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ON AUTONOMY: LEGAL AND PSYCHOLOGICAL PERSPECTIVES

BRUCE J. WINICK*

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* Professor of Law, University of Miami School of Law. This Article is an
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AUTONOMY is one of the central values that shapes law generally and mental health law in particular.¹ Many legal rules in the mental health area reflect a careful balancing of autonomy values against the state's interests in paternalism and in the protection of community safety.² However, the justifications for valuing autonomy have been insufficiently examined. Indeed, autonomy has its critics.³

This Article examines justifications for our preference for individual autonomy from a number of perspectives. Section II of the Article analyzes the treatment of autonomy values in constitutional and legal doctrine, as well as in philosophical and political theory. This section traces the autonomy principle to the political thought that led to the American Revolution, the Constitution, and the Bill of Rights. Further, this section analyzes in detail how several areas of constitutional doctrine reflect autonomy values. These areas of constitutional doctrine include the substantive due process right of privacy/autonomy; the First Amendment rights


². See Winick, Right to Refuse, supra note 1, at 90-101 (examining balancing of interests that occurs in adjudicating patients' rights to refuse treatment); Bruce J. Winick, Restructuring Competency to Stand Trial, 32 UCLA L. REV. 921, 985 (1985) (analyzing balancing of interests underlying competency to stand trial doctrine); Note, Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1201-02 (1974) (analyzing balancing of interests underlying civil commitment doctrine).

³. See, e.g., Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 624-49 (1982) (defending ad hoc paternalistic interventions in cases in which intersubjectivity produces in actor a strong intuition that beneficiary's choices are based on some form of false consciousness and are in fact harmful, and also justifying instances of paternalism in contract and tort law); Martha Minow, Feminist Reason: Getting It and Losing It, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 357, 358 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) ("[T]he assumptions of autonomous individualism behind American law, economic and political theory, and bureaucratic practices rests on a picture of public and independent man rather than private—and often dependent, or interconnected—woman."); Robin West, Jurisprudence and Gender, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, supra, at 210-34 (criticizing autonomy as male-oriented and inconsistent with women's essential communitarian nature).
Section III of the Article conducts a therapeutic jurisprudence analysis\(^4\) of autonomy and suggests that allowing individuals to make voluntary choices in matters vitally affecting them is developmentally beneficial and may be essential to their psychological well-being. This section also examines principles of cognitive and social psychology that suggest two important propositions that support our deference to autonomy: (1) self-determination enhances individuals' ability to set and achieve their goals effectively; and (2) the alternative—government compulsion of behavior thought to be beneficial—does not work as well.

Section IV of the Article then examines the implications of the political and psychological value of choice in a number of important mental health law contexts. This section analyzes the concept of competency, including competency to make treatment and hospitalization decisions and competency to stand trial in the criminal process. This section also examines the presumption in favor of competency, recently questioned by the Supreme Court in \textit{Zinermon v. Burch},\(^5\) and limitations on the states' \textit{pares patriae} power to interfere with individual choice.

\section*{II. Autonomy in Legal and Political Theory}

\subsection*{A. Philosophical Foundations}

Respect for individual autonomy is deeply rooted in American law. The theory of therapeutic jurisprudence suggests the need for study of the therapeutic implications of various legal rules and practices. This theory seeks to focus attention on an often neglected ingredient in the calculus necessary for performing a sensible policy analysis of mental health law and practice—the therapeutic dimension—and calls for its systematic empirical examination. To identify the therapeutic dimension as a significant consideration is not, of course, intended to suggest that it should trump other considerations. There may well be countervailing normative considerations that outweigh the therapeutic consequences of a particular rule, and therapeutic jurisprudence is not a method of determining which consideration should predominate in decision-making. Its mission is merely to raise questions that call for a more complete analysis of the relevant considerations.


\(^4\) The theory of therapeutic jurisprudence suggests the need for study of the therapeutic implications of various legal rules and practices. This theory seeks to focus attention on an often neglected ingredient in the calculus necessary for performing a sensible policy analysis of mental health law and practice—the therapeutic dimension—and calls for its systematic empirical examination. To identify the therapeutic dimension as a significant consideration is not, of course, intended to suggest that it should trump other considerations. There may well be countervailing normative considerations that outweigh the therapeutic consequences of a particular rule, and therapeutic jurisprudence is not a method of determining which consideration should predominate in decision-making. Its mission is merely to raise questions that call for a more complete analysis of the relevant considerations.

can constitutional history and tradition. The Constitution’s framers were heavily influenced by Enlightenment views of popular sovereignty and limited government. For John Locke, the ideological father of the American Revolution, liberty was freedom from restraint, and the exercise of coercive power by the sovereign was always suspect. The function of the law, in Locke’s view, was to protect individual liberty from restraint by government or others. For Locke, the “end of law” was “not to abolish or restrain, but to preserve and enlarge freedom.” As noted by Isaiah Berlin, a central principle in Locke’s thinking was that

there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred.

This principle was reflected in the writings of Thomas Jefferson, the drafter of the Declaration of Independence. Jefferson’s case for colonial grievances against the British Crown was based


7. See Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 5-6, 9-12, 39, 259 (1990); see also John P. Roche, Courts and Rights 9-10 (1961) (noting Locke’s “enormous impact” on colonial political thought); Gordon S. Wood, The Creation of the American Republic 1776-1787, at 14, 283-84 (1969) (noting that Locke’s social compact concept became increasingly significant after 1776). The ideological origins of the American Revolution also included the Scottish “moral sense” philosophers, whose thinking was fully consistent with the liberalism of Locke. See Gary Wills, Inventing America (1978) (discussing the relationship between Locke’s ideology and moral sense philosophy and concluding that Locke’s ideology influenced moral sense philosophers).


not merely on commercial and political injustice, but also on the natural rights of Englishmen. Jefferson regarded these rights as inherent in the individual and irrevocable, and as rights that the King would not have dared to transgress in England. In the Declaration of Independence, Jefferson expanded this notion into a ringing call for freedom for all people. The Declaration was revolutionary, both as a formal document of rebellion and as a stirring defense of unconditional human liberty. People were to be free, according to Jefferson, not only because they so desired or because tyranny was unjust. They were to be free because, in Jefferson's view, they were in fact free under the laws of nature.

Jefferson regarded human rights as an indissoluble birthright, given by the Creator and therefore inalienable. When Jefferson emphasized the rights to "life, liberty, and the pursuit of happiness" among those "inalienable rights" with which all persons are endowed, he referred to a right that individuals had against the government to pursue their own ends in their own ways. Jefferson reiterated this ideal in his first Inaugural Address, calling for "a wise and frugal Government, which shall restrain men from injuring one another, [but] shall leave them otherwise free to regulate their own pursuits of industry and improvement." To secure this right of personal autonomy, among other "blessings of liberty," the Colonists ordained and established the Constitution.

Individual autonomy was thus a primary value in the revolutionary idealism that led to colonial independence. "Don't tread on me" proclaimed the most famous colonial banner, and Patrick Henry's demand—"Give me liberty or give me death"—became a rallying cry for independence. Free of the yoke of colonial oppression, those who won our independence set about the task of creating a governmental structure in which individual liberty would be protected against government tyranny. A central government was needed that was stronger than the one contemplated by the Articles of Confederation under which the thirteen colo-

11. See id. at 22-25.
12. See id. at 41.
13. See id. at 9, 25-27.
15. Id.
17. See U.S. Const. pmbl.
nies originally had banded together. Accordingly, those wise framers of the basic charter of our government assembled at a constitutional convention in Philadelphia. They rejected a conception of government in which power flowed from the sovereign. This was to be a government in which the people were sovereign, one founded by “[w]e the people,”18 in which the colonies ceded power by explicit delegation to the new government, but retained and reserved those powers not granted.

In the colonial debates on the ratification of the Constitution, the absence of a Bill of Rights protecting individual liberty from infringement by the new federal government became a frequently voiced criticism of the new charter.19 Indeed, five of the eleven colonies that ratified the Constitution by early 1789 proposed amendments guaranteeing individual liberty against encroachment by the federal government,20 and, in 1791, the first ten amendments, collectively known as the Bill of Rights, were adopted.21 These amendments were designed to safeguard personal freedom from interference by the newly formed national government.22

The First Amendment protected liberty of conscience, expression, and political freedom by denying Congress the power to prohibit the “free exercise” of religion or to abridge “the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.”23 The Fourth Amendment, by prohibiting unreasonable searches and seizures,24 protected the privacy of the home and the security of the person. This amendment allowed individ-

18. Id.
19. See, e.g., Richard Henry Lee, Letter from the Federal Farmer to the Republican (Oct. 9, 1787), in Adler, supra note 6, at 206.
23. U.S. Const. amend. I.
24. U.S. Const. amend. IV. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Id.
uals freedom to control who entered their private domains\textsuperscript{25} and protected "expectations of privacy," that is, "the individual's expectations that in certain places and at certain times he has 'the right to be let alone.'"\textsuperscript{26} The Fifth Amendment protected against governmental deprivations of liberty without "due process of law"\textsuperscript{27} and, in the criminal context, protected individuals' freedom from compulsory self-incrimination, thereby reserving to the individual a private enclave free from governmental intrusion.\textsuperscript{28} The Sixth Amendment provided additional protections to criminal defendants by affording them rights to counsel of their own choosing, to compulsory process to subpoena witnesses on their behalf, to confront witnesses against them, and to a jury trial.\textsuperscript{29} These Sixth Amendment rights provide individuals with substantial autonomy in presenting their defense. The Ninth and Tenth Amendments made it clear that the newly created national government was a government of limited authority by providing that the states and the people reserved and retained all powers not delegated to the national government by the Constitution.\textsuperscript{30}

\textsuperscript{25} In 1886, the Supreme Court recognized that the Fourth Amendment was an essential protection of personal security and privacy. See Boyd v. United States, 116 U.S. 616, 626 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . . "); id. at 630 (quoting Lord Camden's opinion in Entick v. Carrington, 19 Howell St. Tr. 1029 (1765) that referred to the "indefeasible right of personal security").

\textsuperscript{26} Winston v. Lee, 470 U.S. 753, 758-59 (1985) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

\textsuperscript{27} U.S. CONST. amend. V. The Fourteenth Amendment, which was adopted in 1868, imposes a parallel due process requirement on the states. See U.S. CONST. amend. XIV. For an extensive discussion of the Supreme Court's application of the Due Process Clause, see infra notes 44-155 and accompanying text.

\textsuperscript{28} See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) ("It reflects many of our fundamental values and most noble aspirations: . . . our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.").

\textsuperscript{29} U.S. CONST. amend. VI. For further discussion of the Sixth Amendment, see infra notes 194-207 and accompanying text.

\textsuperscript{30} See U.S. CONST. amends. IX, X. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. For general discussions of the Ninth Amendment, see John Hart Ely, Democracy and Distrust 34-38 (1980); Raoul Berger, The Ninth Amendment, 66 Cornell L. Rev. 1, 2-3, 14, 20 (1980); Russell L. Caplan, The History and Meaning of
Individual autonomy is thus a value that infuses the Constitution. Liberty was to be a way of life, safeguarded from governmental intrusion. In addition, respect for individual autonomy is a central principle of much of our ethical and political theory. The notion of individual autonomy is at the core of two major ethical traditions in modern Western philosophy: consequentialist theories, such as the utilitarianism of Jeremy Bentham and John Stuart Mill, and deontological theories, such as those of Immanuel Kant.31

John Stuart Mill's essay, On Liberty,32 one of the most influential defenses of individual freedom in the English language, was published in 1859. This was just nine years before the adoption of the Fourteenth Amendment, of which the Due Process Clause ultimately became the most important repository of constitutional protection for individual autonomy. Mill regarded all governmental restraint on individual choice as an evil. "[L]eaving people to themselves is always better, caeteris paribus, than controlling

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them." The central premise of Mill's work, the "harm principle," is that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection." Mill recognized the government's police power interest in protecting the public health, safety, and welfare, but argued that this interest in protecting the community marks the outer boundary of governmental authority over the individual. In Mill's view, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." With few exceptions, Mill would regard paternalistic interventions to be beyond the government's authority. Mill argued that the individual's "own good, either physical or moral, is not a sufficient warrant" for governmental intrusion.

Instead of relying upon the natural rights thinking so prominent in Locke and Jefferson, Mill grounded his broad defense of autonomy on the utilitarianism of Jeremy Bentham, the theory that defines moral good in terms of the greatest happiness for the

33. Id. at 97. *Caeteris paribus* translates roughly to "all things being equal."
34. Id. at 9.
35. Id.
36. Mill would permit the state to interfere with an individual's liberty in order to protect the individual from ignorance when, because of the individual's lack of information or misinformation, it appears that the actions that the individual is about to take do not correspond to those that would have been taken had the individual been enlightened. Thus, Mill wrote:

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. *Id.* at 97-98. However, Mill recognized that the appearance that the person was acting out of ignorance might be mistaken and that the person might actually desire to walk off the bridge for reasons that seem good to him. *Id.* Mill argued that if the person is fully warned of the danger, and wished to proceed anyway, his choice should be respected. *Id.* The officer's intrusion on the person's liberty in order to warn him of the danger would be justified, but not necessarily a further interference with his actions. *Id.*

Mill also allowed a second category of cases in which intrusion upon individual autonomy would be justified. Mill illustrated this category with the example of an individual who wishes to sell himself into slavery. When the individual sells himself into slavery, "he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification for allowing him to dispose of himself." *Id.* at 104. Mill, in effect, viewed the individual as unable to alienate what Mill regarded as inalienable rights. "The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom." *Id.* Mill's "slave" exception is thus a narrow one and was regarded by him as such. See *id.*

37. Id. at 9.
greatest number. Mill believed that governmental interference with individual choice would, on the whole, produce more harm than would leaving individuals to make their own choices, even if some individuals' choices proved imprudent. In Mill's opinion, the state's imposition on the individual of its view of the individual's own good would ultimately be self-defeating, even if the state was benevolently motivated. Mill felt that because the development of the individual's basic faculties of choice and reasoning are prerequisites to self-fulfillment, the individual's ability to engage in autonomous decisionmaking is essential to attainment of the individual's own good. In addition, competent adults know their own interests, abilities, and natural preferences better than the government and are thus far better able to direct their own affairs and chart their own destiny. According to Mill, an individual's "voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it." Thus, the individual's own good is best accomplished by allowing the individual to select his or her own goals and the best methods of achieving them. Because an individual, in Mill's view, is best suited to determine what is good for him or her, the policy of respecting individual autonomy, even though it might in some instances produce unwise choices, is most likely to promote the individual's best interests and achieve the individual's highest potential.

Mill's consequentialist justification for autonomy is limited by the empirical assertion that a policy of respecting individual autonomy would ultimately maximize the individual's and society's well-being. However, even if a policy of deference to self-determination does not increase personal and societal utility, such a policy can be defended on the premise that respect for an individual's autonomy is a basic moral obligation. Western moral tradition posits a sphere of autonomous individual sovereignty based on a fundamental conception of the individual as an autonomous agent worthy of respect. Immanuel Kant's moral and political philosophy, and systems derived from it, are premised on treating the individual as an autonomous, rational decisionmaker able to

40. Id. at 104.
reason and make choices. In this conception, morality dictates that the individual be treated as an autonomous person able to engage in rational reflection about rules. Kant’s theory asserts that individuals must be treated as persons capable of rational choices, as ends in themselves, rather than merely as a means to the achievement of others’ ends. According to this view, there is a natural, inalienable right to be treated as a person, as one whose individual autonomy is respected. It would therefore be wrong for others, including the state, to attempt to choose what is a fitting life for the individual; rather, individuals must be left free to make important choices for themselves.

B. Constitutional Protection for Autonomy

1. Substantive Due Process Protection of Personal Choice in Matters Vitally Affecting the Individual

a. The Development of Substantive Due Process Protection for Self-Determination

These principles of individual autonomy were absorbed into American legal theory and ultimately constitutionalized in the doctrine of substantive due process. The Due Process Clause of the Fifth Amendment, which prohibits the federal government from depriving any person of life, liberty or property without “due process of law,” was originally thought of as providing procedural protections only. However, the concept of due pro-

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41. See Kant, supra note 31, at 59-67 (viewing autonomy as basis of morality and concluding that all rational beings are endowed with free will); see also Dworkin, supra note 31, at 3-33; Feinberg, Harm to Self, supra note 31, at 15-16, 93; Rawls, supra note 31, at 513-20 (concluding that “a well ordered society affirms the autonomy of persons”); Richards, supra note 31, at 79; Wolff, supra note 31, at 14; Morris, supra note 31, at 483.

42. Kant, supra note 31, at 59-67

43. See, e.g., Macklin & Sherwin, supra note 31, at 439 (concluding that each person’s inherent autonomy dictates that he or she be treated with dignity and respect); see also Hill, supra note 31, at 171 (arguing that person’s inherent autonomy mandates greater equality between sexes); Kenneth L. Karst, Foreward: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 58 (1977) (concluding that “to be a person ... is to make responsible choices in controlling one’s destiny); Morris, supra note 31.

44. U.S. Const. amend. V.

45. See Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (noting that “despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments,” these clauses have been interpreted to have substantive content”); Moore v. City of E. Cleveland, 431 U.S. 494, 537 (1977) (White, J., dissenting) (declaring that “the substantive content of the Clause is suggested neither by its language nor by preconstitutional history”); Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856) (interpreting Due Process Clauses as having only procedural meaning); see also Edward S. Corwin,
cess gradually was expanded, particularly after the adoption of the Fourteenth Amendment in 1868, to protect substantive liberty and property interests from arbitrary governmental deprivation. Moreover, although the common law understanding of the term "liberty" within the Due Process Clause was limited to freedom from physical restraint, this concept was gradually ex-

The Twilight of the Supreme Court: A History of Our Constitutional Theory 95 (1934) (stating that "no one . . . had ever suggested that the term 'due process of law' had any other than its anciently established and self-evident meaning of correct procedure"); Ely, supra note 30, at 15, 18 (1980) (asserting that "there is simply no avoiding the fact that the word that follows 'due' is 'process'"); Learned Hand, The Bill of Rights 35-36 (1958) (noting that when Due Process Clause first appeared in Chapter III of 28th of Edward III, it "was regarded as the equivalent of the phrase 'per legem terrae,' which meant no more than customary legal procedure"); Robert McCloskey, The American Supreme Court 116 (1960) (stating that "the due process clause . . . had usually been interpreted as having only a procedural meaning"); Nowak et al., supra note 22, at 336 (noting that "the early American legal theorists' idea of due process focused on the procedural feature of the concept"); Benjamin R. Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court 26 (1942) (noting Due Process Clause was almost "universally" considered as "only a procedural guarantee"); Frank H. Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 95-102 (discussing antecedents of constitutional right to substantive due process); Charles G. Haines, Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations on Legislatures, 3 Tex. L. Rev. 1, 1 (1924) (examining early interpretations of right to due process of law); Walton H. Hamilton, The Path of Due Process of Law, in American Constitutional Law: Historical Essays 129, 132-33 (Leonard W. Levy ed., 1966) (same); Henkin, supra note 6, at 1412 (concluding that neither text nor history of Due Process Clause suggests a substantive component); Charles M. Hough, Due Process of Law—Today, 32 Harv. L. Rev. 218, 223-24 (1919) (interpreting due process rights as they existed prior to civil war); Michael J. Perry, Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 UCLA L. Rev. 689, 695 (1976) (concluding that it is "received wisdom" that original meaning of due process was solely procedural); John Paul Stevens, The Third Branch of Liberty, 41 U. Miami L. Rev. 277, 278 (1986) (observing that "the plain language of the due process clause seems to speak only of procedure").

46. The Fourteenth Amendment, among other things, provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.


48. See A.E. Dick Howard, The Road From Runnymede: Magna Carta and Constitutionalism in America 305-07 (1968) (noting due process of law was thought to "secure the individual from the arbitrary exercises of the powers of government"); Edward S. Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 373-74 (1911) (noting that due process of law prohibits legislature from passing "arbitrary" or "harsh" laws); Howard J. Gra-
panded to include a variety of economic and personal liberties.49

ham, Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860, 40 CAL. L. REV. 483, 486 (1952) (noting that Due Process Clause was originally intended to protect "persons" from restraints on "liberty" and that its framers "scarcely dreamed" that it would be used to overturn social or economic regulations); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 716 (1975) (discussing original judicial interpretations of due process as "natural-rights" constitutional theory); Wallace Mendelson, A Missing Link in the Evolution of Due Process, 10 VAND. L. REV. 125, 126 (1956) (asserting that "orthodox due process meant that government could not punish, or 'go against' a person except in a procedurally proper manner"); William E. Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 HARV. L. REV. 513, 525-66 (1974) (discussing importance of due process to antislavery jurisprudence as constitutional protection of "personal liberty" and "human rights"); Perry, supra note 45, at 695, 698-99 n.50 (noting that natural rights interpretations of word "liberty" in Fourteenth Amendment was key force in "development of substantive due process"); Stephen F. Williams, "Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions, 53 U. COLUMB. L. REV. 117, 118 (1981) (discussing evolution of interpretation of Due Process Clause from protection of essential civil rights to protection of "a broad range of liberties"). See generally JACOBUS TEN BROECK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) (tracing development of judicial interpretations of "liberty" interests protected by Due Process Clause).

49. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923). The Meyer Court stated:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. The Court's decision in Moore v. City of East Cleveland, also reflects the modern, broader interpretation of substantive due process rights. In Moore, the court examined the constitutionality of a local ordinance that effectively prohibited a grandmother from living with her grandson in the same dwelling unit. Moore v. City of E. Cleveland, 431 U.S. 494, 495-96 (1977). The Court noted that "[t]his Court has long recognized that freedom of personal choice in matters of... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id. at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)). The Court held that the ordinance violated the right to due process. Id. at 506.

Similarly, in Ingraham v. Wright, the court construed the Due Process Clause to provide rights beyond the right to be free from bodily restraint. In Ingraham, the court addressed the constitutionality of a Florida statute and regulations promulgated thereunder that permitted teachers to administer corporal punishment after consulting with the principal. Although the Court upheld the constitutionality of Florida's statute and regulations, the Court noted that "[t]he liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" Ingraham v. Wright, 430 U.S. 651, 673 (1977) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). Thus, the Court recognized that the Due Process Clause protects rights beyond the right to be free from bodily restraint. See Board of Regents v. Roth, 408 U.S.
The Supreme Court has construed the Due Process Clause of the Fourteenth Amendment not only to incorporate virtually all of the specific provisions of the Bill of Rights, but also to protect liberty interests not specifically enumerated in the Constitution. The Court has expressed the view that the Framers believed that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." As the Court has indicated, "[i]n a constitution for free people, there

564, 572 (1972) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract . . . ." (quoting dicta in Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

The freedom of contract referred to by the Court in Roth became a device by which a conservative Supreme Court, reflecting a nineteenth century conception of laissez-faire capitalism, invalidated repeated attempts by Congress and the state legislatures to enact social and economic legislation. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (invalidating as unconstitutional statute that prevented bakers from working more than sixty hours per week and ten hours per day), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For a general discussion of the Lochner doctrine, see Frank R. Strong, The Economic Philosophy of Lochner: Emergence, Embrasure, and Emasculation, 15 Ariz. L. Rev. 419 (1973). The Court has now disavowed the use of substantive due process to champion economic and property rights against social and economic legislation. See Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (observing that Lochner doctrine has long been discarded); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (same); Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952) (same); see also Strong, supra, at 449-54 (same).

However, the doctrine continues to have vitality in the area of noneconomic liberties. Gunther, supra note 22, at 406; Henkin, supra note 6, at 1427; Perry, supra note 45, at 704-06. For a discussion of the doctrine's continued vitality, see infra notes 58-155 and accompanying text.

50. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 148 (1968) ("declaring that many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause."); see also Gunther, supra note 22, at 405 (noting that "virtually all of the procedural requirements that govern federal criminal law enforcement" have been incorporated); Tribe, supra note 22, § 11-2, at 772-77 (collecting cases holding that certain protections of Bill of Rights are incorporated within Due Process Clause).

51. Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). See generally 3 Joseph Story, Commentaries on the Constitution of the United States 715-16 (1833) (explaining that the "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them"); Tribe, supra note 22, § 11-2, at 774-77. This broad conception of due process as extending to the protection of unenumerated rights is also supported by the text of the Ninth Amendment. See U.S. Const. amend. IX. For the relevant language of the Ninth Amendment, see supra note 30. The debates on ratification of the Constitution also support a broad interpretation of due process rights. See Ely, supra note 30, at 34-41; Levy, supra note 22, at 258, 282 (setting forth James Madison's arguments); David A.J. Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800, 840-42 (1986).
can be no doubt that the meaning of ‘liberty’ must be broad indeed."

Early recognition of the notion that substantive due process protects individual self-determination regarding important decisions came in Justice Bradley’s dissent in the Slaughter-House Cases, decided in 1873, five years after the Fourteenth Amendment’s adoption. Justice Bradley’s opinion suggested that due process protected the right of occupational choice, and could be invoked to attack as arbitrary a regulation of slaughterhouses that created a butchers’ monopoly in the city of New Orleans. In 1888, the Court accepted, in dicta, the notion that “the privilege of pursuing an ordinary calling or trade” is a protected liberty guaranteed by due process. The Supreme Court ultimately adopted in 1897 the principle that the term “liberty” in the Due Process Clause of the Fourteenth Amendment includes occupational choice in Allgeyer v. Louisiana. Such liberty, the Court held, included the individual’s right “to be free in the enjoyment of all his faculties,” including the right “to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation.”

Although the states may regulate occupational matters in the public interest, such as by adopting reasonable educational or experiential requirements or rules governing safety and health in the workplace, the Constitution leaves individuals substantially free

52. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).
53. 83 U.S. (16 Wall.) 36, 122 (1873); see also Butcher’s Union v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring) (“The right to follow any of the common occupations of life... is a large ingredient in the civil liberty of the citizen.”). By this time, Judge Cooley, the most influential constitutional scholar of the period, had written that “the liberty protected by due process included the right of the individual to choose his own employment.” THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 231 (1978 ed.).
55. 165 U.S. 578, 593 (1897); see also Truax v. Raich, 239 U.S. 33, 41 (1915) (concluding that individuals have “the right to work for a living in the common occupation of the community”).
56. Allgeyer, 165 U.S. at 589.
57. To comport with substantive due process, conditions or other qualifications imposed by occupational licensing schemes must bear a reasonable relationship to the competency of the individual to engage in the occupation in question. See, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (holding that state law requirement that bar applicants must be of good “moral character” is reasonably related to individual’s competency to serve as attorney; therefore, law comports with substantive due process); Douglas v. Noble, 261 U.S. 165, 168 (1923) (utilizing rational basis review and holding dentistry licensing scheme constitutional); Dent v. West Virginia, 129 U.S. 114, 123-24 (1889).
to choose the area of work in which they wish to engage, or indeed, to choose not to work at all. The notion that the state could require an individual to work in a particular field or in a particular job, at least absent a wartime draft, would be inconsistent with individuals’ basic right to chart their own destiny.

After Allgeyer, the Court gradually broadened the meaning and application of the term “liberty.” In 1900, the Court found that liberty included “the right of locomotion, the right to remove from one place to another, according to inclination.” Americans, unlike citizens of some other countries, may choose for themselves, without government intrusion, where to travel or to reside.

In the 1905 compulsory vaccination case, Jacobson v. Massachusetts, the Court recognized the existence of “a sphere within which the individual may assert the supremacy of his own will” against government interference. The Court recognized that the state’s police power interest in legislating to protect the public health, safety, and welfare could justify interfering with the individual’s sphere of autonomy, for instance, by acting to prevent the threat of epidemic. However, the Court implied that absent the assertion of such a weighty public interest, the individual’s will would be left free from governmental interference.

(utilizing rational basis review and holding medical licensing scheme constitutional).

59. See Zobel v. Williams, 457 U.S. 55, 65 (1982) (invalidating state distribution of public funds to citizens in varying amounts based upon length of residence within the state); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (invalidating, as penalty on right to travel, law requiring individuals to reside in state for one year before such individuals could vote); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (invalidating durational residency requirement for welfare as impermissible restriction on fundamental right to travel); Edwards v. California, 314 U.S. 160, 177 (1941) (invalidating California statute that criminalized act of knowingly bringing or assisting to bring nonresident “indigent” persons into California); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 35-36 (1867) (invalidating Nevada statute that imposed tax on railroad based upon each passenger railroad transported out of state); cf. Sosna v. Iowa, 419 U.S. 393 (1975) (upholding one-year residency requirement for divorce as not interfering with right to relocate from one state to another).

The Court has also recognized a liberty interest in the right to foreign travel. See Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964) (noting that “freedom of travel” is a constitutional liberty); Kent v. Dulles 357 U.S. 116, 125-26 (1958) (stating in dicta that “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment”).

60. 197 U.S. 11 (1905).
61. Id. at 29.
62. Id.
Although control over one's own bodily integrity, an issue raised in the compulsory vaccination case, is not absolute, it is presumptively protected by the Constitution. Indeed, as early as 1891, the Supreme Court noted that this principle was deeply rooted in the common law, stating that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 63

In a more recent series of cases, the Court has recognized the "right to personal security" to be an "historic liberty interest" protected by due process. In these cases, the Court has found the right to be implicated by administering corporal punishment in school; 64 subjecting residents of mental retardation facilities to unsafe conditions; 65 imposing punitive incarceration without an adjudication of guilt; 66 transferring prisoners to a mental hospital where they would receive "[c]ompelled treatment in the form of mandatory behavior modification programs"; 67 and forcible administration of antipsychotic medication to a state prisoner and to a criminal defendant during trial. 68

b. Protection for Self-Determination in the Areas of Marriage, Family, and Procreation

An important area of individual freedom involves marriage and the family. In a variety of contexts, the Supreme Court has recognized that the Constitution allows the individual to decide whether or not to marry and that the Constitution prohibits the states from imposing unreasonable burdens on this decision. 69

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63. Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891). In its most recent treatment of the issue, the Court stated that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the due process clause from arbitrary governmental action." Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992).
64. Ingraham v. Wright, 430 U.S. 651, 674 (1977).
69. See, e.g., Turner v. Safley, 482 U.S. 78 (1987) (concluding that Missouri prison regulation, which permitted inmates to marry only if prison superintendent concluded that there were "compelling reasons" to do so, impermissibly interfered with inmates' constitutional right to marry); Zablocki v. Redhail, 434
Unlike in some countries, in which marriages may be arranged, in the United States the decision of whether to marry and the choice of a spouse are questions reserved for individual choice. In *Meyer v. Nebraska*[^70] and *Pierce v. Society of Sisters*,[^71] the forerunners of modern constitutional privacy doctrine, the Supreme Court recognized that the sphere of individual sovereignty protected by due process includes the right "to marry, establish a home and bring up children."[^72] The Court has held that due process protects a significant degree of parental authority over child rearing, including the right of parents "to direct the upbringing and education of [their] children."[^73]

These cases recognize a "private realm of family life which the state cannot enter."[^74] The Platonic notion that the state

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[^70]: 262 U.S. 390 (1923). In *Meyer*, a parochial school teacher challenged a Nebraska statute that made it unlawful to teach foreign languages to students who had not yet passed the eighth grade. *Id.* at 396-97. The teacher had been convicted for teaching German to a ten-year-old child. *Id.* at 396. The Court determined that the Nebraska statute violated the Fourteenth Amendment. *Id.* at 402. In its analysis, the Court noted that the "liberty" guaranteed by the Fourteenth Amendment encompassed the teacher's right to teach and the parents' right to engage a foreign language instructor for their children. *Id.* at 400. Accordingly, the Court found that the state had impermissibly interfered with those protected rights. *Id.* at 402.

[^71]: 268 U.S. 510 (1925). *Pierce* involved a challenge to Oregon's Compulsory Education Act, which required every person having custody of a school-aged child to send the child "to a public school for the period of time a public school shall be held" during the year. *Id.* at 530. A parochial school challenged the Act, asserting that the Act interfered with "the rights of parents to choose schools," "the right of the child to influence the parent's choice," and the right of teachers to engage in their profession. *Id.* at 532. The Court held that the Act impermissibly interfered with "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

[^72]: 268 U.S. at 534; *Meyer*, 262 U.S. at 399.

[^73]: 268 U.S. at 534; *see also* Parham v. J.R., 442 U.S. 584, 602 (1979).

[^74]: Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In *Prince*, Sarah Prince challenged a Massachusetts statute that made it unlawful for minors to sell "articles or merchandise" in public places and also made it unlawful for guardians of the minors to permit the minors to violate this law. *Id.* at 161. Prince, a Jehovah's Witness, was convicted for furnishing her nine-year-old niece with religious literature to sell on the streets. *Id.* at 160. Prince argued that the statute violated her "freedom of religion under the First Amendment" and her "parental right" under the Fourteenth Amendment. *Id.* at 164. Although the Court recognized a "private realm of family life which the state cannot enter;" the Court stated that the family "is not beyond regulation in the public interest."
could take over the raising of children in the interests of the republic\textsuperscript{75} is quite inconsistent with our constitutional vision. Although the state may require compulsory education of children, parents may choose to fulfill that requirement by placing their children in private schools,\textsuperscript{76} and the state may neither restrict what parents teach their children nor otherwise interfere with "the right of parents to engage in suitable education of their children."\textsuperscript{77} The state unquestionably has a compelling interest in protecting and promoting children's health and welfare, but in the absence of a showing that parents have neglected or abused their children, these matters are left by the Constitution primarily to the family, which is deemed presumptively best able to make decisions regarding children.\textsuperscript{78}

Although "privacy" is not mentioned in the Constitution, the Supreme Court has recognized that the Constitution protects a zone of personal privacy within which autonomous decisionmaking, at least in certain areas, is shielded from governmental intrusion absent compelling justification. In a number of significant cases, the Court has upheld a privacy interest "in independence in making certain kinds of important decisions."\textsuperscript{79} This notion of constitutional privacy was recognized by the Court in Justice Douglas' seminal opinion in \textit{Griswold v. Connecticut}.\textsuperscript{80} The Court, in striking down a state statutory ban on the sale of contraceptives, found a right of privacy, grounded in "penumbras, formed by emanations" from several constitutional provisions that protected the marital relationship.\textsuperscript{81}

Although Justice Douglas had previously developed the con-
cept of the right of privacy in his lectures and writings, the origins of the right can be traced to Justice Brandeis. In an influential article written many years before his appointment to the United States Supreme Court, Brandeis championed "the right to be let alone." Justice Brandeis later treated this right as constitutionally based, but it was not until Griswold that the Court recognized it as a constitutional principle. By holding that the Constitution left the decision whether to use contraceptives to those principally affected by that decision—the married couple—the Court in Griswold not only protected the privacy and intimacy of the marital bedroom, but also recognized the autonomy of the individual in an important area of personal life. In addition, the Court adopted strict scrutiny as the standard of review for deciding the constitutionality of statutory intrusions on this right of marital privacy. Using a standard applied in the context of the First Amendment freedom of association, the Court invoked the "familiar principle" that governmental purposes "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Eisenstadt v. Baird demonstrated that the Court's holding in

82. See William O. Douglas, The Right of the People 87-91 (1st ed. 1958) (discussing constitutional "right to be let alone" as derived from First, Fourth, and Fifth Amendments).
83. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890) (asserting that "the right to life has come to mean the right to enjoy life, . . . the right to be let alone").
84. See Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the Government, the right to be let alone, [which is] the most comprehensive of rights and the right most valued by civilized men.");
85. See Griswold, 381 U.S. at 484. In Griswold, the Court used the rubric of privacy and avoided speaking directly about substantive due process because substantive due process had become associated with the discredited Lochner doctrine. Graham Hughes, The Conscience of the Court 72 (1975); Helen Garfield, Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner, 61 Wash. L. Rev. 293, 306 & n.82 (1986); Henkin, supra note 6, at 1427-28; Perry, supra note 45, at 705. The right of privacy recognized by Griswold, however, is properly understood as an aspect of "liberty," protected by substantive due process. See Roe v. Wade, 410 U.S. 113, 153 (1973); id. at 168 (Stewart, J., concurring); see also Harrah Ind. Sch. Dist. v. Martin, 440 U.S. 194, 196 (1979); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Whalen v. Roe, 429 U.S. 589, 599 n.23 (1977); Kelley v. Johnson, 425 U.S. 238, 244 (1976).
86. Griswold, 381 U.S. at 485 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)). Under the Griswold standard, the government must employ the least restrictive means to accomplish its end. See id. Moreover, the end must be "compelling." See id. The Court also had previously applied such a stringent standard in Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964) (right to travel).
87. 405 U.S. 438 (1972).
Griswold involved individual autonomy rather than merely deference to the marital relationship. In Eisenstadt, the Court held that a statute permitting distribution of contraceptives to married but not unmarried persons was unconstitutional. The Court stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." It would be constitutionally unthinkable for a state to require its citizens to procreate, no matter how essential to the survival of the society this may be. Nor may a state, in order to deal with the problem of overpopulation, enforce a policy of "zero population growth" by placing limits on the number of children an individual may have. Although it may be permissible constitutionally for the state to provide education designed to achieve such policies, or even economic subsidies or disincentives, in our society the ultimate decision on these matters is left by the Constitution to the individual.

This principle of constitutional privacy has been applied to protect individual autonomy over a variety of matters touching on marriage and procreation. In Cleveland Board of Education v. LaFleur, the Court protected a woman's choice to have children from a governmental regulation that unduly penalized that choice by preventing her from working as a school teacher following the seventh month of her pregnancy. The Court invalidated mandatory maternity leave rules such as the Cleveland policy that conclusively presumed occupational inability without permitting the pregnant woman an opportunity to demonstrate her continued ability to work. In this decision, the Court reiterated that it had long recognized the principle that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."
c. Protection for Abortion Decisions

One of the most significant applications of the right to privacy/autonomy is the Supreme Court's 1973 decision in Roe v. Wade,92 declaring that the decision to have an abortion is within the protected zone of constitutional privacy.93 In Roe, the Court explicitly acknowledged that the right of privacy was protected by the Due Process Clause of the Fourteenth Amendment,94 and this right of privacy was deemed "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."95 The Court stressed the serious detrimental consequences that would result from denying this choice to the pregnant woman:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.96

Although these considerations led the Court to find that the right of privacy with regard to the abortion decision was "fundamental," the Court declined to treat it as an "absolute" right, noting that even fundamental constitutional rights must yield to governmental regulation in appropriate circumstances.97 As in Griswold, however, the Court employed a strict scrutiny standard of review. The Court insisted that to meet this standard, any regulation of the abortion decision must advance a "compelling state interest," and "must be narrowly drawn to express only the legitimate state interest at stake."98

92. 410 U.S. 113 (1973). Roe involved a class action challenge to a Texas abortion law that criminalized abortions unless the abortions were performed to save the mother's life. Id. at 117-18. The Court held that the Texas statute impermissibly infringed on a woman's "right of privacy." Id. at 153.
93. Id. at 153.
94. Id. (referring to "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action").
95. Id.
96. Id.
97. Id. at 155.
98. Id. at 155-56. In the Court's view, the fetus is not viable, and thus is not a "person" during the first trimester of pregnancy. See id. at 163. Further, during the first trimester, the medical risks of abortion to women are no greater
In *Thornburgh v. American College of Obstetricians & Gynecologists*, a highly politicized case concerning the abortion controversy, the Court re-endorsed the principle of privacy/autonomy, stating that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." Broadly reaffirming *Roe*, the Court explained the importance of the abortion decision to the woman involved:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.100

In a concurring opinion, Justice Stevens described the importance of the decision faced by the pregnant woman as "a difficult choice having serious and personal consequences of major importance to her own future." In a ringing endorsement of autonomy values, Justice Stevens noted that *Roe* stands for the presumption "that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound affect upon their destiny."102

As the composition of the Court changed in recent years, transforming the Court into a significantly more conservative institution than it had been in several generations, the *Roe* decision appeared to be in jeopardy of being overturned. The retirement of several of the Court's most liberal members and the interjection of anti-abortion politics into the nomination process made it appear possible that the new Court might deconstitutionalize the

than those of childbirth. *See id.* Based upon these premises, the Court concluded that the state interest cannot outweigh the woman's interest, and she therefore is free to make the abortion decision without state interference. *Id.* at 164. During the second trimester, when the medical risks of abortion increase, the state's interest in maternal health justifies some regulation of the abortion process, but the woman must still be left free to make the decision. *See id.* Finally, in the third trimester, when the child can live outside the mother's womb and thus becomes a "person" in the constitutional sense, the state's interest in the life of the child becomes sufficiently compelling to justify prohibiting abortion. *See id.* at 164-65.


100. *Id.*

101. *Id.* at 781 (Stevens, J., concurring).

102. *Id.* (Stevens, J., concurring).
abortion question, leaving it to state regulation. In cases decided
over the last several years, an increasing minority of the Justices
questioned Roe’s rejection of the fetus as a “person” within the
protection of the Constitution prior to viability.103 Because this
constitutional premise supported Roe’s conclusion that the state’s
interest in protecting the potential life of the fetus could not be
considered compelling prior to that time, this questioning
threatened to undermine the balance struck in Roe.

The much heralded reconsideration of Roe finally occurred in
Planned Parenthood v. Casey.104 In Casey, the Court reaffirmed the
central holding of Roe, but a majority of the Justices rejected Roe’s
trimester approach and recast its standard of scrutiny of statutes
regulating abortion. The Court’s decision was splintered into five
separate opinions. In an opinion that was unusual for the Court
in that it was co-authored by several Justices (Justices O’Connor,
Kennedy, and Souter), the Court abandoned the trimester frame-
work as a “rigid prohibition on all pre-viability regulation aimed
at the protection of fetal life.”105 This opinion rejected the no-
tion that the state’s interest in the life of the fetus prior to viability
was nonexistent; rather, it characterized the state’s interest in the
potential life of the fetus as being “substantial” and “profound”
throughout the period of pregnancy.106 Nonetheless, however
significant this state interest might be, in the view of Justices
O’Connor, Kennedy, and Souter, state regulation of the abortion
decision in the pre-viability phase that place an “undue burden”
on the woman’s free choice concerning the abortion decision are
unconstitutional.107

103. See Webster v. Reproductive Health Servs., 492 U.S. 490, 519 (1989)
(plurality opinion); Thornburgh, 476 U.S. at 795 (White, J., dissenting)
(“[T]he
state’s interest, if compelling after viability is equally compelling before viability.”); id. at 828 (O’Connor, J., dissenting); City of Akron v. Akron Ctr. for Re-
overruled in part by Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (plurality
opinion); cf. Roe, 410 U.S. at 171 (Rehnquist, J., dissenting).
105. Id. at 2818.
106. Id. at 2820-21.
107. Id. at 2820. “An undue burden exists, and therefore a provision of law
is invalid, if its purpose or effect is to place a substantial obstacle in the path of
the woman seeking an abortion before the fetus attains viability.” Id. at 2821.

To promote the States’s profound interest in potential life, throughout
pregnancy the State may take measures to ensure that the woman’s
choice is informed, and measures designed to advance this interest
would not be invalidated as long as their purpose is to persuade the
woman to choose childbirth over abortion. These measures must not
be an undue burden on the right.

Id. “As with any medical procedure, the State may enact regulations to further
These three Justices would replace Roe's trimester analysis with an undue burden test, but in their view, the adoption of this test "does not disturb the central holding of Roe," which they explicitly reaffirmed. Under that "central holding," a state "may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." In addition, this opinion reaffirmed Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Although disagreeing with the joint opinion's adoption of an undue burden test, Justices Blackmun and Stevens, in separate concurring opinions, joined in the joint opinion's reaffirmation of the central holding of Roe. Thus, in Casey, a majority of the

the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." Id. Although upholding a facial attack on the constitutionality of several of the Pennsylvania statute's regulations on the abortion decision, the opinion left open for future decision the question of whether the statute, as applied, unduly burdened the woman's choice.

108. Id. at 2821.
109. Id.
110. Id. (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)).
111. Id. at 2838 (Stevens, J., concurring in part and dissenting in part). "In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person." Id. at 2840 (Stevens, J., concurring in part and dissenting in part) (citations omitted). "The woman's constitutional interest also involves her freedom to decide matters of the highest privacy and the most personal nature." Id. (Stevens, J., concurring in part and dissenting in part) (citation omitted). "A woman considering abortion faces 'a difficult choice having serious and personal consequences of major importance to her own future — perhaps to the salvation of her own immortal soul.'" Id. (Stevens, J., concurring in part and dissenting in part) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring)).

Similarly, Justice Blackmun concluded that

decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

Id. at 2843 (Blackmun, J., concurring in part, concurring in judgment, and dissenting in part). "[P]ersonal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government." Id. at 2846 (Blackmun, J., concurring in part, concurring in judgment, and dissenting in part). "Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life." Id. (Blackmun, J., concur-
Justices re-endorsed constitutional protection for the pregnant woman's autonomy over the abortion decision. Four of the Justices, in two separately authored dissenting opinions, wanted to overrule Roe entirely.112

Although it was thought possible that the Court in Casey would overrule Roe, in fact a majority of five Justices broadly reaffirmed its central holding. The Court made it clear that, at bottom, Roe's result is dictated by our Constitution's commitment to the autonomy principle. In the view of a majority of the Justices, matters involving "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."113 In language that has broad implications for the constitutional protection of autonomy, these Justices stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."114

However significant a state's interest in protecting the potential life of the fetus, this interest may not override the woman's fundamental right to make the abortion decision for herself. The significance of the abortion decision to the woman who must bear and raise the child, and the personal health and economic consequences to her, make this most intimate and personal decision one that she is uniquely qualified to make and one that is best left

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112. Id. at 2855 (Rehnquist, C.J., concurring in judgment in part and dissenting in part); id. at 2873 (Scalia, J., concurring in judgment in part and dissenting in part). Chief Justice Rehnquist's dissent recognized that the woman's decision whether to have an abortion was a liberty interest, although not a fundamental liberty interest. Accordingly, in his view, the states may regulate the abortion decision in ways that are rationally related to any legitimate state interest. See id. at 2807 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). In Justice Scalia's view, by contrast, the woman's ability to choose abortion is not a liberty interest within the protection of the Constitution at all. See id. at 2874 (Scalia, J., concurring in judgment in part and dissenting in part).

113. Id. at 2807; see also id. at 2838 (Stevens, J., concurring in part and dissenting in part); id. at 2844 (Blackmun, J., concurring in part, concurring in judgment, and dissenting in part).

114. Id. at 2807.
to her if we are to be consistent in our constitutional commitment to individual autonomy. Even though protection of the potential life of the fetus may be a substantial state interest, it inevitably clashes with the woman's freedom to control her body and her own future. These interests simply cannot be reconciled, and on balance, the woman's fundamental right to determine the course of her very existence must predominate over the interests of the fetus that, prior to viability, lacks the capacity for independent existence.115

Constitutionally, the state may attempt to influence a woman's decision or to encourage her not to have an abortion,116 but the decision should ultimately rest with the woman, the person most vitally affected. Even Chief Justice Rehnquist, long an opponent of the right to choose an abortion, acknowledged in his dissent in Roe that the state's interest in protecting the potential life of the fetus would not justify a statutory ban on abortion in which the life of the woman was in jeopardy.117 Being required to carry and bear an unwanted child would be so devastating to the woman compelled to do so, and would affect her life and that of the child so dramatically, that the balance should tilt in favor of the woman's right to choose even when the woman's life is not literally at risk. The state should not be able to impose the substantial burdens of unwanted pregnancy and childbirth upon a woman, making her body an instrument of social policy.

The state cannot subject an individual to a surgical procedure that would remove a vital organ for the purpose of transplanting the organ into the body of another citizen who needed it

115. See Ruth B. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 385 (1985) (asserting that abortion decision involves "a woman's autonomous charge of her full life's course"); Karst, supra note 43, at 58 (stating that abortion decision involves "a right to take responsibility for choosing one's own future").

116. The Supreme Court has stated:
There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

117. Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). The wisdom (if not the constitutionality) of the state's attempting to influence the abortion decision, through, for example, the denial of Medicaid funding, may be seriously questioned.
to live and is deemed more worthy by the state. For example, even though individuals can survive with only one of their two kidneys, the state cannot mandate the removal of an individual’s kidney to save the life of another. Similarly, as between the state and the individual, the abortion choice should be left to the woman, whose body and future life are dramatically affected by this most personal and intimate of decisions. It is therefore appropriate that this important area of individual autonomy was left substantially undisturbed by the Supreme Court in *Casey*.

d. Protection for Health Care Decisionmaking

The Supreme Court has only recently recognized that substantive due process protects the right to make personal health decisions. Like other constitutionally protected autonomy

118. The question of whether a fetus is a “person” is not, of course, a scientific question. Rather, it is a metaphysical one. It turns more on conceptions of morality or religion than on fact. Although courts may not be well-equipped to determine such moral or religious questions, neither are legislatures. Like matters of morality and religion generally, the Constitution should be construed to leave the abortion question to the individual. The First Amendment, by prohibiting government from establishing any religion, disqualifies religious objectives from serving as justifications for intrusions on liberty. *See* U.S. Const. amend. I. Secular objectives, of course, may often overlap with religious ones, in which case a legislative attempt to effectuate such a secular purpose will not offend the Establishment Clause. *See*, *e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1960) (holding that statute prohibiting retail sales on Sundays did not constitute law “respecting an establishment of religion”); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1960) (same). However, to the extent that a state attempts to ban abortion based on an essentially religious conception of when life begins, this ban would infringe upon the First Amendment’s principle of separation of church and state. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2839 (1999) (Stevens, J., concurring in part and dissenting in part) (declaring that “consistent with the First Amendment the State may not promote a theological or sectarian interest”). The difficult choices faced by a pregnant woman in deciding whether to have an abortion are essentially a matter of conscience reserved by the Constitution to the individual. In our system, government-imposed orthodoxy in matters of morals and religion is constitutionally intolerable. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1944) (holding that state may not compel public school students to salute flag).

rights, the right to self-determination in matters of personal health is deeply rooted in our constitutional traditions. The right is an outgrowth of the “historic liberty interest” in “personal security” and bodily integrity.\textsuperscript{120} In the 1905 case of \textit{Jacobson v. Massachusetts}, although the Court upheld compulsory vaccination for smallpox against a claim that it violated the liberty of every person “to care for his own body and health in such way as to him seems best,”\textsuperscript{121} the Court treated the claim seriously. The Court considered the vaccination to be routine and noted that no claim had been made that it presented any risk to the petitioner’s health. The Court suggested that the result might be different if the vaccination would seriously impair the petitioner’s health.\textsuperscript{122} Absent any evidence that the individual’s health would be adversely affected by the vaccination, the state’s police power interest in protecting the public health from the spread of a highly contagious disease justified interference in what otherwise would be an area preserved by the Constitution for individual self-determination.

The common law origins of this right of the individual to ex-

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\item \textsuperscript{120} See \textit{Ingraham v. Wright}, 430 U.S. 651, 673 (1977) (noting that “among the historic liberties so protected was a right to be free from . . . unjustified intrusions on personal security”); \textit{Union Pac. Ry. Co. v. Botsford}, 141 U.S. 250, 252 (1891) (holding that court may not order plaintiff to submit to pretrial surgical examination); cf. \textit{Winston v. Lee}, 470 U.S. 753 (1985) (holding that nonconsensual surgical removal of bullet would violate Fourth Amendment’s ban on unreasonable searches and seizures).
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\item 121. 197 U.S. 11, 26 (1905); For further discussion of \textit{Jacobson}, see \textit{supra} text accompanying notes 60-62.
\item 122. \textit{Jacobson}, 197 U.S. at 29. \textit{Compare Schmerber v. California}, 384 U.S. 757, 771 (1966) (finding compulsory blood test of suspected intoxicated driver to be “routine” and to involve “virtually no risk, trauma, or pain” and thus upholding compulsory blood test against Fourth Amendment attack) \textit{with Winston}, 470 U.S. at 761, 765-66 (finding surgical removal of bullet from criminal suspect’s body for use as evidence to be “severe” intrusion presenting disputed “medical risks” and thus holding that such procedure would violate Fourth Amendment).
\end{enumerate}
exercise control over health care have been recognized frequently. Almost eighty years ago, Justice Cardozo, then a judge serving on the New York Court of Appeals, memorialized the right to make personal health decisions in language that has been quoted often: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages." Case law developing the informed consent doctrine as a device to protect the patient's right to refuse treatment has grounded the right in the common law's deference to individual autonomy:

Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be master of his own body and he may, if he be of sound mind, expressly prohibit the performance of life saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient.

Basic principles of tort law have embraced this principle of informed consent in order to vindicate a patient's control over decisions affecting his or her own health. Absent an emergency or incompetency, the individual must voluntarily consent

123. Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914). In Schloendorff, a surgeon was held liable for assault when the surgeon removed a fibroid tumor from the patient while the patient was unconscious. Id. In another state court opinion from this period, the Oklahoma Supreme Court referred to "the free citizen's first and greatest right . . . —the right to the inviolability of his person," and therefore forbade a physician "to violate without permission the bodily integrity of his patient." Rolater v. Strain, 137 P. 96, 97 (Okla. 1913).

124. Natanson v. Kline, 350 P.2d, 1093, 1104 (Kan. 1960); see also Ericson v. Dilgard, 252 N.Y.S.2d 705, 706 (Sup. Ct. 1962) ("[I]t is the individual who is the subject of a medical decision who has the final say and . . . this must necessarily be so in a system of government which gives the greatest possible protection to the individual in furtherance of his own desires.").

before medical treatment may be administered, and the physician is required to provide sufficient information so that the choice is informed. "[T]rue consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." 126 The "root premise" of the informed consent doctrine is the "concept, fundamental in American jurisprudence, that the individual may control what shall be done with his own body." 127 Unless incompetent, the patient's medical decisions must be respected, no matter how foolish these decisions are thought to be. 128

e. The "Right to Die"

An application of the right to make personal health decisions that has received much recent attention is what has become known as the "right to die." In In re Quinlan, 129 the New Jersey Supreme Court approved the appointment of a parent as guard-

127. Id.
128. See Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452, 1455 (D.D.C. 1985) (holding that competent adult has right to have life-support system removed even though death will likely result); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (Dist. Ct. App. 1986) (holding that mentally competent patient has right to refuse nasogastric tube); In re Estate of Brooks, 205 N.E.2d 435, 442 (Ill. 1965) (concluding that, absent a clear and present danger, patient's refusal to take blood transfusion must be respected even if unwise); Lane v. Candura, 376 N.E.2d 1232, 1235-36 (Mass. App. Ct. 1978) (concluding that irrationality of patient's decision does not justify conclusion that patient is legally incompetent); Downer v. Veilleux, 322 A.2d 82, 91 (Me. 1974) (acknowledging competent adult's right to refuse treatment or cure, however unwise adult's sense of values may be to others); In re Conroy, 486 A.2d 1209, 1225 (N.J. 1985) (noting that patient's right to informed consent must be respected even when it conflicts with values of medical profession as whole); In re Quackenbush, 383 A.2d 785, 789 (Morris County Ct. 1978) (holding that mentally competent individual has right to refuse operation involving extensive bodily invasion even absent dim prognosis); New York City Health & Hosps. Corp. v. Stein, 335 N.Y.S.2d 461, 465 (Sup. Ct. 1972) (concluding that patient not adjudicated incompetent may refuse recommended ECT treatment); In re Yetter, 62 Pa. D. & C.2d 619, 623 (1973) (concluding that constitutional right of privacy includes right of mature, competent adult to refuse to accept medical recommendations that may prolong individual's life); see also SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 340 (3d ed. 1985); FOWLER v. HARPER ET AL., THE LAW OF TORTS § 17.1, at 562 (2d ed. 1986); President's Comm'n for the Study of Ethical Prob's. in Med. & Biomed. & Behav. Res., Deciding to Forego Life Sustaining Treatment: Ethical, Medical and Legal Issues in Treatment Decisions 40 (1983) [hereinafter DECIDING TO FOREGO LIFE SUSTAINING TREATMENT]; Petty, A Problem with Refusing Certain Forms of Psychiatric Treatment, 20 Soc. Sci. Med. 645, 646 (1985); Note, supra note 125, at 1661.
ian for a comatose adult existing in a chronic vegetative state and recognized the parent's ability to discontinue life-sustaining treatment for the patient. The court relied on *Roe v. Wade* to support a constitutional right of privacy extending to personal health decisions, including the decision to discontinue life-support systems. The court reasoned that in *Roe*, the Constitution was read to "interdict judicial intrusion into many aspects of personal decision." In *Quinlan*, the right of privacy was found to be "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions." Even though the patient in *Quinlan* was "grossly incompetent," the court found that the Constitution protected her "independent right of choice," which during her incompetency, her father as guardian could exercise on her behalf.

*Quinlan* has been widely followed in cases recognizing a constitutional right to refuse treatment, including life-sustaining treatment, on the part of both competent and incompetent patients. Citing a number of these state court decisions that up-

130. Id. at 663.
131. Id.
132. Id. at 664. The patient, Karen Quinlan, was in an unresponsive comatose condition with no cognitive function. Id.
133. Id.
held the right of the individual to make personal medical decisions, the Supreme Court, in a 1990 decision, *Cruzan v. Director, Missouri Department of Health*, expressed its "assumption" that "a competent person has a liberty interest under the Due Process Clause in refusing medical treatment." The *Cruzan* Court recognized that this liberty interest could be exercised by surrogate decisionmakers, acting on the patient's behalf during a period of incompetency, and could be invoked even to discontinue life-sustaining procedures or nutrition, as long as the individual, while competent, clearly expressed a wish that this be done. In a concurring opinion, Justice O'Connor noted that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination."

f. Defining the Limits of Substantive Due Process Protection for Autonomous Decisionmaking

In a number of areas, therefore, by invoking either the rubric of "privacy" or the concept of "liberty," the Supreme Court has recognized that due process protects a zone of autonomous decisionmaking in matters that are personal and intimate and of extreme importance to the individual—those matters dealing with marriage, procreation, contraception, abortion, family relationships, child rearing and education, occupation, residence, travel, and health. The Supreme Judicial Court of Massachusetts, in a broad defense of the autonomy principle in a right to die case, noted that the constitutional right to privacy "is an expression of

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135. *Id.* at 261 (1990). In *Cruzan*, the Court determined that it was constitutionally permissible for a state to require "clear and convincing evidence" of a patient's desires before terminating life-sustaining medical treatment. *Id.* at 283. The Missouri Supreme Court had rejected the request of parents of a comatose accident victim to withdraw artificial feeding and hydration because "there was no clear and convincing evidence of [the patient's] desire to have life-sustaining treatment withdrawn under such circumstances." *Id.* at 263. The United States Supreme Court determined that the Missouri Supreme Court's "clear and convincing evidence" requirement furthered the state's interest in preservation of human life and did not violate the patient's due process rights. *Id.* at 281.

136. *Id.* at 278-79.

137. *See id.* at 282.

138. *Id.* at 287 (O'Connor, J., concurring).
the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice. 139

How far does the sphere of personal autonomy extend? Clearly it cannot cover all individual choices, or for that matter, all choices regarded as important by the individual. Otherwise, given the burden on government of satisfying the rigorous strict scrutiny standard, a wide variety of governmental regulations would be invalid, and the role of the legislature in accommodating private interests and seeking to further the public health, safety, and welfare would be seriously compromised. Under constitutional theory, only “fundamental” constitutional rights are entitled to the protection of strict judicial scrutiny. Only those liberties so deeply rooted in our history and tradition that they are deemed to require special safeguarding by the judiciary against intrusion by the political branches of government will be given this extraordinary measure of constitutional protection. Otherwise, the Supreme Court, the members of which are insulated from political pressures by life tenure, 140 would usurp the essential role of the legislature in a democracy. 141 This role envisions that the legislature, as the representatives of the people, should shape social and economic policy for the society. Strict judicial scrutiny of the actions of the political branches of government must accordingly be reserved for special situations, such as the protection of minority rights against majoritarian influences and those fundamental liberties that the Constitution insulates from interference from the political process. 142

But which liberties are deemed “fundamental”? In holding

139. Superintendent of Belchertown Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977) (holding that sixty-seven year old patient with mental retardation retains right to refuse chemotherapy).

140. U.S. Const. art. III.

141. The Court, in Griswold v. Connecticut, while greatly expanding the scope of substantive due process to encompass a new area of constitutional privacy, was careful to make clear that it could not play a role as “super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” Griswold v. Connecticut, 381 U.S. 471, 482 (1965). For further discussion of Griswold, see supra notes 80-86 and accompanying text.

142. See Griswold, 381 U.S. at 484; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that legislation should be closely scrutinized when such legislation facially conflicts with an express constitutional prohibition, restricts the channels for political change, or disadvantages “discrete and insular minorities”).
that a prohibition on distributing contraceptives to minors violated the constitutional right of privacy, the Supreme Court in *Carey v. Population Services International* noted: "While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, . . . procreation, and child rearing and education . . .'."143

What do these categories have in common? What is it about decisionmaking in these areas—marriage, procreation, child rearing and education, as well as occupation, residence, travel, and health—that justifies the special protection of strict constitutional scrutiny? Some commentators have criticized the Court for offering "little assistance to one's understanding of what it is that makes all this a unit."144 Justice Stevens has attempted to identify the elements common to the members of this series, noting that they all deal with "the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition."145 These areas are all "personal and intimate,"146 having "serious and personal consequences of major importance."147

But apparently not all intimate decisions that are central to an individual's life will qualify. In a closely divided and controversial decision, the Supreme Court in *Bowers v. Hardwick* rejected the contention that the "personal and intimate" choice of sexual activity, at least when that choice is homosexual, is protected by constitutional privacy.148 In permitting the states to proscribe


146. Id. (Stevens, J., concurring).

147. Id. (Stevens, J., concurring).

148. Bowers v. Hardwick, 478 U.S. 186, 190 (1986). In *Bowers*, Hardwick challenged a Georgia statute that criminalized sodomy. *Id.* at 188. Hardwick had been convicted of violating the statute by committing sodomy in the bed-
consensual homosexual activity, the Court characterized those fundamental rights protected by constitutional privacy as "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." If the right in question fails to meet this standard, it will not qualify as a "fundamental" right, and government intrusion on the asserted right will not receive heightened scrutiny. The right in question may be a liberty interest within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments, but if it is not deemed "fundamental," the substantive protection afforded by those clauses will be limited.

Nonfundamental liberties will be constitutionally protected, but governmental intrusions on those liberties will be subjected only to minimal judicial scrutiny. The Court will review governmental action in such cases under the rational basis test, a flexible balancing test that is deferential to the role of the legislature in defining the public interest. Only in rare instances will the Court invalidate legislative action when it is applying the rational basis test. The legislature or its delegate may not ignore nonfundamental liberty interests altogether, but as long as governmental action bears a reasonable relation to a legitimate state interest, the majoritarian process may trump the individual's freedom to make choices in nonfundamental areas of liberty.

The Supreme Court's decision in Bowers, which placed the freedom to engage in consensual homosexual conduct in this latter category of minimal scrutiny, diminishes the autonomy principle. Matters of sexuality, provided such conduct is not performed


150. See id. at 186 (applying rational basis review to determine constitutionality of statute prohibiting sodomy); Kelly v. Johnson, 425 U.S. 238, 247-48 (1976) (applying rational basis review to determine constitutionality of police department policy regulating officers' hair length); Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (applying rational basis review to determine constitutionality of ordinance that prohibited certain unrelated persons from residing together); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (applying rational basis review to evaluate constitutionality of statute regulating interstate commerce in certain milk products); see also Thornburgh, 478 U.S. at 197 (White, J., dissenting) (arguing that freedom to choose to have abortion, although liberty interest protected by the Due Process Clause, is not "fundamental" interest and therefore should receive only minimal scrutiny).
publicly, are intimate and personal and are critical aspects of self-definition and self-expression. As long as the other person involved is a freely consenting adult, decisions about sexuality should be left to the individual. The Court’s decision in Bowers undoubtedly reflected the perception of a general public condemnation of homosexuality as immoral. The Court did not decide whether consensual heterosexual conduct is within the zone of constitutional privacy, although several of the Justices suggested that it is within the protected zone. As long as consenting adults are involved, what goes on in the privacy of the bedroom should be beyond governmental control.

Like the abortion controversy, the controversy concerning homosexuality raises essentially moral and religious questions. The Constitution should be read to place such essentially moral and religious matters beyond governmental control. Although religious doctrine or conventional morality may condemn certain sexual practices, these matters, when engaged in privately between consenting adults, should be left to the individual. In our system, government may not impose orthodoxy in matters of religion and morality. Although the government’s legitimate interest in protecting public health may justify some regulation of sexual practices—for example, to prevent the spread of sexually transmitted diseases—a total ban on certain sexual practices cannot be justified based on such health concerns. Those indi-

151. In a recent dissent in Planned Parenthood v. Casey, Justice Scalia recognized that autonomy over homosexual practices was difficult to distinguish from autonomy over the abortion decision. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in judgment in part and dissenting in part). Specifically, Justice Scalia reasoned that homosexual sodomy is an “intimate” and a “deep[ly] personal” decision involving “personal autonomy and bodily integrity,” as is the abortion decision. Id. at 2876 (Scalia, J., concurring in judgment in part and dissenting in part). Justice Scalia, of course, would find that the Constitution protects neither decision.

152. See Bowers, 478 U.S. at 197 (Powell, J., concurring); id. at 215-16 (Stevens, J., dissenting).


154. See West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1944); see also Planned Parenthood v. Casey, 112 S. Ct. 2791, 2839 (1992) (Stevens, J., concurring in part and dissenting in part) (“[I]n order to be legitimate, the State’s interest must be secular.”). For further discussion of Barnette, see infra notes 159 & 161 and accompanying text. For further discussion of Casey, see supra notes 104-18 and accompanying text.
individuals who may be harmed by these practices are primarily the sexual partners themselves, and as long as they are competent, consenting adults, protecting them from harm would appear to be an insufficient justification for banning such practices altogether. Moreover, the state should not be permitted to ban private sexual conduct in order to accomplish such objectives as protection of the morals of children, promotion of family values, or prevention of offenses to public sensibilities. Although a majority of our population may condemn homosexuality as immoral and contrary to religious doctrine, a significant minority reject such conceptions of morality and religion and prefer to engage in sexual practices that the majority may consider deviant. We are a pluralistic society that traditionally has celebrated our diversity. The majority, quite simply, should not be permitted to legislate morality or religion for a minority. *Bowers* is thus fundamentally inconsistent with our constitutional values and should be overruled. 155

In addition to the areas of autonomy discussed above, matters of individual appearance and lifestyle choices should also be considered within the area of constitutional protection. In *Kelly v. Johnson*, the Court rejected a police officer’s challenge to a police department policy that regulated officers’ hair length. *Kelly v. Johnson*, 425 U.S. 238 (1976). Specifically, the Court upheld the regulation’s constitutionality on the ground that it was reasonably related to the need to insure uniformity of appearance and foster the *esprit de corps* of the police force. *Id.* at 248. However, when government is not the employer, the question of how an individual dresses and other matters of personal appearance should be left to the individual.

Our history has reflected a great variety of hair and dress styles. Except in special contexts in which government has traditionally exercised control over these matters—such as in the military, in the prisons, in at least certain kinds of governmental employment and perhaps in the public school—these matters should be reserved for individual choice. How we wish to project our personal appearance is intimately involved with the development and expression of individual personality. It simply is inconsistent with our constitutional heritage for government to dictate what shall be orthodox in matters of dress and hair style.

Similarly, what we eat and how we enjoy ourselves recreationally are matters of individual choice. Government may regulate the production and sale of food in order to protect the public health, but whether an individual chooses to eat meat or to be a vegetarian is for the individual to decide. Although government may educate its citizens about the health risks of eating certain foods, for example, by warning them that fried foods are fattening and high in cholesterol, whether people decide to eat such foods or not is a matter of individual taste.

Similarly, the government may educate its citizens about the dangers of smoking and alcohol and regulate an individual’s right to perform such activities in public in order to protect the health and safety of others. However, whether to smoke or to drink is a matter of individual choice, at least for an adult.

For the same reasons, government may regulate hazardous recreational activities, but the decision whether to take up skydiving or skiing is left to the individual. Individual autonomy over these matters of personal appearance, taste, and lifestyle are an essential part of the freedom that being an American entails.
Between government and the individual, substantive due process carves out an area in which the individual is left substantively free to control important aspects of his or her own life. In a political system committed to individual liberty and to facilitating the pursuit of happiness, self-determination in important life choices is respected and presumptively protected against governmental intrusion. Any governmental interference with individual liberty must be justified. At a minimum, it may not be arbitrary and unreasonable. For infringement on fundamental liberties long honored by our history and tradition, the burden of justification must be high. This substantive protection of liberty has become an accepted part of the meaning and promise of "due process of law."

2. First Amendment Protection of Autonomy

The First Amendment provides an important measure of constitutional protection for autonomous decisionmaking in matters of thought, belief, religion, expression, access to information, participation in the political process, and association. Not only are these freedoms safeguarded by the First Amendment, but the freedoms the First Amendment protects are essential to the exercise of all freedoms. As Justice Cardozo put it, freedom of speech and thought are "the matrix, the indispensable condition, of nearly every other form of freedom." In his nonjudicial writings, Justice Cardozo reiterated this theme:

We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge, or none that is not illusionary. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget. . . . At the root of all liberty is the liberty to know.

The notion that freedom of speech and thought is a necessary condition for all liberty is also expressed in Justice Brandeis' celebrated concurring opinion in Whitney v. California:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . . They valued liberty both as an end and as


a means. They believed liberty to be the secret of happiness . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .

In a series of cases, the Supreme Court has protected the individual's freedom of thought and belief by invalidating laws that were designed to invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from official control." Government may, of course, attempt to educate or influence its citizens concerning a variety of matters, but decisionmaking must ultimately be left to the individual. In our society, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." As the Court has noted, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should


159. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1944) (holding that public school students may not be compelled to salute flag); accord Branti v. Finkel, 445 U.S. 507 (1980) (holding that newly-appointed public defender could not discharge assistant public defenders solely because of political beliefs); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that non-union employees need not pay service charge equivalent to amount of union members' dues, a portion of which would be spent on political activities with which nonunion employees disagreed); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that Jehovah's Witness may not be compelled to display state motto—"Live Free or Die"—on license plate); Elrod v. Burns, 427 U.S. 347 (1976) (holding that employers cannot discharge employees on basis of employees' political party affiliations); Stanley v. Georgia, 394 U.S. 557 (1969) (holding that statute prohibiting mere private possession of obscene material is unconstitutional); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that school may not prohibit students from quietly and passively displaying armbands to protest Vietnam War); see also Winick, The Right to Refuse, supra note 1, at 19-29 (1989) (discussing freedom to believe and freedom of thought).


161. Barnette, 319 U.S. at 642 (invalidating statute requiring students to salute flag); see also Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (invalidating state requirement that public officials declare belief in God as condition for holding office).
be shaped by his mind and his conscience rather than coerced by the State."\(^{162}\)

The First Amendment therefore provides an important measure of constitutional protection for individual autonomy. By protecting the "free exercise" of religion and prohibiting an "establishment of religion,"\(^{163}\) the First Amendment safeguards the rights of individuals to choose their own religion or no religion at all.\(^{164}\) The amendment "forestalls compulsion by law" in matters of religion and protects "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose."\(^{165}\)

The First Amendment's protection of freedom of speech allows the individual rather than the government to control the content and form of his or her communication to others. Even ideas deemed "offensive,"\(^{166}\) "loathsome,"\(^{167}\) "noxious,"\(^{168}\) or "immoral"\(^{169}\) are protected by the First Amendment. The First Amendment "is designed and intended to remove governmental restraints on public discussion, putting the decision as to what

\(^{162}\) Aboud, 431 U.S. at 234-35; see also Burns, 427 U.S. at 372.

\(^{163}\) U.S. Const. amend. I.

\(^{164}\) See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977) (holding that Jehovah's Witness may not be compelled to display state motto on license plate); Wisconsin v. Yoder, 406 U.S. 205 (1972) (application of compulsory school attendance law to Amish parents who refused to send children to public school after eighth grade in order to educate children at home violated First Amendment's protection of free exercise of religion); Torcaso, 367 U.S. at 488 (invalidating state requirement that public officials declare belief in God as condition for holding public office); Barnette, 319 U.S. at 624 (holding that students cannot be compelled to salute flag); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that statute prohibiting distribution of religious material violated First Amendment).

\(^{165}\) Cantwell, 310 U.S. at 303.


\(^{167}\) See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe ... "); Collins v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (holding that First Amendment protects Nazi Party's ideas).


\(^{169}\) Stanley v. Georgia, 394 U.S. 557, 565 n.8 (1969) (First and Fourteenth Amendments preclude states from criminalizing mere possession of obscene material in home).
views shall be voiced largely into the hands of each of us."¹⁷⁰ These matters are left to the individual "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."¹⁷¹ Not only does the First Amendment protect choice in what an individual may express, but it also allows the individual to choose what information and ideas he or she may wish to receive.¹⁷² Moreover, the First Amendment protects the individual's choice of persons or groups with whom to associate for the purpose of engaging in those activities protected by the amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.¹⁷³ The First Amendment freedom of associa-

¹⁷¹. Id.
¹⁷². See Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 7 (1986) (plurality opinion) (holding that company cannot be compelled to include messages with which company disagrees in its billing statements); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-04 (1982) (holding that public and press have constitutionally protected right of access to criminal trials); Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (concluding that First Amendment limits school board's ability to remove books from school libraries); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577-78 (1980) (plurality opinion) (holding that right of public and press to attend criminal trials is guaranteed under First and Fourteenth Amendments); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, 756-57 (1976) (holding that advertisement of prescription drug prices is within protection of First and Fourteenth Amendments); Procunier v. Martinez, 416 U.S. 396, 408 (1974) (holding that party corresponding with prisoner derives protection from First and Fourteenth Amendments against unjustified governmental interference with intended communication), overruled by Thornburgh v. Abbott, 490 U.S. 401 (1989); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (noting that Constitution protects right to receive information and ideas); Stanley, 394 U.S. at 564 (same); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (asserting that right to receive publications is fundamental personal right protected by Bill of Rights); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (holding that rights of freedom of speech and freedom of press include right to distribute and right to receive information); Martin v. City of Strutters, 319 U.S. 141, 143 (1943) (holding that rights of freedom of speech and freedom of press embrace right to distribute literature and right to receive it); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (holding that dissemination of information concerning facts of labor dispute is within area of free discussion guaranteed by Constitution). See generally Thomas I. Emerson, Legal Protection of the Right to Know, 1976 WASH. U. L.Q. 1.
¹⁷³. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984); NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) (concluding that First Amendment freedom of association protects blacks' right to engage in nonviolent boycott of white merchants); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (holding that ordinance limiting contributions to $250 contravenes freedom of association guaranteed by First Amendment); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) (holding that nonunion employees could not be compelled to pay service charge equivalent to that paid by union members as dues when portion of service charge would be spent on political
tion protects not only the right of an individual to associate with others in an organization of the individual's choice and the right to contribute to that organization, but also the right not to be compelled by the government to join an organization and the right not to financially support an organization's efforts to advance an ideological cause with which the individual disagrees. Similarly, the First Amendment protects not only the right of the individual to speak freely, but also "the right to refrain from speaking at all."

The First Amendment is therefore an important safeguard for individual self-determination. In significant areas of the individual's life—religion, morality, politics, and aesthetics—the First Amendment leaves decisionmaking to the individual, free from governmental intrusion. In addition, these First Amendment freedoms, and the Amendment's protection of access to information and ideas, facilitate the exercise of self-determination in all areas of the individual's life.

3. Fifth and Sixth Amendment Protection for Autonomous Decisionmaking in the Criminal Process

When an individual is accused of a crime, the Constitution protects the individual's right to determine the course of his or her defense and the strategy he or she may wish to employ. The Due Process Clauses of the Fifth and Fourteenth Amendments re-
quire a range of procedural protections that are designed not only to achieve accuracy of adjudication, but also to promote and protect the defendant’s participatory and dignitary interests. Our long tradition of procedural fairness honors the dignity of the individual defendant by allowing him or her to play a major role in determining how to face criminal charges. These concepts of fairness are animated by a vision of the autonomous and rational defendant who, together with chosen counsel, is encouraged to and is able to mount a defense with the full vigor that the adversary system contemplates.

The Fifth Amendment, both through its general due process commitment and its specific protection against compulsory self-incrimination, stands as an endorsement of the adversary system and as a rejection of the inquisitorial mode of adjudication used in countries following the civil law tradition and employed in the despised Star Chamber proceedings. The adversary system is premised on the autonomy of the litigants. The litigants shape the issues, marshall and adduce the evidence, and select their own strategies for presenting the case. In an inquisitorial system, the judge plays an active role in discovering the facts. By contrast, in the adversary system, the judge plays an essentially passive role. In jury trials the judge merely presides over the trial in a neutral and independent fashion, or, in cases in which a jury trial has been waived or is unavailable, the judge acts as a neutral fact finder, and the active control of the case is left to the adverse parties.

In furtherance of the adversary system, various constitutional protections allow the defendant to shape his or her defense and exercise a substantial degree of control over many aspects of the trial process. A criminal defendant may choose to plead guilty or not guilty, to represent himself or herself or to retain counsel, to challenge jurors for cause or to remove jurors by peremptory


challenge, to make pretrial motions, to raise particular defenses, to demand a jury trial or a bench trial, to call witnesses on his or her behalf, to cross-examine adverse witnesses, to testify, to move for a mistrial when error has occurred, or to appeal if convicted.  

The state's ability to intrude on these decisions or on the ability of the defendant to confer with counsel concerning them has been limited by the Supreme Court in several important respects. For example, the state may not, through forcible administration of antipsychotic medication to a defendant, interfere with the ability to make these decisions by diminishing the interaction with counsel or the capacity to comprehend the proceedings. When the defendant chooses to invoke his or her Fifth Amendment right not to testify, the prosecution may not penalize this choice by asking the jury to draw an inference from the assertion of the privilege. The state may not interfere with the defendant's presentation of a defense by requiring him or her to testify first or not at all. When the defendant chooses to testify, the state may not diminish the ability to present a defense by prohibiting testimony that is recalled or refreshed through hypnosis. The state may not unreasonably interfere with the attorney-client relationship, which is essential to the defendant's ability to guide his or her defense, by rules that unreasonably ban attorney-client communications during trial. In addition, the prosecution may not discourage a defendant from exercising the right to appeal by threatening to subject him or her to more serious charges on re-trial if the appeal is successful.

Although the Fifth and Sixth Amendments allow the criminal
defendant to exercise a significant degree of control over whether and how he or she will present a defense, the defendant may choose to waive these Fifth and Sixth Amendment rights. Waiver usually requires a "voluntary relinquishment of a known right or privilege." There are some rights, however, that may be waived by action or inaction of the defendant's attorney, and these rights may sometimes be waived without an informed decision by the defendant. Thus, defense counsel's failure to raise a timely objection to the admissibility of a confession is deemed sufficient to waive the issue, whether or not the defendant consents. Similarly, the failure of defense counsel to challenge the composition of the grand or petit jury can constitute waiver without the defendant participating in the decision. Counsel's failure to cross-examine a witness or to raise and preserve a point may also act as a waiver of important constitutional rights.

Although counsel may occasionally waive the client's rights without consultation, the defendant has the opportunity, at least in theory, to control the actions of counsel. The waiver-by-counsel rule is based, at least in part, on the assumption that a defendant will object if counsel seeks to waive rights that the defendant


188. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 91 n.14 (1977) (holding that defendant's counsel waived ability to challenge confession by failing to timely object); Estelle v. Williams, 425 U.S. 501, 512 (1976) (holding that Due Process Clause was not violated when defendant wore prison attire to trial and when defendant's counsel failed to object); Faretta, 422 U.S. at 820 ("[C]ounsel [may have] power to make binding decisions of trial strategy in many areas."); Henry v. Mississippi, 379 U.S. 443, 450-52 (1965) (concluding that absent exceptional circumstances, counsel's decisions are not subject to judicial review even if such decisions were made without consulting client); United States ex rel. Brown v. Warden, 417 F. Supp. 970, 972-73 (N.D. Ill. 1976) (collecting cases); see also 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.6, at 57-58 (1984) (collecting cases that set forth decisions that are within "ultimate authority" of counsel).


191. Michael E. Tigar, Forward: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1, 1-60 (1970); see also LAFAVE & ISRAEL, supra note 188, § 11.6, at 58.
wishes to assert. Moreover, there are limits to the waiver-by-counsel rule. The Supreme Court has stated that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." The defendant's ability to exercise control, even over decisions that his or her attorney may make without consultation, is also protected by the defendant's right to select counsel of choice, as well as by the right to waive counsel altogether and choose self-representation. The Supreme Court has consistently construed the Sixth Amendment guarantee of the right of the accused "to have the Assistance of Counsel for his defense" as protecting the defendant's right to select his or her own counsel. Although the Sixth Amendment is now construed also to guarantee the right of an indigent defendant to the appointment of counsel, courts have always interpreted the Sixth Amendment to protect "the right of an accused to 'a fair opportunity to secure counsel of his own choice.'"

192. See Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944) (asserting that when defendant fails to object to actions taken by counsel, assumption is that defendant "consented to or ratified" those actions), cert. denied, 324 U.S. 869 (1945).

193. Jones v. Barnes, 463 U.S. 745, 751 (1983) (dicta); see also Riggins v. Nevada, 112 S. Ct. 1810, 1820 (1992) (Kennedy, J., concurring) ("It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' " (quoting Rock v. Arkansas, 483 U.S. 44, 52 (1987)); Wainwright, 433 U.S. at 93 n.1 (Burger, C.J., concurring) ("Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make."); ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2, at 21-22 (2d ed. 1980) ("The power of decision in matters of trial strategy and tactics rests with the lawyer."); 2 LAFAVE & ISRAEL, supra note 188, § 11.6, at 53-62 (collecting Supreme Court cases requiring personal decisions of defendants).

194. U.S. CONST. amend. VI.


197. Crooker v. California, 357 U.S. 433, 439 (1958) (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)); see also Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989) (recognizing defendant's right to retain counsel of choice); Wheat v. United States, 486 U.S. 153, 159 (1988) (recognizing "right to select and be represented by one's preferred attorney," but approving court's barring of representation by counsel found to have conflict of interest); Chandler v. Fretag, 348 U.S. 3, 9-10 (1954) (reversing conviction in which defendant was denied right to counsel of choice); Bute, 333 U.S. at 661 (recognizing right of accused to counsel of choice in a federal proceeding); Glasser v. United
In addition, the Supreme Court has interpreted the Sixth Amendment to guarantee the right of the defendant to dispense with the representation of counsel and to represent himself.198 In upholding the right to self-representation in Faretta v. California, the Supreme Court expressly invoked autonomy values, stating that the courts should respect the decision of the individual who "will bear the personal consequences of a conviction."199 Even though the decision of a legally untrained defendant who waives counsel and chooses self-representation may be imprudent, the Court honored the defendant's choice out of the "respect for the individual which is the lifeblood of the law."200 "[T]hose who wrote the Bill of Rights," noted the Court, "understood the inestimable worth of free choice."201

The Sixth Amendment rights to retain counsel of choice and to waive counsel reflect "constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding."202 Allowing the defendant free choice in the critical matter of representation at trial fosters both the reliability of the outcome and values unrelated to truth determination. The right to counsel of choice is critical to "the basic trust between counsel and client, which is a cornerstone of the adversary system."203 Like the right to self-representation, which exists in large part to "affirm the dignity and autonomy of the accused" by affording him or her a strong measure of control over the proceedings,204 the right to counsel of choice "is premised on respect for the individual."205 The Constitution affords defendants a fundamental constitutional right to choose the type of defense


199. Faretta, 422 U.S. at 834.

200. Id.

201. Id. at 833-34.


205. Wilson v. Mintzes, 761 F.2d 275, 286 (6th Cir. 1985); see also Faretta, 422 U.S. at 834 (noting defendant's choice concerning whether to be represented by counsel must be honored out of respect for individual).
they wish to present.\textsuperscript{206} This right, also supported by autonomy values, is intimately connected with the right to select counsel of choice, because "the most important decision a defendant makes in shaping his defense is his selection of an attorney."\textsuperscript{207} These constitutional safeguards applicable in criminal cases thus further reflect the high value the Constitution places on individual autonomy.

\section*{B. Protection for Autonomy in Other Areas of the Law}

The principle of autonomy also permeates much of American law outside the domain of the Constitution. Autonomy influences not only public law, but private law as well.\textsuperscript{208} For example, a strong commitment to individual autonomy is reflected in the history and development of the law of contracts. "As freedom became a rallying cry for political reforms, freedom of contract was the ideological principle for development of the law of contract."\textsuperscript{209} The insistence of utilitarian theorists Jeremy Bentham and John Stuart Mill on "freedom of bargaining" as indispensable to progress had an indelible influence on the development of contract law.\textsuperscript{210} The principle of freedom of contract is rooted in the utilitarian premise that "it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises."\textsuperscript{211} The foundation of contract law is built on this notion of private autonomy. This notion has been expressed as "recognizing the desirability of allowing individuals to regulate, to a large extent, their own affairs, the State has conferred upon them the power to bind themselves by expression of their intention to be bound."\textsuperscript{212}

Contract law is thus premised on the ability of individuals to

\begin{itemize}
\item \textsuperscript{206} See Crane v. Kentucky, 476 U.S. 683, 690 (1986) (noting that Constitution affords defendants right to present best defense); Washington v. Texas, 388 U.S. 14, 19 (1967) (holding that right to present defense is fundamental to due process of law); Robert N. Clinton, \textit{The Right to Present a Defense: An Emerging Constitutional Guarantee in Criminal Trials}, 9 \textit{Ind. L. Rev.} 713, 793-95 (1976) (analyzing constitutional basis of right to present defense and deriving such right from general reading of Bill of Rights).
\item \textsuperscript{207} United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979).
\item \textsuperscript{208} \textit{See, e.g., Harold C. Havighurst, The Nature of Private Contract} 30-31 (1961) (noting influence of individual freedom on contract law).
\item \textsuperscript{209} John D. Calamari & Joseph M. Perillo, \textit{The Law of Contracts} § 1-3, at 5-6 (3d ed. 1987).
\item \textsuperscript{210} Id.
\item \textsuperscript{211} \textit{Restatement (Second) of Contracts} 2-3 (1981) (introductory note to Chapter 8).
\item \textsuperscript{212} Calamari & Perillo, \textit{supra} note 209, § 1-4, at 8.
\end{itemize}
order their own affairs and the desirability of allowing them to do so. In our market economy, unlike in communist economic systems, economic decisionmaking, at least at the microeconomic level, is left substantially to the individual. Indeed, the evident failure of having state control over the means of production and distribution was a principal cause of the recent collapse of communism in Eastern Europe. In our society, the individual is substantially free to order his or her economic affairs as he or she chooses.

The laws of property and of trusts and estates are also based on individual autonomy. These areas of law are premised on the notion that individuals may exercise substantial control over the use and enjoyment of their property, and may determine what shall be done with it during their lives and upon their deaths. Although state law may provide general rules for the distribution of the estates of those who die intestate, the individual is free to fashion his or her own scheme of distribution by executing a will directing in what manner the property shall be disposed or by disposing of the property by gift or conveyance during the individual's life.

Similarly, basic principles of tort and criminal law defer to individual autonomy. Both criminal and tort law impose rules of conduct designed for the protection of others, but neither controls the individual's conduct; they merely constrain human behavior by imposing after-the-event consequences for rule infractions. The consequences—civil damages or criminal punishment—are designed to deter the individual from engaging in careless or antisocial behavior. This deterrence approach recognizes and fosters individual autonomy by allowing people to choose whether or not to obey the law.213 In general, individuals may violate the principles of tort law as long as they are willing to compensate the victims of their carelessness, and they may even choose to violate criminal prohibitions as long as they are willing to pay the penalties. Although seriously constrained, a degree of autonomous choice is left to the individual.

Individual autonomy is also basic to our systems of civil and criminal procedure.214 Both are based on the adversary system, which provides the litigants with substantial autonomy in shaping

213. See Note, supra note 2, at 1232-33 (analyzing criminal law's deterrence approach as premised on personal autonomy).

214. See ROBERT M. COVER ET AL., PROCEDURE 1571-72 (1988) (concluding that civil and criminal procedure are "premised upon litigant autonomy").
the issues for adjudication, in adducing the evidence, and in framing the arguments.\textsuperscript{215} In addition, most criminal and civil disputes are resolved through negotiation and settlement; the individual is always free to accept a settlement or a guilty plea or to litigate the matter.\textsuperscript{216}

Although autonomy is an important value reflected in these areas of the law, as with the various branches of constitutional doctrine previously discussed, autonomy is not the only value. The law may allow and indeed encourage individual choice in a variety of areas. Such choice, however, is occasionally constrained by governmental regulation that advances a variety of social and economic goals. But this governmental regulation operates against a backdrop of individual autonomy. The law both assumes the desirability of individual decisionmaking and attempts to facilitate it. Law in our society is a system of regulating behavior, not of controlling it.

### III. The Psychological Value of Choice

Apart from constitutional principles and political theory, the justification for deference to individual autonomy can be grounded in psychological theory. This section examines several principles of cognitive and social psychology in an effort to conduct a therapeutic jurisprudence analysis of legal rules protecting autonomy. As this analysis demonstrates, there is considerable psychological value in allowing people to make choices for themselves. By contrast, governmental control, especially over decisions that vitally affect the individual, may be psychologically damaging to those denied the ability to be self-determining.\textsuperscript{217}

Individuals are far more able to chart a course for the pursuit

\textsuperscript{215} For a further discussion of individual autonomy in criminal procedure, see supra notes 178-207 and accompanying text.

\textsuperscript{216} See, e.g., Fed. R. Crim. P. 11 (setting forth procedure to assure voluntariness in plea bargains); see also Brady v. United States, 397 U.S. 742 (1970) (requiring as condition for entry of guilty plea that defendants voluntarily relinquish known rights or privileges).

\textsuperscript{217} Justice Kennedy, in his concurring opinion in \textit{Riggins v. Nevada}, recently recognized this principle in the criminal context. Riggins v. Nevada, 112 S. Ct. 1810, 1820 (1992). \textit{Riggins} involved the forced administration, during trial, of a high dose of antipsychotic medication to a defendant wishing to be tried free of the effects of such medication. Forcible medication in this situation, Justice Kennedy found, can "lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to engage the defendant in his own defense in preparation for his trial." \textit{Id.} (quoting Brief for National Association of Criminal Defense Lawyers as Amicus Curiae at 42, \textit{Riggins} (No. 90-8466)).
of their own happiness than is the government. Individuals know their own tastes and preferences and can better assess their abilities and circumstances. An individual's choices from the menu of life are inevitably bound to prove more self-satisfying and suitable than any made by an impersonal bureaucrat or even an enlightened philosopher king. Moreover, the individual's act of selecting goals and objectives will itself be an important ingredient in the attainment of those goals.

People generally do not respond well when told what to do. Unless they themselves see the merit in achieving a particular goal, they often will not pursue it, or if required to do so, will comply only half-heartedly. Indeed, sometimes even when the costs of noncompliance are high, people may resent the pressure imposed by others and refuse to comply. Sometimes they may even act perversely in ways calculated to frustrate achievement of the goal. By contrast, individuals appreciate having their autonomy respected and being allowed to exercise choice. Not only do individuals prefer choice to compulsion, but "the law strongly favors allowing individual choice rather than attempting to achieve public or private goals through compulsion."218 In addition to the moral and political values reflected in the law's preference, it is strongly supported by considerations of therapeutic jurisprudence.

Principles of cognitive and social psychology help to explain why permitting individuals to exercise choice often enhances the likelihood of success in attaining their goals.219 People directed to perform tasks do not feel personally committed to the goal or personally responsible for the goal's fulfillment.220 This feeling

218. Bruce J. Winick, Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change, 45 U. MIAMI L. REV. 737, 765 & n.90 (1991); see also Havighurst, supra note 208, at 30-31 (noting value law places on individual choice in contract law). For a further discussion of the value of individual choice, see supra notes 6-217 and accompanying text.

219. See Sharon S. Brehm & Jack W. Brehm, Psychological Reactance: A Theory of Freedom and Control 301 (1981) (noting need for patient participation in therapy and for resistance by patient when patient perceives therapy as forced); Wexler & Winick, Essays in Therapeutic Jurisprudence, supra note 4, at 68-74, 107-14 (discussing cognitive and social psychology theories as they apply to freedom of choice and informed consent); Winick, supra note 218, at 752-72 (discussing cognitive and perceptual processes and role such processes play in human learning); Winick, Competency to Consent to Treatment, supra note 1, at 46-53 (noting existence of increased treatment success rate when individuals are given treatment choices); Winick, Competency to Consent to Voluntary Hospitalization, supra note 1, at 192-99 (noting therapeutic value of allowing patients to voluntarily choose hospitalization).

220. Albert Bandura, Social Foundations of Thought and Action: A
may apply even for tasks the individual is directed to perform in furtherance of his or her own best interests. Choice, on the other hand, brings a degree of commitment that mobilizes the self-evaluative and self-reinforcing mechanisms that facilitate goal achievement.221

Patient response to medical treatment provides a useful example. When physicians do not allow patient participation in treatment decisions and do not explain treatment, patients often fail to comply with medical advice.222 When a patient elects to engage in a course of treatment or to accept a treatment recommended by the physician, psychological theory would predict a higher likelihood of success than when the patient is simply told what to do. To the extent that a patient's election or agreement constitutes an affirmative expression of choice in favor of the treatment recommended, this expression of choice itself may be therapeutic. Compliance with a treatment plan is often indispensable to successful treatment. Unless patients appear for scheduled appointments or take their prescribed medication, treatment cannot succeed. Patient choice may have a particularly important role in the success of verbal treatment techniques like psychotherapy223 or even of many forms of behavioral treat-


222. Id. at 338, 363, 368, 468, 478-80 (discussing relationship between choice and goal achievement); BREHM & BREHM, supra note 219, at 301; DONALD MEICHENBAUM & DENNIS C. TURK, FACILITATING TREATMENT ADHERENCE: A PRACTITIONER’S GUIDEBOOK 20, 156-57 (1987) (noting benefits of choice in medical treatment).

because these approaches are largely dependent for their success on the conscious involvement and active cooperation of the patient. But this relationship between personal choice and treatment success may exist for a variety of medical treatment techniques as well.

This positive relationship between individual choice and goal achievement would seem applicable to the selection of a great variety of goals outside the treatment context—for example, educational, occupational, economic, athletic, and familial goals. Psychological theory shows that the setting of explicit goals is itself a significant factor in their accomplishment. This "goal-setting effect is one of the most robust findings in the psychological literature." An individual's conscious setting of a goal is virtually indispensable to its achievement. The setting of a goal at least implicitly involves a prediction by the individual that the goal is achievable and a commitment that he or she will at-

LEGIS. 275, 328 (1983) (commenting on beneficial impact when patients participate in treatment); Winick, Right to Refuse, supra note 1, at 83 (1989) (recognizing that success of psychotherapy depends on patient's willingness to participate).

224. See Edward Erwin, Behavior Therapy: Scientific, Philosophical and Moral Foundations 180-81 (1978) (rejecting notion that behavioral techniques can be used to mechanically control behavior because of necessity of patient involvement in behavioral therapy); Meichenbaum & Turk, supra note 221, at 150; Albert Bandura, Behavior Theory and the Models of Man, 29 AM. PSYCHOL. 859, 862 (1974) (rejecting mechanistic view of behavior therapy and suggesting need for patient choice and cooperation for effective treatment); Isaac M. Marks, The Current Status of Behavioral Psychotherapy: Theory and Practice, 133 AM. J. PSYCHIATRY 253, 255 (1976) (noting need for patient cooperation in behavioral treatment); Bruce J. Winick, Legal Limitations on Correctional Therapy and Research, 65 MINN. L. REV. 331, 360-61 (1981) (recognizing that patient involvement and cooperation in behavioral therapy is essential to successful treatment); Winick, Right to Refuse, supra note 1, at 80 (noting importance of patient cooperation in behavioral therapy).

225. Donald J. Campbell, The Effects of Goal-Contingent Payment on the Performance of a Complex Task, 37 PERSONNEL PSYCHOL. 23, 23 (1984) (noting higher achievement rate for those who set specific goals); Vandra L. Huber, Comparison of Monetary Reinforcers and Goal Setting as Learning Incentives, 56 PSYCHOL. REP. 223 (1985) (noting that goal setting and performance-contingent pay can stimulate higher performance than noncontingent hourly pay); Daniel S. Kirschenbaum & Randall C. Flanery, Toward a Psychology of Behavioral Contracting, 4 CLINICAL PSYCHOL. REV. 597, 603-09 (1984) (analyzing critical role goal setting plays in psychotherapeutic tool of behavioral contracting); Edwin A. Locke et al., Goal Setting and Task Performance: 1969-1980, 90 PSYCHOL. BULL. 125, 125-33 (1981) (noting that goals that are more difficult to attain lead to better results than goals that are of medium difficulty or are easy to attain); James R. Terborg & Howard E. Miller, Motivation, Behavior, and Performance: A Closer Examination of Goal Setting and Monetary Incentives, 65 J. APPLIED PSYCHOL. 29, 30-31 (1978).

226. Campbell, supra note 225, at 23; Locke et al., supra note 225, at 145.

227. Bandura, supra note 220, at 469 ("Those who set no goals achieve no change . . . .").
tempt to achieve it. This prediction and expression of commitment in turn creates expectancies that help to bring about goal achievement.228

Thus, an individual's positive expectancies concerning treatment success, educational achievement, occupational advancement, economic improvement, and athletic performance play an important role in restoring health and in achieving educational, occupational, economic, and athletic goals. The medical treatment context is again illustrative. A patient who expects to improve because of treatment often improves; one who expects no change often experiences none. Indeed, patients' positive expectancies concerning treatment success are thought to explain the therapeutic power of such phenomena as the placebo effect, the Hawthorne effect and the medicine man.229 Although not yet fully understood, these phenomena suggest the existence of a powerful relationship between a patient's expectations of improvement and the patient's perceived and even actual improvement. An increasing variety of medical and psychological conditions are treated with hypnosis and positive imaging techniques that ask patients to visualize their bodies fighting illness and their ultimate restoration to health.230 The positive attitudes and expectations thereby created allow patients to mobilize their...

228. See id. at 412-13, 467 (discussing outcome expectancy theories); Edwin L. Deci & Richard M. Ryan, The Empirical Exploration of Intrinsic Motivational Processes, 13 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 39, 59 (1980) (noting that subjects of experiment who were given choices were more intrinsically motivated than subjects who had choices externally imposed).

229. See, e.g., JOHN G. BOURKE, THE MEDICINE MEN OF THE APACHE 452 (1971) (observing that ability to inspire belief in patients that he has "the gift" is prerequisite to being "a diyi" or medicine man); HOWARD BRODY, PLACEBOS AND THE PHILOSOPHY OF MEDICINE: CLINICAL, CONCEPTUAL, AND ETHICAL ISSUES 19 (1980) ("T]he patient's expectation of symptom change is held to be causally connected to the change that occurs."); MICHAEL JOSPE, THE PLACEBO EFFECT IN HEALING 93-108, 130 (1978) (analyzing Hawthorne effect in terms of expectancy theory); O. CARL SIMONTON ET AL., GETTING WELL AGAIN 22 (1978) (discussing placebo effect in healing); Frederick J. Evans, Expectancy, Therapeutic Instructions, and the Placebo Response, in PLACEBO: THEORY, RESEARCH, AND MECHANISMS 215, 222-24 (Leonard White et al. eds., 1985) (concluding that "placebo response is mediated by expectancies generated within the context of the doctor-patient relationship"); Jerome D. Frank, Biofeedback and the Placebo Effect, 7 BIOFEEDBACK & SELF-REGULATION 449 (1982) (explaining placebo effect in terms of expectancy theory); Peter Horvath, Placebos and Common Factors in Two Decades of Psychotherapy Research, 104 PSYCHOL. BULL. 214, 215 (1988) ("Expectancy factors have been shown to influence therapeutic outcome.").

230. See, e.g., MARTIN T. ORNE & DAVID F. DINGES, HYPNOSIS, IN 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY IV 1501, 1511-12 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989) (discussing use of hypnosis and positive imaging to cure physical ailments).
psychic resources in ways that may play a critical role in the therapeutic process.\textsuperscript{231} Such expectancies and positive attitudes appear more active in patients, students, workers, athletes or others when they voluntarily choose their own goals and the mechanisms for achieving them than when goals are imposed over their objection.

Principles of cognitive psychotherapy help to explain how these positive attitudes and expectancies facilitate success and why they are more likely to be engaged when the goal is freely chosen. Predictions and expectations concerning the achievement of goals stimulate feelings of self-efficacy, which in turn spark action and effort in furtherance of the goals.\textsuperscript{232} The voluntary setting of goals enhances motivation\textsuperscript{233} and increases the individual's effort through self-monitoring, self-evaluation and self-reactive processes.\textsuperscript{234} Setting goals serves to structure and to guide the individual's behavior over the often long course of conduct necessary to achieve the goals.\textsuperscript{235} Goal-setting provides direction for the individual and focuses his or her interest, attention, and personal involvement on the effort.\textsuperscript{236}

An individual's choice of a goal also may trigger a form of what Leon Festinger described as "cognitive dissonance." Cognitive dissonance is the tendency of individuals to reinterpret information and experience that conflicts with their internally

\textsuperscript{231} See Rene Dubos, Introduction, in Norman Cousins, Anatomy of an Illness as Perceived by the Patient: Reflections on Healing and Regeneration 11, 18, 22-23 (1979) (recognizing ability of mind to "mobilize the natural defense mechanisms of the patient"); Kenneth R. Pelletier, Mind as Healer, Mind as Slayer 40-41 (1977) (noting evolution of psychosomatic medicine and its importance in healing process); Simonton et al., supra note 229, at 4-12 (discussing use of visual imagery in cancer healing process); Shultz, supra note 222, at 292-93 (noting evidence that suggests that developing patients' psychic resources is important in healing process).

\textsuperscript{232} See Bandura, supra note 220, at 413, 470-71 (discussing relationship between goal setting and self-efficacy); Horvath, supra note 229, at 218 ("The belief that the treatment works in the manner outlined in the rationale motivates the client to perform the tasks of the therapy.").

\textsuperscript{233} See Deci & Ryan, supra note 228, at 59 (defining intrinsically motivated behaviors as those that are motivated by underlying need for competence and self-determination and performed in absence of any apparent external contingency); Julian B. Rotter, Generalized Expectancies for Internal Versus External Control of Reinforcement, 80 PSYCHOL. MONOGRAPHS 1, 1, 24-25 (1966) (behavior varies as function of individual's generalized expectancies that outcomes are determined by individual's own actions or by external sources beyond individual's control).

\textsuperscript{234} See Bandura, supra note 220, at 469-72; Meichenbaum & Turk, supra note 221, at 158-61.

\textsuperscript{235} See Bandura, supra note 220, at 469.

\textsuperscript{236} See id. at 471-72 (discussing interest enhancement that results from goal setting).
accepted or publicly stated beliefs in order to avoid the unpleasant personal state that such inconsistencies produce. Cognitive dissonance affects not only perception, but behavior as well, producing efforts in furtherance of the individual's stated goal in order to avoid the dissonance that failure to achieve the goal would create. Cognitive dissonance can cause the individual to mobilize energies and resources in order to accomplish the goal. Because failure to achieve an externally imposed goal will not produce similar feelings of dissonance, the motivating effects of cognitive dissonance are more likely to occur when the individual chooses the goal rather than having it imposed by others.

Motivation to succeed is an essential ingredient in goal achievement. Ask any teacher. Ability to accomplish a goal, although necessary, will not produce success by itself; unless individuals are motivated to succeed, they will not commit the effort needed to bring about success. Psychologist Edward Deci's distinction between intrinsic and extrinsic motivation helps to explain why choice works better than compulsion. Intrinsic motivation involves self-determining behavior and is associated with "an internal perceived locus of causality, feelings of self-determination, and a high degree of perceived competence or self-esteem." With extrinsic motivation, on the other hand, the perceived locus of causality is external and feelings of competence and self-esteem are diminished. When people are allowed to be self-determining, they function more effectively, with a higher degree of commitment and greater satisfaction. These feelings increase the motivation to succeed, stimulate positive expectations and attitudes, and spark effort.


238. Festinger, Cognitive Dissonance, supra note 237, at 19.


241. Id. at 208-10; see also Charles A. Kiesler, The Psychology of Commitment: Experiments Linking Behavior to Belief 164-67 (1971) (finding most effective method for behavior therapists to obtain desired results with patients was to give patients perception that they had freedom and control).

242. Id. at 208-10; see also Charles A. Kiesler, The Psychology of Commitment: Experiments Linking Behavior to Belief 164-67 (1971) (finding most effective method for behavior therapists to obtain desired results with patients was to give patients perception that they had freedom and control).

243. See Bandura, supra note 220, at 390-449; Deci, The Psychology of
Thus, according to several strands of psychological theory, voluntary choice in a variety of areas engages important intrinsic sources of motivation and creates the positive expectations that lead to successful goal achievement. These intrinsic sources of motivation and positive expectancies are more likely to be activated when the individual makes a choice that he or she perceives to be voluntary. To the extent that a decision is externally imposed on the individual, or the individual perceives the choice to be coerced, motivation to succeed will be reduced.

These theoretical examinations of the psychological value of choice find support in empirical research in a variety of areas in which it has been demonstrated that allowing individuals to exercise choice increases the likelihood of success. For instance, research with children has demonstrated that involving children in treatment planning and decisionmaking leads to greater compliance and increases the efficacy of treatment. Similarly, allowing students to make choices about educational programs causes them to work “harder, faster, and react[] more positively to the situation than when they [are] unable to make such choices.” Experts have also suggested that medical and mental

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244. See Bandura, supra note 220, at 467, 471-72. For a further discussion of the benefits of choice, see supra notes 217-43 and accompanying text.

245. See Kiesler, supra note 242, at 164-65; Winick, supra note 218, at 768-70.

246. See, e.g., Charles E. Lewis, Decision Making Related to Health: When Could/Should Children Act Responsibly?, in CHILDREN’S COMPETENCE TO CONSENT 75, 76-79 (Gary B. Melton et al. eds., 1983) (noting studies that have found positive effect when children are involved in their health care); Gary B. Melton, Children’s Competency to Consent: A Problem in Law and Social Science, in CHILDREN’S COMPETENCE TO CONSENT, supra, at 1, 11 (noting that physicians prefer involvement of children in treatment because of increased compliance with treatment that results); Gary B. Melton, Decision Making by Children: Psychological Risks and Benefits, in CHILDREN’S COMPETENCE TO CONSENT, supra, at 21, 30-31, 37 (examining benefits derived from giving children opportunity to choose); Gary B. Melton, Children’s Participation in Treatment Planning: Psychological and Legal Issues, 12 PROF. PSYCHOL. 246, 250-51 (1981) (concluding that giving child “personal control probably facilitates therapeutic change”).

health treatment are more effective when provided on a voluntary rather than involuntary basis.\textsuperscript{248}

rooms shown to have higher intrinsic motivation and self-esteem than students in control-oriented classrooms).

\textsuperscript{248} See \textit{Appelbaum et al., supra} note 125, at 28 (discussing informed consent and noting its positive aspects on treatment); \textit{Brakel et al., supra} note 128, at 178 (recognizing that people who voluntarily commit themselves to treatment institutions are "more prone to cooperate with the treatment staff and to participate conscientiously in the treatment program and therefore more likely to benefit from institutionalization than unwilling patients"); \textit{Brehm & Brehm, supra} note 219, at 301 (noting theoretical support for proposition that voluntary treatment is more successful than involuntary treatment); \textit{Meichenbaum & Turk, supra} note 221, at 175; Paul S. Appelbaum et al., \textit{Empirical Assessment of Competency to Consent to Psychiatric Hospitalization}, 138 AM. J. PSYCHIATRY 1170, 1170 (1982) (noting that clinicians feel that "obtaining the patient's informed cooperation lends a positive thrust to the treatment process"); Charles M. Culver & Bernard Gert, \textit{The Morality of Involuntary Hospitalization}, in \textit{The Law—Medicine Relation: A Philosophical Exploration} 159, 171 (Stuart F. Spicker et al. eds., 1981) (discussing possibility of allowing manic patients to appoint "guardianship committees" that could sanction future detention and treatment decisions); Edmund J. Freedberg & William E. Johnston, \textit{Effects of Various Sources of Coercion on Outcome of Treatment of Alcoholism}, 43 PSYCHOL. REP. 1271, 1271, 1277 (1978) (stressing need for patient to engage in treatment of alcohol problem voluntarily); Robert A. Nicholson, \textit{Correlates of Commitment Status in Psychiatric Patients}, 100 PSYCHOL. BULL. 241, 249-44 (1986) (analyzing difference between patients involuntarily committed to hospitalization and those who voluntarily entered mental hospital, determining that voluntary patients were more likely to respond to treatment); Michael L. Perlin & Robert L. Sadoff, \textit{Ethical Issues in the Representation of Individuals in the Commitment Process}, 45 LAW & CONTEMP. PROBS., Summer 1982, at 161, 189-91; Richard Rogers & Christopher D. Webster, \textit{Assessing Treatability in Mentally Disordered Offenders}, 13 LAW & HUM. BEHAV. 19, 20-21 (1989) (suggesting that "involuntary patients are often more impaired, more resistive to medication, and have a poorer prognosis than their voluntary counterparts"); Leonard I. Stein & Mary Ann Test, \textit{Alternative to Mental Hospital Treatment}, 37 ARCHIVES GEN. PSYCHIATRY 392, 392-93 (1980) (discussing benefits of community treatment facilities); Clifford D. Stromberg & Alan A. Stone, \textit{A Model State Law on Civil Commitment of the Mentally Ill}, 20 HARV. J. ON LEGIS. 275, 328 (1983) (incorporating idea that voluntary cooperation of patient enhances treatment into model code for civil commitment); David A. Ward, \textit{The Use of Legal Coercion in the Treatment of Alcoholism: A Methodological Review}, in \textit{Alcoholism: Introduction to Theory and Treatment} 263, 272 (David A. Ward ed., 1980) ("The systematic evaluation of existing studies shows that there is no scientific basis upon which to accept the proposition that the use of legal coercion is effective in treating the alcoholic."); Note, \textit{supra} note 2, at 1399 (noting that "advantages of voluntary admissions flow from the absence of compulsion in the initiation of psychiatric treatment").

An extensive review by Professors Durham and La Fond of the literature on psychotherapy and psychotropic medication, the two most prevalent forms of treatment for the mentally ill, found no persuasive evidence that coercive application of these techniques to involuntarily committed patients was effective. Mary L. Durham & John Q. La Fond, \textit{A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill}, 40 RUTGERS L. REV. 303, 351-56, 567-68 (1988) (analyzing quality of research concerning voluntary versus involuntary commitment); see also Washington v. Harper, 494 U.S. 210, 249 n.15 (1990) (Stevens, J., dissenting) ("The efficacy of forced drugging is also marginal; involuntary patients have a poorer prognosis than cooperating patients."); Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("The testi-
An additional psychological benefit of choice is that, in general, having and making choices is developmentally beneficial. Except for young children, and sometimes even including them, the more choice we give individuals, the more they will act as mature, self-determining adults. This connection was recognized by John Stuart Mill in *On Liberty*. Mill suggested that the exercise of autonomous decisionmaking is an essential element in the psychological and moral development of the individual, and is necessary to the realization of the individual’s full potential. Indeed,

mony has indicated that involuntary treatment is much less effective than the same treatment voluntarily received.”). *See generally* Mary L. Durham & John Q. La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL’Y REV. 395 (1985) (analyzing adverse effects of statutory broadening of civil commitment standards).

In addition, in all areas of treatment, treatment adherence in general increases when the patient is given choice and participation in the selection of treatment alternatives and goals. *See Meichenbaum & Turk, supra* note 221, at 157, 159, 175; Deci & Ryan, *supra* note 228, at 59; Frederick H. Kanfer & Lisa Gaelick-Buys, *Self-Management Methods, in Helping People Change: A Textbook of Methods* 305, 334-47 (Frederick H. Kanfer & Arnold P. Goldstein eds., 4th ed. 1991) (discussing self-management techniques that are supervised by professionals but allow for extensive participation by patient).


250. Mill stated the argument as follows:

The faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes not choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are improved only by being used. The faculties are called into no exercise by doing a thing merely because others do it, no more than by believing a thing only because others believe it. If the grounds of an opinion are not conclusive to the person’s own reason, his reason cannot be strengthened, but is likely to be weakened, by his adopting it: and if the inducements to an act are not such as are consentaneous to his own feelings and character (where affection, or the rights of others, are not concerned) it is so much done towards rendering his feelings and character inert and torpid, instead of active and energetic. He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape like one of imitation. He who chooses his plan for himself, employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self control to hold to his delivered decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one . . . .

Having said that individuality is the same with development, and that it is only the cultivation of individuality which produces, or can produce, well developed human beings, I might here close the argument: for what more or better can be said of any condition of human affairs than that it brings human beings themselves nearer to the best thing they can be?
when individuals are not permitted a large measure of autonomous decisionmaking, but have decisions made for them by others, they fail to develop those self-determining capabilities that are essential to mature, adult functioning. Paternalism, especially excessive paternalism, is inevitably infantilizing.\footnote{251}

A sense of being competent and self-determining provides strong intrinsic gratification and may be a prerequisite for psychological health.\footnote{252} Exercising self-determination is thought to be a basic human need.\footnote{253} A variety of studies show that allowing individuals the opportunity to choose is intrinsically motivating, and that denying them the opportunity to choose "undermines [their] motivation, learning, and general sense of organismic well-being."\footnote{254} Indeed, the stress of losing the opportunity to be self-determining may cause "severe somatic malfunctions" and even death.\footnote{255}

Treating individuals as competent adults able to make choices and exercise a degree of control over their lives rather than as incompetent subjects of governmental paternalism and control will predictably have a beneficial effect. Denying people a sense of control over important areas of their lives can have strongly negative consequences. Indeed, when people feel that they can have no influence over matters that vitally affect them, they may develop what Martin Seligman called "learned helplessness."\footnote{256} Seligman's experimental work with animals and human
subjects led him to posit that repetitive events outside an individual's control may produce a generalized feeling of ineffectiveness that debilitates performance and undermines motivation and perceptions of competence. Depriving individuals of a sense of control over the outcomes they experience produces feelings of helplessness, hopelessness, passivity and depression. By contrast, when individuals exercise control and make choices, they experience increased opportunities to build skills necessary for successful living. As a result, they gradually acquire feelings of self-efficacy, which in turn become important determinants of motivation and performance.257 Hopefully, if given meaningful choices, individuals will perceive themselves as in control of their lives rather than as mere passive victims of forces they can neither understand nor control. This latter view of the self undoubtedly contributes to the existence and continuation of a variety of social and health problems.

Allowing individuals to be self-determining in important areas of their lives—for example, in the areas of health, education, occupation, and family—can only increase personal satisfaction and confidence in the therapeutic.258 educational, work, or family effort. Choice enhances performance and motivation to succeed. Research with nursing home residents supports the conclusion that allowing individuals to exercise control over decisions affecting them is psychologically beneficial.259 This research demon-

eds., 1980) (compiling work of several experts on learned helplessness theory); Lyn Y. Abramson et al., Learned Helplessness in Humans: Critique and Reformulation, 87 J. ABNORMAL PSYCHOL. 49 (1978) (discussing theory of learned helplessness and reformulating theory to apply to human conduct); Deci & Ryan, supra note 228, at 41-42, 60-63, 67 (noting theory, similar to learned helplessness, that when individuals lose choice they also lose intrinsic motivation); Steven F. Maier & Martin E. P. Seligman, Learned Helplessness: Theory and Evidence, 105 J. EXPERIMENTAL PSYCHOL. 3, 16-19 (1976) (detailing theory of learned helplessness); Jerry W. Thornton & Paul D. Jacobs, Learned Helplessness in Human Subjects, 87 J. EXPERIMENTAL PSYCHOL. 367 (1971) (detailing experiment that used human subjects to test learned helplessness theory); see also Deci, The Psychology of Self-Determination, supra note 239; Rotter, supra note 233, at 24-25 (viewing behavior as function of individual expectancies concerning whether outcomes are determined by individual's own actions or by external forces beyond individual's control).

257. See Bandura, supra note 220, at 390-449; Brehm & Brehm, supra note 219, at 376-78 (noting that increased motivation is one of positive effects of control); Deci & Ryan, supra note 228, at 41-42, 60-61 (recognizing that when people are given choices, intrinsic motivation increases).


strated that providing residents increased choices and responsibilities produced improvement in their condition.\textsuperscript{260} People given choices—and hence treated with dignity and respect, as persons rather than as objects—also feel better about their circumstances and perform better as a result. For example, an increasing body of social psychology research on legal procedures shows that litigants given choices and permitted to participate in a proceeding that will decide issues that are important to them are more satisfied with the process and more willing to accept and comply with the decision reached.\textsuperscript{261}

Exercising choice and experiencing a sense of control over important events in their lives may be an essential ingredient in producing mature, self-determining, well-adjusted, happy, and successful members of society. In contrast, when government forces people to act in certain ways, denying them the ability to choose such conduct for themselves, the results may be counterproductive. For example, individuals coerced to participate in education and treatment programs—whether coerced by judges, correctional authorities, parole officers, mental health professionals, or others—often just go through the motions, satisfying the formal requirements of the program without deriving any real benefits.\textsuperscript{262} Indeed, such coercion may backfire, producing a neg-

\begin{itemize}
  \item \textsuperscript{260} Id. at 197.
  \item \textsuperscript{261} See, e.g., E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 26-30 (1988) (discussing studies that show connection between perceived fairness and procedural rules); John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 83-84, 94-95, 118 (1975) (finding adversarial system superior to other judicial systems because of level of control retained by individual); Tom R. Tyler, Why People Obey The Law 126-30 (1990) (recognizing connection between perceived fairness and procedural control); E. Allan Lind et al., Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments, 59 J. Personality & Soc. Psychol. 952, 957 (1990) (determining that ability to present information at trial led to increase in perception of fairness of judgement); Stephen LaTour, Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication, 36 J. Personality & Soc. Psychol. 1531-37 (1978) (noting that one reason defendants studied were more satisfied with verdicts under adversarial system rather than inquisitorial system is that defendants may have perceived more control over process in adversarial system because of ability to select attorney); Tom R. Tyler, The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, 46 S.M.U. L. Rev. 433, 433-45 (1992) (discussing psychological consequences of judicial commitment hearings). For an analysis of the participatory value of hearings from a legal perspective, see Winick, supra note 178, at 801-06.
  \item \textsuperscript{262} Coerced education and treatment are often implemented by correctional authorities, by authorities in the psychiatric setting, or by the courts as a condition of diversion, probation, or parole. See Committee on Psychiatry and the Law of the Group for the Advancement of Psychiatry, Psychiatry and Sex Psychopath Legislation: The 30s to the 80s 889 (1977) (noting problems
\end{itemize}
ative "psychological reactance" that creates oppositional behavior and leads to failure.\textsuperscript{263} Coercion may also trigger a form of the "overjustification effect," in which the individual may accomplish a specified goal, but because the individual attributes this performance to external pressure, he or she does not experience any lasting attitudinal or behavioral change.\textsuperscript{264} The voluntary choice of a course of conduct, however, involves a degree of internalized commitment to the goal often not present when the goal is imposed involuntarily.\textsuperscript{265}

Thus, psychological theory provides an important justification for the law's preference for individual autonomy. People function better, with greater success and satisfaction, when permitted to make choices for themselves in important areas of their lives. Permitting individuals the opportunity to make their own choices and to experience the effects of such choices is developmentally beneficial and may be essential to psychological well-being. Paternalism, by contrast, may not work as well and may often be counterproductive.

\section*{IV. Conclusion}

\subsection*{A. The Value of Autonomy}

Our political and legal conceptions of autonomy are aspirational. They are based on a conception of the individual as a rational decisionmaker able to make free choices reflecting internal values and preferences. In reality, however, this atomistic conception of the individual is artificial. The individual is a component of at least several social groups—the family, the work place,
a variety of associations and interest groups, and the community. The individual's decisionmaking is heavily dependent upon the desires of these other groups and the anticipated impact the individual's decisions will have on them. We are by nature communal, more interdependent than independent. Our choices are almost never wholly free; rather, they are constrained by a variety of social, economic, religious, psychological, and familial pressures that produce choices we often perceive to be anything but free.

Our idealized model of individual autonomy is thus inconsistent with psychological realities and largely artificial. Nevertheless, our political conception of the individual as an autonomous decisionmaker, able to make rational choices free of constraints, is a useful foundation upon which to build a legal system. This conception of the individual is particularly useful as a basis for a constitutional structure, a major function of which is to place limitations on governmental power. The focus of this Article, after all, is the place of individual autonomy in our legal system. The Article examines the concept of autonomy from several perspectives in order to provide the groundwork for an analysis of how our law should be structured so as to strike a proper balance between individual self-determination and the needs and interests of an organized society in an increasingly complex world. Our political conception of the freely autonomous individual may not be appropriate for designing the family, the work place, or the football team. In the context of constructing a legal system, however, this conception may be useful. In attempting to define the sphere of individual decisionmaking that should be free from governmental intrusion, it is appropriate to adopt a view of the individual as possessing a higher degree of autonomous decision-making capacity than may be realistic.

We thus cherish autonomy and the conception of the individual as possessing a significant degree of freedom over the important aspects of his or her life. We therefore erect barriers against governmental intrusion into these areas in order to permit the individual's spirit and intellect to flourish, to facilitate the pursuit of happiness, and to maximize the potential for self-fulfillment. We ascribe and attribute freedom and autonomy to the individual partly for normative reasons—because within our traditions it is hard to conceive of a legal and social order that does not treat people this way—and partly for utilitarian reasons—because in our view to do so will maximize individual and social utility. For
these reasons, we adopt a conception of the individual as autonomous both because we think the principles of morality and justice require it, and because in our judgment this conception will maximize individual and societal well-being. These are the teachings of John Locke, Thomas Jefferson, John Stuart Mill, Immanuel Kant, Louis Brandeis, Benjamin Cardozo, and William O. Douglas.

The value of autonomy infuses and shapes our basic conceptions of the relationship between society and the individual. In our society, which is premised on the importance of the individual, the notions of individual autonomy and the citizen's right to chart his or her own destiny are highly valued political ideals that inevitably and properly are reflected in our constitutional and legal structures. This must be so for a government dedicated to liberty and the pursuit of happiness. Because individual conceptions of happiness inevitably differ, the individual, and not the government, must select his or her own path to that promised land.

This attribution of autonomy to the individual, particularly in the service of defining limitations upon governmental authority over the individual, can also be justified by principles of psychology that help us to understand how individuals learn and behave. Attributing autonomy to the individual and protecting a relatively large sphere of autonomous decisionmaking may be essential to psychological well-being and may facilitate the individual's achievement of the goals he or she sets. In general, a policy of respect for individual choice fosters intrinsic motivation and personal satisfaction. By contrast, excessive governmental paternalism and control can be counterproductive, ultimately frustrating the attainment of whatever goals government may think the individual should seek to achieve.

Psychological theory thus suggests that allowing people to make choices for themselves will be beneficial in a number of ways. Even assuming the truth of these theoretical assumptions, however, they do not alone justify the adoption of legal rules that seek to maximize individual autonomy. Whether a legal system should promote autonomy is a normative question. These psychological observations about human nature and behavior do not justify the adoption of legal rules without at least an implicit normative premise that as a society we should pursue such values as self-determining capacity, effective goal achievement, and individual psychological satisfaction. Our society, however, does and
traditionally has embraced these values. It was to secure liberty and to facilitate the pursuit of happiness that we sought and won our independence and ordained and established the Constitution. We rejected government absolutism in favor of a conception of government that allows each individual to determine and pursue his or her own conception of the good life. These are the values upon which our nation was founded. Assuming a continued commitment to these values, the psychological benefits of allowing individual choice argue strongly in favor of a legal system that treasures the principle of autonomy and that interferes only minimally with individual choice and only when the attainment of other cherished values necessitates it. Autonomy, accordingly, should be presumptively protected by our law, and government should bear a heavy burden of justification when it seeks to interfere with an individual's choice. When the area of choice involved is one of those important life decisions that our history and tradition leave to the individual, that burden should be extremely high and the individual's claim of liberty should receive a special measure of protection.

B. Implications for Mental Health Law

What are the implications for mental health law of this political conception of individual autonomy versus governmental control, and of the psychological justifications for embracing autonomy? These political and psychological conceptions do not, of course, suggest that individual autonomy should never be restricted. Autonomy is not the only value we respect. One individual's liberty may clash with that of another, and a basic function of government must be to protect an individual from the harmful acts of others. In addition, there may be occasions when an individual's ability to engage in autonomous decisionmaking is so impaired by mental illness, age, or other causes that principles of beneficence justify paternalistic interventions into the life of the individual. There may even be circumstances when the intrusion into autonomy is so minor or so limited in time that principles of beneficence justify governmental action to protect the individual without a demonstration that the individual's ability to choose is impaired. But when the intrusion is serious, when it affects the

266. For example, when the legislature requires automobile manufacturers to install seatbelts and motorists to wear them, it is undeniably interfering with the liberty of manufacturers to sell cars without seatbelts and the liberty of consumers to buy such cars or to enjoy the comfort and convenience of not wearing them. This matter could be left to the marketplace, with manufacturers permit-
individual's ability to make the ultimate decisions that shape his or her life, the high value we place on autonomy requires that the government meet a high burden of justification.

The legal and psychological perspectives on autonomy discussed in this Article suggest that justifications for intruding on autonomy that are grounded in principles of beneficence—principally, those based on the state's parens patriae power—be narrowly defined. The parens patriae power allows government to engage in decisionmaking in the best interest of persons who by reason of age or disability are incapable of making such decisions for themselves. Historically, the parens patriae power was premised on the presumed incapacity of minors and mentally disabled persons to protect or care for themselves. Because this power is based on the need for the government to protect the well-being of its citizens when they cannot care for themselves, the government's ability to invoke this power to intrude on individual choices in important areas of life should be limited to situations involving individuals who, because of age or physical or mental disability, are incapable of determining their own best interests for themselves. Although a number of cases have alluded to this limitation, it has not been authoritatively recognized as a general

267. Mills v. Rogers, 457 U.S. 291, 296 (1982); see also JOEL FEINBERG, HARM TO SELF 6 (1986) (analyzing parens patriae power); Winick, Competency to Consent to Treatment, supra note 1, at 16 & n.3 (discussing scope of government's parens patriae power); Winick, supra note 224, at 374 (examining government's parens patriae power to make decisions for those who are unable to make decisions for themselves); Note, supra note 2, at 1207-45 (discussing commitment under parens patriae power of state).

268. See Addington v. Texas, 441 U.S. 418, 426 (1979) (discussing in dicta parens patriae power of government); O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring) (noting historical roots of parens patriae power); Winick, supra note 224, at 375 (noting historical derivations of parens patriae power); Note, supra note 2, at 1212-16 (discussing historical roots of parens patriae power of state).

269. The cases have usually involved assertions of a right to refuse anti-
principle, and its justifications have not been adequately examined. In addition to our political preference for individual autonomy, the psychological value of recognizing autonomy and the difficulties that refusing to recognize autonomy may produce strongly support the recognition of incompetency as a necessary condition for governmental assertion of the *parens patriae* power as a justification for intrusions on important areas of autonomy.

Moreover, the concept of incompetency in this context should be narrowly defined, and a strong presumption in favor of competency should be applied. Although a number of cases have recognized such a presumption in favor of competency,\footnote{270} and

psychotic medication. See, e.g., Bee v. Greaves, 744 F.2d 1387, 1395 (10th Cir. 1984) (refusing to allow jail staff to inject accused with thorazine in order to keep him competent for trial), *cert. denied*, 469 U.S. 1214 (1985); Rennie v. Klein, 653 F.2d 836, 846-47 & n.12 (3d Cir. 1981) (en banc) (noting that “'[t]here must be a careful balancing of the patient’s interest’ with those of the state), *vacated and remanded*, 458 U.S. 119 (1982); Rogers v. Okin, 634 F.2d 650, 657-59 (1st Cir. 1980) (requiring individual to be incompetent to make decision concerning mental health treatment before state can justify use of its *parens patriae* power), *vacated and remanded* sub nom. Mills v. Rogers, 457 U.S. 291 (1982); Winters v. Miller, 446 F.2d 65, 68-71 (2d Cir.) (holding that woman stated cause of action on which relief could be granted when she alleged that hospital rendered involuntary care without first having her found legally incompetent), *cert. denied*, 404 U.S. 985 (1971); Davis v. Hubbard, 506 F. Supp. 915, 935-36 (N.D. Ohio 1980) (holding that patient being declared mentally ill does not in itself justify use of *parens patriae* power to forcibly administer psychotropic drugs when patient is still competent to make decision); People v. Medina, 705 P.2d 961, 973 (Colo. 1985) (en banc) (specifying limits on involuntary administration of antipsychotic drugs); *In re Boyd*, 403 A.2d 744, 747 n.5 (D.C. 1979) (holding that commitment of individual alone is insufficient to justify overriding individual’s treatment decisions); Gundy v. Pauley, 619 S.W.2d 730, 731 (Ky. Ct. App. 1981) (refusing to allow electric shock treatment of patient who was not declared legally incompetent to consent); Rogers v. Commissioner of the Dep’t of Mental Health, 458 N.E.2d 308, 322 (Mass. 1983) (limiting use of state’s *parens patriae* power where no threat of violence existed to “rare circumstances”); Opinion of the Justices, 465 A.2d 484, 489-90 (N.H. 1983) (holding that power to administer forcible medical treatment does not automatically follow exercise of power to involuntarily hospitalize patient; rather, requires showing that individual is incapable of making informed decision); Rivers v. Katz, 495 N.E.2d 337, 342-43 (N.Y. 1986) (holding that to impose involuntary antipsychotic medication, state must show that patient is incompetent and must also show compelling state interest); *In re K.K.B.*, 609 P.2d 747, 750-52 (Okla. 1980) (denying hospital right to administer psychotropic drugs against mentally ill patient’s will). See generally Winick, *Competency to Consent to Treatment, supra* note 1, at 16-17 & n.3 (collecting cases that recognize that legitimate power of government to protect citizens who cannot protect themselves is limited to situations in which citizen is incompetent).

\footnote{270}{See, e.g., Lotman v. Security Mut. Life Ins. Co., 478 F.2d 868, 873 (3d Cir. 1973) (stating that “there is a legal presumption that everyone is sane”); *Winters*, 446 F.2d at 68 (holding that judicial finding that person was mentally ill did not create presumption that person was incompetent to make decisions); Rogers v. Okin, 478 F. Supp. 1342, 1361 (D. Mass. 1979) (“Although committed, a mental patient is nonetheless presumed competent to manage his affairs, dispose of property, carry on a licensed profession, and even to vote.”), *aff’d in
commentators have defended it, the presumption was recently questioned by the Supreme Court in its broad dicta in Zinermon v. Burch. In contexts in which the individual seeks voluntarily to make a choice, the choice should rarely be disturbed. Rather, the government, if it seeks to challenge such a choice on the basis that it is incompetent, should bear a heavy burden of demonstrating incompetency. A strong presumption of competency should apply even to those suffering from mental illness. Although mental illness sometimes impairs decisionmaking capacity, often it does not. Moreover, even when mental illness impairs the


272. 494 U.S. 113, 133 & n.18 (1990) (holding that even if request for admission to hospital for medical treatment might be taken at face value, state "may not be justified in doing so, without further inquiry, as to a mentally ill person's request for admission and treatment at a mental hospital."). For a critical assessment of Zinermon, see Winick, Competency to Consent to Voluntary Hospitalization, supra note 1.


274. See PAUL S. APPELBAUM & THOMAS G. GUTHIEL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 220 (1987) ("The mere presence of psychosis, dementia, mental retardation, or some other form of mental illness or disability is insufficient in itself to constitute incompetence."); Karen McKinnon et al., Rivers in Practice: Clinicians' Assessments of Patients' Decision-Making Capacity, 40 HOSP. & COMMUNITY PSYCHIATRY 1159, 1159 (1989) ("Clinical evidence suggests that despite alterations in thinking and mood, psychiatric patients are not automatically
capacity to make decisions in certain areas, capacity is often left unimpaired in others.275

When an individual suffering from mental illness seeks to agree to an intervention proposed by a professional under a fiduciary duty to act in his best interests, there should be a particularly strong presumption that his assent was competent. This strong presumption should apply when a mental patient assents to a treatment recommendation made by a therapist276 or to voluntary hospitalization that a clinician has determined to be appropriate.277 The presumption of competency also should apply when a mentally impaired criminal defendant seeks, with the agreement of counsel, to plead guilty or to stand trial.278 Only upon a clear showing that the individual's assent is the product of mental illness should his or her expressed choice be disturbed. Moreover, even in cases in which the individual is not assenting to a recommendation made or concurred in by a professional, the individual should be presumed competent. Although the presumption should not be as strong in such instances, the burden should still be placed on those questioning competency.

When the individual objects to something that the government would like him or her to do, such as to accept treatment or hospitalization, the individual's objection should be honored unless the state has carried the burden of demonstrating that the objection was incompetent or that the need to protect others necessitates intervention. Personal choice in these matters of significance to the individual's life should presumptively be respected because of both the high value we place on individual autonomy and the psychological value to the individual of honoring his or her choice. Allowing individuals to pursue goals they have voluntarily chosen will facilitate goal achievement, while compelling in-less capable than others of making health care decisions.

275. Winick, Competency to Consent to Treatment, supra note 1, at 23-24, 37-41.
276. See Winick, Competency to Consent to Treatment, supra note 1.
277. See Winick, Competency to Consent to Voluntary Hospitalization, supra note 1.
278. See Bruce J. Winick, Incompetency to Stand Trial: An Assessment of the Costs and Benefits, and a Proposal for Reform, 39 Rutgers L. Rev. 243, 259-81 (1987) (arguing that "criminal defendant can clearly express a desire to stand trial or plead notwithstanding his mental impairment" that in some circumstances should be respected); Winick, Restructuring Competency to Stand Trial, supra note 2, at 951-79 (asserting that "the defendant should be allowed to waive his possible incompetency to stand trial or plead guilty").
individuals to pursue goals to which they object is unlikely to produce success.

Our commitment to the autonomy principle, deeply rooted in American constitutional history and tradition, together with the psychological value of self-determination, casts substantial doubt on the wisdom of the Supreme Court's recent dicta in *Zinermon* that questions a presumption in favor of the competency of the mentally ill. The presumption in favor of competency should be reaffirmed, and incompetency should be narrowly defined. Only in clear cases should an individual be deemed incompetent when he or she is able to articulate a choice. When the individual is found to be incompetent for a particular purpose, he or she should continue to be presumed competent for other purposes. The state's *parens patriae* power, authorizing intrusions on important areas of autonomy, should be narrowly construed to require a strong showing of incompetency as a pre-

279. For example, the courts should define the competency of a mental patient to consent to voluntary hospitalization as follows:

As long as the patient understands that the facility he is seeking admission to is a psychiatric hospital, that he will receive care and treatment there, and that release is not automatic, but can occur if he should change his mind and that in such an event he can obtain help from any staff member to gain his release, he should be deemed competent.


280. See Winick, *Competency to Consent to Treatment*, supra note 1, at 44 (suggesting that presumption in favor of competency should be rebutted in case of individual expressing choice "as was the product of pathological delusions or hallucinations, or based on beliefs that were intrinsically irrational or on reasons that were clearly irrelevant"); see, e.g., Zinermon v. Burch, 494 U.S. 113, 118 (1990) (delusional patient seeking voluntary hospitalization who thought he was entering heaven deemed incompetent to consent to hospitalization); Department of Human Servs. v. Northern, 563 S.W.2d 197, 211-12 (Tenn. Ct. App. 1978) (finding that delusional denial by gangrenous patient that she could live without amputation rendered her incompetent to refuse recommended surgery).

When the patient is delusional, but the delusions are not the primary reason for the individual's treatment decision, however, the patient should not be found incompetent. See, e.g., *In re Yetter*, 62 Pa. D. & C.2d 619, 623 (1973); see also Appelbaum & Gutheil, *supra* note 125, at 82; Brakel et al., *supra* note 128, at 185, 258, 438-39; David B. Wexler, *Mental Health and the Law* 40 (1981); Allan M. Tepper & Amiram Elwork, *Competence to Consent to Treatment as a Psychological Construct*, 8 Law & Hum. Behav. 205, 207 (1984); Winick, *Competency to Consent to Treatment*, supra note 1, at 22-23.

requisite for its assertion. Our society should be benevolent, but we should resist the temptation to impose benevolence coercively.