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# WHO SHOULD CONTROL THE DECISION TO CALL A WITNESS: RESPECTING A CRIMINAL DEFENDANT'S TACTICAL CHOICES

Rodney J. Uphoff\*

## I. INTRODUCTION: THE PROBLEM IN CONTEXT

A law student approached me not long ago to discuss a problem he had encountered while helping to prepare a criminal case for retrial.<sup>1</sup> The defendant's first trial ended with a hung jury. The defendant, Steven Brown, now faced a second trial on the same misdemeanor charge of assaulting a police officer.<sup>2</sup> Although the defendant still wanted to go to trial, Brown told defense counsel that he did not want his elderly father to have to testify again. From defense counsel's standpoint, the father's testimony was critical because he was the only witness corroborating the defendant's version of the event. Moreover, in talking to members of the jury after the hung verdict, counsel learned that the jurors viewed the defendant's testimony as largely incredible, but found Brown's father to be very believable. Thus, counsel concluded—and so informed her client—that the defendant's chances for an acquittal at trial would be greatly reduced if his father did not testify.

Seemingly aware he was hurting his own defense, Brown insisted, nonetheless, that he did not want to put his father through the stress of another trial. Brown told his lawyer that he was prepared to take his chances at trial without his father's testimony. Concerned by her client's insistence on an unsound strategic course that defense counsel felt was contrary to Brown's best interest because it compromised the strength of their defense, counsel tried to persuade Brown to change his mind.<sup>3</sup>

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\* Professor and Director of Clinical Legal Education, University of Oklahoma College of Law. I would like to thank Don Bogan, Peter Joy and Carrie Hempel for their comments and criticisms. I would also like to thank Kim Marchant and Lori Ketner for their assistance in the preparation of this article.

1. The student was enrolled in the Criminal Defense Clinic, a clinical course that I direct at the University of Oklahoma College of Law. The students in this course work with an experienced criminal defense lawyer/clinical supervisor to provide representation to indigent defendants in Oklahoma state court proceedings.

2. The defendant's name and some of the facts have been changed to maintain the client's confidentiality. For a thought-provoking look at the problems involved in using clients' stories for teaching purposes, see Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying With the Law to Produce Scholarship With Integrity*, 5 CLINICAL L. REV. 271 (1998).

3. Defense counsel's attempt to persuade Brown to rethink his decision and to allow counsel to call Brown's father as a witness was, given the facts of this case, appropriate lawyering. See STANDARDS FOR

When that failed, counsel suggested that the student discuss with me whether she or the client ultimately controlled the decision to call the father to testify.

Much to his chagrin—and, perhaps, to his surprise<sup>4</sup>—the student quickly learned that I had no simple answer to his seemingly straightforward inquiry. As he would soon discover, lawyers, courts, and commentators are sharply divided as to whom should have the final say when lawyer and criminal defendant disagree regarding the decision to call a particular witness.<sup>5</sup> In the absence of a strong professional consensus regarding the proper allocation of decisionmaking power in the attorney-client relationship, criminal practitioners are given considerable latitude to decide for themselves how to resolve decisionmaking disputes with their clients. Most lawyers tend to approach such disputes from a particular lawyering orientation or style,<sup>6</sup> and that orientation shapes their resolution of such a dispute. Regardless of one's decisionmaking orientation, however, the criminal defense lawyer locked in a disagreement with a client over a strategic decision eventually will be forced to make a tough judgment call, a call that necessarily implicates important client values.

This article seeks to highlight the difficulty facing defense counsel by examining three variations of the strategic impasse that counsel faced in the Brown case. In each scenario, the criminal practitioner confronts a variation of the same dilemma: whether to call Brown's father as a witness or to defer to the client's unsound tactical choice that his father not testify. Ultimately, defense counsel must decide in each scenario whether to respect Brown's right to be wrong or to override the defendant's choice for Brown's own good.

Before turning to the three scenarios, the article begins by examining the traditional view of the proper allocation of decisionmaking

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CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 commentary at 201 (3d ed. 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE] ("Although it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence, counsel is free to engage in fair persuasion and to urge the client to follow proffered professional advice"). See also *infra* notes 216, 235 and accompanying text.

4. Students in the clinic, especially early in the semester, often are surprised at my failure to offer them simple answers to their inquiries. My explanation is that the resolution of questions about lawyering frequently turns on subtle distinctions, factual nuances, and conflicting values that require extensive discussion rather than a pat answer. Additionally, even if I have a pat answer, I generally want the student to struggle with the problem first before disclosing my position. For the pedagogical justifications for this approach to supervision, see David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1527-35 (1998).

5. See *infra* notes 35-38, 64-197 and accompanying text.

6. See *infra* notes 31-35 and accompanying text.

responsibility between lawyer and client. Section II discusses how a criminal defense lawyer adhering to this traditional approach would be likely to respond to the dilemma in the Brown case. Section II also describes the client-centered approach to lawyering and explores how that lawyering orientation influences counsel's resolution of such a dispute. Section III discusses the general, and often inconsistent, guidance provided by ethical rules, caselaw, and professional norms regarding the allocation of decisionmaking power between lawyer and criminal defendant.<sup>7</sup> Occasionally, criminal defense lawyers are provided specific directives as to how particular disputes with their clients over strategy are to be resolved.<sup>8</sup> For the most part, however, neither the Constitution nor the courts mandate that lawyers follow the strategic commands of their clients or dictate that lawyers disregard those commands.<sup>9</sup> Rather, criminal defense lawyers generally are given broad discretion to determine whether—and to what extent—they will share or cede control over a strategic decision to a defendant.<sup>10</sup>

Exercising that broad discretion wisely, however, is not easy. As the Brown case illustrates, the criminal practitioner entangled in a strategic impasse with a client must make a demanding judgment call. To assist lawyers confronting such dilemmas, Section III outlines an approach that calls for defense counsel to weigh four factors before deciding to respect or to override a client's strategic choice: the defendant's

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7. See, e.g., WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 559-60 (1992) (noting the uncertainty as to which decisions ultimately are for counsel and which are for the client and concluding that "[t]he problems of uncertainty are exacerbated, however, by the absence of any well reasoned guidelines for distinguishing between those decisions requiring defendant's personal choice and those subject to counsel's control over strategy"); *Trimble v. State*, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985) (after reviewing mixed guidance of ethical rules, ABA Standards and caselaw regarding strategic decisionmaking, lamenting "the continuing difficulty in determining defense counsel's role in the criminal trial").

8. See, e.g., *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991) (holding that if defense counsel and defendant reach an absolute impasse over strategic decision regarding use of peremptory challenge, defendant's wishes control).

9. See *infra* notes 64-182 and accompanying text. Lawyers are not authorized to follow a client's instructions when by doing so, counsel would be assisting a client—or participating—in conduct that the lawyer knows to be criminal or fraudulent. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1980); MODEL RULES OF PROFESSIONAL CONDUCT 1.2(d) (1989); *Nix v. Whiteside*, 475 U.S. 157 (1986). Thus, defense counsel faces a difficult ethical dilemma when her client insists that she call a witness that counsel reasonably believes will testify falsely on the stand. Compare *State v. Hagen*, 574 N.W.2d 585 (N.D. 1998), and *People v. Schultheis*, 638 P.2d 8 (Colo. 1980), with Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth*, 28 NEW ENG. L. REV. 881 (1994), and MONROE H. FREEDMAN, UNDERSTANDING LAWYERS ETHICS 123-24 (1990). This article does not address a lawyer's responsibility when confronted with such a dilemma. Rather, for the purpose of this article, assume that counsel in Brown and the three variations of the Brown case lacks any reasonable basis for believing that Brown or his father will testify falsely.

10. See *infra* notes 40-182 and accompanying text.

capacity for choice, the reasons for the defendant's preferred strategy, the harm the defendant faces, and the likelihood of the defendant suffering that harm if counsel respects the defendant's wishes. Section IV concludes by exploring the utility of this suggested approach in three variations of the Brown dilemma.

## II. LAWYER-CENTERED VERSUS CLIENT-CENTERED DECISIONMAKING: DIFFERING VIEWS OF LAWYER-CLIENT DECISIONMAKING RESPONSIBILITY

### A. *The Traditional Approach*

For some lawyers—especially among those who adhere to the traditional view of the lawyer-client relationship—the issue posed by the Brown case presents no serious dilemma. According to this traditional view of lawyering, the client chooses the goals or the objectives of the representation while the lawyer selects the means to achieve the client's ends.<sup>11</sup> Once the client has retained a lawyer, or agreed to accept appointed counsel, the client's role is largely passive.<sup>12</sup> The lawyer, as a trusted and skilled professional, utilizes her training and specialized knowledge to manage the client's legal problem or case in accordance with counsel's best judgment. Thus, except for a few fundamental decisions specifically reserved for the defendant,<sup>13</sup> the criminal defense lawyer makes all tactical and strategic decisions, including which witnesses to call, because the lawyer, as a detached expert, is in a better position to do so than the untrained, emotionally involved client.<sup>14</sup>

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11. The traditional view as articulated by Justice Burger in decisions such as *Wainwright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) and *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983), places almost all decisionmaking power and responsibility in the hands of defense counsel, the skilled professional, who is to use her expertise to manage her client's case. Although commentators use a variety of terms to describe the lawyer's role in the traditional approach to the lawyer-client relationship, generally the lawyer/manager is depicted as the master while the pliant, needful client is portrayed as the servant. See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths - A Dead End?*, 86 COLUM. L. REV. 9, 33-37 (1986). For a more detailed look at the traditional approach, see DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 16-18 (1991); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 5-14, 30-39 (1994).

12. See *Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir. 1996) (attributing a very limited role to the defendant in tactical decisionmaking).

13. The decisions consistently deemed to be ultimately reserved for the defendant include: whether to plead guilty, whether to accept a plea agreement, whether to waive a jury trial, whether to testify, and whether to appeal. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1989); *Jones*, 463 U.S. at 750.

14. Unquestionably, a significant number of lawyers agree with former ABA president Chesterfield Smith that the lawyer as professional must take charge of the case and make all strategic decisions: "Clients

Moreover, the lawyer has the right—indeed the responsibility—to make all tactical decisions because the nature of the trial process simply does not allow time for consultation, much less informed client decisionmaking.<sup>15</sup>

To the traditionalist, therefore, once Brown accepted appointed counsel, he expressly agreed that his lawyer could use her best judgment to handle his defense.<sup>16</sup> Accordingly, because counsel reasonably believes that the father's testimony will aid the defense case, counsel is empowered to call Brown's father to the witness stand despite Brown's objection.<sup>17</sup> This approach to decisionmaking, therefore, is lawyer-centered because it maximizes lawyer autonomy by providing counsel the authority to make the strategic decisions she deems necessary to attain the results counsel believes are in the client's best interests.<sup>18</sup>

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before long get great confidence in me and they don't want me to tell them all of the alternatives. They want me to tell them what to do. I do it and charge them." Panel Discussion, *A Gathering of Legal Scholars to Discuss "Professional Responsibility and the Model Rules of Professional Conduct,"* 35 U. MIAMI L. REV. 639, 643 (1981). For a sampling of others advocating the traditional approach, see, e.g., Clement F. Haynsworth, Jr., *Professionalism in Lawyering*, 27 S.C. L. REV. 627 (1976); F. LEE BAILEY & HENRY B. ROTHBLATT, *FUNDAMENTALS OF CRIMINAL ADVOCACY* §58, at 44 (1974); Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 996 (1970); Samuel C. Stretton, *Trial Tactics and Strategy - Who Controls It, The Attorney or the Client?*, THE CHAMPION, May 1992, at 25-26.

15. See *Wainwright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) (placing ultimate responsibility for strategic and tactical decisions with the lawyer, without need for consultation, in part, because of nature of trial process).

16. See, e.g., *People v. Hamilton*, 774 P.2d 730, 741 (Cal. 1989) (en banc) ("By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics."). For a more critical look at the claim that a client's initial consent to representation justifies sweeping lawyer control over all strategic decisions, see Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 77 (1979); BINDER ET AL., *supra* note 11, at 268; David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 458-59.

17. In rejecting the defendant's appeal based on his court-appointed lawyer's decision to override his client's strategic wishes, the court in *Nelson v. State*, 346 F.2d 73 (9th Cir. 1965), *cert. denied*, 382 U.S. 964 (1965) summarized the arguments for lawyer control over decisionmaking:

Does the fact that here there was prior consultation with the accused, and that he disagreed with counsel's strategy, make a legal difference? . . . Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the law-suit [sic], that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel. One of the surest ways for counsel to lose a law-suit [sic] is to permit his client to run the trial. We think that few competent counsel would accept retainers, . . . if they were to have to consult the defendant, and follow his views, on every issue of trial strategy.

*Id.* at 81.

18. As David Luban has written, "a lawyer's manipulating a case or client for the client's own good - or, rather, for what the lawyer takes to be the client's own good even though the client does not see it that way . . . is called paternalism." Luban, *supra* note 16, at 458. For an in-depth discussion of paternalism and the extent to which a lawyer's paternalism may be justified, see generally Luban, *supra* note 16.

### B. Client-Centered Lawyering

The participatory or client-centered model<sup>19</sup> represents a very different approach to lawyering. The role of the client-centered lawyer is to help the client identify legal problems, to develop viable options consistent with the client's goals, and to present the advantages and disadvantages of each option so that the client ultimately can select a course of action that is consistent with the client's chosen goals.<sup>20</sup> The client-centered lawyer initiates a counseling process that requires the client to take an active role both in defining his interests and in establishing his priorities as well as in making all fundamental decisions that are likely to have a substantial legal or nonlegal impact on the client or his case.<sup>21</sup> The client-centered model seeks to promote client

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19. Although there are many variations of the client-centered approach, those commentators who espouse such a model of lawyering are critical of the lawyer-dominated traditional view of the attorney-client relationship and argue instead for a more balanced relationship in which lawyers interact with their clients in a manner that fosters greater client decisionmaking. For a look at a representative sample of different proponents of a client-centered approach, see ROBERT F. COCHRAN, JR., ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); ROSENTHAL, *supra* note 11; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781 (1987); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L. J. 1545 (1995); Spiegel, *supra* note 16; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987).

20. See BINDER ET AL., *supra* note 11, at 290-308, 316-46. Arguably, the client-centered model's most influential proponents are David Binder and Susan Price, whose first book, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977), was the most widely used text on legal interviewing and counseling in legal education. Joined by their colleague Paul Bergman, Binder and Price authored a revised text, *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH*, *supra* note 11, which continues to enjoy widespread use. The Binder, Bergman and Price model, nonetheless, has its critics including others favoring a client-centered approach. See, e.g., Ellmann, *supra* note 19; Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996). For an excellent overview of the arguments for and against the client-centered approach to legal counseling and decisionmaking together with an assessment of the strengths and limitations of the Binder and Price model, see generally Dinerstein, *supra* note 19.

21. According to Binder, Bergman and Price, the client should make any decision when a lawyer, using "such skill, prudence, and diligence as other members of the profession commonly possess and exercise," would or should know that such a decision is likely to have a substantial legal or nonlegal impact on a client. See BINDER ET AL., *supra* note 11, at 268 (citation omitted). Although this "substantial impact" standard does extend client decisionmaking to include some strategic or tactical issues, the standard has been rightfully criticized as vague and as offering little real guidance to lawyers trying to determine which decisions really belong to the client. See, e.g., Miller, *supra* note 19, at 511-14; Hurder, *supra* note 20, at 77-80. Indeed, the standard proposed by Binder, Bergman and Price relegates virtually all strategic and tactical decisionmaking to the lawyer, albeit with the need to consult with the client in many such decisions. Requiring only consultation, however, substantially reduces the force or sweep of client-centered decisionmaking.

autonomy by making clients responsible for decisionmaking. This approach, however, goes further than just recognizing that most clients are competent decisionmakers. Rather, this model assumes that clients often are in a better position to make case decisions because so many decisions actually turn on the client's values and priorities that the client alone best appreciates.<sup>22</sup> The lawyer's role in this model, then, is to provide clients with meaningful information so as to empower clients to make informed choices about their cases.<sup>23</sup>

Client centered lawyers still are called upon to utilize their professional judgment to make many tactical and strategic decisions. Commentators advocating the client-centered approach recognize that lawyers must be provided the professional discretion to make numerous tactical decisions—such as how to question a witness, what to include in a closing argument, or whether to make an evidentiary objection—without the client's consent or input.<sup>24</sup> Time, common sense, and respect for professional autonomy preclude the client from making all of the myriad decisions involved in a criminal case.<sup>25</sup> Although client-centered advocates generally agree that clients must be given the opportunity to make all significant case decisions, client-centered theorists differ substantially in the extent to which they would share or give clients decisionmaking control over strategic decisions that a

22. See BINDER ET AL., *supra* note 11, at 5-10, 17-18; Miller, *supra* note 19, at 503-04. But see William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 222-26 (1991) (arguing that good lawyering often demands that lawyers make judgments about their clients' best interests and influence their clients to adopt those judgments).

23. The lawyer remains an active participant in the counseling process advocated by Binder, Bergman and Price, but counsel is cautioned to withhold her advice or opinion regarding the client's best course of action so as not to unduly influence or override her client's fundamental decisions. BINDER ET AL., *supra* note 11, at 19-22. Other client-centered theorists have criticized this aspect of the Binder and Price approach arguing that denying advice to clients is manipulative and paternalistic, see Ellmann, *supra* note 19, at 744-45, or that more flexibility regarding the circumstances when advice should be proffered is warranted, see Dinerstein, *supra* note 19, at 509-10, 567-70. In addition, the informed consent model advocated by some commentators, see, e.g., Spiegel, *supra* note 16, envisions shared decisionmaking between lawyer and client, a different goal from that sought by those espousing the Binder and Price approach. See Dinerstein, *supra* note 19, at 507, 529-34.

24. Some client-centered theorists contend that lawyers must be given considerable freedom to perform their craft without client interference stating that:

[A] client's decision to hire you is tacit willingness for you to make lawyering skills decisions free from consultation. Thus, such matters as how you cross examine, write briefs, or phrase contingency clauses are generally for you alone to decide, even though they may have a substantial impact. They involve primarily the exercise of the skills and crafts that are the special domain of lawyers.

BINDER ET AL., *supra* note 11, at 270. But see *supra* note 23.

25. As Justice Brennan observed, "[f]rom the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made quickly in the course of a trial." *Jones v. Barnes*, 463 U.S. 745, 760 (1983) (Brennan, J., dissenting).



traditionalist would certainly label as tactical and, therefore, exclusively the lawyer's.<sup>26</sup>

Client-centered theorists have not, for the most part, addressed how impasses between lawyers and clients over strategic choices should be resolved.<sup>27</sup> Undoubtedly, while many espousing a client-centered approach ultimately may opt to defer to Brown's choice not to call his father to the witness stand, not all client-centered lawyers would do so. Binder, Bergman and Price surely would expect a lawyer to consult with Brown before making a final decision regarding calling the father as a witness, but they do not indicate that a lawyer should defer to the client's wishes in such a situation.<sup>28</sup> Rather, Binder, Bergman and Price suggest that counsel should not permit Brown to make a tactical choice if, in her professional judgment, Brown's tactic will compromise the attaining of the client's chosen goals. For many advocates of a client-centered approach, however, respect for Brown's choice is at the heart of this approach to lawyering.<sup>29</sup>

### C. Decisionmaking in Practice

Although many legal educators espouse a client-centered approach to lawyering,<sup>30</sup> many criminal practitioners still adhere to the traditional view. Indeed, a recent study of almost 700 public defenders revealed that a majority of those defenders believed in, and practiced, a lawyer-centered approach to decisionmaking.<sup>31</sup> Nonetheless, that same study confirmed that a significant minority of public defenders surveyed favored a more client-centered approach.<sup>32</sup> Unquestionably, not all

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26. Compare BINDER ET AL., *supra* note 11, at 270-71 (lawyering skills decisions are the special domain of lawyers but many such decisions warrant client consultation), with Spiegel, *supra* note 16, at 123-26 (client decides whether to call witness or cross-examine a particular witness though lawyer decides how to perform particular task such as the order of proof and the details of eliciting testimony).

27. For an extensive look at the failure of most client-centered literature to provide guidance on the allocation of specific decisionmaking power, see Miller, *supra* note 19, at 505-514.

28. See BINDER ET AL., *supra* note 11, at 271, 281-86.

29. See, e.g., Spiegel, *supra* note 16, at 123-26.

30. See Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541, 543 (1995) (noting that the client-centered theory of representation is "accepted and adopted throughout the nation's law schools").

31. See Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 32-51 (1998) (describing a study of 699 public defenders in five offices that looked at the attitudes and practices of the respondents with respect to twelve strategic decisions commonly faced in criminal cases).

32. See *id.* at 37-38 (reporting that 38% of the public defenders in the study generally approved of a more client-centered approach). The study indicated, however, that this commitment to and practice of a more client-centered approach varied significantly depending on the strategic or tactical decision to be made. See *id.* at 38-39.

lawyers can be readily identified as a particular type of decisionmaker nor can all decisions be easily pigeonholed into those which are solely for the client and others which are exclusively the concern of counsel.<sup>33</sup> Lawyers who prefer a client-centered approach do not consistently consult with clients with respect to all significant case decisions nor uniformly provide all clients equal access to decisionmaking power.<sup>34</sup> Nor do all lawyers with a lawyer-centered approach necessarily dictate all tactical and strategic decisions to every client or always refuse to respect the wishes of a client who is insisting upon a dubious strategic choice. Nevertheless, lawyers do tend to have a client-centered or lawyer-centered orientation, an orientation that generally reflects their view of the appropriate role of counsel in controlling case decisions.<sup>35</sup>

If a majority of lawyers, in fact, have a lawyer-centered orientation, one would expect that most of them would resolve the impasse facing counsel in the Brown case by calling the father as a witness. In the survey noted above, 88.6% of the lawyers responding to the study indicated that it is the lawyer's decision that controls when counsel and client disagree about the decision whether to call a particular witness.<sup>36</sup> What is somewhat surprising, however, is that of the twelve trial-related decisions analyzed in this study,<sup>37</sup> the impasse over a witness generated the third highest percentage in favor of lawyer control of a disputed issue. The fact that such an overwhelming percentage of respondents

33. See Hurder, *supra* note 20, at 77-80 (claiming that dividing decisions into those in the client's domain and delegating others to the lawyer neither reflects actual practice nor is desirable, but that the preferred approach involves open negotiation and joint decisionmaking).

34. Dinerstein, *supra* note 19, at 569-604. For empirical support for both propositions, see Uphoff & Wood, *supra* note 31, at 32-59.

35. In Charles Ogletree's view, a public defender's decisionmaking orientation or conception of her role turns on the weight that she gives to the value of empathy compared to the value of heroism. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-81 (1993). To Ogletree:

[t]he empathetic lawyer quite naturally embraces the client-centered approach to representation, which "emphasiz[es] the importance of clients' expertise, thoughts and feelings in resolving problems." She is likely to bring the client into decisionmaking and to respect the client's decisions, even on strategic matters that have been traditionally allocated to the lawyer. By contrast, the "heroic" public defender tends to accord a much less central role to the client. Narrowly focused on the goal of winning the case, she is likely to limit client autonomy and input to the minimum required by ethical rules, for fear that the client will make the "wrong" decisions.

*Id.* at 1281 (quoting BINDER, ET AL., *supra* note 11, at 18 (citation omitted)).

36. See Uphoff & Wood, *supra* note 31, at 39.

37. The twelve decisions were: whether to waive a jury trial; whether to accept a plea bargain; whether the defendant will testify at trial; whether to waive a preliminary hearing; whether to initiate plea bargaining; whether to raise an affirmative defense; whether to request a lesser included instruction; whether to file a suppression motion; whether to call a defense witness; whether to request the appointment of an expert; whether to interview a prosecution witness; and whether to exercise a peremptory challenge. See *id.* at 34.

agreed that lawyers should have the final say over witnesses is rather remarkable given the fact that 38% of the respondents agreed, at least to some extent, with the general proposition that lawyers should allow their clients to make all important case decisions.<sup>38</sup>

It is unclear, of course, if this study of public defenders is representative of criminal defense lawyers as a whole. In addition, simply because a lawyer answers a survey in a particular way does not mean, when faced with a real client and a real dilemma, that lawyer will, in fact, act in accordance with his or her theoretical answer. More importantly, knowing how most lawyers claim they would handle a disputed decision does not—or at least should not—determine for the conscientious lawyer how to resolve a dispute such as that facing counsel in the Brown case.<sup>39</sup> Before taking a closer look at the difficulties facing the criminal defense lawyer struggling with the dilemma posed by the Brown case, it is important to review the guidance that ethical rules, caselaw, and professional standards offer the criminal practitioner.

### III. THE SELECTION OF DEFENSE WITNESSES: WHO CONTROLS THE FINAL DECISION?

#### A. *The Ethical Rules and the Allocation of Decisionmaking Authority*

The law student or lawyer seeking to determine whether the lawyer or client has the final say on any particular strategic or tactical decision will find only limited guidance in the ethical rules of the legal profession. Although commentators have looked to language in both the Model Code of Professional Responsibility<sup>40</sup> ("Model Code") and the Model Rules of Professional Conduct<sup>41</sup> ("Model Rules") to justify a client-centered approach to decisionmaking, these ethical codes provide even more support for those espousing the traditional model of the lawyer-client relationship.<sup>42</sup> In the end, however, neither the Model Code nor the Model Rules offer a definitive answer to the question of how decisionmaking power should be allocated between lawyer and client. Nor does either ethical code resolve conclusively the specific question of who ultimately controls the decision to call particular witnesses.

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38. See *id.* at 37-38.

39. For a thoughtful discussion of the point that knowing how lawyers behave does not resolve the question of how lawyers ought to behave, see Ted Schneyer, *Getting from "Is" to "Ought" in Legal Ethics: Mann's Defending White-Collar Crime*, 1986 AM. B. FOUND. RES. J. 903.

40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

41. MODEL RULES OF PROFESSIONAL CONDUCT (1989).

42. See Dinerstein, *supra* note 19, at 534-38; Miller, *supra* note 19, at 506-11.

## 1. The Model Code of Professional Responsibility

Model Code Ethical Consideration 7-7 seemingly grants clients broad decisionmaking power:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.<sup>43</sup>

Although this provision gives the lawyer the right to make some decisions, it constitutes a significant check on a lawyer's decisionmaking authority by specifically reserving for the client the authority to make any decision affecting the merits of the cause or substantially prejudicing the client's rights. Construed literally, almost any strategic and tactical decision in a case could affect the merits of the case and, therefore, all such decisions should be the client's. Yet, the examples set out in EC 7-7—accepting a settlement offer, waiving an affirmative defense, pleading guilty or taking an appeal—are the types of significant decisions generally considered to be reserved for the client, suggesting, therefore, that this provision is not meant to be read too broadly.<sup>44</sup>

Similarly, Model Code EC 7-8 lends some support to the position that the client is the prime decisionmaker in the lawyer-client relationship by declaring that “[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”<sup>45</sup> Read in its entirety, EC 7-8 describes a decisionmaking process in which the lawyer has a duty to bring to the client's attention a full range of information and to offer advice that includes moral and non-legal considerations so that the client fully appreciates the ramifications of the decisions the client must make. EC 7-8 gives the client the power, not only to decline to pursue a legally available objective, but also to forego a particular method.

In the *Brown* case, the defendant's desire to keep his father off the witness stand was based on *Brown's* concern for his father's physical and emotional well-being. Thus, EC 7-8 arguably affords *Brown* the authority to trump his lawyer's chosen method—calling *Brown's* father

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

44. Other commentators also doubt that EC 7-7 was meant to be read broadly. See, e.g., Spiegel, *supra* note 16, at 65-67; Dinerstein, *supra* note 19, at 534-35.

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

as a witness—because the defendant’s decision rests on a non-legal concern. EC 7-8 seemingly dictates that, despite the lawyer’s legitimate fear that the failure to call this critical defense witness will result in a guilty verdict, the decision regarding this “non-legal” factor ultimately rests with the client.

On the other hand, despite using the word “methods,” EC 7-8 basically describes a process designed to ensure that the client makes decisions related to the objectives or ends of the representation, not one necessarily meant to apply to all of the tactical or strategic decisions involved in the litigation of a case. The provision surely reminds lawyers that it is the client’s non-legal concerns, not the lawyer’s, that are paramount. Nevertheless, reading EC 7-8 in conjunction with the rest of the Code, it is doubtful that the provision was ever intended to grant to the client the final say over strategic matters when the lawyer and client disagree about a legal factor—the utility of the father’s testimony—that may affect the client’s case.

Indeed, the Model Code’s very next provision, EC 7-9, undercuts the argument that EC 7-7 and EC 7-8 grant clients ultimate decisionmaking authority for all significant strategic and tactical decisions. EC 7-9 states that: “[i]n the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client.”<sup>46</sup> Although this provision does not spell out in any detail which decisions are within the lawyer’s domain, EC 7-9 unmistakably indicates that lawyers retain significant decisionmaking authority beyond mere technical matters.<sup>47</sup>

The Model Code contains other language evincing the inconsistency of its guidance on the proper allocation of decisionmaking authority between lawyer and client. Model Code EC 7-26 states that a lawyer should “present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent or perjured.”<sup>48</sup> Read plainly, EC 7-26 directs a lawyer to follow a client’s wishes if that client wants a particular witness to be called. Yet, no court has looked to this provision as authority for the proposition that a lawyer must defer to the client’s decision to call a witness even though counsel believes that the witness will hurt the defense case or merely provide cumulative or irrelevant testimony. Nor is there any reported decision disciplining a lawyer for failing to honor a client’s request that certain evidence be

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46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1980) (citations omitted).

47. See Spiegel, *supra* note 16, at 66.

48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26 (1980) (citations omitted).

presented.<sup>49</sup> Indeed, the fact that EC 7-26 does not even speak to the dilemma posed in the *Brown* case—the lawyer wants to present admissible evidence by calling a particular witness, but the client does not want that witness called—constitutes further evidence that this provision was never intended to apply to or to resolve the question of whether counsel or the client has the final say in selecting the witnesses to be called at trial.

Finally, the only disciplinary rules that touch on the subject of the allocation of decisionmaking further illustrate the Model Code's mixed guidance. DR 7-101(B)(1) states that a lawyer may "[w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client."<sup>50</sup> This vague grant of broad discretionary power to counsel cannot be squared with an expansive reading of EC 7-7 and EC 7-8. It is equally difficult to reconcile the discretion provided counsel by DR 7-101(B)(1) with DR 7-101(A)(1)'s command that a lawyer "shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law."<sup>51</sup> Simply put, the vague and conflicting provisions of the Model Code do not provide lawyers a useful framework for determining how decisionmaking responsibility is to be divided properly between lawyer and client.

## 2. The Model Rules of Professional Conduct

Initially, the Model Rules appear to be a significant improvement over the Model Code. Model Rule 1.2 sets up a distinction between the objectives and the means of the representation and states that, except in limited situations, a lawyer "shall abide by a client's decisions concerning the objectives of representation."<sup>52</sup> Unquestionably, the

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49. *But see* *Nichols v. Butler*, 953 F.2d 1550, 1552-54 (11th Cir. 1992) (holding that lawyer acted improperly in threatening to withdraw mid-trial and thereby coercing the defendant into giving up his right to testify). Additionally, lawyers have been found to have provided ineffective assistance of counsel for failing to call certain defense witnesses. *See, e.g.,* *People v. Bell*, 505 N.E.2d 365, 368-71 (Ill. App. 1987); *Wenzy v. State*, 855 S.W.2d 47, 50-51 (Tex. Ct. App. 1993). Although no court has looked to the provisions of the Model Code to find that a defense lawyer behaved unprofessionally in overriding a client's wishes regarding the selection of witnesses, courts have looked to EC 7-7 and 7-8 to find that counsel behaved properly in acceding to a defendant's strategic wishes. *See, e.g.,* *Trimble v. State*, 693 S.W.2d 267, 278-79 (Mo. Ct. App. 1985).

50. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1980).

51. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1980) (citations omitted). Other commentators have noted the inconsistent guidance provided by the Model Code. *See, e.g.,* Dinerstein, *supra* note 19, at 535 n. 153; Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1056-57 (1984).

52. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1989).

client has the right to determine the goals of the legal matter in which he or she is embroiled.<sup>53</sup> On the other hand, the client does not control the selection of the means used to attain those goals. Rather, Model Rule 1.2 provides that, although the lawyer must consult with the client as to means, it is the lawyer's responsibility to select the means used to achieve the client's ends.<sup>54</sup>

On its face, Model Rule 1.2 offers practitioners an easy-to-apply standard. The lawyer need only determine if the disputed decision involves an objective or a means to an objective, and the lawyer then knows who ultimately controls the decision. The selection of a witness is a strategic or tactical decision that is only a means to the desired end: winning the lawsuit. Accordingly, such a decision is squarely within the lawyer's province.

Nonetheless, as the Comment to Rule 1.2 recognizes, "a clear distinction between objectives and means sometimes cannot be drawn."<sup>55</sup> In fact, the lawyer's selection of means or counsel's strategic choices may so profoundly affect the client's substantive rights and the opportunity to realize the client's objectives that it is inconsistent with general agency principles to permit the lawyer/agent such sweeping control.<sup>56</sup> It is questionable whether Rule 1.2 was intended to authorize

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53. It is proper, of course, for a lawyer to counsel a client to rethink, to change, or to abandon certain goals and to raise non-legal concerns, including ethical and moral considerations, in the course of rendering such counsel. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 and cmt. (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980); COCHRAN, JR., ET AL., *supra* note 19, at 165-87; FREEDMAN, *supra* note 9, at 50-52. If, at the end of such moral counseling, the lawyer and client still disagree about the objectives of the case, then counsel may seek to withdraw from that representation if the client is choosing to pursue goals counsel deems repugnant or immoral. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 158 (1986). If counsel continues to represent the client, however, she must defer to her client's chosen goals. SHAFFER & COCHRAN, JR., *supra* note 11, at 40-54.

54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989).

55. *Id.* See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31, cmt. (Proposed Final Draft No. 1 1996) (noting that it may be unclear whether a decision relating to the representation is to be made by the client or the lawyer).

56. See RESTATEMENT (SECOND) OF AGENCY §14 (1958) (principal has right to control the conduct of an agent with respect to matters entrusted to him); § 369 (an agent cannot act contrary to a principal's wishes); and § 385 (agent subject to duty to obey all reasonable directions to the manner of performing a service agent has agreed to perform). Although an attorney is in complete charge of the "minutiae of court proceedings" and may be permitted to withdraw if not allowed to act as counsel thinks best, the attorney, nonetheless, is duty bound not to act contrary to the directions of the principal. See RESTATEMENT (SECOND) OF AGENCY § 385, cmt. As that same comment makes clear, however, the agent is under no duty to perform illegal or unethical acts. See *id.* Similarly, the two latest draft versions of §§ 31-34 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS generally reflect these same agency principles. That is, the proposed RESTATEMENT mandates considerable attorney-client consultation regarding decisions and allows for variations in the allocation of decisionmaking depending on the client's wishes and the parties' agreement, but sharply limit a lawyer's power to ignore a client's instructions even over strategic matters. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 31-34 and cmts. (Proposed Final Draft No. 1 1996) and (Proposed Final Draft 1998).

lawyers to act contrary to the express wishes of their clients on important strategic decisions. Many legal scholars, therefore, have sharply criticized the ends/means test as vague and unhelpful in determining whether the lawyer or a client ultimately has the right to make a particular strategic decision.<sup>57</sup>

Other language in the Comments to Model Rules 1.2 and 1.3 only compounds the confusion. The Comment to Model Rule 1.2 retreats from the dichotomy presented in the Rule itself by declaring first that “[b]oth lawyer and client have authority and responsibility in the objectives and means of representation,” then suggesting that often “the client-lawyer relationship partakes of a joint undertaking,” and finally warning that the law defining the scope of a lawyer’s authority in litigation “varies among jurisdictions.”<sup>58</sup> That same Comment also includes the disclaimer that “a lawyer is not required to pursue objectives or employ means simply because a client may wish to do so.”<sup>59</sup> No explanation is offered as to when or under what circumstances a lawyer is justified in ignoring or overriding a client’s objectives. Nor can this language be easily squared with the command of Rule 1.2 itself. Similarly, it is not easy to reconcile Rule 1.2’s directive about abiding by the client’s decision regarding objectives with the Comment to Model Rule 1.3 which proclaims that “a lawyer is not bound to press for every advantage that might be realized for a client.”<sup>60</sup>

The Comments to the Model Rules not only undercut the client’s authority regarding objectives, but they also opine that the lawyer’s control of the means used in a client’s case is not unlimited. Although the Comment to Model Rule 1.3 notes that a lawyer “has professional discretion in determining the means by which a matter should be pursued,”<sup>61</sup> the Comment to Rule 1.2 goes on to speak of shared responsibility over means.<sup>62</sup> Moreover, in the Comment to Model Rule

57. See, e.g., Miller, *supra* note 19, at 506-09; Dinerstein, *supra* note 19, at 535-538; Strauss, *supra* note 19, at 317-26; BINDER ET AL., *supra* note 11, at 267-271; Maute, *supra* note 51, at 1080-1105; Luban, *supra* note 16, at 459; Lee A. Pizzimenti, *The Lawyer’s Duty To Warn Clients About Limits On Confidentiality*, 39 CATH. U. L. REV. 441, 473-476 (1990).

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989). The Comments to a Rule are intended only to illuminate the meaning of a rule, not to change the meaning. There are, however, many instances where the Comments call for lawyers to act in a manner at odds with the demands of the Rule itself. See FREEDMAN, *supra* note 9, at 99-107.

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1989).

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1989).

61. *Id.* As the Comment to the draft version of § 34 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS recognizes, lawyers have the inherent authority to make many decisions that are required in the course of litigation when time does not permit consultation. If a client gives contrary instructions, however, counsel is bound to follow the client’s instructions. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 34, cmt. (Proposed Final Draft No. 1 1996).

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2, cmt. (1989).



1.2, the lawyer is cautioned that “[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”<sup>63</sup> Such language hardly suggests that lawyer’s professional discretion regarding means is unrestricted. Rather, for defense counsel in the Brown case wrestling with the decision whether to call the client’s elderly father against the client’s wishes, the Comment to Rule 1.2 arguably directs counsel to defer to her client’s choice because that choice reflects Brown’s concern for his father’s health. A broad reading of this Comment arguably strips counsel of considerable control over case tactics, a result seemingly inconsistent with the language of Rule 1.2 itself. In the end, however, the vagueness of the objectives/means test and the inconsistencies in the Model Rules and their Comments neither mandate a particular structure to the attorney-client relationship nor dictate a particular resolution to counsel’s dilemma in the Brown case.

*B. Federal Courts and Decisionmaking Responsibility Between Counsel and Criminal Defendant*

1. The Supreme Court and Allocation of Decisionmaking Responsibilities

Although the profession’s ethical rules do not demand that lawyers adhere to a particular lawyering orientation, a criminal defense practitioner struggling with the issue raised by the Brown case also must look to constitutional mandates, especially caselaw interpreting the Sixth Amendment right to the effective assistance of counsel, to determine if the United States Constitution commands any particular allocation of decisionmaking power between counsel and the criminal defendant.<sup>64</sup> Such a search reveals that the Constitution actually dictates very little about the allocation of decisionmaking authority between lawyer and criminal defendant.<sup>65</sup> The Constitution does not preclude a lawyer from sharing decisionmaking power with a client. On the other hand, except for a few specified decisions ultimately reserved for the defendant,<sup>66</sup> the Constitution does not require that a defendant represented by counsel

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63. *Id.*

64. In a state criminal case, a criminal defense lawyer also must ensure that the state constitution of that jurisdiction has not been interpreted to grant decisionmaking authority to a criminal defendant over a specific issue.

65. *See Jones v. Barnes*, 463 U.S. 745, 755 (1983) (Blackmun, J., concurring).

66. *See supra* note 13.

be given any control over the strategic decisions made on his or her behalf.<sup>67</sup>

A criminal defendant is not bound to accept legal representation. That is, the mere fact that the Sixth and Fourteenth Amendments to the Constitution guarantee the assistance of counsel does not mean that a state may constitutionally force a lawyer upon a criminal defendant.<sup>68</sup> Rather, as the Court recognized in *Faretta v. California*,<sup>69</sup> the Sixth Amendment grants to every accused the right to self-representation—to conduct one's own defense personally—because it is the defendant who suffers the consequences if that defense is unsuccessful. Even though a criminal defendant is likely to be better served by proceeding with counsel's guidance, a defendant is free to decline to take advantage of counsel's training and expertise and to "conduct his own defense ultimately to his own detriment."<sup>70</sup>

In trumpeting the importance of the accused's autonomy, the *Faretta* decision offers encouragement to those advocating a client-centered approach to decisionmaking issues.<sup>71</sup> Writing for the majority, Justice Stewart observed that the "language and spirit of the Sixth Amendment contemplate that counsel . . . shall be an aid to a willing defendant" and that "an assistant, however expert, is still an assistant."<sup>72</sup> Nevertheless, Stewart concluded "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative."<sup>73</sup> Thus, as long as the defendant agreed to accept defense counsel, then Stewart was willing to allow the lawyer/assistant to bind the client/master, at least "in many areas" of trial strategy.<sup>74</sup> Although *Faretta* did not define with any

67. "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. To the contrary, the lawyer as the defendant's representative is at the core of our adversary process." Jones v. Estelle, 722 F.2d 159, 165 (5th Cir. 1983).

68. See *Faretta v. California*, 422 U.S. 806, 819 (1975).

69. *Id.*

70. *Id.* at 834.

71. See Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636 (1977) (reading *Faretta* as requiring lawyers to give defendants greater control over tactical decisionmaking).

72. *Faretta*, 422 U.S. at 820.

73. *Id.* at 820-21 (citations omitted).

74. *Id.* at 820. Consent to accept appointed counsel at the beginning of a relationship when the client's only other choice is self-representation is more like a contract of adhesion. The defendant's consent can hardly be characterized as free and voluntary. Moreover, it is highly unlikely that the defendant's choice is an informed one. Few defendants are advised that by accepting counsel they are delegating control over virtually all strategic decisions to counsel. For a discussion of the difficulties of forcing clients to make a decision about the allocation of decisionmaking responsibilities at the onset of the attorney-client

precision how decisionmaking power in the lawyer-client relationship was to be divided, the opinion lends support both to proponents of the traditional view of lawyering as well as those favoring a more client-centered approach.<sup>75</sup>

Subsequent Supreme Court cases demonstrate, however, that the Constitution provides criminal defense lawyers wide discretion over decisionmaking issues and requires only that a represented defendant have final decisionmaking power over a limited number of fundamental decisions. In his majority opinion in *Jones v. Barnes*,<sup>76</sup> Chief Justice Burger noted that the accused has the ultimate decisionmaking authority only over certain matters: whether to plead guilty, waive a jury, testify on one's behalf, or take an appeal.<sup>77</sup> Thus, defense counsel who usurps one of these decisions risks offending the Constitution. In all other aspects of the defense, however, counsel's role is to manage the case and to make all tactical decisions. As case manager, defense counsel who is preparing an appellate brief is not constitutionally required to press every non-frivolous argument desired by the defendant.<sup>78</sup> Rather, counsel has the ability—and ultimately the power—to ignore the client's express wishes and to present the client's appellate case as counsel sees fit.<sup>79</sup>

In his dissent in *Jones*, Justice Brennan took issue with Burger's view of the proper function or role of defense counsel.<sup>80</sup> According to Brennan, defense counsel should be assisting the defendant to make

relationship, see Spiegel, *supra* note 16, at 77-85. Indigent defendants rarely have any say about the choice of counsel or her lawyering style. Even the paying defendant, unless unusually sophisticated, generally lacks the knowledge or time to bargain for decisionmaking power at the beginning of the relationship. See Berger, *supra* note 11, at 49-50.

75. Courts generally read *Faretta* narrowly finding that "a criminal defendant, having agreed to be represented by counsel, is bound by counsel's decisions on matters entrusted to counsel[.]" *State v. Lee*, 689 P.2d 153, 159 (Ariz. 1984) (in banc). *But see* Chused, *supra* note 71, 649-56 (arguing that *Faretta* mandates greater control by defendants of strategic and tactical decisions).

76. 463 U.S. 745 (1983).

77. *Id.* at 751.

78. Appointed appellate counsel must act as an active advocate - not that of *amicus curiae* - and "support his client's appeal to the best of his ability," even though counsel's professional judgment is that her client's appeal has no merit. *Anders v. California*, 386 U.S. 738, 744 (1967).

79. As authority for his position, Burger looked to the final draft of Model Rule 1.2(a) which specified that "the lawyer shall abide by the client's decision . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify." *Jones*, 463 U.S. at 753 n.6. Burger then declared that "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Id.*

80. *Jones*, 463 U.S. at 758-64 (Brennan, J., dissenting). Brennan's dissent was joined by Justice Marshall. In his concurring opinion, Justice Blackmun also expressed his agreement with Brennan's ethical view observing that "it seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which non-frivolous claims to pursue." *Id.* at 754 (Blackmun, J., concurring).

choices, not imposing choices on the defendant because “[t]he role of the defense lawyer should be above all to function as the instrument and defender of the client’s autonomy and dignity in all phases of the criminal process.”<sup>81</sup> Clients aided by competent counsel have the capacity to make informed tactical judgments about their appeals. Even if counsel may be better able to make wiser tactical choices, Brennan—citing *Faretta*—argued that the Sixth Amendment obligates defense counsel to conduct the defense requested by the defendant.<sup>82</sup> In Brennan’s view, then, the Constitution gives the criminal defendant a personal right to make the decision which non-frivolous issues should be presented on appeal, even against the advice of counsel, if the defendant so chooses.<sup>83</sup>

Brennan’s view of lawyering as articulated in *Jones* is decidedly more client-centered than that endorsed by the majority. Brennan flatly rejected the proposition that by choosing a lawyer a criminal defendant relinquishes control over every aspect of the case except for the most basic structural issues. Rather, “[a] defendant’s interest in his case clearly extends to other matters.”<sup>84</sup> For Brennan, then, the accused’s right to make strategic choices—even if detrimental—is not limited just to fundamental decisions basic to the defense.<sup>85</sup> The defendant’s decisionmaking power, however, is not unbounded. Brennan acknowledged that the allocation of authority between lawyer and client at trial is subject to significant time constraints. He recognized, therefore, the need to confer decisionmaking authority on the lawyer with regard to “the hundreds of decisions that must be made quickly in the course of a trial.”<sup>86</sup>

Brennan’s views on the role of defense counsel and the proper allocation of decisionmaking responsibility between lawyer and criminal defendant did not command a majority in *Jones* or in any subsequent

81. *Id.* at 763.

82. In addition to *Faretta*, Brennan cited *Anders v. California*, 386 U.S. 738 (1967) in support of his proposition. *Jones*, 463 U.S. at 759 (Brennan, J., dissenting).

83. *Id.* at 758.

84. *Id.* at 759.

85. Absent exceptional circumstances, he is bound by the tactics used by his counsel at trial and on appeal. *Henry v. Mississippi*, 379 U.S. 433, 451, 85 S. Ct. 564, 569, 13 L.Ed.2d 408 (1963). He may want to press the argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial, and the proper role of counsel is to assist him in these efforts, insofar as that is possible consistent with the lawyer’s conscience, the law, and his duties to the court.

*Id.*

86. *Id.* at 760.

decision. Indeed, in the following term, in the landmark case of *Strickland v. Washington*,<sup>87</sup> the Court fashioned a test for evaluating claims of ineffective assistance of counsel that emphasizes the importance of respecting counsel's professional judgments. A reviewing court must presume that defense counsel rendered adequate assistance and that counsel "made all significant decisions in the exercise of reasonable professional judgment."<sup>88</sup> Such a presumption means that counsel's strategic choices regarding plausible options made after thorough investigation of law and facts are "virtually unchallengeable."<sup>89</sup> By creating this highly deferential standard, the Court in *Strickland* implicitly reinforced the validity of the traditional, lawyer-centered approach to decisionmaking. Admittedly, *Strickland* refers to defense counsel "as assistant to the defendant," who has certain basic duties including "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments."<sup>90</sup> In delineating counsel's duties, however, the Court undoubtedly is describing a lawyer-client relationship in which the lawyer/assistant is, in fact, in control of the litigation. In fact, the Court specifically declined to adopt a set of standards or to provide rules of conduct outlining defense counsel's duties and responsibilities when representing a criminal defendant. Such rules or standards, the Court worried, would interfere with counsel's professional independence and with "the wide latitude counsel must have in making tactical decisions."<sup>91</sup>

Given the *Strickland* Court's willingness to defer to counsel's tactical decisions, the Court's observation, later in the opinion, that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant," is somewhat surprising.<sup>92</sup> Perhaps this is primarily an empirical observation that often defense counsel acts consistent with the expressed wishes of the defendant. The Court's use of the phrase "quite properly," however, implies not only that wise counsel seeks to secure the informed consent of the defendant before acting, but also that the Court approves of such a lawyering approach. Yet, in view of the Court's earlier statement limiting counsel's duty to consult with and to inform clients about important decisions, together with the Court's overriding concern not to infringe upon counsel's

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87. 466 U.S. 668 (1984).

88. *Id.* at 690.

89. *Id.*

90. *Id.* at 688.

91. *Id.* at 689.

92. *Id.* at 691.

professional independence,<sup>93</sup> it is difficult to conceive that the Court was expressing its preference for such an approach.

Indeed, subsequent cases clearly reveal the Supreme Court's support for the traditional view of lawyering. In *Taylor v. Illinois*,<sup>94</sup> the Court upheld the authority of a state trial judge to preclude two defense witnesses from testifying as a sanction for a discovery violation. Although the Court acknowledged that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,"<sup>95</sup> it found that the defendant's right to present defense evidence may be outweighed by "countervailing public interests"—the integrity of the adversary process and the potential prejudice to the truth-determining function of the trial.<sup>96</sup> Because defense counsel's conduct was willful and designed to obtain a tactical advantage, those countervailing interests justified the preclusion sanction in *Taylor* even though the defendant was not personally responsible for the discovery violation.

The *Taylor* majority specifically rejected the argument that the client should not be blamed for the sins of defense counsel declaring that such an argument "strikes at the heart of the attorney-client relationship."<sup>97</sup> Insisting that "[t]he adversary process could not function effectively if every tactical decision required client approval," the Court once again expressed its preference for the traditional view of lawyer-client relationship.<sup>98</sup> "[T]he lawyer has—and must have—full authority to manage the conduct of the trial."<sup>99</sup> This management authority not only allows defense counsel to decide ultimately whether to call a witness, but also means that "the client must accept the consequences of the lawyer's decision."<sup>100</sup>

Unquestionably, both due process and the Compulsory Process Clause of the Sixth Amendment grant defendants the right to present witnesses in their own behalf.<sup>101</sup> Indeed, the right to call witnesses has long been recognized as essential to the defendant's right to a fair trial.<sup>102</sup> Thus, any action by the State or a trial court to restrict the

93. See *id.* at 688.

94. 484 U.S. 400 (1988).

95. *Id.* at 408 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

96. *Id.* at 414.

97. *Id.* at 417.

98. *Id.* at 418.

99. *Id.*

100. *Id.* The client is bound by defense counsel's strategic maneuvers unless, of course, counsel's representation fell below the minimum standard guaranteed by the Sixth Amendment.

101. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973).

102. See *Chambers*, 410 U.S. at 294.

defendant's right to proffer competent, reliable evidence to the jury warrants close scrutiny.<sup>103</sup> In *Taylor*, however, the defendant's fundamental right to present an adequate defense was compromised because of the misconduct of his own representative. Moreover, the defendant's right to offer evidence was trumped even though there was no evidence that he bore any responsibility for the discovery violation.<sup>104</sup> Arbitrary rules of evidence that prevent a defendant from calling witnesses or presenting evidence will not pass constitutional muster, but arbitrary decisions of counsel—or even counsel's inaction or misconduct—can bar defense witnesses from being heard.<sup>105</sup>

## 2. Lower Federal Courts and Allocation of Decisionmaking Responsibility

Like the Supreme Court, lower federal courts have struggled to outline counsel's role in assisting criminal defendants to exercise their related rights to testify, to call witnesses, and to present a defense. A brief look at that struggle highlights the inconsistent guidance afforded criminal defense lawyers wrestling with defendants over strategic issues involving the presentation of the defense case. It also reveals sharply divergent judicial views of what constitutes the proper role of defense counsel in making significant strategic decisions.

*Wright v. Estelle*<sup>106</sup> represents a striking example of the contrasting judicial attitudes regarding the allocation of decisionmaking authority between counsel and defendant. In *Wright*, a majority of the United States Court of Appeals for the Fifth Circuit, sitting en banc, declined to decide that the defendant had a personal constitutional right to testify. Instead, the majority merely accepted the holding of the panel below which found that even assuming such a constitutional right, any denial of that right was harmless in view of the overwhelming evidence against the defendant.<sup>107</sup> In a concurring opinion, five members of the court chastised the majority for failing to reach the issue and to provide guidance to litigants, lawyers, and trial judges as to whom has the final

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103. See *Rock v. Arkansas*, 483 U.S. at 55-56 (quoting *Chambers v. Mississippi*, 410 U.S. at 295).

104. See *Taylor v. Illinois*, 484 U.S. 400, 433 (1988) (Brennan, J., dissenting).

105. See, e.g., *United States v. Russell*, 109 F.3d 1503, 1507-13 (10th Cir. 1997) (excluding evidence for discovery violation despite absence of counsel's bad faith in failing to list two potential defense witnesses); *People of the Territory of Guam v. Palomo*, 35 F.3d 368, 374-75 (9th Cir. 1994) (upholding the exclusion of a defense witness for discovery violations absent any evidence of willful or blatant violations by the defense).

106. 572 F.2d 1071 (5th Cir. 1978) (en banc) (on rehearing a majority of the court adheres to the panel opinion reported at 549 F.2d 971 (5th Cir. 1978)).

107. See *id.* at 1071.

say when client and counsel disagree regarding the client taking the witness stand.<sup>108</sup> For these judges, the issue ultimately turned on who was in better position to judge trial strategy and ensure the best interests of the defendant. In their view, defense lawyers, as “professional artisans,” were not only obligated to see that their clients received the best defense, but also better positioned to dictate trial strategy.<sup>109</sup> Thus, counsel should be authorized to make the strategic decision whether the defendant should testify and ought not have to yield to the personal demands of the client.<sup>110</sup>

Judge Godbold, in an eloquent dissent joined by two others, presented a powerful defense of the client-centered position.<sup>111</sup> Looking to the rationale supporting the *Faretta* decision and to history, Godbold argued that a criminal defendant has a personal right to decide “whether to become an active participant in the proceeding that affects his life and liberty and to inject his own action, voice and personality into the process to the extent the system permits.”<sup>112</sup> For Judge Godbold and his fellow dissenters, the defendant has a right to tell his story. “Indeed, in some circumstances, the defendant, without regard to the risks, may wish to speak from the stand, over the head of judge and jury, to a larger audience. It is not for his attorney to muzzle him.”<sup>113</sup> In the end, respect for the dignity of the individual and for freedom of choice demand that defendants be given, not just their day in court, but their time on the witness stand if they so desire.

Most federal courts have agreed with Judge Godbold’s view that the defendant’s right to testify is a fundamental constitutional right.<sup>114</sup> In reaffirming that a defendant has a constitutional right to testify, a majority of the United States Court of Appeals for the Eleventh Circuit in *United States v. Teague*<sup>115</sup> emphasized that the right is personal to the defendant and cannot be waived by the court or by counsel.<sup>116</sup> Thus, a defendant must be allowed to testify even though counsel deems the

108. *See id.* at 1072 (Thornberry, Clark, Roney, Gee and Hill, J.J., specially concurring).

109. *See id.* at 1073.

110. *See id.* at 1073-74.

111. *See id.* at 1074 (Godbold, J., dissenting).

112. *Id.* at 1078.

113. *Id.*

114. *See, e.g.,* *Brown v. Artuz*, 124 F.3d 73, 76-77 (2nd Cir. 1997); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994) (vacated without consideration of this point, 53 F.3d 94 (5th Cir. 1995) (en banc); *United States v. Pennycooke*, 65 F.3d 9, 10-11 (3d Cir. 1995); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *United States v. McMeans*, 927 F.2d 162, 164 (4th Cir. 1991); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987).

115. 953 F.2d 1525 (11th Cir. 1992) (en banc).

116. *See id.* at 1532.



decision strategically unwise. Admittedly, defense counsel may be in a better position to assess trial strategy and to ensure that sound tactics are employed.<sup>117</sup> Nonetheless, “[i]t is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense.”<sup>118</sup> Defense counsel is duty bound to advise the defendant as to the advantages and disadvantages of taking the stand.<sup>119</sup> It is the defendant, however, who ultimately must be permitted to make the call. Because it is the defendant’s day in court, the defendant has the choice to tell his side of the story and “[t]he wisdom or un wisdom of the defendant’s choice does not diminish his right to make it.”<sup>120</sup>

Not all the members of the Eleventh Circuit were persuaded of the wisdom of the majority’s approach in *Teague*. Judge Edmondson, joined by two others, acknowledged that the defendant has the right to decide whether to fight and to be represented by counsel in that fight.<sup>121</sup> Once the defendant makes those decisions, however, defense counsel “need not defer to the client’s desires on how the fight is to be waged.”<sup>122</sup> For Edmondson, decisions on calling witnesses, including the defendant, are “quintessentially tactical and require a trained advocate’s judgment.”<sup>123</sup> To permit the defendant to nullify counsel’s tactical efforts and to override counsel’s tactical decision undercuts the adversarial process and the defendant’s right to effective assistance of counsel.<sup>124</sup>

Although Edmondson’s arguments have not carried the day with respect to final control over the decision as to whether the defendant will testify, his lawyer-centered position has prevailed on the issue of control over the decision to call other witnesses. The defendant clearly has a constitutional right to call witnesses, a right that has been deemed to be fundamental.<sup>125</sup> Nevertheless, despite the importance of the right to call witnesses on one’s own behalf, the defendant’s right is not recognized as

117. *See id.* at 1531 (citing *Wright v. Estelle*, 549 F.2d 971, 1073 (Thornberry, Clark, Roney, Gee and Hill, J.J., specially concurring)).

118. *Id.* at 1533.

119. *See, e.g., Brown*, 124 F.3d at 78 (2nd Cir. 1997); *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc); STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(a).

120. *Teague*, 953 F.2d at 1533 (citing *Wright v. Estelle*, 572 F.2d 1071, 1079 (Godbold, J., dissenting)).

121. *See id.* at 1536 (Edmondson, Jr., J., concurring).

122. *Id.*

123. *Id.*

124. *See id.*

125. “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). “Indeed, this right is an essential attribute of the adversary system itself.” *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). For a detailed look at the origins and scope of the defendant’s right to present witnesses, see Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063 (1999).

personal to the defendant. Accordingly, federal courts generally have held that defense counsel is empowered to decide whether, and to what extent, the defendant's right to compulsory process will be asserted.<sup>126</sup>

Because the defendant's right to call witnesses is not considered a personal right, defense counsel can waive that right by declining to call to the stand individuals that the defendant wants to testify. In rare instances, courts have concluded that a lawyer's failure to investigate a potential defense witness combined with a specific showing of the importance of that witness' testimony rendered counsel's strategic choice unreasonable and counsel's performance deficient.<sup>127</sup> Generally, however, courts have applied the deferential *Strickland* standard and refused to second-guess defense counsel's tactical choices regarding calling witnesses.<sup>128</sup>

Reluctant to closely scrutinize defense counsel's professional judgment in selecting defense witnesses, most federal courts have given short shrift to the principal that "it is the [defendant] who is the master of his or her own defense."<sup>129</sup> In providing counsel virtually unchecked power over tactical decisions, courts have significantly undercut the value of the defendant's right to compulsory process and the defendant's right to testify. For just as "[a] defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness,"<sup>130</sup> a defendant's right to testify also is incomplete if corroborating witnesses are not called to testify in support of the defendant. Defense counsel's tactical choices regarding witnesses, albeit ostensibly taken on the defendant's behalf, may render defendant's own testimony meaningless or incredible, thereby undermining the defendant's right to present a defense.

For some federal judges, however, the represented defendant's right to present a defense is actually nothing more than the right to have defense counsel present a reasonable defense. Judges subscribing to this view believe that:

[a] criminal defendant represented by counsel generally has limited responsibilities in conducting his defense, primarily, recognizing and

126. See *Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *Chappee v. Vose*, 843 F.2d 25, 27-33 (1st Cir. 1988); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987); *Eaton v. United States*, 437 F.2d 362, 363 (9th Cir. 1971).

127. See, e.g., *Sanders v. Ratelle*, 21 F.3d 1446, 1457-58 (9th Cir. 1994); *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir. 1990), cert. denied, 111 S. Ct. 369 (1990); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986); *Gomez v. Beto*, 462 F.2d 596, 596-97 (5th Cir. 1972).

128. See, e.g., *Austin v. Bell*, 126 F.3d 843, 847-48 (6th Cir. 1997); *Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991).

129. *U.S. v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992).

130. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

relating relevant information to counsel and making the few trial-related decisions reserved for defendants. . . . The defendant need not participate in the bulk of trial decisions which he may leave entirely to counsel (how to select jurors, which witnesses to call, whether and how to conduct cross-examination, what motions to make, and similar tactical decisions).<sup>131</sup>

Thus, in *Watts v. Singletary*, the court affirmed the defendant's murder conviction and rejected the challenge to the defendant's competency despite the fact that the defendant slept through approximately 70% of his trial.<sup>132</sup> Responding to the dissent's assertion that Watts was unable to contribute to the defense at all during most of the trial, Judge Kravitch noted that "[t]his, however, does not differentiate Watts from most other criminal defendants, who likewise contribute nothing to their own defenses through the vast majority of proceedings."<sup>133</sup>

Judge Kravitch offered no empirical evidence in support of his contention. Indeed, there is considerable evidence that many defendants actively participate in their own defenses.<sup>134</sup> The ABA Standards also envision a lawyer-client relationship that involves consultation and even joint decisionmaking regarding many trial decisions.<sup>135</sup> Recall also that the Supreme Court in *Strickland* observed that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant."<sup>136</sup> Finally, in *Cooper v. Oklahoma*,<sup>137</sup> the Court declared that "[w]ith the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense."<sup>138</sup> As the Court has long recognized, a defendant's competence is important because the defendant's right to a fair trial assumes some active participation of the defendant in exercising the rights essential to due process—the right to summon, to confront and cross-examine witnesses, and to testify on

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131. *Watts v. Singletary*, 87 F.3d 1282, 1288-89 (11th Cir. 1996).

132. *See id.* at 1290 (Carnes, J., dissenting) (noting that the defendant, a 23-year-old crack addict, slept through 70% of his trial because of his nightly use of crack).

133. *Id.* at 1289 n.12.

134. *See Uphoff & Wood, supra* note 31, at 38-51 (presenting survey results that reflect participation of many defendants in trial-related decisions); Paul M. Rashkind, "Wake Up! Your Trial's Over!" *The Bedtime Tale of Watts v. Singletary*, CRIM. JUST., Spring 1999, at 22-23 (arguing that to experienced criminal defense lawyers, the majority's view in *Watts* was "uninformed and misapprehends the attorney-client relationship").

135. *See* STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.1(e) commentary at 148-49 (3d ed. 1993) ("both lawyer and client have authority and responsibility in determining the objectives and means of representation . . . in many cases the client-lawyer relationship partakes of a joint undertaking").

136. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

137. 517 U.S. 348 (1996).

138. *Id.* at 364.

one's own behalf.<sup>139</sup> If it is critical that a defendant be competent in order to participate meaningfully in his or her own defense and not simply have defense counsel make decisions for the defendant, then why should a competent defendant be deprived of the right to make an important tactical decision merely because counsel disagrees with the wisdom of the defendant's choice?

For the criminal practitioner struggling to decide whether to call a defense witness over the defendant's objection, neither *Strickland* nor any other Supreme Court opinion dictates any particular course of action. Rather, *Strickland* grants defense lawyers almost unlimited freedom of action in managing a case and assures them that their actions will be deemed professionally adequate as long as such acts can reasonably be considered to be consistent with sound trial strategy. Although *Strickland* does not mandate a lawyer-centered approach to decisionmaking, it certainly facilitates such an approach.

In the final analysis, neither the Constitution nor the Supreme Court offers a definitive answer to the question posed by the *Brown* case or significant guidance in resolving the troublesome allocation of decisionmaking questions that lawyers, clients, and courts regularly confront.<sup>140</sup> Decisions of the Supreme Court certainly do not preclude a lawyer from sharing decisionmaking power with a client—or deferring to a client's informed tactical choice—and, at times, even encourage such a relationship.<sup>141</sup> Although federal caselaw generally reflects a lawyer-centered approach to strategic decisionmaking,<sup>142</sup> there also is considerable support for the principle that the defendant, as master of the defense, ought to be afforded broad power to dictate the manner of the defense.<sup>143</sup> Accordingly, courts rarely will fault defense counsel for carrying out the strategic wishes of her client.<sup>144</sup>

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139. *See id.* at 354.

140. *See* LAFAVE & ISRAEL, *supra* note 7, at 559-62.

141. *See* *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

142. *See, e.g.*, *Boyd v. U.S.*, 586 A.2d 670, 673 (D.C. Cir. 1991) ("It is, of course, beyond dispute that counsel for the accused has ultimate responsibility for many tactical trial decisions, such as which witnesses to call.")

143. *See, e.g.*, *U.S. v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992); *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985).

144. *See, e.g.*, *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985). *But see* *Alvord v. Wainwright*, 469 U.S. 956 (1984) (Marshall, J., dissenting) (arguing that blind deference to a client's wishes, without any investigation or regard for the client's mental state, was inappropriate and constitutionally ineffective).

### C. State Courts and the Allocation of Decisionmaking Authority

As we have seen, neither the Constitution nor the ethics codes require criminal defense lawyers to resolve the dilemma presented by the Brown case in a particular manner. Nonetheless, a criminal practitioner's freedom to respond to an impasse over witnesses will be constrained if there is controlling authority within counsel's jurisdiction on the issue. Indeed, in a number of jurisdictions, courts have addressed the specific question of who controls the decision regarding witnesses when counsel and client disagree.<sup>145</sup> In some states, courts have provided inconsistent guidance to defense counsel struggling to resolve a disagreement with a defendant regarding the decision to call a particular witness.<sup>146</sup> In most states, however, courts have granted defense counsel broad control over tactical and strategic matters, thus affording counsel the discretion to resolve the strategic impasse largely as he or she sees fit.<sup>147</sup>

Generally state courts have been asked to address issues involving the allocation of decisionmaking responsibility between lawyer and client in the same manner as the Supreme Court in *Jones v. Barnes*. That is, in the course of reviewing a claim of ineffective assistance of counsel, the court

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145. Compare *State v. Lee*, 689 P.2d 153, 157-60 (Ariz. 1984) (in banc) (holding that strategic decision regarding selection of witnesses belongs to counsel); *State v. Davis*, 506 A.2d 86, 92 (Conn. 1986) (finding that counsel's refusal to accede to client's demand that particular witness be called does not violate defendant's right to compulsory process); *State v. Pratts*, 366 A.2d 1327, 1333 (N.J. Super. Ct. App. Div. 1975) (stating that lawyer has ultimate authority to select witnesses to be called); *People v. Williams*, 471 P.2d 1008, 1015-16 (Cal. 1970) (holding that counsel controls the tactical decision about witnesses to call); *with Burton v. State*, 651 So.2d 641, 656 (Ala. Crim. App. 1994) (holding that ultimate decision on calling witnesses is for the defendant); *People v. Wilkinson*, 474 S.E.2d 375, 381-82 (N.C. 1996) (reiterating that if counsel and defendant are at an absolute impasse regarding witness to call, the client's wishes must control).

146. In Missouri, for example, the decision whether to call a witness is a matter of trial strategy that generally will not support a finding of ineffective assistance of counsel. *Johnson v. State*, 901 S.W.2d 60, 63 (Mo. 1995). Yet, it is clearly appropriate for a criminal defense lawyer in Missouri to accede to a defendant's demands that witnesses not be called, even though counsel feels that the client's wishes are unwise. See *State v. Thomas*, 625 S.W.2d 115, 123-24 (Mo. 1981). Indeed, in reviewing defense counsel's duty when faced with a client who insisted that witnesses presenting mitigating evidence not be called, the Missouri Court of Appeals frankly acknowledged "the continuing difficulty in determining defense counsel's role in the criminal trial." *Trimble v. State*, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985). As the Court went on to admit:

the cases find no error when counsel accedes to client demand, even though the accession may not be a wise choice. On the other hand, the lawyer's choice made contrary to the client's wishes will also be approved, even where the wisdom, in hindsight, may be dubious, on the ground that counsel has control of the decisional process and must have such control to be effective.

*Id.*

147. Courts routinely hold that counsel's decision to give up control of a tactical call will not be lightly disturbed. See, e.g., *People v. Gadson*, 24 Cal. Rptr. 2d 219, 224-27 (Cal. Ct. App. 1993) (holding that counsel's decision to defer to client's wishes to call two witnesses to the stand against counsel's advice was not constitutionally deficient representation).

considers whether defense counsel's action or inaction with respect to a particular strategic decision constituted deficient or inadequate representation.<sup>148</sup> Occasionally, the court will specifically determine whether counsel's failure to involve a defendant in the decisionmaking process, or counsel's refusal to follow the client's expressed wishes regarding a strategic decision, rendered counsel's representation inadequate.<sup>149</sup> More typically, however, a state court will not focus on how counsel ought to have resolved a strategic disagreement with the defendant, but whether counsel's conduct in the case fell below a minimal level of competence.

Aware of the limited decisions deemed fundamental and reserved for the client by the Constitution,<sup>150</sup> state judges usually are reluctant to expand the scope of a criminal defendant's decisionmaking power. Granting criminal defendants greater control over strategic decisions not only interferes with the professional independence of defense counsel, it also may intensify friction between counsel and defendant thus threatening the orderly, efficient administration of the courts.<sup>151</sup> Accordingly, courts routinely find that as long as counsel exercised reasonable professional judgment when she made the particular strategic or tactical decision at issue, defense counsel's representation was constitutionally adequate.<sup>152</sup> State appellate opinions, therefore, generally promote the traditional lawyer-centered approach to decisionmaking by holding that the defendant is bound by counsel's strategic and tactical judgment calls even though the accused may not have been consulted<sup>153</sup> or may have disagreed with counsel's strategy.<sup>154</sup>

148. *See, e.g.*, *State v. Doppler*, 590 N.W.2d 627, 633-35 (Minn. 1999) (declaring that counsel's failure to present evidence or call witnesses were tactical matters within counsel's discretion and that court would not review the competency of such tactical decisions).

149. *See, e.g.*, *State v. Lcc*, 689 P.2d 153, 157-64 (Ariz. 1984) (en banc); *State v. Davis*, 506 A.2d 86, 88-92 (Conn. 1986).

150. *See supra* notes 13, 76-144 and accompanying text.

151. *See* *People v. Williams*, 471 P.2d 1008, 1015-16 (Cal. 1970) (expressing concern that disagreements over trial tactics would add to expense of furnishing counsel, delay trials, and embarrass effective prosecution of crime).

152. *See, e.g.*, *Sellers v. State*, 889 P.2d 895, 898 (Okla. Crim. App. 1995) (holding that trial counsel's decision to pursue defense of "automatism" instead of insanity defense was reasonable and not ineffective).

153. *See, e.g.*, *Van Alstine v. State*, 426 S.E.2d 360, 363 (Ga. 1993) (holding that failure of defense counsel to consult with defendant about requesting lesser included instructions did not constitute ineffective assistance of counsel because lawyer made strategic choice, consistent with defendant's feeling about the case); *State v. Johnson*, 714 S.W.2d 752, 766-67 (Mo. Ct. App. 1986) (finding that counsel properly made strategic decision to allow admission of inadmissible evidence without consulting with the defendant because decisions other than fundamental decisions made during trial are necessarily for lawyer alone without advice from defendant).

154. *See, e.g.*, *People v. Turner*, 10 Cal. Rptr. 2d 358, 362 (Cal. Ct. App. 1992) (confirming that all non-fundamental strategic calls, including the selection of witnesses, are subject to counsel's control "despite differences of opinion or even open objections from the defendant"); *People v. Ramey*, 604 N.E.2d 275,

Although state court opinions echo *Strickland v. Washington* in giving lawyers almost unchallengeable authority to make strategic and tactical decisions,<sup>155</sup> these opinions do not necessarily demand that lawyers follow a traditional decisionmaking approach. Rather, state judges, like their federal counterparts, have been quite willing to find that a lawyer has rendered constitutionally adequate and effective representation even though counsel permitted her client to make a strategic decision that is typically made by counsel.<sup>156</sup> In fact, in some cases, state court judges have championed the right of a defendant to make strategic decisions contrary to those proposed by counsel.<sup>157</sup>

On the specific issue of who ultimately controls the selection of witnesses, caselaw is split. The vast majority of state courts that have confronted the question have resolved the issue by declaring it a tactical matter to be decided by defense counsel.<sup>158</sup> Contrasting fundamental

281 (Ill. 1992) (finding that counsel is not ineffective despite presenting self-defense theory contrary to defendant's wishes).

155. *See, e.g.*, *Briones v. State*, 848 P.2d 966, 977 (Haw. 1993) ("[a]n informed, tactical decision will rarely be second-guessed by judicial hindsight").

156. *See, e.g.*, *State v. Buchanan*, 410 S.E.2d 832, 835 (N.C. 1991) (holding that defendant cannot complain because counsel acquiesced to defendant's wishes not to remove certain jurors counsel deemed unsuitable); *State v. McDowell*, 407 S.E.2d 200, 209-10 (N.C. 1991) (ruling that defense counsel is not ineffective for deferring to client's wishes whether to pass or strike certain jurors); *People v. Galan*, 261 Cal. Rptr. 834, 835-36 (Cal. Ct. App. 1989) (finding that counsel is not ineffective for calling witness at client's insistence). A defendant whose lawyer follows the defendant's instructions regarding a strategic trial decision generally will not be able to complain successfully on appeal that the lawyer acted unprofessionally in abiding by the client's wishes. *See, e.g.*, *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993) (finding that counsel's failure to present mitigating evidence was not ineffective assistance because counsel acquiesced to defendant's wishes that evidence not be presented); *State v. Rubenstein*, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (finding counsel was not ineffective for waiving cross examination of state witnesses, stipulating to psychiatric report and waiving opening argument pursuant to defendant's instructions); *In re Trombly*, 627 A.2d 855, 856-57 (Vt. 1993) (insisting that defendant who chose, contrary to lawyer's advice, not to ask for lesser-included instruction, could not complain that counsel was ineffective for deferring to the defendant's wishes). *But see* *State v. Lee*, 689 P.2d 153, 158-59 (Ariz. 1984) (in banc) (deciding that defense counsel provided deficient representation when he acquiesced to defendant's demand to call witnesses whose veracity counsel doubted).

157. *See, e.g.*, *State v. Thomas*, 625 S.W.2d 115, 123-24 (Mo. 1981) (counsel acted properly in deferring to client's unsound strategy that defense witnesses supporting mental defense not be called); *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994) (trial court acted properly in ordering counsel to follow defendant's wishes regarding trial strategy); *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991) (lawyer not ineffective for permitting client to make decision not to peremptorily challenge a juror counsel wanted to remove); *People v. Petrovich*, 664 N.E.2d 503, 503-04 (N.Y. 1996) (when client and counsel disagree about decision whether to request lesser included instruction, choice ultimately is defendant's, who is bound by that choice even if it turns out poorly); *Commonwealth v. Sam*, 635 A.2d 603, 611-12 (Pa. 1993) (defendant had right to direct counsel not to introduce or argue mitigating evidence in the penalty phase).

158. *See* *State v. Davis*, 506 A.2d 86, 89 (Conn. 1986); *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. 1995) (en banc); *People v. Smith*, 31 A.D.2d 847, 848 (N.Y. App. Div. 1969); *Ridley v. State*, 510 S.E.2d 113, 119 (Ga. App. 1998); *State v. Lee*, 689 P.2d 153, 159 (Ariz. 1984) (in banc); *Winter v. State*, 502 P.2d 733, 738 (Kan. 1972); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *People v. Barrow*, 549 N.E.2d 240, 248-49 (Ill. 1989); *People v. Williams*, 471 P.2d 1008, 1015-17 (Cal. 1970); *State v.*

rights reserved personally for the defendant with other strategic decisions involved in the management of a criminal case, these courts view the selection of witnesses as a management decision better left to counsel.<sup>159</sup> In some cases, courts have articulated the advantages of placing this responsibility in counsel's hands: counsel is better trained to decide such an issue,<sup>160</sup> there is insufficient time to permit clients to make informed tactical choices,<sup>161</sup> and few competent lawyers would defend criminal cases if they had to take the time to consult with the defendant and follow the client's views on every issue of trial strategy.<sup>162</sup> Generally, however, the opinions offer little but the conclusory observation that the selection of witnesses is a tactical decision that is within counsel's province.<sup>163</sup>

A few courts have taken a different tact. In *Blanco v. State*,<sup>164</sup> the Florida Supreme Court rejected appellant's claim that the trial court erred in permitting him to call witnesses to testify contrary to counsel's advice.<sup>165</sup> Appellant persuaded the trial court that he be allowed to call

Rubenstein, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987); *State v. Pratts*, 366 A.2d 1327, 1333-34 (N.J. Super. Ct. App. Div. 1975); *Falkner v. State*, 462 So.2d 1040, 1041-42 (Ala. Crim. App. 1984); *Aragon v. State*, 760 P.2d 1174, 1179 (Idaho 1988); *People v. Schultheis*, 638 P.2d 8, 12 (Colo. 1981) (en banc); *Bell v. State*, 733 So.2d 372, 375 (Miss. 1999); *Phillips v. State*, 989 P.2d 1017 (Okla. Crim. App. 1999); *Stopplesworth v. State*, 501 N.W.2d 325, 328 (N.D. 1993); *People v. Morris*, 163 N.W.2d 16, 18-19 (Mich. Ct. App. 1968); *In re King*, 336 A.2d 195, 198 (Vt. 1975); *State v. Orosco*, 833 P.2d 1155, 1163 (N.M. Ct. App. 1991); *Grandison v. State*, 670 A.2d 398, 440 (Md. App. 1996); *State v. Schwelm*, 713 So.2d 697, 706 (La. Ct. App. 1998); *Commonwealth v. Stokes*, 408 N.E.2d 887, 889-90 (Mass. App. Ct. 1980); *State v. Tome*, 742 P.2d 479, 482 (Mont. 1987); *State v. Lindsay*, 517 N.W.2d 102, 107 (Neb. 1994); *State v. Love*, 865 P.2d 322, 325-28 (Nev. 1993); *State v. Glidden*, 499 A.2d 1349, 1351 (N.H. 1985); *State ex rel. Juv. Dept. v. Geist*, 796 P.2d 1193, 1203 (Or. 1990); *Jacques v. State*, 669 A.2d 1124, 1149-50 (R.I. 1995); *Hofer v. Class*, 578 N.W.2d 583, 587-88 (S.D. 1998); *Commonwealth v. Porter*, 569 A.2d 942, 945-46 (Pa. 1990); *Jackson v. State*, 495 S.E.2d 768, 769-70 (S.C. 1998); *In re Jeffries*, 752 P.2d 1338, 1341-42 (Wash. 1988); *Hamburg v. State*, 820 P.2d 523, 528 (Wyo. 1991); *Annas v. State*, 726 P.2d 552, 559 (Alaska Ct. App. 1986); *Johnson v. Riddle*, 281 S.E.2d 843, 846 (Va. 1981); *Ex parte Wellborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996); *State v. Tyler*, 850 P.2d 1250, 1256 (Utah 1993); *State v. Kerley*, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991); *Helton v. State*, 924 S.W.2d 239, 242-43 (Ark. 1996); *State v. Miller*, 459 S.E.2d 114, 127 (W. Va. 1995); *Moore v. Commonwealth*, 983 S.W.2d 479, 484 (Ky. 1998); *State v. Elm*, 549 N.W.2d 471, 476 (Wis. Ct. App. 1996).

159. See, e.g., *In re Horton*, 813 P.2d 1335, 1342 (Cal. 1991) (en banc); *State v. Davis*, 506 A.2d 86, 89 (Conn. 1986); *State v. Pratts*, 366 A.2d 1327, 1333 (N.J. Super. Ct. App. Div. 1975).

160. See *People v. Johnson*, 581 N.E.2d 118, 124-25 (Ill. App. 1991); *Lee*, 689 P.2d at 159; *Levesque v. State*, 664 A.2d 849, 852 (Me. 1995).

161. See *People v. Williams*, 471 P.2d 1008, 1015-17 (Cal. 1970) (en banc).

162. See, e.g., *Falkner*, 462 So. 2d at 1042 (citing *Nelson v. California*, 346 F.2d 73, 81 (9th Cir. 1965)).

163. See, e.g., *Outen v. State*, 720 A.2d 547, 557 (Del. 1998); *Ridley*, 510 S.E.2d at 119; *State v. DeGuzman*, 701 P.2d 1287, 1291 (Haw. 1985); *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986); *State v. Pratts*, 365 A.2d 928, 929 (N.J. 1976) (per curiam); *Ortiz v. State*, 866 S.W.2d 312, 315 (Tex. Crim. App. 1993).

164. 452 So.2d 520 (Fla. 1984).

165. *Id.* at 524.



the witnesses despite counsel's insistence that the testimony would be detrimental to the defendant's case and not in his best interests.<sup>166</sup> Agreeing with the trial court, the Florida Supreme Court concluded summarily that the decision to present whatever evidence the defendant feels is beneficial ultimately is the defendant's.<sup>167</sup> Defense counsel's role is to present to the defendant alternative courses of action, but not to make tactical decisions at odds with a defendant's wishes.<sup>168</sup> Accordingly, if attorney and client disagree as to a matter of trial strategy, the defendant must be permitted the final say.<sup>169</sup>

Similarly, the Court of Criminal Appeals of Alabama rejected the argument that the trial court interfered with the proper functioning of the attorney-client relationship by allowing a defendant to call two witnesses to testify contrary to counsel's advice.<sup>170</sup> Looking to language from Rule 1.2 of the Alabama Rules of Professional Conduct that requires lawyers to abide by a client's decisions concerning the objectives of representation, the court declared that counsel "can only make recommendations to a client as to how to conduct his defense; the ultimate decision, however, lies with the client."<sup>171</sup> The trial court acted properly, therefore, in honoring the defendant's wishes.<sup>172</sup>

Finally, the North Carolina Supreme Court agrees with the majority of courts that responsibility for tactical decisions such as what witnesses to call normally must rest with defense counsel.<sup>173</sup> Nevertheless, if defense counsel and a fully informed criminal defendant reach an "absolute impasse" as to a tactical decision, the client's wishes must control.<sup>174</sup> In *State v. Ali*,<sup>175</sup> defendant and his two defense lawyers disagreed whether to exercise a peremptory challenge to a prospective juror. The defendant wanted to seat the juror against the recommendations of both defense lawyers. As suggested by the

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166. *See id.*

167. *See id.* The court cited only *Milligan v. State*, 177 So.2d 75 (Fla. Dist. Ct. App. 1965) in support of its conclusion.

168. *See Cain v. State*, 565 So.2d 875, 876 (Fla. Dist. Ct. App. 1990) (counsel properly deferred to defendant's selection of jurors after advising defendant to select different jurors).

169. *See Anderson v. State*, 574 So.2d 87, 95 (Fla. 1991) (Barkett, J., concurring in part and dissenting in part) (observing that defendant has the right to call or choose not to call a witness); *Blanco v. Wainwright*, 507 So.2d 1377, 1383 (Fla. 1987) (stating that conflict between counsel and defendant over strategy or tactics should be resolved in defendant's favor).

170. *See Burton v. State*, 651 So.2d 641, 656 (Ala. Crim. App. 1993).

171. *Id.*

172. Other than Rule 1.2, the court did not discuss any authority in its brief treatment of this issue.

173. *See State v. Wilkinson*, 474 S.E.2d 375, 382 (N.C. 1996); *State v. McDowell*, 407 S.E.2d 200, 211 (N.C. 1991).

174. *See State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991).

175. *Id.*

American Bar Association Standards for Criminal Justice,<sup>176</sup> the lawyers made a record of their disagreement before the trial court, but ultimately deferred to the defendant's wishes.<sup>177</sup> Approving the conduct of defendant's defense lawyers, the *Ali* court looked to caselaw confirming that the attorney-client relationship rested on principles of agency.<sup>178</sup> Accordingly, the court concluded that the principal-agent nature of the relationship demands that tactical disagreements be resolved consistent with the client's desires.

As subsequent cases demonstrate, however, attorneys in North Carolina still exercise considerable control over the decision to call witnesses. Absent an absolute impasse, the selection of the witnesses to call is within the province of counsel after consultation with the defendant.<sup>179</sup> Defendants who fail to voice their complaints or wishes to the trial court regarding their lawyers' tactical decisions will not be able to argue successfully on appeal that they were deprived of their right to control strategic decisionmaking.<sup>180</sup> Moreover, if counsel refuses to defer to the defendant's wishes and the trial court sides with defense counsel, then what appears to be an "absolute impasse" may be characterized only as a "mere disagreement" over trial strategy or tactics.<sup>181</sup> As such, a strategic choice based on counsel's professional opinion that a witness need not be called to testify will not be found to have deprived the defendant of his constitutional rights nor constitute ineffective assistance of counsel.<sup>182</sup>

#### *D. Professional Standards and Decisionmaking Responsibility*

Finally, it behooves the student or criminal practitioner wrestling with the *Brown* issue to know how other conscientious criminal defense lawyers recommend handling the issue. The most authoritative statement of the prevailing norms of criminal defense lawyers can be found in the American Bar Association Standards for Criminal Justice (ABA Standards).<sup>183</sup> Certainly other nationally recognized standards

176. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (2d ed. 1980); STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993).

177. See *State v. Ali*, 407 S.E.2d at 188-89.

178. See *id.* at 189.

179. See *State v. Wilkinson*, 474 S.E.2d 375, 382 (N.C. 1996).

180. See *State v. McCarver*, 462 S.E.2d 25, 36 (N.C. 1995).

181. See *State v. Gary*, 501 S.E.2d 57, 61-62 (N.C. 1998).

182. See *id.* at 62.

183. STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1993). The American Bar Association promulgated the first edition of the Defense Function Standards in 1971. On February 3, 1992, the ABA House of Delegates approved the present edition of the Defense Function Standards and that version is

offer some guidance to lawyers striving to carry out the duty to render zealous, effective representation.<sup>184</sup> The ABA Standards, however, represent the most widely cited set of guidelines describing the duties of a lawyer charged with the responsibility to defend a person accused of a crime.<sup>185</sup>

ABA Standard 4-5.2,<sup>186</sup> entitled "Control and Direction of the Case," substantially tracks the division of decisionmaking responsibility between counsel and a criminal defendant set forth in Model Rule 1.2(a) and the majority opinion in *Jones v. Barnes*. That Standard provides:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.<sup>187</sup>

As the commentary points out, Standard 4-5.2 adds to the fundamental decisions reserved to the defendant by *Jones* and by Model Rule 1.2(a), by specifically including the decision to accept or reject a proffered plea agreement.<sup>188</sup> This addition is hardly controversial. Rather, the settlement decision is so closely intertwined with the decision regarding

contained in the third edition of the ABA's Standards for Criminal Justice. The ABA Standards have been cited with approval in countless decisions and generally acknowledged to represent the "prevailing norms of practice." See, e.g., *Strickland*, 466 U.S. at 688.

184. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft 1998). For another set of well-crafted standards expressly designed to aid criminal defense lawyers, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995) (National Legal Aid and Defender Ass'n) [hereinafter PERFORMANCE GUIDELINES].

185. See *Strickland*, 466 U.S. at 688 (acknowledging the importance of the ABA Standards).

186. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993).

187. *Id.*

188. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2, commentary at 201 (3d ed. 1993).

the plea to enter that it is almost inconceivable that anyone would claim that such a decision is the lawyer's.<sup>189</sup>

ABA Standard 4-5.2 directs the lawyer to give the defendant the benefit of counsel's careful advice and full experience before the defendant makes any of the decisions designated as fundamental. It is the client, not counsel, who has the final say in these decisions because these decisions are "so crucial to the accused's fate."<sup>190</sup> ABA Standard 4-5.2 fails to acknowledge, however, that many strategic and tactical decisions may be critical to the outcome of a trial and, therefore, equally crucial to the defendant's fate. Arguably, a defendant should be afforded final control over any trial-related decision that is reasonably likely to affect the outcome of his case. Instead, ABA Standard 4-5.2 opts to promote lawyer autonomy by giving ultimate responsibility for all strategic and tactical case decisions to defense counsel.<sup>191</sup>

The commentary to Standard 4-5.2 proclaims the advantages of the lawyer-centered approach. Given the complexity of many of the defendant's rights, it is very time consuming and, frequently, futile to expect lawyers to provide a meaningful explanation to most clients as to how to exercise their rights.<sup>192</sup> In addition, many tactical decisions must be made during trial without adequate time for consultation.<sup>193</sup> Finally, even when decisions can be anticipated so that consultation is appropriate, the decisions ultimately should rest with counsel "[b]ecause these decisions require the skill, training, and experience of the advocate."<sup>194</sup> In the end, because the lawyer knows best, the lawyer should have the power to make all strategic and tactical decisions.

The full extent of the lawyer's decisionmaking power under ABA Standard 4-5.2 is revealed by the fact that defense counsel's duty to consult about trial strategy and tactics is subject to the lawyer's judgment that such consultation is "feasible and appropriate."<sup>195</sup>

189. See Keith N. Bystrom, *Communicating Plea Offers to the Client*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER - PRACTICAL ANSWERS TO TOUGH QUESTIONS* 84, 89 (Rodney J. Uphoff ed., 1995). See also Uphoff & Wood, *supra* note 31, at 39-40 (noting that less than 1% of the responding public defenders indicated that if there were a disagreement about the decision to accept or reject a plea bargain, the final call was for counsel).

190. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2, commentary at 201 (3d ed. 1993).

191. See *id.* at 201-02.

192. See *id.* at 202.

193. See *id.*

194. *Id.*

195. *Id.* at 201. In the history of the third edition of Standard 4-5.2, it is noted that the language "where feasible and appropriate" was added "to reflect the fact that sometimes consultation is virtually impossible, e.g., in the middle of cross-examination." STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2, history at 200. Certainly there are circumstances, especially in the middle of trial, when client consultation is impractical and unworkable. Nevertheless, the "feasible and appropriate" language and similar language in the commentary to other ABA provisions provides too much cover for those lawyers who fail to consult

Admittedly, lawyers are encouraged “ordinarily” to consult with the client before making some strategic decisions, “especially those involving which witnesses to call.”<sup>196</sup> Nevertheless, the lawyer is given the professional discretion to make many important decisions without any need to consult with the defendant if the lawyer feels doing so is inappropriate or unfeasible.

The ABA Standards do suggest that, in some limited situations, a lawyer should defer to the strategic preferences of the defendant. Indeed, the Brown case arguably represents one such situation. As the commentary to ABA Standard 4-3.1 explains, “[i]n questions of means, the lawyer should assume responsibility for technical and legal, strategic and tactical issues, such as what witnesses to call . . . [b]ut defense counsel should consult with his or her client on these questions where such consultation is feasible, and counsel should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”<sup>197</sup> Accordingly, because Brown’s insistence that his father not be called as a witness is based on Brown’s concern for his father’s health, a criminal practitioner may read Standard 4-3.1 to require counsel to defer to Brown’s choice. It is likely that the drafters of the ABA Standards wanted to encourage lawyers to respect a client’s concern that a particular tactic not be used to hurt a third person. It is doubtful, however, that the drafters of the ABA Standards truly intended that a lawyer be deferential when the client’s concern involves an insistence on an unsound strategic choice that is likely to cause significant harm to the client.

#### IV. RESOLVING THE STRATEGIC IMPASSE: TO RESPECT OR TO OVERRIDE THE DEFENDANT’S STRATEGY?

##### *A. A Framework for Analyzing the Issue*

How then should the criminal practitioner committed to providing quality representation resolve the impasse presented by the Brown case? Unquestionably, the criminal defense lawyer is obligated to further the client’s interest to the fullest extent possible within the bounds of the law.<sup>198</sup> Like Abbe Smith and William Montross, I agree that most

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with their clients. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.9, commentary at 178 (noting that counsel is not expected to describe trial or negotiation strategy to client in detail, but “ordinarily should consult the client on tactics that might injure or coerce others”).

196. STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2, commentary at 202 (3d ed. 1993).

197. STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.1, commentary at 148 (3d ed. 1993).

198. *See Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) (holding that defense counsel best

criminal defense lawyers, in fact, view loyalty or fidelity to the client to be the cornerstone and governing virtue of criminal defense practice.<sup>199</sup> Thus, for many criminal practitioners, “fidelity to the client is the virtue that trumps all other values and virtues.”<sup>200</sup> Nevertheless, even if this client-above-all perspective shapes the way most defense lawyers resolve difficult ethical questions, it does not answer the question of how this decisionmaking dilemma should be untangled. Rather, a lawyer’s sense of fidelity may drive counsel to make the tactical choice to call Brown’s father in order to ensure that Brown’s best interests are protected while another lawyer, equally loyal to Brown, may defer to her client’s strategic choice to promote Brown’s autonomy and dignity. In the end, conscientious counsel may be forced to choose whether to respect Brown’s wishes or to impose counsel’s own strategic choice on the client by calling the father as a witness despite the defendant’s objections. In making such a decision, counsel inevitably faces a tough judgment call, a call that necessarily requires a choice between conflicting values. In my view, counsel should strive to promote client autonomy by respecting the client’s strategic wishes to the fullest extent possible. Nonetheless, in some circumstances, a good lawyer will override a client’s wishes and refuse to follow the dubious strategic instructions of a client in order to protect the client from serious harm.<sup>201</sup>

Defense counsel’s power to override her client’s strategic wishes on a tactical matter traditionally allocated to counsel should be exercised sparingly. Liberal use of this power robs clients of their freedom of choice. I propose, therefore, that lawyers locked in a strategic impasse with a defendant analyze and balance four factors—the client’s capacity for making an informed choice, the reasons for the client’s proposed choice, the degree of harm facing the client, and the likelihood of that harm occurring—before deciding how to act. As the following variations of the Brown case reveal, using such a framework will not eliminate the difficulty of counsel’s call. It may, however, assist lawyers

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serves the public by advancing the “undivided interests” of the client); STANDARDS FOR CRIMINAL JUSTICE Standard 4-1.2, commentary at 122-23 (3d ed. 1993).

199. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 517-35 (1999). For similar views, see generally DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973); KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); FREEDMAN, *supra* note 9.

200. Smith and Montross, *supra* note 199, at 522.

201. For a thoughtful look at the merits of criminal practitioners employing surrogate decisionmaking to resolve the dilemma posed by the mentally ill criminal defendant seeking to control defense strategy, see Josephine Ross, *Autonomy Versus A Client’s Best Interests: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998).

to exercise wisely the professional judgment demanded of them when counsel and client disagree about a particular strategic decision.

### 1. Discussing the Issue Thoroughly

Presumably when Brown expressed his wish that his father not be called to testify, defense counsel thoroughly and carefully discussed the matter with him. Nonetheless, counsel should begin the task of resolving the dispute she and her client face by re-examining the position of each side to make certain that an impasse, in fact, exists. Miscommunication, a common problem between lawyers and clients, may have led to a misunderstanding about the issue in question. It is not unusual for parties to a dispute to misperceive the other side's position and to be locked in a dispute that has no basis in fact. Thus, counsel needs to ensure both that she understands the client's true position and that she has made herself and her position clearly understood.

Defense counsel starts this process of re-examining each other's position by carefully restating for Brown her rationale for calling the father as a witness. It is not enough that counsel may have already stated her reasons. Rather, counsel's goal is to provide her client information in a manner that enables the client to process counsel's explanation.<sup>202</sup>

Giving clients a clear, accurate picture of the legal predicament they face is essential to good lawyering.<sup>203</sup> As good lawyers recognize, however, many factors may produce miscommunication between counsel and criminal defendant and, in turn, generate a misunderstanding. In providing a client information about an important case decision, therefore, counsel must explain the decision in a manageable, coherent fashion using language and a process that actually facilitates client understanding.<sup>204</sup> In addition, counsel must work to eliminate distractors—such as other people in the discussion,

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202. A full discussion of the essentials of effective lawyer-client communication is well beyond the scope of this article. For a sampling of the many books and articles on the subject, see BINDER, ET AL., *supra* note 11; R. M. BASTRESS & J. D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990); STEFAN H. KRIEGER, ET AL., *ESSENTIAL LAWYERING SKILLS* (1999); COCHRAN, JR., ET AL., *supra* note 19; Gay Gellhorn, *Law and Language: An Empirically - Based Model for the Opening Moments of Client Interviews*, 4 *CLINICAL L. REV.* 321 (1998); Hurder, *supra* note 20; Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *CORNELL L. REV.* 1298 (1992).

203. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.1 (3d ed. 1993); *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978) (“[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one’s client of the realities of his case are cornerstones of effective assistance of counsel”).

204. See KRIEGER, ET AL., *supra* note 202, at 207-09; COCHRAN, JR., ET AL., *supra* note 19, at 133-35.

interruptions, or other pressing matters—that interfere with the client's ability to hear or to absorb counsel's explanation. Finally, counsel should be sensitive to and strive to minimize the negative effects that racial, cultural, or class differences may have on her communication with the defendant.<sup>205</sup>

During this discussion, it is critical that counsel ascertain if her client fully appreciates both the risks involved in the decision not to call the father and the consequences that are likely to follow from such a decision. Brown must be told in no uncertain terms that Brown's father is an essential witness whose absence will hamper the presentation of the defense case to such an extent, that the chances or odds of success at trial will be greatly reduced. In my experience, lawyers who provide their clients predictions or estimates using a range of percentage terms, albeit necessarily inexact, are most likely to be understood.<sup>206</sup> People are accustomed to thinking of risk taking by weighing the odds of a certain result or of a event occurring. Vague pronouncements, couched in terms such as "good," "fairly strong" or "weak" to describe the client's prospects at trial, are of limited help.<sup>207</sup> Rather, the lawyer must communicate this information in terms that make sense to the defendant and clarify, not obfuscate, the risks the defendant faces.<sup>208</sup>

Once defense counsel is satisfied that the defendant is fully aware of counsel's position—and presumably still maintains that he does not wish his father to testify—then counsel should ask Brown to clarify the reasons for his position. It is important, of course, that counsel actually listen to her client, not merely feign interest in the client's reasons.<sup>209</sup> The process of learning more about the client's position may require counsel to push for specifics. That is, defense counsel may have to probe to find out more details about the father's health status. Counsel should learn when the father last saw a doctor and the nature of any specific medical problem he is experiencing. Additionally, it would be important for defense counsel to find out as much as possible about Brown's discussion with his father about the issue of the father testifying at trial. In particular, counsel needs to know whether the father has

205. See KRIEGER ET AL., *supra* note 202, at 13. Gender differences in some cases also may inhibit communication between counsel and client and need to be addressed specifically. For a look at how the contrasting communication styles of men and women cause communication problems, see DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990).

206. See BINDER ET AL., *supra* note 11, at 337-45.

207. See KRIEGER ET AL., *supra* note 202, at 197-98.

208. See ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, *SKILLS AND ETHICS IN THE PRACTICE OF LAW* 51-2 (1993); COCHRAN, JR., ET AL., *supra* note 19, at 126-29.

209. For a discussion of the importance of the skill of good listening for the successful lawyer, see Gellhorn, *supra* note 202, at 322-350; Steve Keeva, *Beyond the Words*, A.B.A.J., Jan. 1999, at 60-63.



expressed a definite opinion regarding testifying and the father's openness to additional discussions on the subject. Finally, counsel must ascertain how entrenched Brown actually is in his position.

As experienced lawyers recognize, pushing a criminal defendant for details must be done tactfully. Cross-examining a client in such an instance rarely yields helpful information and may only make the client more intransigent. The goal is open communication and to achieve that end a lawyer facing the type of impasse posed in the Brown case needs to be able to draw upon the solid, trusting relationship she already has forged with her client. If lawyer and client do not have such a relationship, it is unlikely that they will be able to communicate effectively about the impasse.<sup>210</sup>

## 2. Barriers to Attorney-Client Communication

Most appointed criminal defense lawyers are painfully aware of the difficulties they confront in establishing good lines of communication with their clients. Good communication is generally built upon trust, but, unfortunately, few criminal defendants start out fully trusting their appointed lawyer.<sup>211</sup> And why should they? Most indigent defendants find themselves ensnared in an elaborate, complicated legal system that already treats them as guilty and threatens them with more punishment. The procedures and language used are alien and, at times, nearly incomprehensible. All of the other actors in this formalized environment, including the lawyer foisted upon the defendant by the State, move easily and freely in the system, laughing with each other over inside jokes.<sup>212</sup> Not surprisingly, many criminal defendants feel isolated and mistrustful of their appointed representatives.<sup>213</sup>

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210. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.1(a) (urging counsel to seek to establish a relationship of trust and confidence); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 337-40, 374-76 (stressing that establishing a trusting relationship is a prerequisite to effective representation).

211. See *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting); LISA J. MCINTYRE, *THE PUBLIC DEFENDER* 62-73 (1987); Roy B. Flemming, *Client Games; Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253, 254-260.

212. Numerous commentators have described the manner in which the criminal justice system works to reward regular players - the insiders - while making it difficult for those outside the system to understand the actual rules of the game. See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xiii-xxii (1982); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, *LAW & SOC'Y REV.*, June 1967, at 15.

213. For a detailed look at the factors that breed mistrust and friction between criminal defendants and appointed counsel, see Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 *GEO. L.J.* 1015 (1981). See also JONATHAN D. CASPER, *CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE* 100-25 (1978).

Although not easy, it certainly is possible for appointed lawyers to overcome their clients' misgivings and to win their clients' trust. Gaining a defendant's confidence generally demands time, energy, and an empathetic attitude.<sup>214</sup> The lawyer must display competence and self-confidence, while still honestly acknowledging one's limitations. Counsel may need to reassure her clients by promising to make up for those limitations with hard work. The conscientious lawyer then delivers on that promise, not by guaranteeing any particular result, but by working tirelessly on the client's behalf.

Good lawyers strive to treat their clients with respect and to present the client's story in a manner that does not silence the client's voice.<sup>215</sup> Yet, the fact that Brown and his lawyer find themselves locked in a dispute over a strategic decision does not demonstrate that Brown and his lawyer have a flawed relationship. Indeed, Brown may trust counsel and have confidence in her abilities, yet still disagree with the counsel's recommended strategic choice. Moreover, the fact that defense counsel continues to push Brown to allow the father to be called to the witness stand does not necessarily mean that counsel has not listened to or understood Brown's concerns.<sup>216</sup>

Nevertheless, establishing and maintaining a good lawyer-client relationship often involves considerable effort. Because lawyers and clients are different people with different needs, they may have to overcome a number of obstacles to achieve a healthy relationship.<sup>217</sup> Just as in a good marriage, however, the normal stress and strain of even a good attorney-client relationship means that problems still will be encountered. A good attorney-client relationship—or successful marital relationship—takes advantage of good lines of communication,

214. For a discussion of the importance of empathy for those doing criminal defense work, see Ogletree, *supra* note 35, at 1242-43, 1271-75. See also White, *supra* note 210, at 337-40, 374-76.

215. See Cunningham, *supra* note 202, 1299-1300; COCHRAN, JR., ET AL., *supra* note 19, at 20-30.

216. Good lawyering frequently demands that counsel attempt to persuade a client that taking certain action or making a particular decision is unwise or contrary to the client's best interest. In offering advice, counsel is to avoid undue influence and manipulation but is to use "reasonable persuasion." STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.1, commentary at 198 (3d ed. 1993). See also STANDARD FOR CRIMINAL JUSTICE Standard 4-5.2, commentary at 201-02 (3d ed. 1993) (urging lawyers not to improperly coerce clients to follow their recommendations, but to use "fair persuasion" when counseling clients). For a look at the difficulty of the counseling task facing the criminal defense lawyer and of determining what constitutes reasonable persuasion, see Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1306-13 (1975); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-CL. L. REV. 1, 27-37 (1993); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 83, 131-32 (1995).

217. For an insightful account of the problems even well-intentioned, caring lawyers encounter when they fail to recognize their client's differences and to translate effectively their client's story, see Cunningham, *supra* note 202. For a look at the barriers that commonly inhibit lawyer-client communication, see BINDER, ET AL., *supra* note 11, at 34-40.

however, to resolve problems or disputes that arise. Generally, then, the better the attorney-client relationship, the less likely it will be that the client ultimately will refuse to agree to counsel's recommended strategy.<sup>218</sup>

### 3. Contacting the Father

If Brown's lawyer has taken the time to create a solid relationship with her client, then the client is less likely to feel threatened by counsel's inquiries about his father's health or about the defendant's reasons for his insistence that his father not testify. Brown may even invite or encourage counsel to speak to his father directly. Counsel should take advantage of any opportunity to meet personally with the father to discuss the matter.

On the other hand, Brown may tell counsel that, based on his discussions with his father, Brown is not able or willing to take the subject up again with his father. Nor may Brown want counsel to speak with his father. Should defense counsel, nevertheless, go to see the client's father and seek to persuade him to testify on his son's behalf? Should a lawyer do so without first obtaining Brown's permission?

Given counsel's belief that the father's testimony is critical to the outcome of the trial, she undoubtedly should make every effort to speak directly with the father before determining how to resolve the disputed decision. Personal contact with the father gives counsel more information on which to base a judgment as to how to proceed. Seeing a wheezing old man in obvious pain may convince defense counsel that Brown's preferred strategic choice indeed is appropriate. Alternatively, counsel may discover that the father's desire not to testify is primarily related to the bother and the inconvenience of another trip to the courthouse. In that case, good lawyering demands that counsel use whatever powers of persuasion she can muster to convince the father to testify.

Defense counsel's problem, unfortunately, is that she is in a much better position to decide how to resolve their impasse only after she actually has talked with the father. Recognizing this, a lawyer may be sorely tempted to go see the father without requesting the client's permission. If instead counsel specifically asks Brown's permission but Brown refuses, then counsel must decide whether to risk irreparably

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218. Drawing upon studies involving lawyers and other counselors, Cochran Jr., DiPippa, and Peters reached a similar conclusion. COCHRAN, JR., ET AL., *supra* note 19, at 114-17.

damaging her relationship with her client by going to see the father over Brown's objection.

A lawyer does not have any duty to secure a client's consent before talking with defense witnesses. Defense counsel is obligated, however, to conduct a thorough investigation and to prepare properly for trial.<sup>219</sup> Adequate preparation generally encompasses a responsibility on counsel's part to interview all relevant witnesses.<sup>220</sup> Because of the obvious importance of the father's testimony, it may be incumbent on counsel to ascertain for herself if the client's father is, in fact, unwilling to testify and the basis for that stance. Arguably, then, counsel has a duty to go speak to the father regardless of her client's wishes.

I disagree. If Brown insists that his father not be contacted, counsel has the discretion to decide whether to respect the client's wishes.<sup>221</sup> Unquestionably, counsel should not simply honor her client's wish, but should attempt vigorously to persuade Brown to reconsider and allow counsel to speak to Brown's father. If counsel is unsuccessful, however, she faces another tough call.

This is not to say that counsel necessarily must request or secure Brown's consent before talking to his father.<sup>222</sup> Rather, defense counsel's prior dealings with the father and son may have been such that it is totally appropriate for counsel to contact the father without seeking the client's consent. Moreover, any ambiguity in the discussion between

219. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-4.1 (3d ed. 1993) ("[C]ounsel should conduct a prompt investigation. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."). The defendant's initial insistence on pursuing a particular defense also does not diminish counsel's duty to undertake a thorough investigation. See *People v. Ledesma*, 729 P.2d 839, 871 (Cal. 1987) (en banc).

220. Although a defendant's insistence that certain witnesses not be called may limit the scope of counsel's duty of investigation, a client's directives do not excuse counsel's failure to conduct an adequate investigation. See, e.g., *Thompson v. Wainwright*, 787 F.2d 1447, 1451-52 (11th Cir. 1986). But see *Knight v. Dugger*, 863 F.2d 705, 706 (11th Cir. 1988) (finding that defense counsel who followed defendant's instructions and failed to interview and to present defendant's mother did not render ineffective assistance).

221. Under the circumstances of this case, counsel would not be deemed ineffective if he respected Brown's wishes. See, e.g., *Mitchell v. Kemp*, 762 F.2d 886, 889-90 (11th Cir. 1985) (holding counsel not ineffective for failing to investigate and to present mitigating evidence due to defendant's directives); *Alvord v. Wainwright*, 725 F.2d 1282, 1288-89 (11th Cir. 1984) (concluding counsel not ineffective because defendant refused to permit counsel to assert an insanity defense); *State v. Thomas*, 625 S.W.2d 115, 123-24 (Mo. 1981) (counsel acted properly in acceding to client's strategic demands regarding presentation of the defense case even though attorney felt defendant's strategy was unsound); *State v. Buchanan*, 410 S.E.2d 832, 835 (N.C. 1991) (holding that a defendant cannot complain because counsel acquiesced to defendant's wishes not to remove certain jurors that counsel deemed unsuitable). Conversely, counsel surely could point to Standard 4-4.1 to justify his decision to contact Brown's father. See *supra* note 219.

222. Indeed, 95.1% of the respondents in the public defender survey on decisionmaking indicated a willingness to override the client's wishes about interviewing a prospective witness if counsel and client disagreed about such a decision. See Uphoff & Wood, *supra* note 31, at 50-51.

counsel and client about the father or any opening that presents counsel the opportunity to speak directly to the father should be exploited.

Rarely, however, would Brown and his lawyer have had an extended conversation about the father's testimony—one in which counsel tried to persuade Brown to permit her to call the father as a witness—without counsel expressing a desire to speak with the father directly. It is very likely, therefore, that Brown took a definite position regarding counsel's contact with his father. If Brown's initial position is that his father not be contacted, then, counsel generally should not attempt to contact the father without first advising Brown of her intentions.

Once having raised the contact issue with Brown, counsel should use her advocacy skills and her positive relationship with Brown to overcome Brown's reluctance and to persuade him that she should be permitted to speak directly with the father about the problem. In attempting to persuade Brown to allow counsel to contact his father, counsel should push her client fairly but forcefully.<sup>223</sup> It is fair to insist that counsel's professional obligations include the duty to speak directly with key witnesses. It also is fair for a lawyer to point out that he or she may be sanctioned or disciplined if the defense of the case is not handled properly. Further it is fair—and often effective—to remind the client how hard counsel has fought for the client and how eager counsel is to secure justice for the client. Refusing counsel's reasonable request to meet with the father, counsel may argue, may serve to compromise counsel's efforts and jeopardize the entire defense.

Nonetheless, despite counsel's best efforts, Brown may remain steadfastly opposed to counsel talking with his father. Assume, for example, that Brown informs counsel that his father was totally exhausted after the last trial and asked his son not to make him go through a second trial. The son assured his father that his testimony would not be needed. The son not only is unwilling to ask his father to testify, but also instructs counsel not even to contact him. Despite counsel's counseling efforts, Brown refuses to budge. Counsel must now decide whether to ignore her client's wishes and to contact the father regardless of the likely damage to the attorney-client relationship.

A review of the four factors noted earlier may aid in counsel's decision. In the case in which I was consulted, for example, Brown was a veteran with some college education. He was, therefore, a reasonably intelligent client who seemingly was very capable of making an informed choice. Moreover, Brown was fully aware that by barring counsel from speaking with his father, he not only was preventing counsel from

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223. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2, commentary at 201.

having any chance of persuading his father to testify, but he also was virtually ensuring that his father would not testify at trial. In that case, nevertheless Brown made a conscious, deliberate choice to spare his father from worrying about testifying even though that choice greatly decreased Brown's chances to win at trial. Certainly, the defendant's choice greatly increased his risk of harm—his lawyer would lose the chance to persuade Brown's father to testify, the father would not testify, and Brown would be convicted. Yet, the likely consequences of the client's choice would be relatively minor—a misdemeanor conviction and a small fine or short jail sentence. Thus, a balancing of these four factors in that case lends support to counsel's decision to respect her client's choice and not contact the father.<sup>224</sup>

#### 4. Finding a Way to Finesse the Impasse

Frequently, however, defense counsel who confronts the impasse presented by the Brown case will be able to gain access to the father and thereby, to improve significantly counsel's chances for finding a means to break or to finesse the impasse. Seeing and talking to the father personally enables counsel to evaluate the accuracy of the defendant's concerns about his father and to weigh the manner and extent to which the father-son relationship is affecting the client's decisionmaking. In addition, this discussion affords counsel the opportunity to determine the potential for resolving the impasse through counsel's direct intervention with the father. Perhaps the father can be persuaded to go to the son and volunteer to testify because the father wants what is best for the son. As experienced lawyers appreciate, a lawyer's advocacy takes many different forms. Sometimes persuading a reluctant witness to testify may require all of a lawyer's persuasive skills—and mean the difference between the client's success and failure at trial.<sup>225</sup>

In some instances, counsel's discussion with the father together with her continuing dialogue with her client will alert counsel to a new avenue for resolving the dispute.<sup>226</sup> Perhaps, for example, the student

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224. As a practical matter, counsel would be hard pressed to persuade a reluctant father to testify if he was contacting the father in the face of his client's open opposition. Given the facts of this case, I would not jeopardize my relationship with Brown - and my chances of changing his mind later - in an uphill and likely vain battle to persuade the father to testify over Brown's strenuous objection.

225. Criminal defense lawyers often have to contend with family members, friends, or acquaintances of the defendant who are unwilling for a variety of different reasons, to come to court to testify. Overcoming that unwillingness is one of the keys to counsel's success as an advocate. For a look at difficulty of overcoming witness reluctance from the prosecutor's perspective, see Stacy Caplow, *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 *CLINICAL L. REV.* 1 (1998).

226. In some cases, counsel may even uncover additional corroborating evidence or a new witness

could reduce the father's stress and, in turn, satisfy her client's concerns by shortening the length of the father's testimony. Alternatively, counsel might propose re-structuring the order of defense witnesses in a manner that permits the father to avoid needless time spent waiting in court which, once again, might minimize the father's anxiety. By carefully considering the underlying reasons for the Browns' concerns, a creative lawyer may be able to fashion a solution that assuages those concerns and effectively eliminates the impasse.

### *B. Employing the Analysis: Three Scenarios*

Let us now assume that, despite counsel's best efforts, including speaking with the client's father, counsel cannot finesse or break the impasse. In counsel's professional judgment, Brown's father, albeit reluctant, should be called as a witness because without him Brown's conviction is almost assured. Brown is adamant, however, that his father not be called. Thus, counsel must decide whether to respect Brown's wishes or to call the father as a witness despite Brown's objections. Counsel cannot avoid the dilemma—she must make a tough judgment call.

As already discussed, lawyers tend to have a decisionmaking style or orientation that reflects their view of the proper role of counsel and of the working of a lawyer-client relationship.<sup>227</sup> Invariably, the judgment call that the defense lawyer faces in the Brown case will be shaped by her decisionmaking orientation. Yet, as a look at the following three variations of the Brown case highlights, defense counsel's decision in each scenario ultimately turns on the importance that she places on the value of individual autonomy.

#### 1. The Reasoned Objector

In this variation of the case, suppose that after an extended discussion of the subject of the father's testimony, Brown calmly tells defense counsel that his preference remains unchanged. That is, he knows that his father's testimony is very important and that if he goes to trial without that testimony, he is very likely to lose. Moreover, he understands, he says, that his decision not only is likely to lead to a criminal

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thereby minimizing the need for the father's testimony. In the Brown case, however, defense counsel had already conducted a thorough investigation and knew that Brown's father was the only citizen witness to the incident.

227. See *supra* notes 30-35 and accompanying text.

conviction, but also to a fine and possible jail sentence. Brown insists, however, that his elderly father was very anxious and upset after the stress of testifying at the first trial. The father did not eat or sleep for several weeks following the trial. Although ready to testify if needed, the father has told the son he dreads the prospect. Brown is willing, therefore, to forego his father's testimony and suffer the likely consequences in order to spare his father the ordeal of testifying a second time. Is it proper for a criminal practitioner in this situation to ignore Brown's wishes and call the father to testify?

The answer, in my view, is an emphatic no. The prime justification for taking a traditional, lawyer-centered approach is that the lawyer, as trained expert, is better able to decide strategic matters.<sup>228</sup> A traditionalist may argue that the lawyer has the right to make the strategic decision to call the father because that choice clearly increases the likelihood of the defendant's success at trial. This approach trumps the value of client autonomy, but does so in order to maximize the client's own good. That is, this approach assumes that winning at trial and avoiding a criminal conviction ultimately serves the client's best interests even if the client does not recognize or appreciate the wisdom of counsel's choice.<sup>229</sup>

In this scenario, however, the dispute between counsel and her client is not really about strategy—how to attain a good result—but whether the cost of success at trial is worth the price. The dispute actually involves a conflict of values. Although counsel may believe that winning at trial is so important that it outweighs the relatively minor harm that the father will experience by testifying, Brown disagrees. Plainly, not everyone need share counsel's emphasis on winning.<sup>230</sup> Indeed, reasonable, rational people often disagree strongly about values and the weight or the priority to be given certain values.<sup>231</sup>

228. See *supra* notes 14, 17 and accompanying text.

229. See John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 98 (1999) (describing how earlier in his practice he adhered to a traditional approach assuming that the clients wanted to win and how incensed he would be when his clients would "screw up my case"). But see Luban, *supra* note 16, at 466-79 (discussing ambiguity of paternalist claim to be acting in the best interest of another).

230. Many in society are unwilling to engage in certain behavior or employ particular means even though such action may increase one's chances for success or further the advancement of a legitimate end. In the sports world, for example, people sharply divide over issues of sportsmanship and of the merits of a win-at-all-costs mentality. On the importance of looking beyond just winning and treating the client as a friend, see SHAFFER & COCHRAN, JR., *supra* note 11, at 40-54.

231. People disagree even over what constitutes a value. For example, some view chastity before marriage as an important value worth upholding, but many do not. For a helpful discussion of the difference between values and wants, see Luban, *supra* note 16 at 467-79.



Furthermore, even though defense counsel may view the father's discomfort as relatively minor, Brown does not. To Brown, his father's stress and attendant well being is quite significant.<sup>232</sup> In fact, it is so significant that Brown is willing to assume a markedly greater risk at trial and the ensuing personal harm in order to avoid causing any harm to his father. His choice is not irrational, but represents a reasoned expression of Brown's values and priorities. Why then should Brown's ordering of values be accorded less weight than counsel's?

Quite simply, it should not be. In this scenario, for instance, counsel's focus and her perception of Brown's best interest may have been too narrow. Lawyers have no special expertise in defining how others should prioritize their values.<sup>233</sup> The lawyer's role as case manager does not give counsel the power to substitute counsel's value scheme for the client's or to force a client to accept counsel's win-at-all-costs mentality. Rather, it is the client who has the right to make value choices in the process of setting the objectives of the case.<sup>234</sup> If the client makes a conscious, informed choice to lessen his chances at trial in order to promote another objective—the well-being of his father—that the defendant deems more important, then that choice should be respected.<sup>235</sup>

A consideration of the four factors previously identified supports the conclusion that, given the facts of this scenario, counsel should respect the client's choice. Despite rejecting counsel's recommended strategy, the client in this scenario clearly displayed the ability to process the information presented him. Cognizant of the risks involved, Brown made a reasoned, meaningful choice. Brown understood that his choice was very likely to lead to negative consequences for him. He also was fully aware of the harm he was likely to suffer as a result—a guilty verdict, criminal conviction, a fine or minimal jail sentence. Brown's choice unmistakably reflected his balancing of the harm he would suffer compared with the suffering his father would endure if compelled to testify again. Although others—including counsel—may disagree with that choice, Brown's decision and the process he used to arrive at the

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232. In my experience, lawyers often fail to recognize how frightening or traumatic testifying at trial is for many people.

233. See SHAFFER & COCHRAN, JR., *supra* note 11, at 30-61, 94-129 (rejecting the notion of lawyers' moral superiority and arguing instead that lawyers have responsibility to counsel clients to make moral judgments but to do so without imposing the lawyer's own values). *But see* William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); WILLIAM SIMON, *THE PRACTICE OF JUSTICE* (1998).

234. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1989); *supra* note 53.

235. See Luban, *supra* note 16, at 473-74 (concluding that "if an individual adduces reasons for acting in non-self-interested ways, paternalism is unjustifiable - it is an assault on the individual's integrity").

decision, undeniably, were reasonable. Accordingly, counsel should respect Brown's wishes.

Respecting a client's choice, however, does mean simply accepting the client's definition of what constitutes his or her best interest. Once again, good lawyering often requires that counsel push the client to weigh different considerations and interests.<sup>236</sup> Forcing a criminal defendant to take a hard look at the future and the likely long term effects of various decisions is at the heart of good client counseling.

Given the facts in this scenario, however, counsel's judgment call is not especially difficult. A calm, reasonable client concerned about his elderly father is choosing to suffer some harm to spare his father some pain. Defense counsel may not relish the task of going to trial without a key weapon. It often is hard for a trial lawyer to accept losing a trial, especially if counsel cannot put forward her best defense. Nevertheless, given the minimal harm Brown faces, the defendant's choice is reasonable, perhaps even noble. In this case, therefore, counsel should find it relatively easy to respect her client's choice. Changing the facts, however, may make counsel's call much tougher and lead to a very different result.

## 2. The Irrational Objector

Let us examine a second variation of the Brown case. In this scenario, Brown and his lawyer again have discussed at length the issue of the father's testimony and have reached an impasse. The reason Brown does not want his father called to the witness stand, however, has nothing to do with concerns about the father's health. In fact, the father is eager to testify. Rather, Brown's insistence that the father not be called is based on Brown's assessment of his father's performance at the last trial. Brown is convinced, despite counsel's vigorous arguments to the contrary, that his father was a terrible witness who unwittingly undermined Brown's whole defense. Ignoring the jurors' post-trial comments and counsel's best judgment, Brown firmly believes he is likely to win at trial if he just keeps his father off the witness stand.

In this scenario, defense counsel is wrestling with an impasse that routinely confronts the criminal practitioner. It is quite common for lawyers and criminal defendants to discuss a proposed witness and disagree sharply about the strengths or weaknesses of that person's testimony. Sometimes counsel and a client quarrel about the relative weight a trier of fact will give to certain testimony and at other times, the

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236. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. (1989); *supra* notes 53 and 216.

dispute centers on how the judge or jury will react to the bearing or demeanor of a prospective witness. As this scenario highlights, the lawyer and the defendant may have radically different perspectives of how a witness or certain evidence will cut or play when presented to a jury.

The dispute in this variation of the Brown case, thus, turns on two conflicting perceptions of the consequences of a strategic choice. From Brown's standpoint, the choice is obvious. His father is a very poor witness whose testimony at the last trial badly hurt the defense. Keeping his father off the witness stand, therefore, greatly improves his chances of winning the upcoming trial.

Although Brown has listened to defense counsel's arguments about the importance of his father's testimony, his view is that counsel simply is mistaken. Brown's perceptions, moreover, are unlikely to change, despite counsel's efforts, because they are based on Brown's own first hand observations. For Brown and many other clients, assessing witnesses turns on the ability to read people and to accurately gauge how others will react to a person. Brown may firmly believe that he has as much—or, perhaps, even more—experience and insight about such matters as counsel, especially if defense counsel is a young lawyer or a law student.<sup>237</sup> From Brown's perspective, then, calling his father as a witness is a counterproductive, foolish tactical step.

Defense counsel's perspective, however, is markedly different. Assessing witnesses and analyzing evidence are exactly the types of tasks that lawyers, as skilled professionals, are trained to perform. This professional training gives lawyers a proper focus enabling them to judge the value of certain evidence and its relevance to the overall case. In addition, a lawyer's judgment is honed by experience<sup>238</sup> and enhanced by counsel's disinterested, objective perspective.

In defense counsel's professional judgment, the strategic choice called for in this scenario is clear. Brown's father is a very credible witness who evokes sympathy and support for the defense. Yet, almost inconceivably

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237. Young, inexperienced lawyers, especially public defenders, often are challenged by clients who underestimate counsel and overestimate their own abilities and experience. Yet, some client's have experiences and insights that may greatly benefit the defense. For an article extolling the merits of listening to a client's insights, see Miller, *supra* note 19.

238. In the case of a law student practicing pursuant to a student practice rule, the student must rely heavily on the supervising attorney's professional experience. A client normally would be made aware of the supervisor's background and professional opinion in the course of discussing a disagreement about a strategic decision. How far the supervisor would or should go in the counseling process to influence the ultimate decision turns on the nature of the supervisor/student relationship, and their resolution of the intervention issue, and the circumstances of that decision. For a thorough, insightful discussion of the intervention issue, see Chavkin, *supra* note 4, at 1527-45.

to counsel, Brown sees his father as a damaging witness. Brown is unwilling or unable to recognize the value of his father's testimony largely because Brown's judgment is clouded by his defensive, warped perception of his own testimony and credibility. Brown's proposed strategy, therefore, is flawed because it ultimately rests on his distorted assessment of his father's worth as a witness.

This is more than just a minor disagreement between counsel and client over the merits of calling a particular witness. Admittedly, even skilled professionals at times assess the same witness differently. Simply because a client sees evidence or a witness in a different light does not mean that the client is misguided or irrational. Moreover, this is not merely a case of conflicting risk calculations or of differing attitudes about risk taking.<sup>239</sup> Assessing risk and figuring the impact of a particular witness on one's overall risk calculations necessarily are difficult and inexact tasks that often produce reasonable, albeit heated, disagreements.<sup>240</sup>

In counsel's view, however, this is not a reasonable, rational disagreement. Rather, this is a case in which counsel and the client fundamentally disagree about the client's perceptions of reality.<sup>241</sup> Furthermore, counsel is absolutely confident that Brown's erroneous, illogical view of

239. A lawyer and client might agree, for instance, that a particular witness was ineffective on a prior occasion, but disagrees about that witness' likely performance or potential worth in a second proceeding. Or, even if the defendant concurs that the chances of an improved performance or of a different jury reaction is small, the defendant may be willing to take the gamble, despite the slim chances for success, because in view of all of the other evidence, the gamble makes sense. Defense counsel, on the other hand, might see other defense witnesses as strong or the state's witnesses as weaker and worry that a poor performance by the witness in question will drag down the entire defense case. Thus, counsel may urge a different strategy with respect to that witness.

240. For an extended look at the difficult task of assessing witnesses, see GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: PREPARING AND PRESENTING THE CASE* 227-50 (1981). For a discussion of the complex task of making meaningful predictions, see KREIGER, ET AL., *supra* note 202, at 197-203.

241. At times, clients have more insight into the power of their own stories than counsel. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990). In other instances, clients want to tell their own story - their way - regardless of the effect the client's strategy has on the client's winning the case. See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2459 (1989). Nevertheless, there also are "troublesome" cases in which:

the client wants to tell the story, can fully express his/her voice to the jury, can provide the jury with the concrete details of his/her world that provide the necessary context for evaluating that story, and the story is arguably true, but the fact finder will nevertheless automatically discount the story because the story is not plausible within the narrative structures available to the fact finder.

Mitchell, *supra* note 229, at 103. Although I agree with Mitchell that there are some troublesome client stories that can be creatively harmonized as described in his article, in other cases, allowing the client to tell her story her way will ensure that her story is not effectively presented. In Brown's case, counsel is confident that presenting Brown's case his way will ensure that his story is summarily rejected by the jury.

his father is driving his client's proposed strategy. Defense counsel is also firmly convinced that her own observations and assessment of the father's demeanor and of the value of his testimony are correct. Finally, the validity of counsel's judgment and the wisdom of her strategic choice have been confirmed by the original jurors.

Unquestionably, Brown and his lawyer have a common goal in this scenario—winning the trial. Nonetheless, Brown's means to that end—keeping his father off the witness stand—are, in counsel's view, wholly inconsistent with that desired end. Blinded by faulty judgment, Brown is insisting on pursuing a course of action that actually increases the likelihood of a guilty verdict. Thus, from counsel's perspective, deferring to the client's desired strategy seems irrational and unwise because it serves to frustrate, not promote, the client's own goals.<sup>242</sup>

To many lawyers and commentators, good lawyering often demands that lawyers first identify and then correct the faulty irrational thinking of their clients.<sup>243</sup> Frequently good lawyers must persuade their clients of the folly of certain actions or decisions. Such counseling is at the heart of good lawyering regardless of one's lawyering style or decisionmaking orientation. Lawyers differ, however, in the techniques they will employ and the extent to which they will go to dissuade their clients from taking foolish, harmful action. In the end, the difference turns primarily on the individual lawyer's willingness to allow a client the right to be wrong.

For most lawyers—certainly those espousing a traditional lawyer-centered view—allowing Brown to make an unsound tactical decision runs contrary to counsel's professional training. Indeed, permitting a criminal defendant to pursue a strategy that is hurtful to his or her case runs contrary to the professional's first duty: protect the client.<sup>244</sup> As Justice White observed, defense counsel's mission is, above all, to advance the interests of the defendant even at the expense of truth or the

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242. See Smith, *supra* note 216, at 28-37 (discussing tension between client autonomy and lawyer responsibility and concluding that at times lawyers must take decisionmaking responsibility); Ross, *supra* note 201, at 1372-86 (arguing that defense counsel should override wishes of mentally ill defendants to promote that client's best interests). *But see* Luban, *supra* note 16, at 466-79 (noting the problem of labeling odd preferences as irrational and of distinguishing acceptable from unacceptable bad reasoning).

243. See, e.g., Simon, *supra* note 22, at 222-26.

244. In rejecting the claim that criminal defense lawyers should temper their zealous representation based on a duty to others, including the community as a whole, Abbe Smith unabashedly embraces the zeal and the undiluted partisanship demanded of the criminal defense lawyer by the ethics codes. See Abbe Smith, *Commentary - Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1589 (1999). "For it is passion - unbridled, undistilled, and intensely focused passion on behalf of a person in need - that drives criminal defense lawyers to use 'all means and expedients . . . at all hazards and costs to other persons' to 'save th[e] client.'" *Id.* at 1599-1600 (citation omitted).

interests of the state.<sup>245</sup> Deferring to a client's irrational strategy seemingly violates counsel's solemn duty to fight zealously on a defendant's behalf. For many lawyers, such deference is equivalent to counsel agreeing to "throw" the contest.<sup>246</sup>

Anecdotal<sup>247</sup> and empirical evidence<sup>248</sup> indicate that many criminal lawyers see themselves, in fact, as their client's champions and adhere to a "heroic" image of the role of the criminal defense lawyer.<sup>249</sup> Such lawyers are motivated by a desire to challenge the State and best the prosecutor. Driven by the desire to battle the State, to protect the client and, above all, to win, lawyers with this heroic, traditional view generally would find it very difficult to permit Brown to make a "wrong" strategic decision.<sup>250</sup> Facing the impasse presented by this variation of the Brown case, such lawyers would adopt a lawyer-centered approach and be inclined to manipulate, threaten, or even coerce Brown, if necessary, to ensure that he not be injured by his own foolishness. If Brown remained insistent that his father not be called to testify, the traditional approach ultimately dictates that counsel disregard Brown's wishes.

Understandably, a criminal practitioner may be sorely tempted to take such a lawyer-centered approach and save Brown from his own foolishness. The role of savior can be quite appealing. Playing savior, however, demands a clarity of vision and purpose that few lawyers possess. Thus, before rushing to embrace this role, a criminal defense lawyer should examine carefully her justifications for overriding her client's preferred strategy.

As in the first scenario, counsel's focus or perspective may be too narrow. In the process of making strategic decisions for the client's own good, counsel may be using a system for filtering information that is as distorted or as biased as the client's. In the guise of correcting irrational strategic thinking, counsel may be treating any choice inconsistent with her own as irrational. Once again, the line between ends and means is

245. See *U.S. v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part, concurring in part); *Smith v. State*, 717 P.2d 402 (Alaska Ct. App. 1986). For extended discussions of the criminal defense lawyer's duty of zealous advocacy and of the different role of the criminal defense lawyer, see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993); FREEDMAN, *supra* note 9, at 65-86; Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177-78 (1983).

246. See Babcock, *supra* note 245, at 178 (describing her passionate desire to win as one of the motivating factors that drives her to fight for her criminal clients).

247. See Smith & Montross, *supra* note 199, at 515-35; Abbe Smith, "Nice Work If You Can Get It:" "Ethical" Jury Selection In Criminal Defense, 67 FORDHAM L. REV. 523, 564 (1998).

248. See MANN, *supra* note 199.

249. See Ogletree, *supra* note 35, at 1275-81.

250. See *id.* at 1281.

often blurred such that the imposition of counsel's strategic choice actually may reflect a difference of opinion over values.<sup>251</sup>

Second, lawyers are neither disinterested observers nor pure hearted saints striving selflessly to serve their client's best interests. Rather, the vast majority are people of normal desires and motivations pushed and pulled by a host of competing interests as they struggle to provide their clients competent representation. Financial concerns, loyalty to others, demanding caseloads, and the need to allocate scarce resources, including counsel's time, may compromise a criminal defense lawyer's decisionmaking.<sup>252</sup> Despite such pressures, many criminal defense lawyers render effective, conscientious representation.<sup>253</sup> But not all do. Sadly, some lawyers allow their professional judgment to be adversely affected by interests other than the defendant's best interest.<sup>254</sup>

Third, lawyers generally are interested in their standing or reputation in the community. A criminal defense lawyer particularly may be concerned about her reputation among judges, peers, and prosecutors.<sup>255</sup> So too, even the most conscientious lawyer appreciates that her desire to perform her craft well and to have others think highly of her work may influence her strategic decisionmaking in a criminal case. As Justice Brennan warned, "[g]ood lawyers undoubtedly recognize these temptations and resist them, and they endeavor to convince their clients that they will. It would be naive, however, to suggest that they always succeed in either task."<sup>256</sup>

Finally, the traditionalist's claim to an unbridled right to make all strategic choices about witnesses is based largely on the superiority of the lawyer's professional judgments. Yet, lawyers' judgments about witnesses involve much more art than science. Such judgments or assessments are not statistically grounded, but represent only counsel's best estimate of how a witness will perform and how a trier of fact will

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251. See Luban, *supra* note 16, at 466-67.

252. See Uphoff, *supra* note 216, at 77-81; Smith & Montross, *supra* note 199, at 532-33.

253. See Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 427-28 (1992).

254. See, e.g., Alschuler, *supra* note 216, at 1179-1270; Uphoff, *supra* note 253, at 425-47; Commonwealth v. Martinez, 681 N.E. 2d 818, 823-27 (Mass. 1997) (defense counsel's divided loyalties and breach of client's confidence established conflict of interest warranting new trial). Criminal defendants face an uphill battle, especially when the conflict of interest does not involve multiple representation, in demonstrating that defense counsel's conflict actually adversely affected counsel's performance. See, e.g., Beets v. Scott, 65 F.3d 1258, 1260 (5th Cir. 1995) (en banc) (finding that defendant failed to show that counsel's unethical media contract and his failure to withdraw as counsel to testify as a defense witness actually prejudiced her case).

255. See Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 23-25 (1991); Alschuler, *supra* note 216, at 1254-55. For a more detailed look at the pressures criminal defense lawyers face to "play ball" rather than to be adversarial, see Uphoff, *supra* note 216, at 89-94.

256. Jones v. Barnes, 463 U.S. 745, 761-62 (1983) (Brennan, J., dissenting).

react to that witness. Often these estimates are little more than educated hunches, much like weather forecasting before the age of modern technology. Such assessments are hardly infallible. Indeed, lawyers with limited trial experience—especially young lawyers who also have limited life experience—may be only marginally more capable of making sound strategic decisions about witnesses than their clients.

In light of the inevitable uncertainty of many tactical moves and the varied, conflicting interests that may cloud counsel's judgment, not all lawyers can be trusted to use their tactical decisionmaking power wisely or consistent with their clients' best interest. Indeed, for the client-centered lawyer—aware of the fallibility of her judgment calls and suspicious of the traditional lawyer's claim of undivided selfless, zeal—it is the defendant who is more likely to make strategic decisions that are consistent with the client's own interests.<sup>257</sup> Lawyers who disregard or override their clients' strategic choices, ostensibly in order to serve their clients, may just be abusing their power. If the defendant's choice seems foolish, so be it. A defendant should be free to reject counsel's proffered advice because it is, after all, the client's case.

Cognizant of the conflicts inherent in the traditional approach, the novice criminal practitioner may be more inclined to take a client-centered approach and to defer to Brown's strategy. Certainly for some advocates, the client-centered approach has considerable appeal because it maximizes the client's autonomy. For other lawyers, however, the approach is attractive because deferring to the clients' strategic wishes allows them to escape the burden of decisionmaking responsibility.<sup>258</sup> Nervous or insecure about their own tactical acumen, some lawyers attempt to duck responsibility by too readily agreeing to a client's foolhardy strategic choice.<sup>259</sup> Perhaps wary of assuming full responsibility for making the right strategic call, the novice defense lawyer may find it more comfortable simply to give in to the client's desired strategy.

Good criminal defense lawyers do not attempt to shirk their responsibility to provide their clients candid advice and counsel.<sup>260</sup> Admittedly,

257. See COCHRAN, JR., ET AL., *supra* note 19, at 3; ROSENTHAL, *supra* note 11, at 36-46.

258. See Cathy Kelly, *What We Could Teach the Cops About Coercion*, THE CHAMPION, May 1998 at 34, 62 (arguing that lawyers should stop controlling clients' choices not only because clients should have the right of self-determination, but it is far less stressful for lawyers if they stop playing god).

259. A lack of time, interest, or experience also may explain a lawyer's willingness to defer to a defendant's foolish strategic decision. See, e.g., *Brennan v. Blankenship*, 472 F.Supp. 149, 157 (W.D. Va. 1979), *aff'd*, 624 F.2d 1093 (1980) (defense counsels failed to develop the only viable defense to the criminal charge, failed to inform client of the impact of raising such a defense, and allowed themselves to be "guided by [client's] uninformed direction").

260. For the criminal defense lawyer, candid advice often entails telling the defendant that she has



many tactical decisions are fraught with uncertainty. At times, counsel may be very anxious about the wisdom of a particular strategic choice. Sometimes the best that counsel can do is to advise the defendant that he or she must choose between two equally risky options. In other instances, however, counsel may be very confident of the folly of the client's proposed strategic decision. In such a case, good lawyering demands that counsel advocate vigorously to dissuade a client from pursuing that foolish course of action.<sup>261</sup>

Assume, therefore, that Brown's defense lawyer has not tried to wiggle out of the dilemma she faces, but has confronted it directly. Highly skilled criminal defense lawyers generally are more capable than their clients in making sound tactical judgments. Thus, defense counsel in this variation of the Brown case, an experienced lawyer who also is a clinical law teacher, may be absolutely correct in her assessment of the best strategy to employ. Certainly there are times—and this scenario presents such a case—when the client's proposed tactic or strategy is just plain foolhardy. By respecting such a misguided tactic, counsel is aiding the client in harming himself. Or, at the very least, counsel has failed to stop the defendant from imposing a self-inflicted wound. The question becomes should defense counsel allow the defendant to harm himself?

It is true, of course, that our society grants people broad freedom to pursue their own needs, including the right to make what many others might deem poor or even immoral choices.<sup>262</sup> Our respect for the individual's freedom of choice is so strong that we give people the right to engage in conduct or take part in activities that may be harmful or even life-threatening.<sup>263</sup> Criminal defendants, including those facing the

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two unpalatable options: pleading guilty and accepting a long sentence or taking a weak case to trial and risking receiving an even longer sentence. For a helpful discussion of the skill of delivering such bad news to a client, see Linda F. Smith, *Medical Paradigms For Counseling: Giving Clients Bad News*, 4 CLINICAL L. REV. 391 (1998).

261. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993); *supra* notes 3, 53, 216, 236 and accompanying text.

262. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities* 1986 AM. B. FOUND. RES. J. 613, 616-17 (noting that this societal commitment to the principle of individual autonomy is "founded on the belief that liberty and autonomy are a moral good, that free choice is better than constraint, that each of us wishes, to the extent possible, to make our own choices rather than to have them made for us").

263. See, e.g., *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 287-89 (1990) (O'Connor, J., concurring) ("[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self-determination. . . . Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."); *Roe v. Wade*, 410 U.S. 179, 210-15 (1973) (Douglas, J., concurring) (detailing the many rights contained within the sweep of "the Blessings of Liberty" among them "the autonomous control over the development and

death penalty, are permitted to make decisions or take actions that are harmful and seemingly contrary to their best interests.<sup>264</sup> Why then should represented defendants be denied their freedom of choice over important strategic matters simply because, at the outset of the case, they accepted the assistance of counsel?

In my view, there is no principled reason for depriving defendants of their freedom to make important strategic decisions. The traditional justification for limiting the defendant's freedom is that society's interest in a just, accurate result compels the defendant to accept the sound decisions of his professional representative.<sup>265</sup> Yet we allow clients to represent themselves despite the real danger such self-representation will skew the trial's outcome and permit the conviction of an innocent defendant.<sup>266</sup> Surely represented defendants, even those who insist on a foolish tactic, generally are exposed to less risk of a flawed conviction than those defendants who go to trial without counsel. If respect for individual autonomy justifies self-representation, then that same principle supports greater client control over strategic decisionmaking.<sup>267</sup>

It is not, in fact, concerns about innocence and accurate results that fuel judicial and professional reluctance to grant defendants greater say over tactical and strategic decisionmaking. Rather, it is concerns about finality, about efficiency, and about the orderly administration of justice that explain the bench and the bar's unwillingness to harness professional power and their willingness to restrict client decisionmaking.<sup>268</sup>

expression of one's intellect, interests, tastes, and personality" and the right of privacy which includes "the privilege of an individual to plan his own affairs, for, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases").

264. See, e.g., *Faretta v. California*, 422 U.S. 806 (1974) (defendant permitted to represent oneself even though such self-representation may be hurtful to one's own defense); *People v. Bloom*, 774 P.2d 698, 713-15 (Cal. 1989) (en banc) (defendant in capital case has right to instruct counsel not to present mitigating evidence).

265. See *U.S. v. Teague*, 953 F.2d 1525, 1536 (11th Cir. 1992) (en banc) (Edmondson, Jr., J., concurring).

266. See *Faretta*, 422 U.S. at 833-34 (defendant's right of self-representation constitutionally protected notwithstanding the danger that such representation may undermine the fairness of the trial).

267. Citing *Faretta*, the Missouri Supreme Court upheld the defendant's right to block his attorney's chosen defense and insist on his own defense strategy. *State v. Thomas*, 625 S.W.2d 115, 124 (Mo. 1981). The court stated that the defendant:

[m]ay not be forced to accept major decisions of trial strategy if he is fully informed and voluntarily decides not to follow the advice of his lawyer. It would be absurd to say that a defendant may waive the assistance of counsel entirely and yet may not waive the benefit of counsel's advice with respect to a particular decision, such as whether or not to assert a particular defense.

*Id.*

268. See *LAFAVE & ISRAEL*, *supra* note 7, at 559-62. These concerns often are coupled in federal decisions with a stated desire to respect state sovereignty. See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991).

Lawyers strapped for time do not want to take the time to explain or to justify their strategic maneuvers. Critics of client-centered decisionmaking not only claim that such an approach is too time consuming, but that it is also ultimately futile to expect most defendants to be able to understand strategic considerations such that they, in turn, can make informed tactical decisions.<sup>269</sup> Additionally, judges and lawyers raise the specter of the meddlesome defendant continuously changing his mind or constantly interrupting counsel's strategic flow making it impossible to present a coherent, effective defense.<sup>270</sup> The meddlesome defendant not only may damage his own case, but also may damage counsel's professional reputation.<sup>271</sup> Both judges and lawyers also worry that decisionmaking disputes will spill over and disrupt court proceedings. Above all, bench and bar are wary of doing anything more to fan the flames of the ineffective assistance of counsel claims that already swamp the appellate courts.

In the end, none of these concerns justify depriving an informed, competent defendant of the right to make important strategic choices. Courts are quite willing to trumpet the defendant's decisionmaking power when affirming a conviction in which counsel and/or the trial court acceded to the defendant's requested strategic wishes.<sup>272</sup> This is so even if the defendant's strategy is foolish or suicidal.<sup>273</sup> On the other hand, courts routinely refuse to closely scrutinize or rubberstamp counsel's dubious strategic moves, even though taken without consulting with or in direct contravention of the defendant's wishes, ostensibly because counsel needs such decisional control to be effective.<sup>274</sup> Defendants who are sufficiently persistent or disruptive—or whose counsel, for whatever reason, agrees to abide by the client's wishes—may well be given control over a strategic decision. Many other defendants, however, will not have any say over tactical decisionmaking and only a limited right to complain about counsel's poor strategic decisions under the *Strickland* standard. Thus, the prevailing judicial attitude toward client involvement in strategic decisionmaking is like that toward jury nullification. Although courts

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269. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2, commentary at 202.

270. See LAFAVE & ISRAEL, *supra* note 7, at 562.

271. *Id.*

272. See, e.g., *Trimble v. State*, 693 S.W.2d 267, 278-79 (Mo. Ct. App. 1985); *Commonwealth v. Sam*, 635 A.2d 603, 611-12 (Pa. 1993).

273. See, e.g., *People v. Bloom*, 774 P.2d 698, 713-30 (Cal. 1989) (in banc); *State v. Thomas*, 625 S.W.2d 115, 123-24 (Mo. 1981).

274. See, e.g., *Trimble*, 693 S.W.2d at 279 (acknowledging that "the lawyer's choice made contrary to the client's wishes will also be approved even where the wisdom, in hindsight, may be dubious, on the ground that counsel has control of the decisional process and must have such control to be effective").

generally acknowledge that a jury has the right to nullify the law by its verdict, judges are loathe to inform jurors of the existence of that right for fear it will be exercised too freely.<sup>275</sup> Similarly, judges fear the disruptive effects of greater client control over strategic decisionmaking.

Professional concerns and judicial fears, however, are overstated. Greater client involvement in decisionmaking demands improved lawyer-client communication. In some cases, lawyer and client will need to spend more time together outside of court. Undoubtedly, some defendants will find it difficult to understand the information needed to make sound, informed strategic decisions. In my experience, however, most of the confused or inexperienced clients gladly will defer to counsel's recommended strategy.<sup>276</sup> In fact, many criminal defendants, including sophisticated clients, are quite happy to turn over decisionmaking responsibility to counsel.

On the other hand, a significant number of defendants will want to play an active role in case decisionmaking. At times, a defendant will not agree with counsel's proposed tactic. When strategic disagreements develop, however, counsel may find it difficult to resolve that dispute amicably. Undoubtedly, some disputes over tactics will necessitate a court hearing or, at least, the making of a record.<sup>277</sup> Yet, giving clients a great role in strategic decisionmaking does not translate necessarily into contentious, wasteful court proceedings. Indeed, better lawyer-client communication may eliminate many disputes and, in the end, save judicial resources and facilitate smooth judicial proceedings. Moreover, asking defendants before trial if they have had an opportunity to discuss important strategic decisions with counsel and requiring courts to resolve decisionmaking disputes before trial instead of on appeal may improve the overall functioning of the adversary system.<sup>278</sup>

More importantly, the fact that some clients may be hurt by their own indecision or interference with counsel's orderly presentation of the defense does not justify granting lawyers sweeping authority over all strategic decisionmaking. Being charged with a crime and requesting

275. See, e.g., *State v. Hatori*, 990 P.2d 115, 119-22 (Haw. Ct. App. 1999).

276. Most criminal defense lawyers would concur that experienced criminal defendants, especially those who feel they were betrayed or poorly defended by their previous lawyers, are more likely to challenge counsel's recommendations. For similar observations, see White, *supra* note 210, at 338, 347-76.

277. See STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2 (3d ed. 1993) (suggesting that record be made of any significant disagreement between counsel and the defendant over strategy or tactics).

278. Some state courts already require such a colloquy to ensure that the defendant's right to testify is fully protected. See, e.g., *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984) (en banc); *Culbertson v. State*, 412 So. 2d 1184, 1186-87 (Miss. 1982); *State v. Neuman*, 371 S.E.2d 77, 81-82 (W. Va. 1988). Extending that colloquy to include other strategic considerations may be both workable and desirable. A full discussion of this proposal, however, is beyond the scope of this article.

the aid of a lawyer ought not deprive competent adults of their right to control the decisions which ultimately affect their lives and their liberty. Clients should be able to opt to have their lawyers make all strategic decisions, but the decision to accept appointed counsel hardly represents a conscientious choice to cede all tactical decisionmaking power to counsel. Persons presumed innocent should be free to reject counsel's advice and pursue a foolish or wrong course of action if they so desire. Indeed, respect for individual autonomy dictates that a defendant like Brown be permitted to make the strategic choice regarding his father, even if that strategy ensures the defendant's demise.<sup>279</sup>

But here's the rub. Although, in theory, I generally agree that defendants should have the right to be foolish, I have found in actual practice, that it is very difficult to honor that right. Like most criminal defense lawyers, I take seriously my responsibility to zealously defend my clients. In striving to do my best, I have learned, like Charles Ogletree,<sup>280</sup> that empathy for those accused of crimes has been an important motivating factor for me and for many of the lawyers with whom I have worked.<sup>281</sup> Empathy pushes me to work harder for my clients and to worry more. I am not only interested in the outcome of my clients' cases, but in what happens to them after their cases are concluded. Clients are not just case numbers, but real people with families and dreams. Sometimes they have become my friends.<sup>282</sup> In this I am not unique; many of the criminal defense lawyers that I know and others with whom I have worked are very empathic.<sup>283</sup>

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279. As the Second Circuit observed, "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires." *United States ex rel Malonado v. Denno*, 348 F.2d 12, 15 (2nd Cir. 1965). See also Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988) (arguing that respect for individual dignity demands that competent defendants be given control over the decision to abandon the appeal of a death sentence and to block the presentation of mitigating evidence in the penalty phase of a capital trial).

280. See Ogletree, *supra* note 35.

281. I worked as a public defender in the Milwaukee office from 1978 to 1984, directed a criminal defense clinic at the University of Wisconsin Law School from 1984 to 1988, and have run a criminal defense clinic at the University of Oklahoma College of Law from 1990 until the present. For a thorough discussion of the importance of lawyers' understanding of the emotional aspects of the lawyer-client relationship, including valuing empathy, see Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLIN. L. REV. 259 (1999).

282. See SHAFFER & COCHRAN, JR., *supra* note 11, at 44-54 (arguing for a moral relationship between lawyer and client like that between friends); Ogletree, *supra* note 35, at 1271-75 (describing the nature of his friendship with his clients and contrasting it with Charles Fried's concept of the friendship between lawyer and client). For a full exploration of Fried's view, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

283. See Smith, *supra* note 244, at 1592 (observing that "criminal defense lawyers often have 'authentic, loving' relationships with individual clients" (citing Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLIN. L. REV. 65, 86-91 (1994))); Smith & Montross, *supra* note 199, at 455-58, 497-535 (extolling the

Empathy also means treating one's clients with dignity and respect. I have tried to maintain a respectful attitude toward all of my clients, especially since defendants get so little respect from others in the criminal justice system.<sup>284</sup> So too, empathy for my clients encourages me to involve my clients in decisionmaking. I have taken to heart Justice Brennan's charge that "[t]he role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."<sup>285</sup>

To be an effective defense lawyer, however, more is required than just a positive, caring attitude. I worked hard to polish my analytical skills and my trial abilities to enable me to challenge the State more vigorously. Most of my fellow public defenders in the Milwaukee office readily embraced the heroic image of the defense lawyer sworn to battle the State regardless of the odds or the abhorrent nature of the crimes with which our clients were charged. Heroism motivated us to become more competent lawyers.<sup>286</sup> The better we got, the more confident we became both in our abilities and in our judgment. Our clients generally reaped the benefits of our greater skill.

Like Ogletree and his colleagues at the Public Defender Service in Washington, D.C., many of the public defenders in our office tried to project a lawyering style that combined the best aspects of the traditional and client-centered approach. Indeed, even after leaving the Milwaukee Public Defender's Office, I have continued to practice and teach an approach that blends heroism with empathy. There are times, however, when those attitudes or motivations directly clash and simply cannot be reconciled. Like defense counsel in this variation of the Brown case, I have been forced to choose whether to pursue a winning strategy or to respect my client's foolhardy strategic choice. Despite wanting to be the instrument and defender of my client's autonomy, I

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dedication and commitment of many criminal defense lawyers). Admittedly, not all criminal defense lawyers share this attitude. See MCINTYRE, *supra* note 210; Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87). Horror stories abound about incompetent defense lawyers who seemingly do not care or, at least, do not care enough. Among the many commentators who have discussed the problem of lack of zeal in the criminal defense bar, see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Uphoff, *supra* note 253, at 425-47; Alschuler, *supra* note 216, at 1179-1270.

284. See, e.g., Smith & Montross, *supra* note 199, at 444-46 (discussing the hostility directed against criminal defendants). Moreover, as Smith and Montross point out, not only are criminal defendants demonized, so too are the lawyers who defend them. *Id.* at 446-51.

285. Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting).

286. See Ogletree, *supra* note 35, at 1275-78 (discussing heroism and detailing the extent to which the "hero" mentality motivates public defenders to battle the State on behalf of their underdog clients).

personally find it very hard to let those I care about harm themselves.<sup>287</sup> Ironically, the more empathetic a lawyer becomes—committed to helping indigent defendants, seeing them as special friends in need, worrying about their lives beyond their cases—the more that lawyer feels her clients' pain. It can be gut-wrenching to see a client you care about lose and suffer the consequences. It can be even worse if the client's harm was preventable but for counsel's willingness to respect the client's freedom to be foolish.

There is another reason I personally find it difficult to empower my clients to make foolhardy decisions. At bottom, most defendants—although, admittedly, not all—are not as interested in their freedom of choice as they are in their freedom. That is, if most clients were asked which they valued more—freedom of choice or winning at trial—most clients would select winning.<sup>288</sup> Many clients just lack confidence in their lawyers and the strategic choices those lawyers are making. Defendants who truly trust and have confidence in their lawyer do not generally demand the same control over case decisions as those who fear that their lawyer's inexperience, lack of zeal, excessive caseload, or incompetence compromises counsel's recommendations.<sup>289</sup> Thus, clients want decisionmaking power, not for the sake of having control over their cases, but because they ultimately want to win.

I want my clients to win almost as badly—and, in some instances, even more<sup>290</sup>—than they do. Thus, the more confident I am in the wisdom of my strategy or of the folly of my client's, the more discouraging it is not to be able to convince a client to follow my recommended strategy. So I push the defendant as forcefully as I can to persuade the client of the merits of my preferred strategy. I do so, however, without

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287. See Ross, *supra* note 201, at 1375-76 (concluding that her ethics of care perspective requires her to override the value of autonomy in order to save her clients from self-destruction).

288. See Smith, *supra* note 216, at 31 (discussing tension between client autonomy and lawyer responsibility and suggesting that defendants' primary concern is to stay out of jail or, at least, get out as soon as possible). That is not to say that clients care only about case outcomes. Research suggests that clients care about the manner in which they were treated by their lawyer and the system. See, e.g., JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE (1978); Clark D. Cunningham, *Evaluating Effective Lawyer-Client Communication: An International Project Moving From Research To Reform*, 67 FORDHAM L. REV. 1959, 1959-65 (1999). Other clients worry more about process costs or just getting their case over with quickly. See MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 216-22 (1979). Finally, some clients do care more about how their story is told or what tactics are used to secure a victory. See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 916 (1992).

289. COCHRAN, JR., ET AL., *supra* note 19, at 115-17; Flemming, *supra* note 211, at 274-75.

290. It is not uncommon to find defendants, especially in misdemeanor cases, more concerned with getting a case over than in securing the optimum result. See FEELEY, *supra* note 288, at 221-22.

employing dishonest or unduly coercive tactics.<sup>291</sup> If the client remains adamant, I look at the same four factors discussed in the first scenario before deciding whether to respect that client's right to be foolhardy.

In this scenario, Brown undoubtedly is a competent decisionmaker, capable of making an informed choice. Despite his general intelligence and capacity for rational choice, however, his reasoning in this variation of the case is badly flawed. Because he is misreading the situation, Brown also fails to appreciate the long odds against him if his strategy were to be followed. Rather than seeing risk, Brown perceives that his tactics maximize his chances for victory.

Counsel is quite confident, however, that Brown's strategy hurts the defense. Without the father, the defendant's conviction is very likely. In this case, there is no ambiguity in judging the relative merits of either strategy. Indeed, the more confident counsel is of the advantages of a particular strategy, the less open counsel should be to abandoning that strategy. Similarly, the more counterproductive or harmful that the client's proposed tactics are, the less inclined counsel should be to permit the client to pursue those tactics.

In addition, the father's testimony is pivotal in this case. Thus, the disputed tactical choice is very likely to determine the outcome of the trial. In this scenario, then, deferring to Brown's strategy virtually guarantees that Brown will be harmed by his choice. Fortunately, the resulting damage to the client—a misdemeanor conviction and a fine or short jail sentence—is relatively minor. In this variation of the Brown case, therefore, I would opt to respect Brown's foolish choice and would try the case without calling the father as a witness. My decision to do so, however, rests primarily on the fact that Brown will only suffer limited pain as a consequence of our respective choices.

The defendant's right to make foolish strategic choices, in my view, is not unbounded. Rather, the defendant's personal circumstances or those of the case may require that the client's freedom to be wrong be restricted. Counsel ultimately has the responsibility to determine how far to go in permitting a client to exercise strategic decisionmaking authority.

In my view, the judgment required of counsel is much like that facing the parent of a teenage child.<sup>292</sup> Parents are responsible for safeguarding

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291. The line between hard persuasion and coercion is a subtle, imprecise one. See White, *supra* note 210, at 371-73; *supra* note 216. A discussion of that important distinction also is beyond the scope of this article.

292. Indeed, it is much like the judgment demanded by Model Rule 1.14 when a lawyer is considering whether to respect the decisions of an impaired person. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1989). Rule 1.14 requires lawyers to strive to maintain a normal client-lawyer



their child's welfare, but also for helping their child grow into a responsible adult. Good parents must teach their children about judgment and increasingly give their children more freedom to control their lives. Teenage children, especially older ones, not only must make many decisions, but generally start to demand even more freedom. Parents, however, ultimately must decide how far to go in respecting the decisions of their children.

Good parents frequently find it necessary to impose their will on their child for the child's own good. Indeed, it is difficult for many parents to stop making decisions for their children for fear that, even as teenagers, their children will make poor, unduly risky decisions and harm themselves. Yet caring parents also recognize that they cannot constantly make all decisions for their children. If a child is to grow into a mature, responsible adult, the child must be given the power to make decisions for himself or herself.

For the parent that means creating an environment that allows the child to start exercising increased control over decisions. Learning to make decisions like learning other skills—walking, riding a bike, swimming—entails making mistakes and learning from those mistakes. Making mistakes in the learning process also involves some pain. Good parents recognize that being overprotective may stifle their child's growth. Albeit hard, good parents allow their child's learning—and the mistakes—to go on while trying to minimize the child's pain and to avoid any permanent harm to the child in the process.

The judgment called for in good parenting with respect to decisionmaking, then, is similar to the judgment required of the good lawyer regarding a client's decisionmaking. Given the special responsibilities of the attorney-client relationship, it is understandable that counsel wants to protect her client from any harm. Like parents, lawyers often feel the need to assume decisionmaking control for the

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relationship and to abide by a client's decisions as far as reasonably possible. *See id.* *See also, e.g., In Re M.R.*, 638 A.2d 1274, 1284-85 (N.J. 1994) (requiring a lawyer representing client with Down's Syndrome to follow her wishes unless absurd or they present unreasonable risk of harm to her health, safety and welfare). At times, however, the client will be insisting on action that counsel believes is contrary to the client's best interests. Although all concede that the lawyer's position is "an unavoidably difficult one," *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. (1989), scholars disagree as to counsel's role in this situation. *See, e.g.,* Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515. No matter how counsel decides to proceed, she will be called upon to exercise sound professional judgment and to balance certain risks and competing interests before responding to the client's wishes. In some circumstances, albeit not clearly defined, counsel is permitted to take "protective action" if the client wants to proceed in a manner seemingly contrary to the client's own interests." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b). Similarly, the student in Brown must decide whether to honor his client's foolish strategy or to take protective action by overriding his client's wishes.

client's own good. Yet clients, like teenage children, often feel quite capable of making their own choices and clamor for the right to do so. Lawyers like parents will struggle to know when to grant their clients that freedom to act for fear that the clients will make poor decisions and harm themselves.

Unlike parents, a lawyer's special responsibility does not continue beyond the case itself. And, unlike parents, it is not essential that the lawyer teach one's clients about decisionmaking.<sup>293</sup> Nevertheless, in the face of similar client and child demands for the freedom to control their lives, both good lawyers and good parents ought to be motivated to give wing to their clients' and their childrens' aspirations to fly. For parents, permitting a child decisionmaking experience is critical if the parents are to guide their child's development toward autonomy. For a lawyer, respect for the individual—and his or her autonomy—is “the lifeblood of the law.”<sup>294</sup>

In the end, both good lawyers and wise parents are required to exercise the same sort of judgment in deciding whether to allow their child or client the freedom to fly. They must scrutinize each flight—or important decisionmaking situation—to determine if the circumstances warrant allowing the client or child the room to fall or to crash. In some instances, the risk of harm is too great and the parent or lawyer cannot allow the child or client the freedom to act. But just as the overprotective parent stifles the child's ability to grow, the unduly paternalistic lawyer stifles a client's individual autonomy.<sup>295</sup> Each must strive to achieve the proper balance.

Changing the facts of the Brown case, therefore, may lend to different resolutions of this strategic impasse. If, for example, Brown was mildly retarded and only marginally competent, counsel should be more inclined to override Brown's wishes regarding an important witness.<sup>296</sup> If Brown's father was only a minor witness, however, then counsel should be more willing to tolerate Brown's proposed foolish tactic. Similarly, counsel should be more willing to respect the client's choice

293. Although the general experience of taking responsibility for important decisions may serve the client well, a lawyer's responsibility does not extend to training clients to be better decisionmakers. *But see* SHAFFER & COCHRAN, JR., *supra* note 11, at 40-135 (arguing that lawyers should be concerned with client goodness and help the clients to make sound moral decisions).

294. *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (Brennan, J., concurring).

295. The use of the term “unduly” means, of course, that I believe that in some instances, lawyers are justified in being paternalistic. I am not claiming, however, that lawyers generally have the right to control their client's lives or define their best interests. Rather, I am arguing that with respect to strategic decisionmaking, lawyer paternalism is warranted in some circumstances.

296. *See* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 98-108.

in situations in which counsel is less confident of the comparative advantages of her preferred approach. Say, for example, the lead defense lawyer believes that Brown's father is a good, but not great, witness. One of the other defense lawyers working on the case shares her assessment while the other is much more ambivalent. In such a situation, the ambiguity of the optimal strategy makes it far easier to respect the client's proposed choice, even though that choice is contrary to lead counsel's advice.

Finally, as my resolution of this scenario reflects, it is easier to respect a client's poor strategic choice when the harm the client is likely to suffer is minimal. Conversely, the harsher the consequences facing the client, the more difficult it becomes for counsel to allow a client the freedom to be foolish. This is especially so if counsel also is confident that her strategic choice is sound and that the client's choice is very likely to produce those negative results.

Assume, for example, that defense counsel was defending Brown on a murder charge. Assume also that all the other facts of this scenario remain unchanged. That is, Brown still insists that his father not be called as a witness. How should counsel respond to the client's right to be foolhardy in this instance?

Brown should be told that, in view of the severity of the punishment facing him, counsel will not allow Brown to pursue a strategy that counsel firmly believes is harmful. In advising Brown that defense counsel's decision regarding the father ultimately controls,<sup>297</sup> counsel should attempt to minimize damage to the attorney-client relationship and to facilitate the successful implementation of counsel's strategy. This will not be easy. Imposing one's will on another often causes bruised feelings or resentment.<sup>298</sup>

Invariably, if counsel's strategy were to pay off and Brown were to win at trial, Brown's bruised feelings likely would be assuaged.<sup>299</sup> If Brown is convicted, however, counsel undoubtedly would be subjected to even more criticism and second-guessing for overriding Brown's

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297. It would be improper for a lawyer in North Carolina to render this advice or to override the client's wishes in this situation because settled caselaw clearly gives the defendant the final say when lawyer and client are at an absolute impasse over a strategic decision. See *supra* notes 174-78 and accompanying text.

298. Clients - like children and horses - often chafe at the bit. All parents have had the unpleasant experience of telling a child no with the final explanation being "because I say so" or "because it's for your own good." Frequently that message, regardless of its truth, fails to satisfy or to ease the child's hurt feelings.

299. But see Cunningham, *supra* note 202, at 1328-31, 1366-87 (using the Dujon Johnson case to demonstrate that for some clients winning may not be as important as being treated with dignity and respect).

wishes. Most experienced lawyers recognize that such criticism goes with the job. For the conscientious lawyer, neither fear of such criticism nor concerns about the client's hurt feeling deters her from making the tough call to override a client's unsound strategic demand when such a call is warranted.

This does not mean that counsel's willingness to tolerate a defendant's foolish strategic decision depends solely on the amount of harm that the client faces. Unquestionably, it is harder to let a client be wrong when the price of foolishness is so high. Yet, the likelihood of the harm and the reasons for the client's decision also are salient factors. For example, it may be appropriate for counsel to respect an unwise strategic maneuver, even though the potential consequences are grave, in a case in which that maneuver is based on the client's heartfelt desire to avoid subjecting his father to the risk of a heart attack. On the other hand, there are situations where the risk of disaster is simply too great to permit the client to pursue a foolhardy tactic regardless of the client's motivation. Counsel need not—and should not—respect a client's suicidal tactics.<sup>300</sup>

### 3. The Uncommunicative Objective

In the final scenario, assume that when the defense lawyer called Brown to tell him of the prosecutor's decision to retry the case, Brown advised counsel that his father simply would not be testifying in the subsequent trial. Defense counsel's attempt to press Brown for an explanation proved futile. In following discussions, counsel's efforts to

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300. Indeed, many lawyers who do death penalty defense work contend that allowing defendants to block the presentation of mitigating evidence and to argue for the imposition of the death penalty is akin to assisting defendants to commit suicide. See, e.g., Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855-61 (1987). A number of courts and commentators agree and take the position that counsel should introduce mitigating evidence despite defendant's objection. See, e.g., *People v. Deere*, 710 P.2d 925, 930 (Cal. 1985) (en banc); *State v. Hightower*, 518 A.2d 482, 483 (N.J. Super. Ct. App. Div. 1986); *People v. Koedatch*, 548 A.2d 939, 992-97 (N.J. 1988); Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987). Other courts and commentators, however, contend that a defendant should have the right to prevent defense counsel from introducing mitigating evidence even if it means ensuring the imposition of a death sentence. See, e.g., *People v. Silagy*, 461 N.E.2d 415, 430-32 (Ill. 1984); *State v. Felde*, 422 So. 2d 370, 393-95 (La. 1982); *Autry v. McKaskle*, 727 F.2d 358, 361-62 (5th Cir. 1984) cert. denied, 465 U.1085 (1984); Bonnie, *supra* note 279, at 1367-90. Not surprisingly, then, some lawyers will follow a client's instructions even if that means arguing for or attempting to secure a death penalty. See Mark Hansen, *Death's Advocate*, A.B.A. J., Dec. 1998, at 22 (reporting on lawyer's attempt to secure a criminal defendant's desired result: a death sentence). No matter how one comes out on this difficult issue, however, complying with a competent defendant's deliberate choice regarding the defense of the penalty phase of a capital trial is different from respecting a defendant's misconceived strategic choice regarding the conduct of a trial.

raise the matter were met with a change of subject, silence and, ultimately, with Brown's persistent refusals to discuss his father in any way. Although the client willingly and reasonably talked about other aspects of the upcoming trial, he brusquely cut off any communications about the father. Responding to counsel's request to talk personally with the father, Brown abruptly told her no. Brown insisted that counsel forget about the father and instead worry about the trial. Counsel also tried pointing out the negative effect that the father's absence would have on Brown's chances of success at trial, but the client shrugged off counsel's concerns. Despite defense counsel's insistence that without the father Brown faced long odds at trial, the defendant asked only that counsel take "her best shot" at trial. Brown refused to be drawn into any further discussions about the father. Should counsel proceed to trial without calling the father or take some other course of action?

There are times when the defendant's refusal to communicate or to discuss issues with counsel is so serious that counsel must consider dramatic action. Dramatic action, however, is not called for in this scenario. This is not a case in which counsel must decide whether to challenge the defendant's competency.<sup>301</sup> Brown is not incompetent nor is he only marginally competent. Nor is this a case in which the attorney-client relationship has deteriorated to the point that counsel is warranted in moving to withdraw. Certainly there are cases in which the communication problems between counsel and a client are so pronounced, that counsel should go to the court and ask for leave to withdraw as counsel. Rather, this is a case in which the client is purposefully cutting off communication with counsel about a limited, but highly relevant, matter for some unknown and unstated reason or reasons.

Brown's refusal to discuss this matter is hurtful but not fatal to the attorney-client relationship. Criminal defense lawyers, especially appointed counsel, frequently have to work with clients who have difficulty making themselves understood or who choose to make communication difficult. Despite counsel's best efforts, a client simply may not be interested in establishing a meaningful relationship with defense counsel.<sup>302</sup> Nonetheless, counsel must strive to provide his or her client the best representation possible under the circumstances, even in the face of the client's own obstructive behavior.

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301. For a look at defense counsel's role when representing a defendant of questionable competence, see generally Uphoff, *supra* note 296.

302. Although criminal defendants are not guaranteed the right to a meaningful attorney-client relationship, see *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983), good lawyers strive to create such relationships.

As in the other two scenarios, the criminal practitioner in this variation of the case understandably hesitates to ratify a decision that will hurt Brown's chances for success at trial. It is particularly difficult to agree to a harmful strategy when the client refuses to offer any explanation to support such a strategy. Perhaps earlier conversations with Brown about his father, observations about the father based on prior contacts, or revelations by Brown about himself may provide counsel come clues to help her unlock the mystery. Absent such clues, counsel is left to speculate about the reasons for Brown's obstinate position.

Even though Brown may have very legitimate reasons for preferring to proceed to trial without the benefit of his father, counsel may find Brown's failure to communicate those reasons quite frustrating. Certainly defense counsel will be tempted to respond to the client's stubbornness by simply announcing her intent to exercise her authority over strategic decisions and to call the father to testify despite Brown's wishes. Given the circumstances of this case, however, counsel should resist the temptation to save Brown from his own stubbornness. In view of Brown's attitude, resolving this clash of wills by trying to force Brown to accept counsel's strategic choice is very likely to rupture the attorney-client relationship and drive Brown to ask—probably unsuccessfully<sup>303</sup>—for new counsel.

Assuming that the trial judge denies Brown's request for a new lawyer, counsel will be going to trial with an angry client and little assurance that counsel's strategic choice will actually benefit the defendant. Brown's father, in fact, may be unavailable to testify. If available, he may be quite hostile either because he was the driving force behind Brown's insistence he not be called or because he now shares his son's anger. Hostile defense witnesses are seldom very helpful.

Moreover, even if the father does testify and performs well, Brown may still be quite angry with counsel. His anger may interfere with counsel's trial preparation as well as adversely affect Brown's testimony and overall demeanor at the trial. In the unlikely event that the case is won or hung again, Brown's anger will likely dissipate. It is more likely, however, that defense counsel's efforts to "save" the client from himself by imposing counsel's strategic choice on an unwilling defendant, will only have made matters worse. The defendant not only will lose at trial, but his wishes will have been disrespected in the process.

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303. Courts are reluctant to grant indigent defendants new counsel because of disagreements over strategy. *See, e.g.,* *People v. Schultheis*, 638 P.2d 8, 11-14 (Colo. 1981). This is particularly so close to trial. Defendants and their lawyers generally are warned to work things out.

On the other hand, some lawyers may choose to respond to an uncommunicative client insistent upon a foolish strategy by too quickly giving in to the client's poor choice.<sup>304</sup> Like over-permissive or uninvolved parents, some lawyers are too eager to please and too willing to accommodate their client's foolishness. They will not invest the time and the energy needed to dissuade a client from making a poor strategic choice. Like parents overanxious to avoid any confrontation or argument with their aggressive teenager, counsel may find it easier or less bothersome simply to allow the insistent client to have his own way. Indeed, a client's belligerent attitude does make it easier for counsel to adopt a *laissez faire* mentality toward the client. Nonetheless, lawyers should not shirk their responsibility to try to reason through the problem with the client and guide the client to the best decision despite the client's attitude.

So too, frustration with the Brown's uncommunicative attitude ought not cause counsel to respond in anger. The defendant is not well-served if counsel accedes to Brown's wishes in a disrespectful manner. Rather counsel should advise Brown of her resolution of their strategic impasse in a manner that facilitates the possibility of future discussion and reconsideration. Thus, Brown should be told that counsel is disappointed with Brown's refusal to confide in her the defendant's reasons for not wanting his father called as a witness. Absent such an explanation, counsel cannot help but conclude that Brown's strategy is misguided. Nonetheless, despite their strategic disagreement, counsel should tell Brown she is deferring to the defendant's foolhardy strategy because it is Brown's case.

Having provided Brown this explanation, defense counsel will be in a better position, as she continues her trial preparations, to press Brown to reconsider his decision. Perhaps, impressed by counsel's willingness to respect his choice, Brown may come to trust counsel enough either to open up and explain the problem or even change his strategic choice. If not, and counsel goes to trial without the father and loses, then Brown will sustain some harm. Fortunately, the harm is minimal in this case. Thus, counsel's decision to respect Brown's choice may not leave Brown any worse off—or only somewhat so—but it is likely to leave him satisfied with counsel's representation.

A review of the four factors discussed in the previous scenarios supports the merits of such an approach in this variation of the case. As

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304. See *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991) (finding defense counsels were ineffective because "[t]he ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called").

in the other scenarios, Brown undoubtedly is a competent decisionmaker. In all other respects, he has responded appropriately and reasonably to counsel when they have discussed other aspects of the case. Except for his reluctance to use his father as a witness, Brown appears to understand the information provided him and to process it in a manner consistent with informed decisionmaking. Thus, even though Brown has not offered any explanation for his position, counsel has no basis for concluding that the defendant's unstated reasons are irrational. Absent evidence to the contrary, counsel should give her client the benefit of the doubt and assume that Brown has some justification for his stance.

Even assuming that Brown's unstated justification has some merit, however, this factor cannot be accorded much weight. More significant is the fact that the client's unsound strategic choice is highly likely to lead directly to a guilty verdict. Thus, respecting the defendant's preferred strategy means allowing the defendant to suffer harm that counsel may well be able to prevent. Empathy makes it hard for counsel to let irrational clients injure themselves. It is not appreciably easier to permit stubborn, uncommunicative clients to do so. Fortunately, the nature of this case and Brown's personal circumstances are such that the harm he will suffer is quite minor. As in the other two scenarios, then, a balancing of these four factors leads to the conclusion that counsel should respect Brown's wishes and not attempt to call the father to testify.

Counsel's willingness to respect an uncommunicative client's insistence on a foolish strategic maneuver should be tempered with caution. Even in the case just discussed, it may be appropriate for the defense lawyer to override Brown's wishes if, for example, she reasonably suspects that the defendant's stance is based on his fear of his father. Counsel should not permit another person - including a parent - to bully a client into a poor strategic decision.<sup>305</sup> Counsel must scrutinize carefully Brown's lack of communication for any evidence of undue outside pressure before respecting the defendant's wishes.

In addition, as in the case of the irrational client, raising the consequences of the client's foolishness increases the likelihood that counsel will find it necessary to trump her client's strategic choice.

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305. Good lawyering demands not only that counsel provide candid, independent advice, but that counsel insulate a client, as much as possible, from the undue influence of other persons. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B); EC 5-1; EC 5-21 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1989). For a look at the difficulty of counsel's role when the person applying undue pressure is a parent, see Wallace J. Mlyniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 105 (Rodney J. Uphoff ed., 1995).



Thus, if all of the facts remained the same except that Brown were facing a serious felony charge, then defense counsel would be hard pressed to respect Brown's dubious tactical choice. In such a case, Brown's failure to articulate a justification for his strategy would dictate that counsel attempt to call the father regardless of the likely damage to the attorney-client relationship.

## V. CONCLUSION

As the lawyer handling the Brown case discovered, the criminal defense lawyer locked in a dispute with a client over the decision to call a particular witness faces a difficult choice. On the one hand, counsel can exercise professional control and make the decision that maximizes the defendant's chances to win at trial despite the defendant's objections. Alternatively, counsel can respect the defendant's wishes and follow his suggested tactical choice even though doing so may seriously harm the defendant.

Agreeing to a tactic that is harmful to one's own case is difficult for most lawyers to swallow, especially for those criminal defense lawyers who feel that the deck is already stacked against their clients. Counsel's sense of craft, her interest in her own reputation, and her ego also make it difficult to accept a counter productive strategy. Losing is hard enough. Not taking one's best shot is even harder for most highly competitive trial lawyers. It is particularly hard to watch a client you have fought for and care about injury himself.

Yet for the lawyer who values individual autonomy, respect for the client requires that the client be afforded the right to be foolish or wrong. That right is not, in my view, absolute. Rather, the good lawyer, like the good parent, will struggle to balance the client's freedom of choice with the lawyer's duty to prevent clients from inflicting harm upon themselves. Respecting client decisionmaking means allowing some defendant's to suffer the consequences of their foolhardy strategy. In some instances, however, conscientious counsel should weigh the factors discussed in this article and override the defendant's strategic wishes.