For example, if the plaintiff's lawyer decides not to call a witness because the testimony more likely than not will hurt the plaintiff, that presumably is a better decision than calling the witness. But what if the plaintiff wants the witness called because he or she wants a certain side of the story told? What if the prospective witness is the plaintiff, who feels it critical to explain certain events to vindicate him or herself, or who just cares most about having his or her story heard? Consider again the problem associated with the means-ends distinction. Clients want to win, but they often want to win a "certain way." Sometimes the way is more important than the result.

Furthermore, questions about legal means usually do not have one "right" answer. It is not simply a matter of applying the attorney's expertise. Rather, such decisions involve questions of values and unquantifiable risks. For in-

68. Clermont & Curren, *Improving on the Contingency Fee*, 63 CORNELL L. REV. 529, 535-36 (1978); see Maute, *supra* note 10, at 1074-75.

69. Clermont & Curren, *supra* note 68, at 536.

70. See *supra* text accompanying notes 34-42; see also C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, INFORMED CONSENT 11 (1984) ("[D]ecisions about medical care are not to be made exclusively by physicians, because only the patient has access to the personal information, which is highly relevant to the making of the decision.") [hereinafter C. LIDZ].

71. See *supra* notes 62-69 and accompanying text.

stance, the attorney for the defendant in a personal injury suit believes that a continuance probably will increase the willingness of the impoverished plaintiff to settle and to do so for less money. Perhaps the lawyer even could roughly quantify that increased chance at thirty percent. The "rational" decision would be to cause a delay. However, delay is troubling to the defendant. Uncertain liability and the stress of involvement in the legal system makes the defendant loath to delay any longer. Perhaps too, the defendant finds the use of a tactical tool to exploit the plaintiff's poverty offensive. Certainly, the attorney's technical knowledge does not aid him or her in weighing the benefits of delay against the client's anxiety and ethical beliefs. Moreover, the attorney is inherently less capable of evaluating those subjective factors than the client. They are values that can only be communicated imprecisely.⁷²

The limits of expert decisionmaking were primary factors in the argument for informed consent in the medical context.⁷³ Consider, for example, the hypothetical woman with breast cancer. Clearly, the doctor possesses superior medical knowledge concerning treatment modalities. But that expertise does not enable the doctor to determine whether the woman should choose radical surgery and the ten to twenty year survival rate, or less disfiguring treatment, with a statistical proof of somewhat reduced life span. The decision depends less on technical expertise and more on value judgments.

In the examples drawn from law as well as from medicine, the professional's technical knowledge is necessary but not sufficient to reach a "better result." The assumption that attorneys make better decisions than clients because attorneys possess superior technical skills ignores that clients possess unique information about their own value hierarchy. A decision devoid of such value judgments can never be defined as the "best decision."

C. *Professional Autonomy*

The justification for attorney decisionmaking based on professional autonomy encompasses three distinct arguments. First, attorney decisionmaking is central to being an attorney, and client decisionmaking subverts what it means to be an attorney.⁷⁴ Second, the attorney's professional reputation might be jeopardized if he or she were forced to follow the client's every whim.⁷⁵ Last, client decisionmaking would cause lawyers to violate the duties owed to third parties and to society generally.⁷⁶ None of these arguments, however, justify the current allocation of decisionmaking authority to the attorney.

The argument that "lawyering requires attorney decisionmaking" is tauto-

72. See J. KATZ, *supra* note 3, at 92, 99, 102 (physicians cannot convey all aspects of esoteric knowledge to patients; burden of justifying patient participation should reside with opponents).

73. See Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 222 (1985) ("[I]n the face of value pluralism, factual indeterminacy and increasing options, patient autonomy has become a central principle of both popular and philosophical analysis of medical decision making.").

74. See *supra* note 43 and accompanying text.

75. See *supra* notes 44-45 and accompanying text.

76. See *supra* notes 44-45 and accompanying text.

logical: it is defined that way because attorneys arbitrarily define it that way. There is nothing inherent to the practice of law that requires an attorney to make decisions for the client. To the contrary, the fact the client must make certain decisions demonstrates that client decisionmaking is not inconsistent with lawyering.

To say that the attorney is transformed from a "thinking professional" into a hired mouthpiece under an informed consent doctrine clearly is exaggeration. Even under an informed consent model the attorney would perform the functions traditionally associated with "lawyering": researching the law, applying the law to a particular fact situation, and attempting to persuade others that the client's position is the correct one. The only difference under an informed consent model is that attorneys also would use their special skills and expertise to inform their clients of the legal issue and to help clients reach a viable decision. The doctor is no less a thinking professional because he or she is required to obtain patient consent; nor would the attorney be less a thinking professional.

Admittedly, attorneys may have an interest in maintaining decisionmaking authority to preserve their professional reputations. On a personal level, the attorney may fear that he or she will not "look good" if compelled to raise an argument that is weak—but not frivolous. Of course, some of this fear may be minimized once informed consent becomes the norm, and the choice of strategy is not automatically ascribed to the attorney. Moreover, the situations in which the client will force the attorney to raise a truly weak argument should be few. As this Essay argues later, the assumption that clients are poor decisionmakers is incorrect.⁷⁷ In general, it should take little persuasion to get a client to understand that a particular argument has little chance of success.⁷⁸

Moreover, the client's interests outweigh any concern the attorney has in maintaining decisionmaking authority to preserve his or her reputation. It should be remembered that it is the *client's* day in court, not the lawyer's. The consequences of a trial obviously affect the client in a much more profound way than they affect the lawyer. The client does the time in a criminal case, and it is the client's money at stake in a civil suit.⁷⁹

The third argument—that client decisionmaking will force attorneys to vio-

77. See *infra* notes 124-129 and accompanying text.

78. As Justice Brennan has noted, "It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments." *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting).

79. In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that the sixth amendment right to counsel includes the right of defendants to waive the right to counsel knowingly and proceed *pro se*. The court stated:

It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Id. at 819-20 (quoting the language of the sixth amendment).

late duties owed to others—misunderstands the model of informed consent. Essentially, this argument suggests that clients will ask their attorneys to act unethically, and that attorneys will be forced to do so. Informed consent, however, only gives the client the right to make decisions; it does not mean that the attorney must acquiesce. Bar associations, and the courts, should make clear that attorneys cannot defend against a charge of unethical conduct on the ground they acted at the client's behest. As a President's Commission considering the issue of informed consent in health care noted in its report: "Patient choice is not absolute. Patients are not entitled to insist that health care practitioners furnish them services when to do so would violate either the bounds of acceptable practice or a professional's own deeply held moral belief."⁸⁰ If the client asks the attorney to act illegally or unethically the attorney should explain to the client why he or she cannot do so. If the client remains insistent in the demand the attorney, if practicable, should withdraw from the lawsuit.⁸¹ Perhaps also, attorneys will exercise more care under an informed consent doctrine to accept only those cases and clients with which they ethically feel comfortable.

Moreover, informed consent actually may lead to less unethical behavior. Attorneys who currently act ethically can continue to do so; nothing in the informed consent doctrine requires otherwise. Attorneys who now behave unethically, however, may be compelled to act in a more ethical manner by their clients. It is conceivable that attorneys act unethically because they ascribe certain imputed ends to the client—they assume that the client wants them to behave in such a manner.⁸² Under an informed consent model, the attorney must deal with the client's actual desires; in such a case unethical conduct might decrease. At the very least, there is no reason to believe that unethical behavior would increase because of client decisionmaking. As Professor Spiegel writes:

Lawyers, rather than confront differences with their clients, may impute selfish motives and ends to them. Under present practice, therefore, the lawyer might present possibly false testimony on the unquestioned assumption that the client so desires. Informed consent offers two possibilities for change: the lawyer may discover that his assumption was wrong, or the client, after discussion with the lawyer, may decide against presenting the testimony.⁸³

80. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 3. The attorney's duty of loyalty would continue to be limited under an informed consent model, as it is under the traditional decisionmaking model, to "legitimate, lawful conduct compatible with the very nature of a trial as a search for truth . . ." *Nix v. Whiteside*, 106 S. Ct. 988, 994 (1986). "[T]he legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct . . ." *Id.* at 995.

81. The Model Code of Professional Responsibility currently permits the attorney to withdraw from representation in certain limited circumstances, but places significant restrictions on the client. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (B), (C) (1970). A loosening of these rules to "increase the moral choice of the lawyer as well as the client" may be advisable under an informed consent model. *See Martyn, supra* note 10, at 317-18.

82. In an extreme example, G. Gordon Liddy suggested serving his client, Richard Nixon, by such techniques as drugging the opposition, kidnapping, hiring professional killers, eavesdropping, and spying. *Burt, supra* note 2, at 1023 n.36.

83. Spiegel, *supra* note 9, at 119.

D. *Efficiency*

The argument that efficient functioning of the judicial system justifies attorney decisionmaking has some, albeit minimal, validity. Certainly, there are times when it is impractical for the attorney to confer with the client and obtain consent. One can imagine a courtroom scene resembling a Marx Brothers movie—the attorney objects to a question and the client objects to that objection.

However, the efficiency argument proves too much. On its face the argument pertains most readily to in-trial, courtroom scenarios requiring speedy, on-the-spot judgments. Essentially, this means that decisions such as whether to object to testimony or evidence, and what spontaneous questions to ask should rest with the attorney—although even here, the “tone” and approach of attack can be discussed with the client in advance. For example, the client can request that the attorney not ask a witness a certain line of questions, or that the attorney treat a “hostile” witness gently. In those unusual circumstances in which the attorney’s approach is contrary to the guidelines provided by the client, the client could request and the court could grant a continuance.

The attorney’s right to make certain in-trial decisions could constitute an exception analogous to the emergency or incompetence exceptions in the medical informed consent model. Doctors are permitted to treat a patient without consent when obtaining consent is impossible and immediate treatment is necessary.⁸⁴ Just as there is no realistic opportunity for consultation in such medical emergencies, informed consent is not always feasible in certain trial settings. This fact, however, does not justify attorney resolution of all means decisions. At best, this efficiency argument means that in situations in which an instantaneous decision must be made and prior consultation with the client is not feasible attorney decisionmaking is the only viable option.

The concern for the efficient functioning of trials obviously has no relevance for the vast majority of legal issues, which are resolved out of court. Moreover, it has no applicability to appellate argument. There is more than ample time for counsel to confer with the client over the choice of argument on appeal.⁸⁵

A second “efficiency” concern asserted in support of attorney decisionmaking is that the time and cost of providing the information to the client is prohibitive. If this means that attorneys may not make quite as much money, so be it. The client’s needs should take precedence over the attorney’s need for more income. As Jay Katz noted with respect to the analogous complaint from doctors:

The railroading of patients, seeing scores of them a day back to back,

84. See F. ROZOVSKY, *CONSENT TO TREATMENT: A PRACTICAL GUIDE* 88-92 (1984).

85. Appellate advocacy illustrates well the scope of the efficiency argument. Both the arguments made in the written brief and during the oral presentation should be subject to the client’s consent. On the other hand, the attorney need not get the client’s consent to respond to the judge’s questions; however, the answer should be consistent with the client’s approach. See *Krisner, Jones v. Barnes, The Sixth and the Fourteenth Amendments: Whose Appeal is it, Anyway?*, 47 OHIO ST. L.J. 179, 195 (1986) (advocating client decisionmaking with respect to the arguments raised on appeal).

surely would be affected by conversation. If physicians were to suffer as a consequence, then doctors' contemporary claims to a right to financial compensation, that has placed them near the top in earnings compared with other groups, must be reconciled with medicine's ancient claim to placing patient care first.⁸⁶

Even assuming that the income of attorneys is a legitimate concern, attorneys' salaries will not suffer significantly. First, those that bill hourly can recoup any additional cost by charging for the time. Second, conversation time will not necessarily be lengthy, especially when attorneys become accustomed to explaining issues to clients.⁸⁷ Moreover, it is possible that attorneys currently spend at least some time justifying certain decisions, after the fact, to irate clients.

Ironically, an informed consent model ultimately may increase attorneys' salaries by encouraging more people to seek legal assistance. Some individuals may be deterred from seeking legal advice by the fear that they will have no control over the lawsuit. A practice of law that permits and encourages active client participation may entice many who need legal advice to seek it.

On the other hand, the fear that increased costs, passed on to the client, will render legal advice unaffordable to many is a legitimate concern. Significant numbers of individuals already are deterred from seeking legal advice because of perceived or actual inability to afford the cost.⁸⁸ The concern is that imposing an informed consent requirement will worsen this situation. It is impossible to predict empirically how much informed consent will "cost" each client in additional fees, and whether that incremental amount will render legal assistance unaffordable. It is doubtful, however, that the costs of consultation will be a significant proportion of the legal bill. As indicated earlier, obtaining consent on most issues would not be a lengthy process. Given the high cost of legal fees, the additional expenses caused by communication should be marginal. It is unlikely, moreover, that individuals will perceive informed consent as being the "final straw," pushing the cost of legal assistance beyond reach.

The real question is whether those who want and can afford to make decisions should be prevented from doing so because others cannot or do not want to pay for it. The appropriate solution is not to keep all clients from exercising decisionmaking authority, but to subsidize increased legal services for the poor to ensure the availability of legal assistance. Admittedly, absent such a solution, some individuals will desire to waive the right to make certain decisions because of cost. Still, many middle or lower income people undoubtedly will want to invest their money in the right of decisionmaking and thus, will benefit under the informed consent model.⁸⁹

86. J. KATZ, *supra* note 3, at 227-28.

87. See Martyn, *supra* note 10, at 342.

88. See, e.g., B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970) (probing problems in availability of legal services based on findings of American Bar Association Special Committee); B. CURRAN & K. ROSICH, *DATA MANUAL FOR THE SURVEY OF THE LEGAL NEEDS OF THE PUBLIC* (1980) (analyzing data from the American Bar Foundation and the American Bar Association Special Committee); Stein, *Legal Services and the Middle Class*, 53 N.D.L. REV. 573, 580 (1977) (discussing problems with providing quality legal services to middle class consumers).

89. See *infra* notes 130-147 and accompanying text.

In the above sections this Essay has argued that the three justifications for attorney decisionmaking are not supportable. The assumption that attorneys act in the best interests of the client and make inherently better decisions is questionable at best. Moreover, neither professional autonomy nor efficiency are necessarily valued goals; in any event, neither will be sacrificed by client decisionmaking.

However, these are reasons why the traditional justifications for allocating decisionmaking authority to the attorney are not persuasive. The question thus arises: Are there reasons *for* giving such authority to the client? The next section introduces the argument for informed consent based on autonomy.

III. THE ARGUMENT FOR CLIENT DECISIONMAKING: AUTONOMY

A. *The Value of Autonomy*

This section presents the deontological⁹⁰ and utilitarian arguments⁹¹ in favor of client decisionmaking. On deontological principles client decisionmaking is an inherent good because it recognizes individual dignity and personhood, and the right of self-determination. In other words, informed consent enhances autonomy, and all the rights that inure in that concept. On the other hand, a utilitarian would argue that informed consent is beneficial to both client and society: the process of deciding for oneself increases one's personal happiness and well being.

1. The Deontological Approach: Autonomy as a Good in Itself

The primary justification for informed consent is the principle of autonomy. This principle denotes the ability to make choices about one's life; it is the right of self-determination. It is a value endorsed both by religious⁹² and secu-

90. The origin of deontology can be found in the writings of Immanuel Kant. See I. KANT, *GROUNDING FOR THE METHAPHYSICS OF MORALS* (1981). Deontologists believe that

on the basis of a priori assumptions that individuals have certain human rights and that it is the role of the lawyer to help preserve and protect them. This makes particular behavior of lawyers appropriate quite without regard to what the effect is on the general happiness or well being produced by asserting the rights.

T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 17 (3d ed. 1984).

91. Utilitarianism is associated with David Hume, Jeremy Bentham, and John Stuart Mill. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1876); D. HUME, *A TREATISE OF HUMAN NATURE* (1888); J. MILL, *UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM* (1962). See generally T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 20-55 (1979) (analyzing the moral principles applicable to biomedicine); P. RAMSEY, *THE PATIENT AS PERSON* (1970) (examining present day problems in medical ethics). "The utilitarian thinker asks how particular conduct affects people's happiness and well being. If more well being is generated by one course of behavior than another, then that course of behavior is preferable." T. MORGAN & R. ROTUNDA, *supra* note 90, at 16.

92. For example, Pope John XXIII wrote:

The dignity of the human person . . . requires that every man enjoy the right to act freely and responsibly. For this reason . . . man should exercise his rights, fulfill his obligations, and in the countless forms of collaboration with others, act chiefly on his own responsibility and initiative. This is to be done in such a way that each one acts on his own decision, of set purpose and from a consciousness of his obligation, without being moved by force or pressure brought to bear on him externally.

lar⁹³ scholars and is a basic precept of Anglo-American law.⁹⁴ It has been described as "one of our highest social values."⁹⁵ Indeed, "[o]ne might reasonably claim that the most humane principle advanced by the post-theistic West is that of personal human autonomy."⁹⁶ Liberal society emphasizes concern for the individual; autonomy is a central value articulating and embodying that concern.

Why is autonomous decisionmaking so valued? Making our own decisions affirms our sense of personhood—it tells us who we are. It allows individuals to apply their own value hierarchy and to determine, often in a literal sense, the future course of their lives. As philosopher Gerald Dworkin explains:

We desire to be recognized by others as the kind of creature capable of determining our own destiny. Our own sense of self-respect is tied to the respect of others . . . [N]otions of creativity, risk-taking, of adherence to principle, of responsibility, are all linked conceptually to the possibility of autonomous action. These desirable features of a good life are not possible (logically) for nonautonomous creatures. In general, autonomy is linked to activity, to making rather than being, to those higher forms of consciousness that are distinctive of human potential.⁹⁷

Making one's own choices is particularly justified when questions of values are implicated, as they are in the legal system, and when the decisions affect a person's life as substantially as those matters in which an attorney typically is involved. Lawsuits resolve disputes over property or contractual rights, define fault and negligence and hence, obligation, determine privacy interests, and in the case of criminal suits, decide questions of liberty and life. It is difficult to conceive of situations in which the right to decide one's own fate is more fundamentally implicated.⁹⁸

Thus, absent any utilitarian justification—and even assuming that an expert (or a computer) could make better decisions than the client—informed consent is justified. As the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research concluded:

[T]he values underlying [informed consent] are not merely legal artifacts. Rather, they are deeply embedded in American culture and the

Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191, 191 (1977) (quoting PACEM IN TERRIS, Encyclical Letter of Pope John XXIII, para. 34 (Apr. 11, 1963)).

93. See R. FADEN & T. BEAUCHAMP, *supra* note 5, at 7-9; J. KATZ, *supra* note 3, at 104-21.

94. See 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 17.

95. C. LIDZ, *supra* note 70, at 10.

96. White, *Informed Consent: Ambiguity in Theory, Practice*, 8 J. HEALTH, POL., POL'Y & LAW 99, 101 (1983).

97. Dworkin, *Autonomy and Informed Consent*, in 3 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 63, 74.

98. Dworkin makes an analogous argument in the medical field:

First, one's body is irreplaceable and inescapable. If my architect doesn't listen to me and this results in a house I do not like, I can always move. I cannot move from my body. In addition, since my body *is* me, failure to respect my wishes concerning my body is a particularly insulting denial of autonomy.

Dworkin, *supra* note 97, at 75.

American character; they transcend partisan ideologies and the politics of the moment. Fundamentally, informed consent is based on respect for the individual, and in particular, for each individual's capacity and right both to define his or her own goals and to make choices designed to achieve those goals.⁹⁹

2. The Utilitarian Approach: Autonomy Enhances Personal Happiness and Satisfaction

Principles of utility also justify informed consent: informed consent will maximize benefits to everyone in society, including attorneys, clients, and the legal institutions themselves.¹⁰⁰ Rules of consent serve to protect attorneys and clients from misunderstandings that arise from a failure to communicate.¹⁰¹ Informed consent helps allay public fears and skepticism about the legal profession that currently exist, particularly among indigent defendants.¹⁰² "[T]o force a lawyer's *decisions* on a defendant 'can only lead him to believe that the law contrives against him.'" ¹⁰³ Furthermore, informed consent encourages self-scrutiny by attorneys; they are compelled, individually and collectively, to evaluate the appropriate relationship between attorney and client.¹⁰⁴ Finally, informed consent maximizes the well being of society because it reaffirms the value and validity of autonomy. All of society benefits when the ideals of autonomy are heralded, rather than subverted, by the legal profession. Adoption of informed consent, in other words, revitalizes the general commitment to the concept of autonomy. As Professors Beauchamp and Childress relate, "to the extent violations of autonomy are institutionally condoned, we all stand to suffer, because the right to make such choices will in general be impaired or even eliminated by this institutional arrangement."¹⁰⁵

Furthermore, autonomous decisionmaking is desirable from a utilitarian perspective because it best assures that individual preferences will be maximized. Client control makes it more likely that the resulting choices will be satisfying. Given the frequent absence of objective criteria, and the legitimate subjective preferences of clients, ascertaining whether a particular course of action will promote a client's well being is a matter of individual judgment.¹⁰⁶

99. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 16-17.

100. *Cf.* T. BEAUCHAMP & J. CHILDRESS, *supra* note 91, at 64 (informed consent in medicine will protect and benefit everyone in society).

101. The practical effect may be a reduced amount of legal malpractice litigation. See Martyn, *supra* note 10, at 346; *cf.* Bettman, *The Issue of Informed Consent*, 27 SURV. OPHTHALMOLOGY 133, 133 (1982) (informed consent creates bond that makes patient willing to accept an unfortunate outcome; it eliminates surprise and the anger that most often causes patients to sue).

102. See Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RES. 52, 67 (1967) (indigent clients mistrust appointed counsel).

103. *Jones v. Barnes*, 463 U.S. 745, 762 (1983) (Brennan, J., dissenting) (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)).

104. See Martyn, *supra* note 10, at 345 (informed consent in medicine has caused a number of doctors and medical schools to re-examine the entire physician-patient relationship).

105. T. BEAUCHAMP & J. CHILDRESS, *supra* note 91, at 64; see also White, *supra* note 96, at 116 (benefit to informed consent independent of any effect on medicine that may exist; there is a "value to society in keeping alive such notions as autonomy and the right to self-determination").

106. See, e.g., D. BINDER & S. PRICE, *LEGAL INTERVIEWING & COUNSELING: A CLIENT-*

Furthermore, individuals express more satisfaction in their own decisions for the simple reason that *they* made the decision. In other words, the process of deciding for oneself—even if others could have made the same choice—leads to increased satisfaction with the result.¹⁰⁷ For example, studies in the medical field suggest that

patients knowledgeable about their condition and involved in the decisionmaking process are likely to emerge from therapy in better health. A number of recent studies indicate that informed patients tend toward greater compliance with certain therapeutic regimens, reduced levels of anxiety, faster recovery from surgery, and enhanced ability to protect their own well-being¹⁰⁸

B. *The Implication of Autonomy for Decisionmaking*

The above section indicates that autonomy is good in and of itself and that it leads to desirable results. A desire to achieve autonomy does not, however, resolve the question of who should make what decisions. For one thing, autonomy is a vague notion and it may be difficult to determine exactly what is a client's "autonomous" choice. For example, what if the attorney identifies a conflict between a client's "autonomous" wish to win the lawsuit, and a client's

CENTERED APPROACH 153 (1977) (legal decisions rest on some imprecise accounting concept of what factors, on balance, emerge as important to client); D. ROSENTHAL, *supra* note 12, at 29-61 (study found clients who actively participate get significantly better results than those who delegate to attorney); cf. C. LITZ, *supra* note 70, at 11 (only patients have access to certain personal information necessary to medical decisionmaking); Shultz, *supra* note 73, at 292-93 ("Neither experts nor society can judge what is best for an individual better than the individual herself [Assuming adequate information is provided by the doctor,] patient-made decisions should generally yield outcomes that are preferable as evaluated by the . . . patient."); Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1646 (1974) ("Only the patient knows sufficiently his own value preferences, capacity for pain and suffering, future business and social plans, and religious beliefs to evaluate the desirability of a particular treatment so it will maximize the patient's satisfaction.").

107. See G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 60 (1983) (lack of involvement in and control over their own cases reduces clients' satisfaction with outcome); Maute, *supra* note 10, at 1051 n.2. Moreover, studies support the position that individual participation and decisionmaking make it more likely that individuals comply with the result. For example, one study of consensual dispute resolution in small claims court found that

the very act of choosing to accept a settlement that might have been rejected may generate pressures that favor compliance. Agreement may, in effect, reinstitutionalize legal norms at the personal level . . . , adding guarantees of personal honor to the formal guarantees of law. Also, pressures toward cognitive consistency, as suggested by a variety of social-psychological theories . . . , may lead one to structure later behavior in accordance with prior commitments, as may the possibility of embarrassment.

McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 43 (1984).

The dissatisfaction experienced particularly by criminal defendants is linked directly to their lack of participation in the process. For example, studies indicate that a large part of indigent defendants' dissatisfaction stems from the feeling that "they were treated as objects, manipulated by their lawyer in conjunction with the prosecutor." Mazor, *supra* note 31, at 1138. The fact attorneys can disregard their clients' wishes exacerbates the clients' suspicion of their attorneys. Jones, 463 U.S. at 762 (Brennan, J., dissenting); cf. Roter, *Patient Participation in the Patient-Provider Interaction: The Effect of Patient Question Asking on the Quality of Interaction, Satisfaction & Compliance*, 5 HEALTH EDUC. MONOGRAPHS 281 (1977) (study demonstrated that patients who receive more information and are free to ask questions are more satisfied with care).

108. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 69-70.

“autonomous” refusal to argue a certain defense? Which “autonomous” choice deserves respect?

It is possible, moreover, that preserving autonomy in the long run may require parental-type intervention in the short run. The classic example is that of Homer's Odysseus. Before Odysseus sailed by the Island of the enchanting Sirens he had his men bind him to the mast and swear not to release him. Odysseus feared the Sirens, who used beautiful music to draw sailors to their death. Hearing the bewitching music of the Sirens, Odysseus demanded his release from the mast. His crew, in refusing to release him, were acting parentalistically. However, in responding to Odysseus' earlier request, and saving his life, they obviously preserved his autonomy.

This Essay contends that autonomy establishes a presumption in favor of client decisionmaking over all aspects of the lawsuit. The value of autonomy does not diminish simply because it is a “means” decision being made. To the contrary, as argued earlier, the strategic choices often are the very decisions clients feel most strongly about. At a minimum, the goal of autonomy requires that clients have the *choice* whether to care about the means. Those strategic decisions that do not evoke concern from the client likely will be delegated to the attorney.

This presumption in favor of autonomy rests on a belief that, with appropriate information, clients are capable of reaching a rational decision. Only in the rare situation in which the client is incapacitated or incompetent will parentalistic intervention be necessary. In other words, weak parentalism is only rarely justified; strong parentalism should never be acceptable. The factual basis for the belief that clients are capable of reaching a rational decision will be demonstrated in the next section.¹⁰⁹

Given that there rarely is a “right or wrong” answer, and that even the “best” decision often is impossible to determine, the “rational” choice need not be the one the lawyer would have made. The fact the lawyer believes that the client is making the wrong decision is, therefore, irrelevant. The attorney's duty is to explain the various legal issues adequately and to accept the client's resolution.

Admittedly, autonomy is not absolute, but merely establishes a presumption for client decisionmaking. There are other values reflected in concerns for professional autonomy and efficiency that may override the client's right to decide. First, as discussed earlier, the client should not have the right to force an attorney to act illegally or unethically.¹¹⁰ Autonomy is the right to self-determination; it must be limited when it infringes on another's rights so severely. Second, efficiency, in a narrow sense, may restrict autonomy. As previously discussed, there may be rare situations in which the legal process itself is jeopardized by client decisionmaking, or in which the attorney truly cannot inform

109. See *infra* notes 124-129 and accompanying text.

110. See *supra* notes 80-83 and accompanying text.

the client and gain consent for compelling efficiency reasons. In such circumstances, the attorney should be given decisionmaking authority.

Third, there may be other values that outweigh autonomy. For example, it may be decided that the societal desire to convict only guilty people is more important than autonomy. Thus, if autonomy results in more innocent people being convicted, due to poor client choices, increased client decisionmaking should be re-examined. The next section addresses this final concern.

IV. INFORMED CONSENT: CAN RESPECTING AUTONOMY WORK?

A theory of informed consent attempts to promote both autonomy and rational decisionmaking. For such a theory to work there must be adequate and accurate communication between attorney and client. The client must understand the information, and he or she must make an informed choice free from coercion. This final section attempts to demonstrate that clients are capable of making voluntary and rational choices.

A. *The Communication Imperative: The Danger of Information Distortion and Coercion*

The theory of informed consent assumes there will be a meaningful exchange of material information, so that the client can make an accurate assessment of the risks and benefits of the available choices. Certainly, the attorney is not obliged to tell the client everything; the client realistically cannot be provided the equivalent of a law school education. The precise information that the attorney must divulge depends on the particular decision under consideration. For most issues the discussion would focus on the "classical" elements of disclosure: risks and benefits of alternative courses of action.¹¹¹ Obviously, this general formula leaves much discretion with the attorney.

The efficacy of disclosure thus depends on the circumstances and spirit in which it is given.¹¹² One fear is that the attorney will, for a number of reasons, provide either incomplete information, or present the information in such a way as to coerce the client into a predetermined choice. In either event, the goals of autonomy and rational decisionmaking are subverted.

111. See C. LIDZ, *supra* note 70, at 12 (physicians must disclose the nature of the procedure, its benefits and risks, and any possible alternatives); *cf.* *Canterbury v. Spence*, 464 F.2d 772, 788 (D.C. Cir. 1972) (relatively remote consequences of medical treatment may have to be disclosed if they pose a chance of death or disablement). Some state statutes have attempted to identify more specifically the information physicians must disclose. For example, Colorado's informed consent law required physicians to tell the "likelihood" of death or injury from a procedure and provided that "likelihood means an approximation of the percentage within two percent of the risk associated with the procedure . . ." Act of Apr. 30, 1976, ch. 88, § 1, 1976 Colo. Sess. Laws 522, 523, *repealed by* Act of May 27, 1977, ch. 190, § 1, 1977 Colo. Sess. Laws 799, 799. The mathematical requirement "proved [an] unworkable practice and the law was repealed within a year of passage." J. LUDLAM, *supra* note 5, at 49.

112. See Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137, 164-77 (1977) (discussing the disclosure standards of informed consent). See generally Thompson, *supra* note 66 (detailing social psychological research about people's responses to different methods of disclosure).

1. The Reasons for Information Distortion

The attorney's personal interests may endanger full and open disclosure. Perhaps most significantly, the attorney's antipathy towards informed client consent may cause the attorney either to hold back information he or she believes the client cannot comprehend, or shade the information to ensure that the client reaches the decision deemed appropriate by the attorney. Similarly, certain financial conflicts of interest between the attorney's needs and the client's may discourage full communication. For example, an attorney working on a contingent or a fixed fee basis may not want to take the time necessary to disclose material information about various choices the client faces. In such a situation, the time spent gains no additional compensation for the attorney.

In essence, the conflicts of interest that cause doubt about attorney decisionmaking in the first place may be recast as reasons why informed consent does not really ensure client choice. So long as the attorney controls the information, the attorney controls the choice.

2. Possible Answers

The fear that attorneys may, either purposely or inadvertently, use their ability to control information to coerce their clients' choices is a troubling one. Certainly, society expects and wants attorneys to try to persuade their clients to accept what the attorney believes is the wisest course of action. The line between persuasion and coercion is a difficult, yet important one to draw. Persuasion respects the right of an individual to make choices; coercion undermines an individual's autonomy.

Given the often subtle nature of coercion, it may be impossible to know its true extent. It is important, however, to keep in mind that information flow need not be perfect for informed consent to be justified. As Bernard Barber notes:

[Informed consent does] not require some utopian, impossible, or unreal consent process. In the real and morally satisfactory world, informed consent is a matter of more rather than less, of better rather than worse, of the search for improvement rather than of the commitment to formalized and inadequate consent.¹¹³

In any event, the concern about inadequate and biased information may be exaggerated. First, the experience of the medical profession empirically reveals that, despite doctors' original dislike of the concept of informed consent,¹¹⁴ sig-

113. B. BARBER, *INFORMED CONSENT IN MEDICAL THERAPY AND RESEARCH* 10 (1980).

114. The medical profession's original antipathy towards informed consent is well known. Informed consent has been condemned by the medical profession as a myth and a fiction and even made the subject of parodies designed to illustrate its absurdity. See C. LIDZ, *supra* note 70, at 10; see, e.g., DeLee, *Malpractice and Informed Consent—A Legal Ploy*, 61 *INT'L SURGERY* 331, 332 (1976); Laforet, *The Fiction of Informed Consent*, 235 *J. A.M.A.* 1579, 1579 (1976); Ravitch, *Informed Consent—Descent to Absurdity*, *MED. TIMES*, Sept. 1983, at 164, 164. Criticism of informed consent by doctors, at least measured by the written word, seems to be decreasing. See Shultz, *supra* note 73, at 223 & n.14 (noting that doctors have begun to recognize and accept patient demands for more information and control).

nificantly increased information flow between doctor and patient did occur. One study, for example, showed that while only twelve percent of doctors told the patient of a diagnosis of cancer before the imposition of an informed consent requirement, now ninety-eight percent would disclose such information to patients.¹¹⁵

Second, despite the inherent conflicts between attorney and client, imposing an informed consent requirement lessens the incentive for coercion. Under an informed consent model the attorney would be liable based solely on the failure to disclose material information adequately. One of the purposes of imposing a rule of liability for providing incomplete or inaccurate information is to influence lawyers, as it has doctors. The doctor's potential liability has "spurred valuable reassessment of ethical norms and professional practices and has made practitioners more sensitive to patients' needs and expectations."¹¹⁶

In addition, sociological data suggests that the mere existence of a legal requirement for informed consent affects the professional's attitudes and behavior.¹¹⁷ In part, this is true because laws often change people's attitudes; people become more accepting of the position advocated by the law or rule. In other words, law serves an important function as a "moral teacher," both for the professions and for the public.¹¹⁸

Even when attitudes do not change, nonetheless, individuals may change their behavior to conform to a new rule. Studies investigating the effect of judicial desegregation orders demonstrate that court decisions played a significant role in the increased acceptance of integration.¹¹⁹ Even when attitudes did not change, however, most individuals acted lawfully.¹²⁰ Research on the effect of seat belt laws has reached similar results.¹²¹ Thus, the conscious or subconscious desire to coerce the client may be minimized once the official legal stan-

115. See Warner, *Should You Tell Your Patients the Truth?*, 129 CANADIAN MED. A.J. 278, 280 (1983); accord 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 76 n.14 (in 1961 90% of physicians preferred not to tell their patients; today 97% disclose cancer diagnoses). The current status of informed consent in the medical profession admittedly is far from perfect. See, e.g., C. LIDZ, *supra* note 70, at 10; White, *supra* note 96, at 116. In many ways the implementation of informed consent in the medical profession is more problematic than implementation in the legal field. For one thing, there exists in medicine the "therapeutic privilege," which frees physicians from a legal duty to disclose if withholding information is beneficial for the patient. See Comment, *Informed Consent: The Illusion of Patient Choice*, 23 EMORY L.J. 503, 503-04 (1974). In other words, the doctor may withhold information if disclosure would cause the patient's physical or mental condition to deteriorate. See Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 460-470 (discussing scope of therapeutic privilege). Whatever the validity of the therapeutic privilege in medicine, there exists no corresponding fear in law that disclosure will so "frighten" the client as to risk loss of life or severe psychological depression. Thus, the extent of disclosure in the legal field can be expected to be greater than that which currently exists in medicine.

116. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 151.

117. See B. BARBER, *supra* note 113, at 33.

118. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 151.

119. See M. BERGER, *EQUALITY BY STATUTE: LEGAL CONTROLS OVER GROUP DISCRIMINATION* 176-77 (1952).

120. *Id.* at 179.

121. See Fhanér & Hane, *Seat Belts: Opinion Effects of Law-Induced Use*, 64 J. APPLIED PSYCHOLOGY 205 (1979) (compulsory seatbelt law increased frequency of seatbelt usage from approximately 30% to 80%).

dard changes. The ideals of enhancing autonomy and self-determination theoretically should be especially appealing to attorneys. Additional education, moreover, may help attorneys accept, and hopefully embrace, the concept of informed consent. Courses exploring the process of communicating with the client can help acclimate new attorneys to the importance of client autonomy.

In addition, structural changes in the legal profession can decrease the incentive to coerce the client. The ABA Code of Professional Ethics Disciplinary Rule 7-104(A) currently prohibits an attorney from communicating with a party known to be already represented by another attorney. Therefore, a person represented by Attorney A cannot also consult with Attorney B on the same matter, unless Attorney A consents.¹²² Changing this rule to allow clients to "check" the accuracy and completeness of information would encourage attorneys to be forthright in order to stay employed. In essence, clients could obtain "second opinions" on those decisions that matter to them. Although, for cost reasons, a client would likely seek second opinions only for a small number of critical decisions, the attorney obviously would not know in advance which decisions the client will check. Accordingly, there would be a strong incentive for attorneys to disclose fully and accurately the risks and benefits for all choices.

Finally, even if an attorney were to attempt to coerce the client, the attempted coercion may have little influence when important consequences are at stake, or when the client has a clear preference for one choice over another.¹²³ In other words, when a client feels strongly about a certain issue or course of conduct, the attorney's attempt to influence the client unduly may be least effective. It is, of course, these deeply held beliefs that most significantly implicate autonomy concerns.

B. *Is Parentalism Justified: Can the Client Understand the Information?*

A core assumption of the parentalism theory is that the client is inherently incapable of understanding "technical" information. The analogous position—that patients cannot understand medical information—was a core argument against informed consent in medicine. Although opponents of informed consent frequently—and vehemently—make the argument,¹²⁴ it has not been tested adequately. On the contrary, the research that does exist suggests that clients—and patients—can understand the information needed to make a rational decision. Even if certain technical information is beyond the reach of the average layperson, such information often is not needed in reaching a rational medical or legal decision. In the medical field, for example, patients can understand that a pro-

122. The Model Code of Professional Responsibility prohibits an attorney from communicating with a "party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980); see Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1033 (1982).

123. See Thompson, *supra* note 66, at 110-11.

124. Shultz, *supra* note 73, at 292 n.321 (perhaps core objection to proposals strengthening patient choice is fear of poorer health); see Helfand, *Understanding How Physicians Think: Medical Decisionmaking and Informed Consent*, THE PHAROS, Fall 1983, at 31, 31.

posed procedure has a certain survival rate and possible side effects, even though they may not understand the methodology behind the studies or the physiology of the side effects. Similarly, a client can understand that impeaching an alibi witness has certain risks without understanding the precise workings of the rules permitting impeachment.

Even doctors believe that patients can understand medical information if reasonable time and effort is taken to explain the information. In one survey, forty-eight percent of the doctors reported that ninety to one hundred percent of their patients could understand the information necessary to make a decision; an additional thirty-four percent believed that seventy to eighty percent of their patients could adequately comprehend the necessary information.¹²⁵

More importantly, evidence indicates that it is the professional's poor communication skills that frustrate comprehension. Attorneys are accustomed to speaking to other experts who "speak the same language," and they may not explain legal concepts coherently to lay persons. Most clients would be capable of understanding the risks and benefits of a particular decision if the issues were explained in "plain English" and not legal jargon.¹²⁶

The desire to speak and write in convoluted, complicated "legalese" is partly a reflection of poor teaching in law school, and partly an attempt to maintain the mystique of the profession.¹²⁷ Ridding the legal profession of "legalese" may be a worthwhile goal in itself. Once informed consent becomes required, law schools and continuing legal education programs likely will respond, as did medical schools, by providing courses on the subject of effective communication. Studies on the effect of informed consent in the medical profession demonstrate not only that schools increasingly are teaching the skills necessary for effective communication with patients, but that such courses significantly enhance doctors' interpersonal skills.¹²⁸ One researcher, after reviewing numerous studies,

125. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 59.

126. Ogletree & Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23, 38 (1986). Ogletree and Hertz relate that in their experience, "defendants invariably do understand even subtle nuances of their legal situation, as long as the explanation is presented in a clear and straightforward manner. When defendants fail to understand, it is usually the fault of the attorney who has rushed through the explanation or has couched concepts in legalese." *Id.* For a discussion of attorneys' use of technical, convoluted language, see Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1985). *Cf.* J. KATZ, *supra* note 3, at 92 ("The extent to which patients can understand medical knowledge is at least an open question. Physicians have had too little experience communicating their esoteric knowledge to patients to permit any conclusive answers."); Meisel & Roth, *Toward an Informed Discussion of Informed Consent: A Review and Critique of the Empirical Studies*, 25 ARIZ. L. REV. 265, 298-99 (1983) (discussing numerous studies and concluding that the primary reason for lack of understanding is technical manner in which information is transmitted by doctors; one study concluded that language of five consent forms studied was at advanced undergraduate or graduate level); Meisel & Roth, *What We Do and Do Not Know About Informed Consent*, 246 J. A.M.A. 2473, 2474 (1981) (patients do not understand because the language is too complex); Schrader, *Does Your Patient Need a PhD to Read Your Consent Form?*, AORN, July 1980, at 15. (study on readability of consent forms).

127. See Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389-90 (1984) (poor writing partly due to linguistic self-preservation; attorneys are letting everyone know they possess knowledge nonlegal world does not possess).

128. Kaufman, *Medical Education and Physician-Patient Communication*, in 3 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 117, 137. As of 1982 60% of the law schools in this

concluded: "Objective assessments of the communication skills of physicians all suggest that intensive training in physician-patient communication results in behavioral change among physicians. . . . The studies reviewed above all suggest that communication skills can be taught to students in medical school as well as to interns and residents."¹²⁹

C. *Voluntary Consent: The Problem of Deference and Waiver*

Autonomy is furthered under the informed consent model only by a knowing and voluntary consent. One problem that may detract from the voluntariness of the consent has already been discussed: the presentation of information so as to coerce a certain decision from the client. But even absent any coercion, it is possible that clients will defer to their attorney's judgment, or will waive the right to make decisions in advance.

1. The Reasons for Deference and Waiver

There are several reasons why clients may not want to make decisions for themselves. First, clients may subscribe to the parentalistic assumptions that they cannot understand legal complexities and legal jargon sufficiently and that attorneys, therefore, make better decisions.¹³⁰ Furthermore, some, like Dostoevski's Grand Inquisitor, believe that people *want* to defer to authority figures, so as to lighten the burden of decisionmaking:

And men rejoiced at being led like cattle again, with the terrible gift of freedom that brought them so much suffering removed from them. Tell me, were we right in preaching and acting as we did? Was it not our love for men that made us resign ourselves to the idea of their impotence and lovingly try to lighten the burden of their responsibilities, even allowing their weak nature to sin, but with our permission.¹³¹

Or, as surgeon Richard Selzer describes in medical terms, the patient becomes like a child, and the doctor the "daddy":

When I try to call the patient in on a consultation, and say "which alternative would you prefer?" *invariably* the patient says, "what do you mean, which alternative? I want you to tell me what to do, you're the doctor." The only unspoken word is daddy; tell me what to do,

country already offered courses that trained students in effective interviewing or counseling techniques. See Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289, 1292 & n.16 (1984). Loyola Law School, for example, requires all students to take a four credit course, entitled Ethics, Counseling, and Negotiations, that provides significant simulation experience and allows students to practice their communication skills. Were informed consent the norm, law schools presumably would place increased emphasis on courses in effective communication. Cf. Kaufman, *Medical Education and Physician-Patient Communication*, in 3 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 131 (despite some resistance, courses in interviewing and communication are becoming increasingly frequent in the standard curricula of most medical schools).

129. Kaufman, *supra* note 128, at 137.

130. See Katz, *supra* note 112, at 142 (all human beings struggle with impulses both to maintain and to surrender their autonomy).

131. F. DOSTOEVSKI, *THE BROTHERS KARAMAZOV* 309 (1880)

daddy. When a person is desperately ill or frightened, there is a certain kind of regression that makes you want to place yourself in someone's loving care.¹³²

Finally, clients who pay by the hour may decide to defer to attorney decision-making or to waive the right to make decisions because of concerns about costs. Allowing the client to decide often means greater consultation time, more hours billed, and hence, increased costs to the client. Some clients may prefer not to make a decision rather than pay the increased costs.

2. Possible Answers

Admittedly, some clients do not want to make any legal decisions and would want to waive all rights to all decisionmaking under an informed consent doctrine. Thus, attorney and client may want to enter into a contract giving the attorney the right to make all strategic decisions.

Perhaps the best solution would be to prohibit such blanket waivers.¹³³ The right to make one's own decisions could be determined to be an "inalienable" right that may never be waived or transferred by possession. Other rights have been deemed so essential to "personhood" or so inherent to the "structure of a decent society" that waiver of such rights is not permitted.¹³⁴ For example, the Supreme Court has held the thirteenth amendment's prohibition against involuntary servitude inalienable, both because servitude is offensive to basic concepts of personhood and because it is incompatible with a free society.¹³⁵ Thus, because a blanket waiver would violate notions of personhood and subvert ideals of self-determination, the client would be unable to waive contractually the right to make all decisions.

Such an approach may be parentalistic, but it may be a minimal intrusion necessary to achieve autonomy in the long run. In essence, it is a temporary intervention, occurring solely to ensure both voluntary and rational decision-making. In other words, a person cannot knowingly and intelligently waive the right to make all decisions at the institution of the lawsuit because he or she cannot know with any precision what choices will arise—the client does not know what rights he or she is giving up. Essentially, what is being prohibited is only the client's right to decide in advance that he or she wants no decisionmaking power. This simply means that each issue must be brought before the client.¹³⁶

132. Interview with R. Selzer, 1 *NEW HAVEN MAGAZINE* 37 (1983), quoted in J. KATZ, *supra* note 3, at 126.

133. Spiegel, *supra* note 9, at 82 n.160 (blanket waiver at beginning of relationship should be void); cf. Meisel, *supra* note 115, at 453-60 (discussing waiver issue in medical context).

134. McConnell, *The Nature and Basis of Inalienable Rights*, 3 *LAW & PHIL. Q.* 25 (1984); see Kreimer, *Allocation Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. PA. L. REV.* 1293, 1387 (1984).

135. See *Bailey v. Alabama*, 219 U.S. 219 (1911); *Clyatt v. United States*, 197 U.S. 207 (1905).

136. John Stuart Mill, a great opponent of paternalism, supported imposed conversation in some situations: "Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him by others. Only after such an enforced conversation must individual men and women be allowed to be the 'final judge' . . ." J. MILL, *supra* note 57, at 21-22; cf. J.

What happens, however, when the client truly does not want to make a particular decision? For example, consider the following dialogue:

Attorney: We have to decide whether to move to strike the deposition testimony. That involves the following questions . . .

Client interrupts: I really don't care—you decide.

At this point should the client be forced to give of his or her time and money to hear an issue that does not concern the client? The answer should be that so long as this waiver is knowing and voluntary, the client should be able to decide not to decide. In other words, the court must ensure that, as with any waiver of rights, the waiver is voluntary, that it is an "intentional relinquishment or abandonment of a known right or privilege";¹³⁷ that it represents "consensual, 'free choice' . . . [reflecting] the individual's freedom to forego benefits or safeguards through the uncoerced exercise of his rational faculties."¹³⁸

For the waiver to be voluntary and knowing, there *must* be some obligation on the attorney at this juncture to tell the client the impact of the decision: What does it mean to strike the deposition? What risks are involved? If the client still wishes not to decide, an effective "waiver" then may be found.¹³⁹

In the final analysis, the number of people who would defer to the attorney, or who would want to waive the right of decisionmaking, is probably small. Studies in the medical field reveal that patients want decisionmaking responsibility.¹⁴⁰ In one survey, for example, seventy-two percent of the public stated that they would prefer to make decisions jointly with the doctor after being informed of the different alternatives.¹⁴¹ What is interesting to note is that eighty-eight percent of the doctors believed that patients wanted doctors to choose the best alternatives *for* them.¹⁴² Studies such as those led the President's Commission considering informed consent in health care to conclude: "Although subcultures differ in their views about autonomy and individual choice . . . the Commission found a *universal desire* for information, choice, and respectful communication about decisions."¹⁴³

The numerous cases that now arise in which the client attempts to direct the attorney's choices demonstrate that people want the "burden" of legal decisionmaking.¹⁴⁴ Furthermore, once informed consent becomes the norm, the at-

KATZ, *supra* note 3, at 122-25 (forced dialogue, although perhaps a form of paternalism, may be necessary to show respect for patient's self-determination).

137. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

138. Tigar, *Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).

139. A cautious practitioner would memorialize the voluntariness of the waiver, perhaps with prepared consent forms.

140. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 46; see also B. BARBER, *supra* note 113, at 28 (patients want more equality and desire informed consent); Denny, Williamson & Penn, *Community Medicine: Informed Consent—Emotional Responses of Patients*, 60 POSTGRADUATE MED. 205, 209 (1976) (only 7% of the patients in study did not want information about risks and benefits of surgery).

141. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 46.

142. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 46.

143. 1 MAKING HEALTH CARE DECISIONS, *supra* note 4, at 2 (emphasis added).

144. See *supra* notes 14, 17, 19, 21, 23 & 37-38 and accompanying text; cf. Roter, *supra* note 107

titudes of the client, like those of the attorney, likely will change. Informed consent affirms the individual's capability to make decisions; more importantly, it gives one the right to do so. Once clients possess the right to impose on attorneys' time, to ask questions, they will increasingly exercise that right. Current economic literature demonstrates that bestowing rights—changing the starting place in bargaining over rights—makes a significant difference.¹⁴⁵ In other words, giving clients the right to decide makes it likely that they will exercise those rights. As one study suggests: "If this evidence generalizes to real cases, the assignment of legal rights could determine outcome more frequently than is commonly supposed."¹⁴⁶

Ultimately, the possibility of waivers is not an argument against extending the right of decisionmaking. As Professor Chemerinsky writes:

No one would argue that the fifth amendment's right against self-incrimination should be eliminated just because people often confess or that the first amendment should be abolished because people often do not exercise their rights of expression Rights should be extended because they reflect fundamental values which should be protected¹⁴⁷

CONCLUSION

In one sense, this Essay has a modest objective. Reserved for another time is any discussion of the specific rules governing an informed consent model for the legal profession. Thus, for example, this Essay intentionally does not discuss the standards for determining attorney liability for providing the client with inadequate information. Of course, this Essay establishes parameters for deciding what those rules should be: any such rules must respect individual autonomy without placing undue weight on the values of parentalism, efficiency, or attorneys' interest in their craft.

In another sense, this Essay has an ambitious objective. It argues for a significant—perhaps revolutionary—change in the overall functioning of the attorney-client relationship. The parentalistic assumptions currently governing the nature of the relationship serve neither the interests of the attorney nor the interests of the client. Recognition of, and respect for, the client's autonomy—the client's right to decide—does more than just enhance the client's well being. It also reaffirms a basic notion of Anglo-American law. Respect for clients' autonomy truly ensures that the legal system is just, not only in its results, but also in its process.

(doctor-patient relationship is organized system of social behavior patients must learn in order to negotiate for services; patients who receive some explanations from doctors respond with more questions than those who receive no explanation).

145. See Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J. L. & ECON. 117, 141 (1983).

146. *Id.* at 141 n.50.

147. Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 556 (1985).

