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# Essay

## LAWYER ADVICE AND CLIENT AUTONOMY: MRS. JONES'S CASE

WILLIAM H. SIMON\*

### INTRODUCTION

In one influential view, the lawyer's most basic function is to enhance the autonomy of the client. The lawyer does this by providing the information that maximizes the client's understanding of his situation and minimizes the influence of the lawyer's personal views.

This autonomy or "informed consent" view is often contrasted with a paternalist or "best interest" view most strongly associated with official decisions about children and the mentally disabled. Here the professional's role is to make decisions for the client based on the professional's view of the client's interests.<sup>1</sup>

I am going to argue against the autonomy view that any plausible conception of good practice will often require lawyers to make judgments about clients' best interests and to influence clients to adopt those judgments. The argument, however, does not amount to an embrace of paternalism. The issue of paternalism remains moot until we can clearly distinguish a judgment that a client choice is autonomous from a judgment that a choice is in the client's best interests, and my argument is that in practice we often cannot make such distinctions. The argument takes the form of an illustration from my own experience followed by an analysis of it.

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\* Professor of Law, Stanford University. This Essay was given as the Stuart Rome Lecture at the University of Maryland School of Law on May 3, 1990. Short as it is, the Essay reflects a lot of advice, especially from David Luban, Lucie White, Jerry López, Michael Wald, Bill Hing, Mari Matsuda, Deborah Rhode, and David Rosenhan.

1. The autonomy view dominates the academic literature. See, e.g., D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); Ellmann, *Lawyers and Clients*, 34 *UCLA L. REV.* 717 (1987); Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 *U. PENN. L. REV.* 41 (1979). However, the paternalist view has been defended in contexts involving ordinary (adult, nondisabled) clients. Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563 (1982); Luban, *Paternalism and the Legal Profession*, 1981 *WIS. L. REV.* 454. Both views seem well represented among practitioners. See H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 163-64 (1963) (small survey of divorce lawyers suggests their role conceptions divide more or less evenly between autonomy and paternalist views).

## I.

The only criminal case I ever handled involved defending a woman who worked as a housekeeper for the senior partner in the firm where I worked. The client, Mrs. Jones, was charged with leaving the scene of a minor traffic accident without stopping to identify herself.

According to her, she *had* stopped to identify herself; it was the other driver—the complainant—who had both caused the accident by hitting her car in the rear and who had left the scene without stopping. The other driver then called the police and reported Mrs. Jones as leaving the scene.

Mrs. Jones was black; the other driver was white. The police, without investigation, had taken the other driver's word for what had happened, and when Mrs. Jones came down to the station at their insistence, they reprimanded her like a child, addressing her—a sixty-five-year old woman—by her first name while referring to the much-younger complainant as "Mrs. Strelski."

Mrs. Jones lived near Boston in a lower middle class black neighborhood with a history going back to the Civil War. She was a homeowner, a church-goer, and a well known and respected member of the community. This was her first brush with the police in her sixty-five years. Nervous and upset as her experience had made her, she was obviously a charming person. As far as I was concerned, her credibility was off the charts.

Moreover, I had a photograph of her car showing a dent and a paint chip of the color of the other driver's car in the rear—just where she said the other driver had struck her. When we got to the courthouse, we located the other car in the parking lot, found the dent and a paint chip of the color of my client's car in the front, and I took a Polaroid picture of that.

The case seemed strong, and the misdemeanor procedure gave us two bites at the apple. First, there would be a bench trial. If we lost that, we were entitled to claim a trial *de novo* before a jury.

Thus, things looked fairly good. Mrs. Jones's main problem was that her lawyer—me—was incompetent. I had never tried a case and had never done any criminal work. But I tried to remedy that by getting a friend with a lot of experience in traffic cases to co-counsel with me. The first thing my friend did was to dismiss, with a roll of his eyes, my plan to expose the police's racism through devastating cross-examination. The judge and the police were repeat players in this process who shared many common interests, he told me. We could never get a dismissal on a challenge to prosecutorial discre-

tion, and if an acquittal would imply a finding of racism against the police, it would be all that harder for the judge to give one. The second thing my friend did was to start negotiation with the prosecutor, which he told me was the way nearly all such cases were resolved. He told the prosecutor some of the strengths of our case and showed him my photographs, but he didn't say a word about racism.

The prosecutor made the following offer. We would enter a plea of, in effect, *nolo contendere*. Under the applicable procedure, this, if accepted by the judge, would guarantee a disposition of, in effect, six months probation. Mrs. Jones would have a criminal record, but because it would be a first offense, she could apply to have it sealed after a year.

We considered the advantages: It would spare her the anxiety of a trial and of having to testify. In the unlikely but possible event that we lost this trial, the plea bargain would have spared her six further months of anxious waiting, and the anxiety of a second trial. In the even more unlikely but still possible event that we lost both trials, it would have spared her certain loss of her driver's license, a probably modest fine, and a highly unlikely but theoretically possible jail term of up to six months.

What was the downside? I couldn't say for sure that the criminal record Mrs. Jones would have for at least a year wouldn't adversely affect her in some concrete way, but I doubted it. (She was living primarily on Social Security and worked only part-time as a housekeeper.) What bothered me was that the plea bargain would deprive her of any sense of vindication. Mrs. Jones struck me as a person who prized her dignity, deeply resented her recent abuse, and would attach importance to vindication.

Mrs. Jones had brought her minister to the courthouse to support her and serve as a character witness. Leaving my friend with the prosecutor, I went over to her and the minister to discuss the plea bargain. I spoke to them for about ten minutes. For about half this time, we argued about whether I would tell her what I thought she should do. She and her minister wanted me to. "You're the expert. That's what we come to lawyers for," they said. I insisted that, because the decision was hers, I couldn't tell her what to do. I then spelled out the pros and cons, much as I've mentioned them here. However, I mentioned the cons last, and the last thing I said was, "If you took their offer, there probably wouldn't be any bad practical consequences, but it wouldn't be total justice." Up to that point, Mrs. Jones and her minister seemed anxiously ambivalent,

but that last phrase seemed to have a dramatic effect on them. In unison, they said, "We want justice."

I went back to my friend and said, "No deal. She wants justice." My friend stared in disbelief and then said, "What? Let me talk to her." He then proceeded to give her his advice. He didn't tell her what he thought she should do, and he went over the same considerations I did. The main differences in his presentation were that he discussed the disadvantages of trial last, while I had gone over them first; he described the remote possibility of jail in slightly more detail than I had, and he didn't conclude by saying, "It wouldn't be total justice." At the end of his presentation, Mrs. Jones and her minister decided to accept the plea bargain, and as I said nothing further, that's what they did.

## II.

My guess is that most people will have some doubts about whether Mrs. Jones's ultimate decision was autonomous. Before we explore these doubts, however, we should consider a prior set of circumstances that seems to represent a paradox for the autonomy view.

Mrs. Jones did not want to be autonomous in the way that the autonomy view contemplates. She asked me to make the decision for her. She would have been immensely relieved if I had told her without explanation what she should have done, and she would have done it.

Now most people recognize that a commitment to individual autonomy requires the condemnation of some specific individual choices that, however seemingly autonomous in themselves, would preclude capacity for further autonomous choice. Choosing to sell yourself into slavery is the classic example. So long as these choices seem crazy or highly unusual, the contradiction they pose for the commitment to autonomy is not that serious.

However, I don't think Mrs. Jones's desire for an "escape from freedom" was crazy or highly unusual. Decisionmaking of this kind involves anxiety. Moreover, some people may reasonably believe that they are not very good at it. In such circumstances, the opportunity to put your fate in the hands of an apparently benevolent expert may seem attractive.

I've had experiences of this kind. For example, I recall our pediatrician advising my wife and me as to whether we should have our then two-month-old son vaccinated against whooping cough, several cases of which had occurred in our area. There was a specified

small probability of an adverse reaction to the vaccine, and given an adverse reaction, a specified small probability of death, and specified small probabilities of less extreme bad outcomes. Without the shot, there was a specified small probability of contracting the disease, a specified small probability given contraction of death, and specified small probabilities of various bad results short of death. I found this explanation, which went on for several minutes, overwhelmingly oppressive, and I felt a sense of deliverance when she concluded by saying, "In the case of my own child, I decided to give him the shot." I felt, and still do, that that sentence was all that I needed or wanted to know.

Such attitudes pose a dilemma for the autonomy view. In the legal context, the lawyer must either acquiesce in the client's choice to put her fate in the lawyer's hands or "force her to be free" by denying her the advice that she considers most valuable. Neither seems consistent with the mainstream idea of autonomy.

In Mrs. Jones's case, I think I was right not to permit her to delegate the decision to me at the outset. I correctly doubted my legal competence in the relevant area, and I didn't know Mrs. Jones very well. (In both respects, my relation to our pediatrician at the time of the vaccination decision was different.) Thus, it was a good idea both to try to involve her in the decision and to learn more about her. But I don't see this conclusion as distinctively supported by respect for Mrs. Jones's autonomy. It was contrary to her expressed wishes, and it did not and probably could not have made it possible for her to make a genuinely autonomous subsequent decision. My decision to withhold my views could be supported as well by saying that it was not in Mrs. Jones's best interests for her to delegate the decision to someone as ignorant about both the law and her as I was then.

### III.

The decision Mrs. Jones ultimately made, as I described it before, illustrates a point that is now widely acknowledged. Even where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt.<sup>2</sup> As you probably surmised from the way I told the story, I think Mrs. Jones's initial decision not to accept the plea

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2. See, e.g., Ellmann, *supra* note 1, at 733-53.

bargain was influenced by the facts that I went over the disadvantages of the plea bargain last, that I concluded by saying, "It wouldn't be total justice," and that my tone and facial expressions implied that justice should have been a decisive consideration for her. I think her ultimate decision was influenced by the facts that my friend discussed the advantages of the plea bargain last, went over the jail possibility at more length, omitted any reference to justice, and implied by his manner that he thought she should accept the bargain.

Proponents of the autonomy view are likely to respond that the problem illustrated by Mrs. Jones's case is not the implausibility of the autonomy ideal, but the failure to competently implement it on the part of her lawyers. They would suggest that the discussion was too hurried and pressured and the advice was less informative and neutral than it should have been. Although such criticisms have substance, they tend to underestimate some intractable problems. Time is scarce in nearly all practice situations, and the difficulties of framing unbiased advice are often overwhelming.

As an illustration of these problems, consider two specific issues in counseling Mrs. Jones. My friend and I made clear to her that there was a theoretical possibility of a jail term if she were convicted, even though we both thought this probability tiny, and this knowledge visibly evoked anxiety and fear in Mrs. Jones. At the same time, we never discussed with her the possibility that we might defend on the ground that the prosecution was racially discriminatory.

Most practicing lawyers would probably approve our conduct. Such judgments are based on assumptions that lawyers necessarily rely on all the time about what a client's goals are likely to be. Most lawyers would assume that even a small probability of jail would be important to most clients, and that in a case with strong conventional defenses, a defense with little probability of success and a strong potential for alienating the judge would be of little importance to most clients. The compatibility of such assumptions with the autonomy view depends on the extent to which the assumptions accurately reflect client ends. My own impression is that they are often inaccurate or too crude to serve as reliable guides. For example, in Mrs. Jones's case I think conventional assumptions about the jail penalty and the discrimination defense are wrong.

Going to jail would have been a disastrous outcome for Mrs. Jones. However, it was also a very unlikely outcome. As a purely cognitive matter, most people have difficulty rationally (that is, consistently) making decisions about risks. Where the decision involves

an outcome that evokes strong emotions and vivid images, the difficulty is compounded.<sup>3</sup> And, of course, where the circumstances in which the decision must be made involve strain and discomfort, the difficulty is further compounded. Such factors account in part for my feeling that it was not helpful to me in deciding about my son's whooping cough vaccination to hear about the probability that he might die from it or from not having it.

I once met a client who had received a notice from the welfare department accusing her—more or less accurately—of some small-time fraud. She sobbed and fidgeted uncontrollably and couldn't focus on my questions or tell a coherent story. After a few minutes she said, "Please tell me there's no chance I could go to jail." I replied, "There is no chance you could go to jail," and she relaxed and achieved some composure. My statement was inaccurate in two respects: first, it implied that I had a professionally adequate basis for such an opinion, when in fact I did not know either what the law said or what the relevant official practices were; and second, there was in fact a chance, albeit a small one, that she could have gone to jail. I did not qualify or correct the statement when I learned more. Had I done so, I don't think she would have been able to focus on anything else or to achieve enough composure or confidence to engage in anything that could plausibly be called decisionmaking.

In Mrs. Jones's case, I think my friend and I should have either omitted mention of jail entirely or characterized it in the way I did to the welfare client. Mrs. Jones was a considerably more self-possessed woman; she was intelligent, and her anxiety was no greater than I'd guess the median person's would be in her situation. Still, I think she was bound to be disabled by any description of jail as a real, even if small, possibility.

What about the option of the race discrimination defense? This defense is almost impossible to establish, and we had no evidence for it other than Mrs. Jones's testimony of some vaguely racist police

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3. Behavioral psychologists have found that the vividness of a possible disastrous outcome may impede people from appropriately discounting it for the probability of its occurrence. Slovic, Fischhoff & Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 463, 465-66, 485-87 (D. Kahneman, P. Slovic & A. Tversky eds. 1982). Thus, it has been suggested that it is difficult to educate people about risks such as nuclear power plant failures because "any discussion of nuclear accidents may increase their imaginability and hence their perceived risk." *Id.* at 487.

The psychological literature surveyed in the Kahneman, Slovic, and Tversky book has numerous applications to situations such as Mrs. Jones's case, but since it would take a separate essay to do justice to them, I forego exploring them here.

statements and the fact that the police had insisted on prosecution after the other driver had withdrawn her complaint. The probability that the client, when fully informed, would want to proceed with the defense, seems low. It would consume a lot of scarce time to fully discuss this option. Moreover, there's some danger that the client wouldn't fully understand the situation, and would choose the defense without appreciating its disadvantages.

Some such reasoning probably underlies the general practice of criminal defense lawyers of encouraging novice defendants to plead not guilty at arraignment without discussing the possibility that there might be moral, expiatory reasons why a defendant might wish to confess guilt even at the cost of making her strategic position more vulnerable. A small number of clients might, when fully informed, decide to plead guilty for such reasons, but lawyers do not explore that possibility in part for fear of wasting the time of or confusing the others.

I don't find such reasoning entirely convincing in Mrs. Jones's case. Mrs. Jones's chances of success on the discrimination claim were no less than her chances of going to jail. She clearly thought she was the victim of official racism. An acquittal would not have specifically vindicated this dimension of her grievance. The opportunity to bear witness in public to the grievance, even if it were not officially vindicated, might have been of some value to her.

In any event, the reasons that lawyers seem to find adequate for not mentioning the racism defense are hard to distinguish from the reasons they seem to find inadequate for not mentioning the jail penalty. The lawyers' tendency to attach more importance to the prescribed penalty than to the defense seems to arise at least in part from influences other than understanding of clients. One such influence is the positivist strain of professional legal culture that tends to privilege specific statutory language over common-law or constitutional principle and material over nonmaterial consequences. Another such influence is a risk aversion of the lawyer that may give priority to avoiding the possibility of disappointing the client (and even provoking malpractice claims) over achieving some benefit that the client does not anticipate. By letting the client assume that there's no way to raise the race discrimination claim, the lawyer eliminates the risk that the client will blame him if the claim is asserted and fails.

#### IV.

I should now acknowledge a point that often concerns people

about Mrs. Jones's case. Mrs. Jones was elderly, female, black, and of modest means; my friend and I were none of these. She probably had a vast lifelong experience of subordination and marginalization of kinds that we knew only through imagination. In these circumstances, the dangers were great that we would fail accurately to understand her, that we would compound her oppression by interpreting her in terms of inappropriate assumptions conditioned by the dominant culture.

Indeed, ever since I entered Mrs. Jones's plea, I have believed that my friend succumbed to just such dangers: class and race prejudice inclined him to see avoiding sanctions as the only thing Mrs. Jones really cared about. On the other hand, even as I have reproached myself for deferring to my friend, I have flattered myself that I appreciated Mrs. Jones's sense of dignity and the likely importance to her of vindication by acquittal.

However, several friends who read earlier drafts of this Essay have persuaded me that I failed to consider adequately the possibility that my own views were conditioned by prejudice. Perhaps I was just smugly attributing my own liberal upper-class moralism to her. I never considered how the fact that I had no reason at all to fear the kind of risks facing Mrs. Jones, might lead me to overly discount them and how my generally more satisfying experience with official institutions might lead me to overvalue official vindication.<sup>4</sup>

Now that I have considered these possibilities, I still think my original interpretation was right. (I just can't see Mrs. Jones's moralism as a projection of my own. I had lots of observations to support my interpretation. After all, the only initiative she took in the whole relation was to bring her minister with her to testify to her character.) But I have considerably less confidence in my judgment about Mrs. Jones than I used to have, and I recognize that in more ambiguous situations the dangers of misinterpretation would be very high.

Such observations might lead some to conclude that lawyers like me are so ill-equipped to understand clients as socially distant as Mrs. Jones that it would be better if we didn't try. Or that we are likely to do more harm than good if we challenge the client's initially articulated choice or if we tell the client what we think the better choice would be. Perhaps, for example, the effort to empathize and

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4. Lucie White's stunning account of a welfare hearing illustrates a lawyer misinterpretation of a client similar to the one hypothesized in the text. See White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1, 19-52 (1990).

establish rapport with a client like Mrs. Jones threatens to unleash in the lawyer unconscious feelings of prejudice that are more likely to be held in check when the relation remains more formal and emotionally sterile.<sup>5</sup> Perhaps such an effort threatens to induce in the client an inappropriate trust and dependence.

I don't agree with these views, at least when put categorically. I think they underestimate the capacity of people to empathize across social distance (though I agree this requires training and effort). Moreover, social distance from the client is not entirely a disadvantage; we associate distance with detachment as well as alienation. A lawyer socially closer to Mrs. Jones might have been less conscious of the distance that remained and more ready to attribute his own values to her than I was.

Even if I am wrong about this point, however, I don't think it affects my principal argument. The point that establishing empathy and rapport can be dangerous is not an argument against paternalism or for autonomy. Empathy and rapport are no less important for autonomy than for paternalism. If at all plausible, the judgment that the lawyer should not strive for empathy and rapport will be based in part on an assessment of whether the outcomes associated with such an effort are, on balance, in clients' best interests.

## V.

Let's consider some descriptions of the contrasting approaches to counseling in the autonomy and paternalist views. Begin with a crude but nevertheless influential version of the autonomy view: the lawyer's job is to present to the client, within time and resource constraints, the information relevant to the decision at hand. The lawyer discharges her function when this information has been presented, and whatever decision the client then articulates is deemed autonomous.

This crude formulation is unworkable and implausible. It is unworkable because it does not provide any criteria of relevance, and because it ignores that the most obvious criteria—the client's goals and values—are not immediately accessible to the lawyer. It is implausible because it measures autonomy simply in terms of the information the lawyer presents without regard to whether the way

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5. Cf. Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1370 (arguing that formal procedures that create role distance between professionals and subordinated people desirably inhibit the influence of prejudice on the professionals).

she presents it influences the decision or whether the client is emotionally or cognitively able to make effective use of the information. On the crude autonomy view, my pediatrician could have fully discharged her duty by telling me the probabilities associated with the vaccination decision even though I felt unable to make any use of this information.

Thoughtful autonomy proponents do not argue for this crude view. In their refined version, the lawyer's duty is to present the information a typical person in the client's situation would consider relevant except to the extent the lawyer has reason to believe that the particular client would consider different information relevant, in which case she is to present that information. The lawyer has to start by inputting the goals of a typical client to the actual client because before she knows the client she has no other basis for understanding.

But in this refined autonomy view the lawyer has a duty both to educate herself about the particular client's concerns and to assist the client in making use of the information the lawyer provides.<sup>6</sup> Here the client's autonomy is as much a goal as a premise of the counseling relation.<sup>7</sup> The refined view contemplates a dialogue in which the lawyer adjusts her presentation as she learns more about the client's concerns and abilities and in which she is as much concerned with relieving the client's disabling anxieties and enhancing her cognitive capacities as she is with simply delivering information.

Now consider the paternalist view—first in a crude version. In this view, the lawyer simply consults her own values; she asks what she would do in the client's circumstances or what she thinks a person with some general characteristic of the client should do and tries to influence the client to adopt that course.

Two versions of more refined paternalist views are associated with the University of Maryland School of Law. David Luban has argued that paternalist coercion is justified when, among other conditions, the client's articulated goal fails to meet a minimal test of objective reasonableness.<sup>8</sup> On the other hand, in his Sobeloff Lecture, Duncan Kennedy argued for paternalistic coercion on the basis

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6. See, e.g., Ellmann, *supra* note 1; D. BINDER & S. PRICE, *supra* note 1.

7. For an elaboration of this idea in a related context, see Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 16-23 (1985). Gerald López illustrates in detail a style of practice that seems appropriate to this idea. See López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

8. Luban, *supra* note 1, at 474-92.

of "lived intersubjectivity."<sup>9</sup> He justified paternalism where the actor was convinced that the subject's articulated choice did not truly express his identity, for example, because of fear and depression.

In contrast to Luban's, Kennedy's approach is triggered by a concrete sense of the particular subject. Here the paternalist judgment does not hold the subject to an external standard such as reasonableness, but holds him to an interpretation of the subject's own projects and commitments. The paternalist works for the choice that seems most consistent with her understanding of who the client is. When she disregards the client's articulated choice, she has concluded that the client has misunderstood either himself or how the options relate to his deeper goals. The Luban and Kennedy approaches are not incompatible, and the refined view should make room for them both.

The two aspects of the refined paternalist view can be readily applied to Mrs. Jones's case. The concerns about Mrs. Jones's request for me to make the decision for her seem to resonate with Luban's perspective. It wasn't reasonable for her to want to put her fate in the hands of someone as inexperienced and ignorant as me. On the other hand, the concerns about her ultimate decision seem to resonate with the Kennedy perspective. There's nothing unreasonable in any general sense about the decision to accept the plea bargain. It would be the right choice for many people—for example, for someone with no strong sense of dignity, with no respect for authoritative public pronouncements, and with no tolerance for conflict or the stress of self-presentation in public. But Mrs. Jones seemed to be a different person. There's at least a suspicion that I let her make the wrong choice, *given who she was*.

My claim is that, once we get beyond the crude versions, it is hard to distinguish the autonomy and paternalist views. Each refined view contemplates a dialogue with the client that it recognizes is both essential to understanding the client and fraught with dangers of oppressing or misunderstanding him. Each refined view involves a dialectic of objective constructs (the "typical client" presumption or the minimal reasonableness test) and efforts to know the client as a concrete subject. The paternalist view is intensely individualistic to the extent that it aspires to deep knowledge of the client as a concrete individual and grounds the lawyer's decision in the client's self-realization. Even where it disregards client choices because they fail the minimum reasonableness test, it is not

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9. Kennedy, *supra* note 1, at 638.

denying the value of autonomy, just that the particular client has the capacity for autonomous choice. Conversely, the refined autonomy view is quite collectivist to the extent that it licenses the application of objective "typical" client presumptions to the particular client. And to the extent that it differs from the paternalist view in failing to apply a minimum reasonableness test, that difference, though perhaps defensible on other grounds, is not plausibly grounded in the value of autonomy, since that value presupposes a capacity for rational choice.

David Luban suggests that the defining and problematical feature of paternalism is its commitment to particular "conceptions[s] of the good life."<sup>10</sup> But the most notable theory of "the good" to come out of the law schools in recent years defines the good in terms of the "choices" people make when not under "domination."<sup>11</sup> This sounds very much like a theory of autonomous choice.

A genuine conflict between autonomy and paternalism would require a view that contained both a thick theory of the good that did not depend on individual choice and a notion of individual choice capable of envisioning choices that violate the good as autonomous. It is not hard to find examples of such views—for example, in most versions of Christianity and other scriptural religions—but they seem to have little direct influence within the legal profession.

If the debate between the autonomy and paternalist views is so often moot, why does it inspire so much energy and emotion? My guess is that the debate expresses the anxiety that lawyers, especially those who represent clients socially distant from themselves, feel about getting to know their clients and about assuming responsibility for them. The process of learning to understand and communicate with a stranger is usually difficult and often scary. Moreover, as I've emphasized, in this process the lawyer inescapably exercises power over the client. The issues that have to be decided are tremendously difficult, and the stakes are often very high. In these circumstances, lawyers often find the demands of connecting with the client and the responsibilities of power emotionally overwhelming.

The crude autonomy view is attractive to lawyers because it absolves them of the burdens of connection and the responsibilities of power by suggesting that they can perform their duties simply by presenting a professionally defined package of information. Both the crude and the refined paternalist views are frightening because

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10. Luban, *supra* note 1, at 464.

11. R.M. UNGER, KNOWLEDGE AND POLITICS 242-46 (1975).

both emphasize the inescapability of lawyer power, and the latter emphasizes as well the duty to connect with the client. So of course does the refined autonomy view, but perhaps the rhetorical association of the refined autonomy view with the crude one evokes some of the psychologically comforting associations of the latter and makes it more palatable than refined paternalism, even when they are functionally indistinguishable.

## VI. CONCLUSION

I don't claim that we can never plausibly conceive of a meaningfully autonomous choice that is not in the chooser's best interests. But I would argue, at least, that there is a large category of cases involving legal decisions, where, given the circumstances in which the decisions must be made, we have no criteria of autonomy entirely independent of our criteria of best interests. Many of the best reasons we have for thinking that Mrs. Jones's choice was not autonomous are the reasons we have for thinking that it was not in her best interests.