

For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*

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Whether they know it or not, students, practitioners and teachers of law have been and continue to be influenced in their work by the work of Harold D. Lasswell. Like a lawyer's lawyer, he has for more than three decades been the legal scholar's scholar. He has jarred the cakes of custom in legal education and given us an agenda for study designed to clarify the goals and alternatives implicit in the process and substance of decisionmaking in law. He has made the law-trained person conscious of what now seems obvious, *i.e.*, that law (including its administration) forms an integral part of the social system; that it is a decision process for formulating and implementing policy concerned with the regulation of coercive force to accord with preferred values; that it encompasses a complex continuum of decisions between and within levels of authority for local, state, regional, national and international communities; and that the study and appraisal of law require identifying and clarifying both the multiple functions of each decisionmaker and the values and consequences at issue in each decision.¹

Emphasizing a contextual and policy-oriented approach to the study of the decision process, Lasswell sought something more discriminating in terms of function than the traditional "legislative, executive and judicial." With regard to decisions in each of these divisions, he asked seven questions which refer to what now may be perceived as seven traditional functions: "How is the *information* [intelligence] which comes to the attention of decision makers gathered and processed? How are *recommendations* made and promoted? How are general rules *prescribed*? How are general rules provisionally *invoked* in reference to conduct? How are general rules *applied*? How is the working of pre-

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1. See Lasswell, *The Political Science of Science: An Inquiry into the Possible Reconciliation of Mastery and Freedom*, 50 AM. POL. SCI. REV. 961 (1956).

scriptions *appraised*? How are the prescriptions and arrangements entered into within the framework of such rules brought to *termination*?²

Though providing a framework and a rationale for the functional analysis of law in any social system, Lasswell, as political scientist and private scholar, does not pretend that his is a value-neutral or value-free profession. Rightly called "policy scientist for a democratic society," he has always sought to promote and to make feasible the widespread sharing of (or at least access to) power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude.³ For him and for Myres S. McDougal, his distinguished and frequent collaborator, the broadest distribution of these eight human needs is the work of law and critical to the meaning and viability of a democratic system.⁴ Lasswell's work affirms the notions that freedom must be "the over-

2. H. LASSWELL, *THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS* 2 (1956) (emphasis added). "Although it is usually possible to point to agencies that specialize in a given function, all agencies perform all functions to some extent." *Id.* at 3.

3. Easton, *Harold Lasswell: Policy Scientist For A Democratic Society*, 12 J. POL. 450 (1950); Smith, *The Mystifying Intellectual History of Harold D. Lasswell*, in *POLITICS, PERSONALITY, AND SOCIAL SCIENCE IN THE TWENTIETH CENTURY* 90 (A. Rogow ed. 1969).

In his acceptance of the Uniform Declaration of Human Rights, Lasswell applies the eight key values which hallmark his analytic design:

1. *Power*. The Declaration asserts the right "to take part in the government," "to be recognized as a person before the law," and "to effective remedy by competent national tribunals." Criteria of fair trial are enumerated together with a right of asylum. There is a right to "a social and international order."

2. *Enlightenment*. There is "freedom of opinion and expression" and a right "to seek, receive, and impart information and ideas through any media and regardless of frontiers."

3. *Wealth*. Recognition is given to the "right to own property" and to a "standard of living adequate for the well-being" of the individual and his family.

4. *Well-being*. The Declaration recognizes the right to "life, liberty and security of person" and condemns "torture" as well as "cruel" or "inhuman" treatment or punishment. There is a "right to rest and leisure" and a general right to "social security."

5. *Skill*. Recognized is the "right to work, to free choice of employment," and "to protection against unemployment." Also "everyone has a right to education" and "to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific achievement and its benefits."

6. *Affection*. The Declaration specifies the "right to marry and to found a family" and to engage in congenial association with others ("peaceful assembly and association"). And there is the right to be identified with a national community ("right to a nationality").

7. *Respect*. The first article affirms that "all human beings are born free and equal in dignity and right... Everyone is entitled to all rights and freedoms... without distinction of any kind." Obviously, there must be no "slavery or servitude," no arbitrary interference with "privacy, family, home or correspondence," and freedom from attacks on "honor and reputation."

8. *Rectitude* affirms "freedom of thought, conscience and religion... Everyone has duties to the community," and there is no right to destroy the freedom of others.

H. LASSWELL, I. MCHALE & B. PIEGEL, *ENVIRONMENT AND SOCIETY IN TRANSITION* 3, 4 (1974). Thus *democracy* may be defined in his terms as a social system in which every one of the specified values are widely shared among all persons within the system and *despotism* as a social system in which the distribution of values is not widely shared, *i.e.*, is decidedly inequitable. Smith, *supra* note 3, at 80.

4. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training In The Public Interest*, 52 YALE L.J. 203 (1943).

riding goal of policy in our body politic" and that respect for human dignity must be the ultimate concern.⁵

Out of a shared concern for assuring that the administration of law serve human dignity, this essay will make a tentative appraisal of three apparently disparate legal processes designed to protect each adult's entitlement to make decisions for himself or herself free of coercion or deception by public or private, but state licensed, authority. It will focus on (a) entrapment into criminal conduct, (b) informed consent to medical therapy or experimentation and (c) bargaining for a guilty plea.

What do these processes have in common? Each involves state supervision of persons who have been entrusted by the state in the interests of public order to use coercive force or who, because of their special skills, training and status, may be overbearing in their relationships with generally less powerful, often highly vulnerable, persons. Each involves provisions for preventing abuse of that assigned or attributed power: in the policeman's relationship with the unsuspecting suspect whom he seeks to catch "red-handed"; in the doctor-scientist's relationship with the patient who requires therapy or with the experimental subject who may or may not be a patient and who may or may not be subject to institutional restraints; and finally, in the prosecutor's, judge's and defense counsel's relationships with the accused who must decide what to plead. To oversimplify, the rules for regulating these transactions between the authorities and the citizen provide that entrapment by the police seeking a suspect's decision to commit a crime is not established if the offender originated the idea to commit the crime charged; that before treatment or experiment may be undertaken, the doctor-scientist must obtain an informed decision of patient or subject; and that a plea bargain is valid if the accused's decision to plead guilty is knowingly and intelligently made.

These rules are rooted in a basic commitment of the legal system to respect human dignity by protecting the right of every adult to determine what he shall do and what may be done to him. They have been designed to assure that citizens (the suspect, the patient or experimental subject, and the accused) remain free to make their respective critical choices without coercion or deception by the authorities (police officers, doctor-scientists, prosecutors, judges and defense attorneys). Yet these rules often disserve their common purpose. They mistakenly direct the attention of supervising decisionmakers away

5. Lasswell, *supra* note 1.

from the conduct of the authorities and to the actual state of mind—the understanding, knowledge, intent and motivation—of the “consenting” citizen. To assign to supervising courts and executive agencies the function of determining whether, for example, an individual citizen’s consent is informed or intelligently made is to attribute to such decisionmakers a capability they do not have. More importantly, in fulfilling that assignment, these agents of decision arrogate to themselves and to the authorities who are to be supervised that which deference to human dignity dictates is to remain with the adult citizen. They act to undercut, rather than to reinforce, respect for the individual’s competence and right to determine for himself what he needs to know (including that he does not want to know anything) in order to choose what he thinks is best for himself.⁶

The law must establish standards of conduct for the authorities, not for the citizens, in these transactions. The rules should force supervising agents to focus (primarily, if not exclusively) on the appropriateness of the authorities’ conduct in communicating with the citizens concerned and in manipulating the settings in which decisions to consent are obtained. The priority of attention for inquiry would thereby be shifted from more subjective to more objective concerns, from the consenting citizen’s state of knowledge and understanding to the conduct of the authorities in the process of informing the citizen for decision. Whether the citizen actually gave or denied consent would not be relevant to the inquiry. What would be critical to a finding that the state’s commitment to human dignity was served or disserved would be the authority’s conduct in light of the more objective standards set.

In order to clarify these assertions and their implications for new rules, this analysis begins with the least structured and visible transaction, entrapping the suspect, and closes with the most structured and visible one, bargaining with the accused for a guilty plea. The analysis is single-focused. It does not address, as Lasswell might, questions concerned with how adequately the processes of entrapping, treating-experimenting, and bargaining serve societal goals. Nor does it attempt to explore the capacity of authorities to govern their own conduct. Instead, the processes are unquestioned and taken out of context. Thus this article will provide but a partial appraisal and will limit its recommendations to some guides for clarifying what deference to

6. “To respect anyone is to protect his choosing function so long as its exercise does not seriously imperil the corresponding freedom of others.” McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 24 (1959).

the human dignity of the citizen would mean and what it might require of the authorities in each of these transactions.⁷

I

Entrapment is generally categorized as a defense for the citizen rather than as an offense by the authority. Such a conceptualization may account for the prevailing, but mistaken, notion advanced by the Supreme Court in *Sherman v. United States* that "to determine whether entrapment has been established a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."⁸ In making crucial a distinction between the citizen who is presumed innocent and the citizen who is presumed criminal, the Court loses sight of the primary purpose of the entrapment doctrine: to control the conduct of the authorities and to hold them to a standard of fairness in relation to all persons. The *offense* of entrapment takes place once the police or those acting on their behalf fail to observe the standard set, whether or not they succeed in provoking the citizen to choose to commit a crime. It might even be argued that the Court, in terms of its own reasoning, should find unsuccessful police efforts to importune the strong and unwilling more offensive than successful efforts to importune the weak and more easily tempted citizen into crime.

In *Sherman*, Kalchinian, a government informer plying his trade in the waiting room of a doctor treating patients for narcotic addiction, sought to convince the patient Sherman to obtain narcotics for him. Kalchinian claimed that he was suffering and that his treatment was not working, and he apparently persuaded Sherman, after many refused requests, to provide him with narcotics.⁹ At the jury trial "the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotic's trade."¹⁰ The question was the one often posed by entrapment statutes: who induced whom

7. However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what might constitute appropriate police conduct.

8. 356 U.S. 369, 372 (1958).

9. "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. . . . Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this." *Id.* at 376.

10. *Id.* at 371.

to commit the crime; with whom did the criminal design originate? Relying on *Sorrells v. United States*, Chief Justice Warren concluded that Sherman had been entrapped. He observed for the Court that "entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law enforcement officials"¹¹ and that "[t]hen stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search."¹²

But the Court refused to reassess the doctrine of entrapment. It failed to allow its confession and search analogies to lead it to understand that the question of the guilt or innocence of an accused is separate from the question of the appropriateness or the offensiveness of the police conduct. Thus the Court, understandably but mistakenly, abrogated the trial court's supervisory function by transferring it to the jury. Of course, in doing so it obscured for the jury the real issue of standards for police conduct by asking it to focus on the accused's " 'predisposition' as bearing on his claim of innocence."¹³

Like the exclusion of evidence unlawfully obtained by the authorities, the defense of entrapment should not hinge on the proneness toward crime, or for that matter on actual guilt or innocence, of the defendant if it is to serve even *indirectly* as a judicial device for supervising the police.¹⁴ Had the defendant been importuned by someone other than an agent of the state, his conviction, and for that matter, the conviction of his accomplice, would not be challenged. In setting standards for police conduct in defining the crime of entrapment—a task beyond the scope of this article—what must be clarified is the need to redress the unfairness which results from the present expectation of the police that they are immune from criminal sanctions for conduct that would be criminal for the private citizen. Under such standards, the police practice of driving in unmarked cars to trap speedy motorists would be perceived differently from the police prac-

11. *Id.* at 372, citing *Sorrells v. United States*, 287 U.S. 435, 441, 451 (1932). For a codification of this position, see, e.g., N.Y. PENAL LAW § 35.40 (McKinney 1967); see *United States v. Russell*, 411 U.S. 423, 427 (1973) (reaffirming Chief Justice Warren's theory of entrapment in *Sherman* by reversing the court of appeals because it "in effect expanded the traditional notion of entrapment, which focuses on the predisposition of the defendant, to mandate dismissal of a criminal prosecution whenever the court determines that there has been 'an intolerable degree of governmental participation in the criminal enterprise.'").

12. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

13. *Id.* at 373, citing *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

14. See *United States v. Russell*, 411 U.S. 423, 439 (1973) (Stewart, J., dissenting). Without addressing the question of the appropriateness of using the exclusionary rule to police the police, it should be noted that it ought not to be the exclusive device for serving that goal. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Alderman v. United States*, 394 U.S. 165 (1969); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Irvine v. California*, 347 U.S. 129 (1954).

tice of driving so disguised at unlawful speeds to entice the citizen to ignore the speed limit.

Relying in part on an article by Professor Richard C. Donnelly, whose work was greatly influenced by his colleague and occasional collaborator Lasswell, Justice Frankfurter concurred with the result in *Sherman*, but disagreed with the Court's reasoning. He more nearly forced focus where it belongs in recommending a new doctrine to be applied to entrapment transactions. The following excerpt from the Frankfurter opinion should be read not only with such transactions in mind, but in terms of its implications for analyzing the problem of supervising doctors and scientists seeking to obtain consent from a patient or the subject of an experiment:

The lower courts have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the defense in the first instance, but without the formulated basis in reason that it is the first duty of courts to construct for justifying and guiding emotion and instinct. . . . [The Court] should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued.

....
The crucial question . . . is whether the police conduct . . . falls below standards, to which common feelings respond, for the proper use of governmental power. For answer, it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers *A test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. . . . Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes*

This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. *It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations.* This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police

and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. . . . The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.¹⁵

Toward its close, Frankfurter's opinion tends to blur the focus on the conduct of authorities by apparently restoring some relevance to making a distinction, however indistinct, between criminally and non-criminally prone citizens.¹⁶ He thus reintroduces the very element which formed the basis of his challenge to the majority of the Court. This intellectual error would be avoided if entrapment were perceived as an independent crime. Nonoffending citizens could then invoke prosecutions for entrapment against importuning authorities and their agents provocateurs. Moreover, prosecution of authorities would ordinarily follow a successful defense of entrapment by an "offending" citizen.¹⁷

The blurring of focus in the Frankfurter opinion must not be used to obscure what it initially clarifies, the need to revise the majority's rule and thus to assess the conduct of the authority, not of the citizen, if the judicial supervision of law enforcement is to serve human dignity. That proposition should be applied in formulating rules governing doctors and scientists, who, unlike the police, are not empowered to use coercive force, but who are licensed by the state because of their special skills to act with or upon citizens in ways which would be either tortious or criminal or both, without citizen consent.

II

"Informed consent," not unlike the shorthand "entrapment defense," has come to obscure rather than to clarify the goal it was designed to serve. The concept has been employed to emphasize a patient's

15. 356 U.S. 369, 378, 379, 382, 383-84 (1958) (emphasis added). The Frankfurter position has been codified in MODEL PENAL CODE § 2.13 (1962) and in PROPOSED FEDERAL CRIMINAL CODE § 702 (Final Rep. of the Nat'l Comm'n on Reform of Fed. Crim. Laws 1971).

16. See *United States v. Russell*, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting): "Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person *ready and willing to commit the crime* an opportunity to do so." (Emphasis added).

17. Rather than define a new crime of entrapment, criminal codes might affirmatively declare that solicitation, attempts and conspiracy (as well as the more substantive crimes within a code) are to be invoked, when applicable, against entrapping police either as accessories or principals.

or subject's actual state of mind, knowledge, or understanding in giving (not denying) consent, rather than to emphasize and force attention on the conduct required of the therapist or experimenter in the *process of informing the citizen for decision*. In the name of respect for human dignity, the current concept has been subtly construed to deny it (a) by granting to the authorities (court, supervisory administrative agency or licensed professional) rather than to the citizen (patient or subject) the final word in determining what is best for him, including what he must know—*i.e.*, how “well informed” he must be—in order to make that decision; and (b) by proceeding as if an authority's breach of obligation to disclose a known risk “is legally without consequence” if the risk did not materialize during the treatment.¹⁸

Like the crime requirement of the entrapment defense, the materialized risk requisite demonstrates the extent to which the concept has departed from its purpose. It does not recognize that a citizen can be wronged without being “harmed,” that his dignity as a human being has been violated and that an assault has taken place the moment the deceiving authority commences therapy or the experiment, even if beneficial. Further, “consent,” as opposed to “decision,” in the legal concept of informed consent introduces a bias, especially in therapeutic transactions, for perceiving refusals as uninformed. Refusals may then be used as a justification for challenging the capacity of the citizen to decide what is best for himself. A finding of incompetence which deprives him of authority to decide for himself results from a successful challenge and constitutes the ultimate disregard of his human dignity. “Consent by proxy,” a dangerous legal fiction for the right to impose one's will on another, may then be obtained to accord not only with what a citizen in his “right mind” ought to want, but also with what he ought to want to know if he is to know what he wants.¹⁹ The

18. *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972).

19. See McCormick, *Proxy Consent in the Experimentation Situation*, PERSPECTIVES IN BIOLOGY & MED., Autumn 1974, at 2.

This essay does not examine the extent to which the state should, for example, through its child neglect and abuse laws supervise parents in their decisions to secure or deny medical care for their children or to make them donors or experimental subjects. Nor does it examine what circumstances, if any, should justify overcoming the usual presumption that children are incompetent to choose for themselves without regard to their parents' wishes, whether to accept or reject medical treatment. In the blood transfusion case discussed at p. 695 *infra* the court also authorized blood transfusions for the infant over the objections of both parents. In life and death situations the state may intervene to assure a child the opportunity to grow to adulthood to decide ultimately what is best for himself or herself. See *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972), in which the court assumed the role of overseer of the parents as authorities who might exploit their children and reviewed their decision to have a healthy twin daughter donate a kidney to her twin sister:

To prohibit the natural parents and the guardians ad litem of the minor children the right to give their consent under these circumstances, where there is supervision

authorities thus get their way without risking liability—and avoiding this risk seems to be a primary concern of those who draft what are strangely called “informed consent forms” to be signed by patient and subject.

Though a cumbersome shorthand, using “the process of informing for decision” in place of “informed consent” would direct attention to thinking through standards of conduct for authorities who ask a citizen to waive his possible claims in tort or criminal law by granting permission for the proposed intervention. It is, after all, a function of the law of torts and crimes to protect the integrity of each citizen from unwanted intrusions upon his person and property without due process. In these transactions intervention may not be tolerated unless it is wanted—unless consent is given. Minimally, deference for the citizen as a human being would require authorities (a) to offer to disclose the purpose, nature, and conceivable risks which the authority believes would be relevant to a reasonable man’s exercise of choice as well as alternatives to the proposed treatment or experiment, (b) to honor the wishes of the patient or subject who does not want to be told of some or of any information the authority must offer to disclose, and to answer, even with an “I don’t know,” any questions the citizen asked, even if the authority thought it was not good for the patient to know the answer or that it was not relevant to a reasonable person’s informed consent, (c) to offer to provide and to facilitate an opportunity for an independent consultation, (d) to honor the wish of a citizen who says to the authority, “I prefer to rely on your judgment, for you to inform me of whatever you think I should know, and for you to do whatever you think is best for me,” (e) to honor a citizen’s refusal to consent without threatening to use or using refusal as a basis for asserting his incompetence, and (f) to honor a citizen’s request to withdraw from treatment or experiment. These communications must, of course, be made by the authorities in a way

by this court and other persons in examining their judgment, would be most unjust, inequitable and injudicious. . . . [N]atural parents of a minor should have the right to give their consent to an isograft kidney transplantation procedure when their motivation and reasoning are favorably reviewed by a community representation which includes a court of equity.

Id. at 378. Exceptions have begun to be acknowledged to the presumed incompetence of children in the form of medical emancipation, especially in late adolescence. *See, e.g., Ballard v. Anderson*, 484 P.2d 1345, 42 A.L.R.3d 1392 (1971) (construing the California abortion statute to permit minors to obtain therapeutic abortions without parental consent); *Melville v. Sabbatino*, 313 A.2d 886, 30 Conn. Supp. 320 (Super. Ct. 1973) (construing CONN. GEN. STAT. ANN. § 17-187 (1963) to permit minors sixteen and over, despite parental objection, to exercise the rights of voluntary adult patients to demand release from a mental hospital). For our purposes, then, the child is perceived as an adult in these legislative and judicial decisions.

which reflects a full commitment to respect the wishes of the patient or subject and in language comprehensible to him.²⁰

In *Canterbury v. Spence*,²¹ Judge Spottswood Robinson acknowledges and cautions against the not uncommon uncritical use of the "informed consent" label. The suit involved personal injuries resulting from an operation performed by a surgeon who allegedly failed to disclose to the consenting patient a risk of serious disability. Judge Robinson comes close to, but falls short of recognizing the full implications of his caution. He, too, ultimately uses the label to undercut what he calls the "root premise . . . fundamental in American jurisprudence that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . .'"²² In a footnote, he observes:

In duty-to-disclose cases, the focus of attention is more properly upon the nature and content of the physician's divulgence than the patient's understanding or consent. Adequate disclosure and informed consent are, of course, two sides of the same coin—the former a *sine qua non* of the latter. But the vital inquiry on duty to disclose relates to the physician's performance of an obligation, while one of the difficulties with analysis in terms of informed consent is its tendency to imply that what is decisive is the degree of the patient's comprehension. The physician discharges the duty when he makes a reasonable effort to convey sufficient information although the patient, without fault of the physician, may not fully grasp it. . . . Even though the factfinder may have occasion to draw an inference on the state of the patient's enlightenment, the factfinding process on performance of the duty ul-

20. The following doctor's request to place an arterial and central venous silastic catheter into the coronary sinus for investigatory purposes not directly related to the patient's illness is in language comprehensible to the patient, but hardly in the spirit contemplated:

Dr. "We would like to do some special measurements of pressure and blood flow

...."

Pt. "I don't want it. I don't think so. Please don't."

Dr. "Well, I think that it would be very helpful for a couple of reasons. One is that we think that these measurements would certainly help us to manage people that have similar problems to yours. We also think that these measurements may be of help in managing your problem, and we don't feel that this test will harm you at all. Now it does have dangers, as any test does . . ."

Pt. "I don't want it."

Dr. "But we think that the possible benefit to others and to you will outweigh the dangers involved. Do you have any questions about the test?"

Pt. "No, except that I wish you could talk to my husband if you have the time."

Dr. "Okay—I do—and I'll need your permission for this. Will that be alright?"

Pt. "That's all right with me."

Smith, *Myocardial Infarction—Case Studies of Ethics in the Consent Situation*, 8 Soc. Sci. & Med. 399, 401 (1974).

21. 464 F.2d 772 (D.C. Cir. 1972).

22. *Id.* at 780, citing *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

timately reaches back to what the physician actually said or failed to say. And while the factual conclusion on adequacy of the revelation will vary as between patients—the fluctuations are attributable to the kind of divulgence which may be reasonable under the circumstances.²³

By not dispensing with the descriptive label “informed” to qualify “consent,” Judge Robinson betrays his commitment to safeguarding the right of adults of sound mind to determine what shall be done with their bodies. “True consent to what happens to oneself,” he asserts, “is the informed exercise of a choice, and entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.”²⁴ To the extent emphasis upon choice and an opportunity means that doctor-scientists must offer to inform and to discuss with patient-subjects the risks and advantages of alternative courses of action, it would comport with the declared jurisprudential goal. To the extent such emphasis means authorities must divulge such information to those who do not object to hearing it, it too would comport with the goal. However, to the extent emphasis is upon consent informed and knowledgeably given, it would not comport with the goal. Yet that is where the court’s emphasis comes to rest. While asserting that “the prerogative of the patient is to determine for himself the directions in which his interests seem to lie,” the court, like the “beneficent” parent who cannot quite accept that his child is now an adult, reasserts that after all, it and the physician know best and that “[t]o enable the patient to chart his course *understandably*, some familiarity with therapeutic alternatives and their hazards becomes essential.”²⁵

Were the court to have kept its focus more directly on the standards of conduct of those it must supervise, it might have better served the policy goal by writing: “True decisions by patients and subjects in such transactions can only be protected to the extent that the authorities, without coercion or deception, facilitate and provide unrestricted access to as much or as little information as the citizen is willing and wishes to have.” This does not mean that patient-subjects must ask

23. *Id.* at 780 n.15.

24. *Id.* at 780.

25. *Id.* at 781 (emphasis added). The court recognizes a reasonable limitation on the physician’s duty to disclose in emergency situations where communication with the patient may be impossible (e.g., if the patient is unconscious) and the patient is therefore unable to make his own decision. *Id.* at 788-89. But the court’s acceptance of a second limitation, the physician’s privilege not to disclose when the latter feels the patient cannot deal emotionally with the information, betrays its commitment to self-determination and, in effect, authorizes an ad hoc unilateral finding by the authority of the citizen’s incompetence. *Id.* at 789.

for information before a physician-experimenter is required to offer to disclose. The burden is always on the authorities to offer to disclose (and to disclose and explain unless the citizen objects) at least that which legislative or judicial standards define as critical to a reasonable person's refusal or consent.²⁶

To circumscribe the process in this way is to set a standard of conduct not for the citizen, but for the authority. The citizen may or may not take into account that which might be divulged. He may or may not take into account even information which he requests before making a decision, whether it is considered relevant or irrelevant to the "informed" consent or refusal of reasonable people. Thus, the court's assertion that "the patient's right of self-decision . . . can be effectively exercised only if the patient possesses enough information to enable an intelligent choice" should be tilted slightly to read that "the patient's right of self-decision is effectively safeguarded if the authorities provide him with a real opportunity (not with an obligation) to possess what information he and a reasonable person might require in order to exercise a choice." To acknowledge that "the patient's right of self-decision shapes the boundaries of the duty to reveal"²⁷ requires not that the patient's choice be an intelligent, informed and unemotionally determined decision,²⁸ but that it be the *patient's* choice and that the authorities, out of regard for him as a human being, honor that choice, even if it be for death.²⁹

Just such deference is to be found in an unreported decision by Judge Tim Murphy for the District of Columbia's Superior Court. He declined to order a patient facing death to accept blood transfusions which were needed for an emergency hysterectomy to which she and her husband had consented.³⁰ He declined to use her refusal,

26. *Id.* at 787.

27. *Id.* at 786.

28. The American Medical Association's ethical guidelines indicate that "the decision to donate an organ must be a reasoned, intellectual decision, not an emotional decision, arrived at entirely voluntarily and free from pressure, and based on full awareness of all relevant information." Fellner & Marshall, *Kidney Donors—The Myth of Informed Consent*, 126 AM. J. PSYCHIATRY 1245, 1250 (1970). But "[n]ot one of the [kidney] donors [in the study] weighed alternatives and rationally decided. Fourteen of the 20 donors and nine of the ten donors waiting for surgery stated that they had made their decision immediately when the subject of the kidney transplant was first mentioned over the telephone, 'in a split second,' 'instantaneously,' and 'right away.'" *Id.* at 1247.

29. See Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632 (1974).

30. *In re Pogue* (D.C. Super. Ct., Nov. 12, 1974), in Wash. Post, Nov. 14, 1974, at C1, col. 1. See *Erickson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (Sup. Ct. 1962) (refusing to order blood transfusion over patient's objection: "[T]he court concludes that it is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires."). *But see* Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

which rested on her belief as a Jehovah's Witness, as a basis for declaring her incompetent to decide for herself. Judge Murphy's decision, prohibiting the attending doctors from imposing their wishes on the patient, would fall short of fully serving the stated goal if later decisions were to limit its application to those patients who explain their choice in terms of a recognized religious belief. Full respect for her dignity as a person would entitle her to refuse without explanation or for reasons incomprehensible or unacceptable to the judge or doctors.

To assert this view as a guide to state supervision of authority is neither to question nor to challenge the following statement by Pope Pius XII: "[T]he patient [or experimental subject] is not absolute master of himself, of his body or of his soul. He cannot . . . freely dispose of himself as he pleases. . . . He has the right of *use*; limited by natural finality, of the faculties and powers of his human nature." Because he is a user and not a proprietor, he does not have unlimited power to destroy or mutilate his body and its functions. Furthermore, "the patient cannot confer rights he does not possess . . . [t]he decisive point is the moral licitness of the right a patient has to dispose of himself. Here is the moral limit to the doctor's action taken with the consent of the patient."³¹ What is challenged is that the power of the state may be employed to impose that moral limit upon citizens who do not share it or that such power be used to push believing citizens beyond that boundary.³²

This single-focus examination of guides to conduct for the authorities in therapeutic and experimental transactions has, up to this point, assumed an initially voluntary relationship between citizen and authority, *i.e.*, one established free of force by the authorities. But such transactions often arise in inherently coercive settings, in settings not unlike those which provoked the Nuremberg declaration of principles for conducting medical experiments on human beings.³³ Involuntary

31. Address by Pope Pius XII, His Holiness, to the First International Congress on the Histopathology of the Nervous System, Sept. 14, 1952, *reprinted in* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *CRIMINAL LAW: THEORY AND PROCESS* 91-92 (1974).

32. Though Congress falls into the informed consent error for the citizen in Title II, "Protection of Human Subjects of Biomedical and Behavioral Research," of the National Research Service Award Act of 1974 (§§ 202(a)(1)(B)(iv), (a)(2), Pub. L. No. 93-348, 88 Stat. 342), it does defer to the human dignity of authority as citizen in his own right by providing, *inter alia*, that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity . . . if his performance . . . would be contrary to his religious beliefs or moral convictions," and that no institution receiving grants under the Act may "discriminate in the employment promotion or termination of employment" of such persons either because they participated or refused to participate in such activity. *Id.* § 214. *But see* *The King v. Bourne*, 1 K.B. 687, 693 (1939).

33. *See* *United States v. Brandt*, in 2 TRIALS OF WAR CRIMINALS BEFORE THE NURNBERG MILITARY TRIBUNALS 171 (1947); WORLD MEDICAL ASS'N, THE DECLARATION OF GENEVA (1949) and THE INTERNATIONAL CODE OF ETHICS (1949), *reprinted in* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *supra* note 31, at 75.

incarceration of the citizen in a prison or mental hospital is a deprivation, albeit with due process, of his human dignity—of his freedom to choose for himself. Although nothing can fully remove the violation of personal dignity which attends incarceration (especially if it is “for one’s own good”), it is appropriate even under such circumstances to continue to focus on setting standards of conduct for offering and providing information to the inmate in order to safeguard his human right to be or not be treated, or to be or not to be an experimental subject. The minimum standards proposed for the free setting would have equal application for that of incarceration. While the difference in setting does not require altering the standards for a process of informing for decision, it does require recognition that the quality of volition in refusing or consenting, no matter how fully informed, has been altered. By definition, part of the information implicitly or explicitly communicated consists, as it does in plea bargaining, of the coercive reality of the transactional setting.

For purposes of evaluating standards of conduct for the authorities in relation to such transactions in incarcerative settings, the general coerciveness of that reality must then be presumed to be information affecting volition, not the citizen’s capacity for making a choice. In *Kaimowitz v. Michigan Department of Mental Health*,³⁴ the inmate had been offered a choice between experimental surgery with the possibility of release and continued incarceration. Rather than focusing on the conduct of the authorities and holding that they must not conduct experiments even on consenting inmates, the court focused on the conduct of the citizen and held that “informed consent *cannot* be given by an involuntarily detained mental patient for experimental psychosurgery” What should have been critical was not whether the inmate’s consent could be informed, but whether the experimental nature of the proposed surgery coupled with an appropriate fear of Nuremberg-like abuses might justify prohibiting the authorities from offering to perform such experiments upon citizens who choose to be subjects. The court thus fails to confront the issue of why the incarcerated inmate should be denied such choice and, if not, why his “consent,” however limited the choice, should not be honored. It does not answer why a citizen, if incarcerated for lawful purposes and not because he refuses medical care or because he refuses to be an experimental subject, should be denied what choice may be offered. It does not answer why a person considered, as he was by the court,

34. Civil No. 194-199 (Mich. Cir. Ct. July 10, 1973), *reprinted in* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *supra* note 31, at 76-81.

capable to consent to traditional therapy, should be presumed incapable or without authority to determine what is best for himself when the choice is restricted to experimental therapy or continued incarceration. So far as the process of informing for decision is concerned, why should the standard of conduct for the authorities, even given the reality of incarceration, be any different from that which should be imposed upon them in nonincarcerative settings? Professor Robert Burt, one of the attorneys appointed by the court to represent the incarcerated person in *Kaimowitz*, forces that issue into view in his reflections about that decision:

Why should we [the state] then bar the threat of [continued] incarceration as an inducement to participate in medical experimentation, including psychosurgery? . . . If we as a society are willing in any event to impose incarceration on that person, why does it more transgress his human dignity and inviolability to permit him an option between those alternatives?

It seems tempting to say, "No, that choice is too cruel. Most people, if they were really rational, really in possession of their senses, would not agree to have their brains scrambled in preference to imprisonment." But if we are most concerned in this matter with protecting individual autonomy and dignity and if we, as a society, are willing to authorize imprisonment for some people and to authorize experimental psychosurgery for some people, why would it not best protect John Doe's autonomy and integrity if we permitted him to choose between these two socially sanctioned options?³⁵

The state may decide to prohibit its authorities from offering the inmate any choice but continued incarceration. But in denying a citizen the option of possibly becoming eligible for release or even of the possibility of a "better life" in custody by choosing to be an experimental subject, the authorities further strip the incarcerated citizen of the power to decide what is best for himself. To the extent that standards of conduct for the authorities are to respect the capacity and right of the incarcerated citizen to accept or reject treatment or participation in an experiment, even under such coercive circumstances, the ultimate goal of law to respect the dignity of each person as a human being will be enhanced.

35. Burt, *Why We Should Keep Prisoners From Doctors: Reflections on the Detroit Psychosurgery Case*, HASTINGS CENTER REP., Feb. 1975, at 25, 27 (Feb. 1975); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 26 (1974): "It is better directly to confront the potentialities of abuse of power over prisoners than to rely on the temporary exclusion of prisoners from 'experimental programs.'"

III

The plea bargain is the most complicated of the three transactions. It concerns the conduct not just of a single authority but of three—prosecutor, trial judge, and defense counsel—in their relationship to the accused citizen. The accusation which brings the citizen into this transaction is not unlike the illness which generally brings the citizen into contact with his physician. The critical difference is, of course, that the accused is not entitled to choose to ignore the accusation and thus to avoid establishing contact with the authorities. In short, the relationships are not voluntary; they result not from the forces of nature, but from state force.

The test of a valid plea of guilty or *nolo contendere* is that it be both voluntary and intelligent.³⁶ Though the requirement that the plea be made voluntarily has, it seems, forced focus on the conduct of the authorities, it misleadingly implies that the citizen has a free choice. However, like the treatment-experiment transactions in institutions of incarceration, the plea bargain is inherently coercive for the accused; his ambit of choice is determined by the state. The authorities are empowered either to leave him no choice but to stand trial or to encourage, if not importune him, to consent to a plea of guilty rather than press his case to court.

What the Court has come to mean by “voluntary” is, of course, voluntary under the circumstances: such a plea would be free from conduct by prosecutor, trial judge or counsel which is “unduly” coercive, that is, conduct engaged in especially for a particular accused, but the plea would not be free of conduct that was generally coercive, that is, inhering in the situation in which any accused finds himself. Thus even if the accused would not plead guilty except for the severity of the maximum sentence authorized for the crime charged, such a plea is not invalid as an involuntary act. Like the authorized indefinite incarceration of John Doe in *Kaimowitz*, the statutorily authorized sentence is not something especially dreamed up by the prosecutor to force the particular accused to plead guilty. It is part of any accused’s reality in the plea bargain setting. For our purposes it is a generally authorized and thus not unduly coercive threat. However, there would be undue coercion if, for example, the prosecutor were to bring more serious charges than those justified by the evidence, to force a guilty plea to lesser charges. Similarly it would be unduly coercive if the

36. *Tollett v. Henderson*, 411 U.S. 258 (1973); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

trial judge were to advise an accused that conviction following his refusal to plead guilty would automatically carry the maximum sentence, whereas a plea would bring only the minimum.

In any event, the requirement of voluntariness, however devalued, does direct supervisory attention to the conduct of prosecutor, judge, and counsel and to the establishment of criteria of impermissible pressure in their effort to induce an accused citizen to plead guilty. Thus the Court in *Brady v. United States*³⁷ declines to hold "that a guilty plea is compelled . . . whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."³⁸ The Court thereby protects (as it might have done with regard to John Doe's "consent" to the psychosurgery experiment in *Kaimowitz*) the citizen's limited autonomy to decide what is best for himself under the circumstances. But while the requirement that a plea be made voluntarily has directed attention toward determining what authorities *may not* communicate to the citizen by way of threats, the requirement that it be made intelligently has failed to direct attention to the need to determine what the authorities *must* offer and be willing to communicate during the course of bargaining.

The requirement that a guilty plea be made knowingly and intelligently, like the requirement that a consent to treatment or experiment be fully informed to be valid, tends mistakenly to focus on the conduct and mind of an accused citizen rather than upon the conduct of the authorities—prosecutor, trial judge, and counsel—in their efforts to obtain his consent to conviction without trial. Not unlike the patient-subject's waiver of a right to have the physician-scientist held liable for assault or battery, the accused's consent is a waiver of his Sixth Amendment right to trial and of his Fifth Amendment right not to incriminate himself. The question for supervisory decisionmakers, whether legislative, judicial or executive, would be: "What information must authorities offer and be willing to disclose to the citizen during negotiations aimed at bargaining away constitutional rights originally fashioned out of deference for his dignity as a human being and out of recognition that men of power are too easily tempted to ignore the autonomy of those they govern?" The test would not be

37. 397 U.S. 742 (1970).

38. *Id.* at 751.

whether the accused made a knowing and intelligent plea, but whether prosecutor, trial judge, and counsel provided the accused with an opportunity to be informed by them of what he wished to know before deciding to accept or reject the bargain.

In safeguarding an accused citizen's right to decide his course of action for himself, standards of conduct might substantially follow those suggested for authorities in their negotiations to treat or to experiment. Thus prosecutors would minimally be required, if they decide to bargain, (a) to disclose to the accused and his counsel the offense charged or to be charged, (b) to offer to disclose, and to disclose unless the accused objects, the evidence upon which proof of the charge is based, the range of sanctions authorized following conviction, the rights which he is being asked to waive, the benefits he could expect in return for the plea and which would or might not otherwise be available to him were conviction to follow trial, (c) to honor the accused's wishes not to be informed of some or any of that which the authorities must offer to disclose, and (d) to answer any questions raised by the accused even if the prosecutor thought they were not relevant to an intelligent consent to a guilty plea.³⁹ Trial judges would be minimally required (a) to advise the accused of his right to counsel and that counsel will, if he wishes, be provided for negotiations with the prosecutor, and (b) to offer to advise and to advise the accused, unless he objects and prefers to place himself on the mercy of the court, of what risks and benefits (if any) in terms of judicial response, would attend the accused's acceptance or rejection of the negotiated plea.⁴⁰ Counsel for the accused would be minimally required (a) to offer to explain and to explain (unless the accused objects) the possible and likely consequences of a plea of guilty as opposed to insisting on trial, and (b) to honor the requests of an accused including his request to "tell me what you think is best for me to do under the circumstances and I will do it."

The communications between authorities and citizen in these trans-

39. *But cf.* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (App. Draft 1968) (standards for plea bargaining). These standards place no affirmative obligations on the prosecutor. On the other hand, they acknowledge that the defendant, not his attorney, must make the decision.

40. *See, e.g.,* *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969) (Judge Bazelon's supervisory review of trial judge Sirica's conduct), holding that a trial judge should not participate directly in plea bargaining nor create incentives for guilty pleas by a policy of differential sentencing; *cf.* Statement of Judge Hoffman (D. Md.), Oct. 10, 1973, reprinted in J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *supra* note 31, at 575.

actions must, of course, be in language comprehensible to the citizen who is, unlike today's incarcerated mental patient, presumed to be competent to participate in the proceedings.⁴¹ The average, reasonable accused, competent to stand trial, is presumed not likely to understand the substantive and procedural language of law. Thus, to protect its own integrity and out of a paternalistic recognition of the more than usual vulnerability of the citizen in such a setting, the law recommends, if not requires, that the accused have access to counsel as translator and advisor. Such persons can assist the accused to the extent he wishes in deciding what he wants to know in order to decide for himself.

In suggesting standards of conduct for the authorities in each of the transactions selected, I have not meant to imply that the law is unambivalently committed to deferring to the dignity of all of its citizens as human beings. Rather it is its ambivalence which prompts or requires clarification of what it authorizes and does in the name of, but often not in the service of, human autonomy. Yet in this effort to appraise these transactions and to recommend with a single focus the direction which supervision of the conduct of authorities should take, I have not restored each transaction to its context as Lasswell might require. It remains for those sufficiently provoked by these suggestions to consider them in a full public order context and to identify the values, goals, and functions in conflict with that which is proposed. The hope is that they will be assisted in acknowledging or prevented from denying the extent to which respect for human dignity is or may be traded for the "societal good" of apprehending more "criminals"; or the "societal gain" that might come from the medical experiment in which "human material" is used without regard

41. *But see* Brief of Petitioner, *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 194-199 (Mich. Cir. Ct. July 10, 1973), *reprinted in* LAW QUADRANGLE NOTES, Fall 1973, at 9 (Univ. of Michigan Law School):

There is . . . one striking exception to [the] general rule [that any medical procedure without consent is a battery]. Persons who are involuntarily committed to state mental institutions, on a permanent commitment order, need not give consent to medical treatment.

....

As a matter of state law, there is no precedent in Michigan cases and little precedent elsewhere . . . addressing whether there are any exceptions to the general rule that committed persons may be compelled to accept any treatment imposed by the state commitment institution.

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for the subject's wishes, or even over his objection; or, the symbolic—even if paternalistic—value of the appearance of justice in the maintenance of an overburdened system of criminal law.

Just as I finished this essay, I happened upon a file card marked, Lasswell, *Analysis and Political Behavior*, which I had prepared as a graduate student in 1946 at the London School of Economics. It contained the following note: Chpt. III Legal Education and Public Policy —p.36—“*Democracy*—the realization of human dignity in a commonwealth of mutual deference.”

I am pleased to acknowledge the influence of Harold Lasswell on my work. I hope he is, too.