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I. INTRODUCTION

In 1991, William Simon wrote a short essay on lawyer-client counseling.[1] He based his essay on his experience with a client he called Mrs. Jones. Simon's essay contrasts what he calls the autonomy or "informed consent" view with a paternalist or "best interest" view of counseling.[2] He concludes that what he calls the refined versions of both views are more alike than previous commentators have acknowledged. This article argues that there are important differences between the paternalist and autonomy views of counseling that Simon's perspective fails to capture, in particular, the psychological and moral significance of the lawyer's intentions.

Simon's essay is part of what might be called a postrevisionist view of lawyer-client relations. Until sometime in the mid-1970s, the subject of lawyer-client relations was seldom explored. As with most professional-client relations, it was simply assumed that the power to make significant decisions was delegated to the professional. A challenge to that perspective arose when a number of authors, myself included, advocated a revisionist model in which the client had the power to make significant decisions within the relationship.[3] Any reac-

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1. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

2. *See id.* at 213.

3. *See, e.g.*, Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel, *Lawyering and Client Decisionmaking*]; Mark Spiegel, *The New Model Rules of Professional Conduct:*

tion begets an opposite reaction, of course, and in academia a revisionist account begets a postrevisionist account. The challenges to the revised model of lawyer-client relations, in which clients ought to have the power to make significant decisions, came from two directions.

One challenge argued that a model giving clients control reinforces the ideology that lawyers have no moral responsibility to attempt to influence their clients' decisions. Drawing on the work of Heinz and Laumann,[4] this postrevisionist account argued that in the corporate sector the advocates of client control had it backwards.[5] The problem was not that lawyers controlled their clients, but that corporate clients dictated to their lawyers. Under this view, what was (and still is) needed were ways to reinforce the lawyer's obligation to tell the corporate client that it was doing something wrong.

The other challenge looked to the individual client. Some of these critics questioned whether those who espoused the autonomy view overvalued autonomy and failed to recognize other competing considerations.[6] In addition, some argued that advocates of client decision making ignored the reality that individual clients frequently have difficulty making decisions and that lawyers inevitably influence their clients' decisions by the way they order the material and how they present options to their clients.[7] Simon's account of Mrs. Jones's case corresponds with these latter views.

Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue, 1980 AM. B. FOUND. RES. J. 1003; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987).

4. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 378-79 (1982).

5. *See, e.g.*, Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 56-58 (1988); *see also* Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES 230, 256-57 (Robert L. Nelson et al. eds., 1992); John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's* Lawyers and Clients, 34 UCLA L. REV. 781, 783-84 (1987).

6. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637; David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1035-37 (1990); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

7. *See* Gordon, *supra* note 5, at 26-29.

What makes Simon's version worthy of a reply, even belatedly, is his argument that if we get beyond the crude formulations "it is hard to distinguish the autonomy and paternalist views."[8] Simon presents a sophisticated version of both models that enhances our understanding of each,[9] and thus makes an important contribution. Ultimately, however, he overstates his case. There remain important differences between lawyers who act according to the dictates of the autonomy model and lawyers who are "refined paternalists." Part II of this Article describes Simon's essay and his claims. In Part III, I argue that Simon is able to claim there are no significant differences in theory only by adopting particular definitions of the paternalist and autonomy views. I also contend that even accepting his definitions there still may be differences in theory between the refined paternalist and the refined autonomy view. In Part IV, I argue that despite the similarities between the two views there are still significant differences in practice. Mrs. Jones's case illustrates that one's starting point as a refined paternalist or as a refined autonomy practitioner affects the way one counsels a client. In addition, I believe that the intentions of the lawyer matter. The lawyer's intentions affect both the moral quality of the interaction between the lawyer and her client and the lawyer herself. In Part V, I argue that Simon, therefore, has not proven that the refined paternalist and the refined autonomy view are the same, regardless of whether he is correct that there are no significant differences between the results achieved by the practitioner of the refined paternalist or the refined autonomy view.

In claiming that Simon has not proven his case, I have not addressed the difficult questions of whether autonomy is overvalued or defined improperly,[10] or whether there are good reasons because of the interests of others or society in general to

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8. Simon, *supra* note 1, at 224.

9. Indeed, it is because Simon presents a sophisticated version of both models that we have used his essay in our teaching at Boston College Law School.

10. See, for example, the writings of feminist authors such as Jennifer Nedelsky and Robin West, questioning whether autonomy is equivalent to individual, isolated decision making. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

override client preferences.[11] I have also not addressed the question of whether in particular lawyering spheres, such as corporate practice, the most significant problem is client domination over lawyers. Different rules may be needed for that sphere of practice.[12] I believe, however, that to the extent one thinks that autonomy is overvalued, should be overridden in particular situations, or is irrelevant when one is representing particular types of clients, it is important to face those issues directly and not by claiming that there is no meaningful difference between refined autonomy and refined paternalism.

II. MRS. JONES'S STORY AND ITS LESSONS

Simon's essay proceeds in five parts. In the first part he presents the story of Mrs. Jones, and in subsequent parts, he offers his analysis. Mrs. Jones, whom Simon represented, faced criminal charges for leaving the scene of an accident without identifying herself. She stated that she had identified herself, but the other driver, who was white, reported to the police that Mrs. Jones, who is black, bad not. In charging her, the police accepted the other driver's version without an investigation. The police also treated her harshly when she came to the police station.

Simon reports that he felt he had a fairly strong case. Given his inexperience (this was Simon's first and last criminal case), he had a friend, who was experienced in traffic cases, act as co-counsel. The friend dismissed Simon's strategy of exposing the police's racism as unrealistic and began negotiations with the prosecutor. After some discussion, the prosecutor offered to accept a plea of nolo contendere, which would result in six months probation and a criminal record that could be sealed after one year.

The rest of the story is the critical part. Simon describes the counseling meeting he had with Mrs. Jones and her minister to discuss the plea bargain. Both the minister and Mrs. Jones wanted Simon to tell her what he thought she should do, but Simon resisted and instead spelled out what he saw as the ad-

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11. *See* sources cited *supra* note 6.

12. *See* Mark Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 W. NEW ENG. L. REV. 139 (1987).

vantages and disadvantages of accepting the plea bargain. The advantages of accepting it were that it would spare her the anxiety of a trial and of having to testify. In the unlikely event that she lost at trial, it spared her six further months of anxious waiting and the anxiety of a second trial.[13] Finally, if Mrs. Jones somehow lost both trials, accepting the plea bargain spared her the loss of her driver's license, a modest fine, and a highly unlikely, but theoretically possible, jail term of up to six months. Simon also considered the disadvantages of accepting the prosecutor's offer:

> I couldn't say for sure that the criminal record Mrs. Jones would have for at least a year wouldn't adversely affect her in some concrete way, but I doubted it. (She was living primarily on Social Security and worked only part-time as a housekeeper.) What bothered me was that the plea bargain would deprive her of any sense of vindication. Mrs. Jones struck me as a person who prized her dignity, deeply resented her recent abuse, and would attach importance to vindication.[14]

In conveying this information, Simon mentioned the disadvantages last. The final thing he said to Mrs. Jones was, "If you took their offer, there probably wouldn't be any bad practical consequences, but it wouldn't be total justice."[15] In Simon's version of these events, it was this last statement that made the difference. Mrs. Jones and her minister rejected the plea bargain, stating: "We want justice."[16]

Simon went back to his friend and said, "No deal. She wants justice."[17] The friend replied, "Let me talk to her."[18] He then proceeded to give her his advice. He did not tell Mrs. Jones what he thought she should do, and he went over the same considerations Simon did. The main differences were that the friend discussed the disadvantages of accepting the prosecutor's offer first, while Simon had gone over them last. The friend also described the remote possibility of jail in slightly more detail

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13. At the time of the Mrs. Jones case, the Massachusetts criminal trial system allowed an appeal from a bench trial decision to be tried de novo before a jury. *See* MASS. GEN. LAWS ch. 278, § 18 (1981) (amended 1993).

14. Simon, *supra* note 1, at 215.

15. *Id.*

16. *Id.* at 216.

17. *Id.*

18. *Id.*

than had Simon. Finally, he did not conclude by saying, "It wouldn't be total justice." At the end of his presentation, Mrs. Jones and her minister decided to accept the plea bargain.

Based upon this story, Simon draws a number of lessons. First, he notes that Mrs. Jones initially wanted to delegate the decision to him. He correctly concludes that this attitude poses a dilemma for the autonomy view because "the lawyer must either acquiesce in the client's choice to put her fate in the lawyer's hands or 'force her to be free' by denying her the advice that she considers most valuable."[19] Second, Simon concludes that his story illustrates the ways lawyers influence their clients' decisions even when they think they are merely providing information.

After developing these points, Simon, in the last part of his essay, describes what he means by the refined autonomy view of counseling and the refined paternalist view. For Simon, the refined autonomy view acknowledges that just presenting information is not sufficient. The lawyer inevitably has to make decisions of relevance. Simply presenting information ignores the need to help the client make effective use of the information.[20] Hence, according to Simon, a lawyer adopting the refined autonomy view has "to present the information a typical person in the client's situation would consider relevant except to the extent the lawyer has reason to believe that the particular client would consider different information relevant, in which case she is to present that information."[21] Finally, thoughtful autonomy proponents realize that the client's autonomy is as much a goal of the counseling relationship as a premise.[22]

Simon then presents his view of refined paternalism. The crude paternalist, according to Simon, "simply consults her own values; she asks what she would do in the client's circumstances or what she thinks a person with some general charac-

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19. *Id.* at 217. Simon makes a subtle switch in the way he phrases the problem. First, he suggests she wanted him to make the decision. He concludes, however, that he was denying her information she deemed valuable. These two ideas are closely related, but it is also possible that a lawyer will tell a client what she thinks her client should do and the client may still make a different decision. *See* Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3, at 49 n.30 (discussing the difference between providing information and wielding decision-making power).

20. *See* Simon, *supra* note 1, at 222-23.

21. *Id.* at 223.

22. *See id.*

teristic of the client should do and tries to influence the client to adopt that course."[23] The refined paternalist, however, attempts to ascertain what the client truly wants to do and influence her decision making to reach that decision. Hence for Simon, "once we get beyond the crude versions, it is hard to distinguish the autonomy and paternalist views"[24] because each starts from a construct of a reasonable client and then attempts to understand the client as a concrete subject. Each contemplates a dialogue with the client that is essential for understanding the client and each has the danger of oppressing or misunderstanding the client.[25]

Part of Simon's reason for making his claim of similarity is based upon the conclusions about practice that he derived from Mrs. Jones's story. In this sense he argues that regardless of whether the refined autonomy view and the refined paternalist view are different in theory, they are similar in practice. But he also seems to make a larger claim—that they are not different in theory.[26] In the next two parts, I discuss each of these claims.

III. THEORY

Simon is able to make his claim that the refined paternalist view and the refined autonomy view are similar in theory because he adopts a particular narrow version of each viewpoint. He first discounts the plausibility of the autonomy view by relying upon an idealized vision of autonomy. Then he adopts a weak view of paternalism and is able to argue that this weak view is similar to what he sees as a more realistic implementation of the autonomy view.

In arguing against what he calls the crude autonomy view, Simon states that "any plausible conception of good practice will often require lawyers to make judgments about clients' best interests and to influence clients to adopt those judgments."[27] This statement embraces several different claims. First, it involves a conception of good practice. In his essay, Simon never spells out what his conception of good practice is; based upon

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23. *Id.*
24. *Id.* at 224.
25. *See id.*
26. *See id.* at 225.
27. *Id.* at 213.

his other writings, however, it presumably involves tolerance of a significant amount of lawyer influence over clients in order to achieve what Simon would consider desirable ends.[28] In discussing Mrs. Jones's case, however, Simon does not seem to rely on these contested views of good practice because he states that any plausible conception of good practice will involve judgments and influence of the type he believes undermines the autonomy view. Because he cites no empirical data, this claim relies upon the evocative power of Mrs. Jones's story. The central problem with this approach, as I discuss below, is that one can agree that Mrs. Jones's story illustrates his claim that good lawyering involves judgments about a client's best interests, but not necessarily agree with the degree of influence Simon seems to believe it must entail. Second, Simon claims that lawyers exercise influence over their clients often. Again, we have a problem in knowing how to evaluate that part of the claim. How frequent is often? How do we know that it occurs often? One story does not show that it occurs often.

The more basic problem with Simon's argument is the particular vision of the autonomy view he adopts in order to rebut it. Simon states that he has shown the implausibility of the autonomy ideal.[29] Implicit in this argument is that the autonomy ideal means that no interference with client autonomy is ever justified. But what Simon has done is describe an idealized version of autonomy, not the autonomy ideal. The autonomy ideal can be adapted to the real world.[30]

For example, Beauchamp and Childress see autonomous action existing on a continuum ranging from fully present to wholly absent.[31] Under such a view of autonomous action, one

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28. *See, e.g.*, William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post Modern, Post Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994) [hereinafter Simon, *Dark Secret*]; Simon, *supra* note 6, at 1083; William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) [hereinafter Simon, *Visions*].

29. *See* Simon, *supra* note 1, at 218.

30. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 7 (1988) (arguing that we should not develop a theory of autonomy that makes it impossible or extremely unlikely that anybody ever has been or could be autonomous).

31. *See* BEAUCHAMP & CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 123 (4th ed. 1994) (stating that autonomous action involves choosers who act (1) intentionally, (2) with understanding, and (3) without controlling influences that determine their action. Although arguably the first of these conditions is all or nothing, the next two—understanding and absence of controlling influence—are a matter of degree. Even

can debate about where on this continuum an action falls and whether a particular action meets one's conception of autonomy. Demonstrating that autonomy has been interfered with, however, is insufficient to prove that it is absent.[32] Ultimately Simon adopts this weaker view of autonomy when he describes the refined autonomy view. My quarrel is not with this "modification," but rather with his claim that because the autonomy view is not pure, it is implausible. Because he similarly adopts a weak view of paternalism, he could just as easily say that the paternalism view is implausible.[33]

Paternalism can be defined in a number of ways, but common elements include the substitution of one person's judgment for another's for the benefit of the latter person.[34] In the refined version, as stated above, the goal is to ascertain what the client truly wants to do and influence her decision making to reach that decision. I call this a weak version of paternalism because, in theory, it does not attempt to impose the paternalist's values upon the client, but to implement the client's own values.[35]

Simon states that this vision of paternalism is the only one possible because we lack what he calls a "thick theory of the

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intention can be viewed as a matter of degree given the presence of mixed motives or the influence of the subconscious).

32. For Beauchamp and Childress, an action can be autonomous as long as there is a substantial degree of understanding and freedom from constraint. *See id.*; *see also* DWORKIN, *supra* note 30, at 9 ("[O]ne may believe that autonomy is not an all-or-nothing concept but a matter of more or less.").

33. Simon, at one point, says that his argument "does not amount to an embrace of paternalism [because] [t]he issue of paternalism remains moot until we can clearly distinguish a judgment that a client choice is autonomous from a judgment that a choice is in the client's best interests." Simon, *supra* note 1, at 213.

34. *See* DWORKIN, *supra* note 30, at 123. Thompson defines paternalism slightly differently. He states it is the "imposing of constraints on an individual's liberty for the purpose of promoting his or her own good." Dennis F. Thompson, *Paternalism in Medicine, Law and Public Policy*, *in* ETHICS TEACHING IN HIGHER EDUCATION 245-46 (Callahan & Bok eds., 1980).

35. Compare the definitions of strong and weak paternalism in Edmund D. Pellegrino, *Autonomy, Beneficence, and the Experimental Subject's Consent: A Response to Jay Katz*, 38 ST. LOUIS U. L.J. 55 (1993). Strong paternalism occurs when the physician alone can know what is best for the patient because the patient cannot possibly grasp the subtleties of clinical decisions. Therefore, the physician has a duty to make decisions for the good of the patient. Weak paternalism implies that the physician ordinarily should respect the patient's autonomy, but is obliged to make the decision for the patient under certain circumstances, such as emergencies, when the patient is incompetent, or when a patient's decision-making capacity is impaired. *See id.*

good."[36] Given that, it appears that the criterion for knowing what is best for somebody is determining what that person values. Indeed, Simon states that "the most notable theory of 'the good' to come out of the law schools in recent years defines the good in terms of the 'choices' people make when not under 'domination.'"[37] According to Simon, this makes the refined paternalist view sound "very much like a theory of autonomous choice."[38]

But there may be differences, even in theory, in the latitude the refined paternalist allows herself to determine what the client's desired ends actually are. The refined version Simon describes is based upon the work of David Luban and Duncan Kennedy.[39] Luban, according to Simon, allows paternalistic coercion when "the client's articulated goal fails to meet a minimal test of objective reasonableness."[40] Simon further asserts that this stance "is not denying the value of autonomy, just that the particular client has the capacity for autonomous choice."[41] The first difficulty in assessing this position is knowing what Simon means when he says he is adopting Luban's position. If he is following Luban strictly, the key word is "minimal." Luban makes it clear that he is not relying upon a reasonable-person standard to judge the validity of paternalistic interventions.

Instead, Luban suggests that paternalism might be justified if we had some causal account of how an individual came to be incompetent independent of the reasonableness of his or her decision.[42] Luban acknowledges this requirement of a causal account may be too strict. There are times when the "irrationality of a person's wants [are] so manifest"[43] that the choice itself constitutes evidence of impairment. Luban does not conclude,

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36. Simon, *supra* note 1, at 225.

37. *Id.*

38. *Id.*

39. *See id.* at 223; 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 (1982); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

40. Simon, *supra* note 1, at 223.

41. *Id.* at 224-25. Simon's views as to why the client lacks the capacity for autonomous choice are ambiguous: Is it that the client is incompetent? Is it because of psychological incapacity based upon the particular transaction? Or is it because of false consciousness?

42. *See* Luban, *supra* note 39, at 482.

43. *Id.* at 477.

however, that irrational choices alone justify paternalism. We have an obligation, he argues, to discover whether the person is "genuinely addled."[44] This is done by asking the person why he wants to pursue this "obviously disadvantageous path. If [the individual] can give us an account of his reasons, we should dismiss the hypothesis of incompetence and abandon our paternalistic designs."[45] This requirement of accounting for one's choice is for Luban, also, a minimal standard. Drawing upon an 1890 New York testament case, he defines the standard as whether "*any* process is going on in the person's head that can be called 'inference from real facts.'"[46] If this is Simon's position, he is correct that the refined paternalist position is very similar to the refined autonomy position, but that is because the refined paternalist has become a practitioner of the refined autonomy viewpoint.[47]

On the other hand, if Simon means to emphasize the word "reasonable" rather than the word "minimal" when he says, "[P]aternalist coercion is justified when . . . the client's articulated goal fails to meet a minimal test of objective reasonableness,"[48] then Simon is advocating something very different from the refined autonomy view.[49] Most paternalists, refined or otherwise, would assert that it is the unreasonableness of the client's decision that shows lack of capacity.[50] They would then go

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44. *Id.*

45. *Id.*

46. *Id.* at 479 (emphasis added) (citing *In re* Will of White, 24 N.E. 935 (N.Y. 1890)).

47. Simon may disagree with the conclusion that the refined autonomy view adopts a minimal reasonableness test. He states that "to the extant [the refined autonomy view] differs from the paternalist view in failing to apply a minimum reasonableness test, [that choice] is not plausibly grounded in the value of autonomy, since that value presupposes a capacity for rstional choice." Simon, *supra* note 1, at 225.

48. *Id.* at 223.

49. Simon's conclusion to his essay essentially hedges on this point. He states: "Many of the best reasons we have for thinking that Mrs. Jones's choice was not autonomous are the reasons we have for thinking that it was not in her best interests." *Id.* at 226. At other places, Simon is also not clear on this point. At times he refers to the reasonableness of the client's actions: "It wasn't *reasonable* for her to want to put her fate in the hands of someone as inexperienced and ignorant as me." *Id.* at 224 (emphasis added). But sometimes he uses the phrase minimum reasonableness: "Even where it [the paternalist view] disregards client choices because they fail the *minimum reasonableness* test . . . ." *Id.* (emphasis added).

50. *See id.* at 225.

on to say that they are justified in intervening because the client's decision-making capacity obviously is impaired. Such reasoning introduces severe problems of overinclusiveness. First, if we lack a "thick theory of the good," how do we know the client's decision flunks some test of minimal reasonableness? If it is by reference to our own values, then the refined paternalist seems very much like an ordinary or crude paternalist. Second, using a reasonable-person standard to assess competency or, to use Simon's phrase, capacity for autonomous choice, is circular. We need some way to judge competency independent of the choices a person makes. Finally, assuming we can overcome these problems, why is it impossible to "distinguish a judgment that a client choice is autonomous from a judgment that a choice is in the client's best interests?"[51] It is one thing to claim that the decision is part of the data we use to evaluate a client's decision-making competence. It is another to claim that the unreasonableness of the decision proves the client's impaired capacity.[52] If this is what Simon means by a refined paternalist, it would license significantly more intervention than the refined autonomy view.

As stated above, in addition to relying upon the work of Luban, Simon also relies upon an article by Duncan Kennedy. Kennedy's article is wide-ranging and attempts to show that paternalism, particularly legislative paternalism, is more pervasive than we acknowledge.[53] In his final section, Kennedy discusses the problem of justifying paternalism. According to Simon, Kennedy adopts a somewhat different position from Luban. Kennedy "does not hold the subject to an external standard such as reasonableness, but holds him to an interpretation of the subject's own projects and commitments."[54] The goal is to

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51. *Id.* at 213.

52. Simon does modify this position somewhat in his conclusion. There he states:

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

Id. at 226.

53. *See* Kennedy, *supra* note 39.

54. Simon, *supra* note 1, at 224.

"work for the choice that seems most consistent with [the paternalist's] understanding of who the client is."[55] Thus, according to Simon, when the refined paternalist "disregards the client's articulated choice, she has concluded that the client has misunderstood either himself or how the options relate to his deeper goals."[56] The difficulty again is overinclusion. It is true that the practitioner of the refined autonomy view has to make assessments of the client's motives and values in order to assist the client to make a decision. The question is whether Kennedy's view gives significantly more license to the refined paternalist to use her own intuitions to second guess the client's choices than the practitioner of the refined autonomy view would find appropriate.

Kennedy, in addition to relying upon intuition to justify the "ad hoc paternalism" he endorses, relies upon the concept of false consciousness.[57] Rather than arguing that the object of the paternalistic intervention is psychologically incapacitated, Kennedy argues that certain mistakes that individuals make about their real interests result from false consciousness.[58] Although he is not absolutely clear about this, the unifying concept seems to be that there is something inherent in the social structure which leads to this false consciousness.[59] The difficulty is not that there is no false consciousness, but that it has an "I know it when I see it" quality. To the extent we say somebody has false consciousness because he or she is about to make a decision we believe to be a mistake, the concept has no measure of validation other than the wrong decision. Using the concept of false consciousness this way makes it both broadly overinclusive and circular, just as the justification of paternalism based upon a showing that somebody is incompetent solely because of the unreasonableness of his or her decisions is overinclusive and circular. Again, if this is what Simon means by a refined paternalist, I believe that he would license significantly more intervention than the refined autonomy view.[60]

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55. *Id.*
56. *Id.*
57. *See* Kennedy, *supra* note 39, at 638.
58. *See id.*
59. *See id.* at 627.
60. Compare Simon's discussion of the "Critical view" of practice in which he states:

In conclusion, Simon is correct that the refined autonomy view and the paternalist view he describes are similar in theory because the refined autonomy view is a weak version of autonomy and the refined paternalist view is a weak view of paternalism. This is not surprising. Weak views of any theory usually attempt to incorporate objections or opposing viewpoints. Simon may have shown that these refined or weak views are points on a spectrum or continuum rather than distinct categories, but does that mean they are the same? The differences in theory described above may still lead to differences in practice. Evaluating this claim requires further exploration of how each of these two theories works in practice. For that exploration, I will look at Mrs. Jones's story in more detail.

IV. PRACTICE

Simon uses the Mrs. Jones story to support many of his conclusions about practice. He recognizes that his conclusions can be attacked on that basis.[61] First is the problem of generalizing from one story.[62] Stories may enrich our understanding by providing qualitative information and perspectives on events other kinds of data lack. I accept that position—indeed as a clinical teacher, I embrace it. Our teaching is heavily based upon drawing lessons from particular experiences and generalizing from those experiences. There remains a problem however. One cannot simply assume any particular story or even a

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> [The Critical Vision of practice] is not reluctant for the lawyer to make controversial, intuitive judgments in interpreting and applying the ideal of nonhierarchical community. Although it recognizes that such judgments are often unverifiable, it aspires to a distinctive kind of verification. The precept that the lawyer further the client's interests, as she understands them, is qualified by the precept that she also try to enhance the client's capacity to express her own interests. The authoritative test of the lawyer's judgment is that the client come to share it under conditions in which the lawyer believes that the client's understanding is not affected by conditions of hierarchy.

Simon, *Visions*, *supra* note 28, at 486. In this essay, however, Simon does not argue that the autonomy view, which he calls the "Professional view," is the same as the "Critical view." Instead, he contrasts the two views, particularly with regard to group representation.

61. *See* Simon, *supra* note 1, at 218.

62. By "story" I do not necessarily mean a work of fiction, but rather a narrative.

specific group of stories is typical.[63] By itself, Simon's story can only be suggestive.

Second, there are aspects of Mrs. Jones's story that present problems. Simon met with his client for only ten minutes.[64] He acknowledges the rushed nature of the meeting, but states that "[t]ime is scarce in nearly all practice situations."[65] Although accurate, this is not persuasive. One does not need unlimited time in order to recognize that having more time might make a difference.

Simon uses a medical example from his own experience to illustrate some of his points. Let me do the same. My wife and I were members of a health maintenance organization. When my wife developed a chronic illness, we found the HMO unsatisfactory. One of the major reasons for our dissatisfaction was that some doctors only allotted short periods of time to see patients, usually approximately fifteen minutes. We switched to a health plan that allowed us to see physicians of our choice. Those physicians allot us at least twice as much time to discuss treatment options. Our experience is that there is a significant difference between fifteen and thirty minutes.[66]

Simon is on stronger ground when he says there are intractable problems that even more time cannot cure. I agree and will discuss this shortly. But there is one more issue that raises significant questions. Simon states that some people question whether he or his friend could understand his client because she was elderly, female, and black, and he and his friend were

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63. I believe we accept Simon's Mrs. Jones story if it resonates with our own experience. If we reject its typicality, it is because we feel it is discordant with our own stories. On the larger debate about the significance of stories, compare Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993), and Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994), and Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992), with Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991), and Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994), and Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

64. *See* Simon, *supra* note 1, at 215.

65. *Id.* at 218.

66. This is for a number of reasons. The more time a doctor has to learn about a patient, the better her ability to tailor her advice to the patient's needs and concerns. The additional time also gives the patient an opportunity to explain their situation to the doctor. One might argue, however, that this additional 15 minutes is significant in terms of cost and not just a small difference.

none of these.[67] Though Simon acknowledges the force of these objections (and so do I), he ultimately concludes that such critics "underestimate the capacity of people to empathize across social distance."[68] Again, I agree.

To bridge this gap, however, takes not only training and effort, as Simon acknowledges,[69] but it also takes time to develop a relationship. I do not mean to repeat the point that the ten minutes spent at the courthouse were too few, although I believe they were. Rather, I want to emphasize that too often we view counseling with clients as one-shot encounters. My experience is that the only way I can claim to have some clear sense of a client (or anybody else for that matter) is as a result of several meetings. Simon did have at least one other meeting with the client, but we do not know much about that encounter. Presumably it was the initial meeting. Perhaps there were other meetings, but he does not describe them. Moreover, given the structure of the criminal justice system, at some point prior to the day of trial there should have been discussion of accepting a plea bargain. Simon and Mrs. Jones would have been better prepared to discuss it on the day of trial if there had been. Because some of the difficulties that Simon describes are a result of having only a one-shot relationship, Simon's story seems more typical of the types of relationships some public defender services have with their clients.[70] This may make it important to explore these one-shot counseling sessions for that segment of practice, but it makes it difficult to accept Mrs. Jones's case as an exemplar from which to derive a theory of counseling.

Although appropriate, these criticisms about the typicality of Simon's story and whether one can generalize from it, are too easy. They do not prove that Simon's analysis is wrong, but they do require us not to accept it uncritically. As Simon also

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67. *See* Simon, *supra* note 1, at 221.

68. *Id.* at 222.

69. *See id.*

70. *See, e.g.*, JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 105-15 (1972); Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4, 6 (1971); Rodney Thaxton & Lida Rodriguez-Taseff, *Professionalism and Life in the Trenches: The Case of the Public Defender*, 8 ST. THOMAS L. REV. 185, 187 (1995).

argues, there are certain "intractable problems"[71] that proponents of the autonomy view have to take into account. Moreover, I believe he is correct when he argues that a refined view of the autonomy position involves risks of interfering with the client's autonomy and perhaps actual interference.

The first intractable problem arose when Mrs. Jones asked for Simon's advice. As Simon argues, the lawyer can either acquiesce or force the client to be free by not supplying the requested advice. Let us assume the lawyer does give the advice. That would seem consistent with a view that the client's express wishes should control, but it has a cost—the cost being that the client may defer to the lawyer's judgment without thinking through the decision herself. Short-term autonomy may triumph over a long-run interest in autonomy.

On the other hand, although the decision not to answer the client can be justified by an analogy to situations where clients are asked to make decisions under conditions of coercion, this analogy does not work. The client is typically not in a position of coercion. She freely asks for the lawyer's opinion and in many situations it makes sense to comply. The client may not want to take the time to master what is necessary to make an informed decision or to pay the lawyer for the time to explain in enough detail so that the client can fully understand. The best decision rule for the client, therefore, may be to delegate the decision to an expert whom the client trusts.[72]

The proponents of the autonomy view might argue that the client is temporarily incapacitated—the psychological pressure of having to decide has made the client retreat to authority. The problem for the autonomy practitioner, however, is how to distinguish the client who is incapacitated from the client who has good reasons for delegating. Moreover, the autonomy practitioner has to determine what degree of psychological pressure justifies overriding the client's expressed preference. At this point, the analysis or justification for the decision not to answer the client's request begins to resemble the kind of analysis that might be used by advocates of paternalism. And if so, does that

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71. Simon, *supra* note 1, at 218.

72. *See generally* Michael H. Shapiro, *Is Autonomy Broke?*, 12 LAW & HUM. BEHAV. 353 (1988) (discussing the view that some delegations of decision-making power are rational).

not prove Simon's point that in the world of practice these positions merge?

Yet is this conflict as stark or as intractable as Simon makes it? Why not give the client the information about what you think she should do based upon your understanding of her values and tell her just that.[73] For example, in Mrs. Jones's case, Simon had at least two plausible and realistic approaches to take once asked for his opinion. The first was to say, "I will give you my opinion, but I wonder whether you should rely upon it, because I am not a regular practitioner in criminal law."[74] If I were standing there, I would add, "I don't know you very well so it is hard for me to judge what is best for you in this situation." Alternatively the lawyer might explain why, in her judgment, giving her opinion might skew the client's judgment and then leave it to the client to decide what to do next.[75]

Perhaps you are not persuaded that these suggestions solve the problem, so let us assume there are situations in which a proponent of the autonomy view would refuse to give her opinion out of fear that the client would simply defer to the lawyer's judgment.[76] What is the significance of this point? Is it devastating for the autonomy view? Does it mean the autonomy view lapses into hopeless contradiction and therefore is incoherent? This depends upon what we mean by autonomy. If we contend that autonomy is a pure concept that means all or nothing, then the answer might be yes.[77] But one can have a weaker view of autonomy and even recognize that in the real world none of us is completely autonomous in any situation. If so, then Simon's objection has to be noted, but it is not devastating. It does not necessarily mean that because I override my client in one re-

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73. Although at one time advocates of the autonomy view could be read to advocate never giving the client your opinion, most proponents now say that it depends. *Compare* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 186-87 (1977), *with* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 279-80 (1991).

74. Simon defends his decision not to advise Mrs. Jones by citing his incompetence and claiming that it would not be in her long-term best interests to accept advice from a lawyer such as him. *See* Simon, *supra* note 1, at 217.

75. Stephen Ellmann is concerned that this type of dialogue is manipulative because it does not let the client know she has the autonomy to delegate. *See* Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 745-46 (1987).

76. *See* DWORKIN, *supra* note 30, at 116.

77. *See supra* text accompanying notes 31-33.

spect, I override my client in all respects. It does mean that I cannot argue that I will *never* override my client's espoused preferences. It also raises the important issue of if I override my client's decision here, why not in other situations?

In this respect, it can be claimed that the refined autonomy view resembles paternalism because both require the same judgment: in what situations am I justified in overriding my client's expressed preferences? The question remains, however, does this mean the autonomy view is the same as the refined paternalist view? I will discuss this problem below.[78] Before that, however, I will review Simon's other intractable problem: the necessity for choice in presenting information and options.

As the Mrs. Jones story illustrates, the lawyer's decision about what information to include and the ordering and phrasing of that information can significantly affect client decisions. Mrs. Jones refused the offer of a plea bargain when Simon mentioned last that "it wouldn't be total justice."[79] She agreed to accept the plea bargain when Simon's friend discussed the disadvantages of trial last, described the remote possibility of jail in slightly more detail than had Simon, and did not end by stating, "It wouldn't be total justice."

I would add one more type of intervention to this list. An attorney who espouses the refined autonomy view should be willing to help reframe client choices and even limit options as the counseling dialogue develops. At the beginning of a discussion there may be a number of options that seem possible. As the discussion proceeds, however, it may become apparent that some options are not realistic either because they cannot be implemented or because the client is not interested in them. In such a case, the attorney should be willing to discard some choices. In doing this, however, there is the danger that the attorney will limit the client's choices by discarding choices the client would eventually adopt.[80] Similarly, at some point the lawyer should be willing to express what she hears back to the client to narrow the considerations or trade-offs the client has

78. *See infra* text accompanying note 85.

79. Simon, *supra* note 1, at 216.

80. Simon illustrates this point in his discussion of an option not presented to Mrs. Jones—the possibility of defending on the ground that the prosecution was racially discriminatory. Indeed, Simon's illustration is an even stronger example because he never presented the option in the first place. *See id.* at 218.

to make. For example, in Mrs. Jones's case, Simon or his friend might have said:

> We need to decide about whether to accept the plea bargain. From what you have told me this involves you deciding between the very small risk of jail and the pressure of wanting this to be over versus your feelings that accepting the plea bargain would not be right. It wouldn't be total justice.[81]

It is possible, however, that in reframing the issue to express what the lawyer thinks the client values, the lawyer will have it wrong.[82] Again, this intervention raises the risk of influencing the client's decision.

This problem of having an inevitable influence on client choice cannot be avoided. That is why Simon is correct in describing the problem as intractable. There is no completely neutral point from which to decide what information to include, how to describe it, and what clarifying interventions are appropriate.[83] Moreover, despite the wish of law students whom I supervise that it be otherwise, I believe there is no way to avoid engaging in this behavior if one wants to help a client reach a decision. Merely providing a list of information and factors is not helpful for most clients. Doing only this merely satisfies the formal requirements of client autonomy.[84]

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81. See the similar example in ROGER S. HAYDOCK ET AL., LAWYERING PRACTICE AND PLANNING 89 (1996).

82. See the discussion of the issue of information overload versus limiting options in BEAUCHAMP & CHILDRESS, *supra* note 31, at 159-60.

83. Simon expands upon this point in a later article in which he states:

> [T]he advice lawyers give clients and the representational tactics they choose on behalf of clients are inevitably influenced by the lawyers' own values. This advice and these tactics in turn influence clients' perceptions of their interests. There is no value-free mode of communication in which clients could be presented with unfiltered information needed for decision. Advice has to be limited and structured in ways that will reflect the advisor's values. Similarly, tactical choices that the lawyer makes may affect not only opposing parties but also the client's sense of his own interests.

Simon, *Dark Secret*, *supra* note 28, at 1102. As stated in the text, I agree with this position. Where Simon and I disagree is on the implications of this inevitability. For him, it means that since influence is inevitable, it can be more easily justified. For me, since influence is inevitable, it is important to have structures that recognize that fact and attempt to lessen its effect.

84. Compare the similar problem in implementing informed consent in medical decisions. Signing a piece of paper that lists various risks may satisfy the legal requirements for informed consent, but it does not mean that the client has been involved in decision making. *See, e.g.*, Cathy J. Jones, *Autonomy and Informed*

Given this reality of practice, Simon argues the refined paternalist and the practitioner of the refined autonomy view are doing the same thing: they are both presenting options that the reasonable client would want to hear and adjusting those options as they learn more about the client. Furthermore, a lawyer committed to implementing client autonomy would struggle with the same issues Simon and his friend did: how do we discuss the possibility of jail and how do we deal with the client's concern for justice or vindication? In that sense, Simon is correct that the refined autonomy view and the refined paternalistic view are similar in practice. Reality presents a context which neither model can escape.

At this point, we have to consider what it means to claim that it is hard to distinguish one from the other. Is it that they struggle with the same issues or is it something more than that? A claim for similarity would at least have to involve the assertion that they would resolve these issues in a similar fashion. This does not mean that in every instance the person espousing the refined autonomy view and the refined paternalist would resolve these conflicts identically. These situations invariably involve judgment. Different individuals might come to different judgments in any particular situation. If, however, we found systemic differences between the two viewpoints that are not the result of individual judgmental difference,[85] then the claim of similarity is substantially weaker. I believe that Simon's experience with Mrs. Jones is capable of being used to illustrate that

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Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy, 47 WASH. & LEE L. REV. 379, 397-406 (1990). The author describes her observations over six months in a 900-bed medical center. She concludes that "the informed consent procedures that most of [the doctors] used, while sometimes meeting the letter of the informed consent doctrine, rarely met what should be its spirit, *i.e.*, providing adequate information and attempting to ensure that patients understand the information so they can make knowing and voluntary decisions about medical care." *Id.* at 398; *see also* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 934 (1994) ("One revealing sign of the extent to which physicians orchestrate a more or less perfunctory process is a now-common locution among physicians. They do not say that they have obtained the patient's consent; rather, they say that they have 'consented the patient'[].

85. Compare David Luban's discussion of paternalism in which he states he is only considering paternalistic actions, not paternalistic structures. *See* Luban, *supra* note 39, at 460. Luban defines a paternalistic structure as "a social arrangement that makes it especially likely that paternalistic actions will be performed whether or not they are justified." *Id.*

there are systemic differences between the refined paternalist view and the refined autonomy view. It illustrates why a commitment to client autonomy might produce different conversations than those Simon describes.

Simon's friend assumed that what the client wanted (or perhaps what he thought the typical client would want) was to avoid jail at any cost. He, therefore, framed his discussion of the pros and cons of accepting the plea bargain with this end in mind. When the client agreed, he saw no need to test the client's decision. I believe a lawyer committed to client autonomy would have at least reminded the client that in her previous conversation with Simon she had expressed a desire for "justice." Therefore, even though Simon may be correct that both the refined autonomy view and the refined paternalistic view have to make assumptions about what a reasonable client might do, the question remains what one does when data comes to you indicating that this client does not meet your expectations of what a typical client might want. Simon's friend either did not hear the inconsistent data or ignored it as being inconsistent with the client's long-term preferences.[86] If this illustrates a systemic skewing, a characteristic difference between the paternalistic and autonomy views, then Simon's claim of similarity seems less plausible.

Simon's friend, however, might be considered a crude paternalist implementing his views of what he thought a client would want. How would a refined paternalist handle the same problem? Simon gives us a description of that by telling us that, after reflection upon this case, he came to believe Mrs. Jones really did want justice. He then states that if he were to redo the counseling session he would not mention the possibility of jail.[87] He justifies this decision because he believes that "she

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86. Compare a similar incident described by Professor Cathy Jones. Professor Jones observed a patient who was counseled by one doctor who disclosed to the patient the risks and benefits of the alternative treatments feasible for her type of cancer. After this meeting, the patient chose treatment by chemotherapy. However, a second doctor disagreed with this decision and met with the patient to discuss her options further. After these additional meetings, the patient changed her mind. At no point was there an exploration with the patient of the reasons for changing her mind. *See* Jones, *supra* note 84, at 403-04.

87. *See* Simon, *supra* note 1, at 219. As an alternative to not mentioning jail, Simon states that he might have said: "There is no chance you could go to jail." *Id.* This approach is similar in that it removes jail as something for the client to be

was bound to be disabled by any description of jail as a real, even if small, possibility."[88] This position can be made consistent with some versions of an autonomy perspective. For example, one justification of a therapeutic privilege by a doctor to withhold information from a patient is that the disclosure of the information will prevent the patient from making an autonomous decision.[89]

But how did Simon know that Mrs. Jones was bound to be disabled by the description of jail? Simon cites to psychological literature that states that people overvalue unlikely, but disastrous, risks.[90] In addition he relies upon two pieces of data. First, he mentions an experience he had with another client.[91] Second, he analogizes to a personal experience he had with a doctor.[92] Even accepting the validity of the psychological studies and his examples, the question remains how Simon knew Mrs. Jones was going to be similarly affected. It appears that Simon is relying upon his assumptions about a typical client. The data he presents supports this conclusion.[93]

Simon argues that we should adjust our assumptions about the typical client based upon the information we have about the particular client. But in this case, the information we have about Mrs. Jones does not support the conclusion that she was disabled by the mention of jail from considering other possibilities. In the first counseling session Simon had with Mrs. Jones, he mentioned the possibility of jail, yet this did not prevent her from choosing to seek justice. Based upon this experience, one might conclude that Mrs. Jones was able to evaluate the possibility of jail and still make other choices. Simon never explains why he ignores his own data. I have never met Mrs. Jones and only know her through Simon's description, so he may be right in his conclusion that she was going to be disabled by discus-

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concerned about. It does, however, raise questions of justifying deceit rather than omission.

88. *Id.*

89. *See* DWORKIN, supra note 30, at 118-19.

90. *See* Simon, *supra* note 1, at 218-19 n.3.

91. *See id.* at 219.

92. *See id.*

93. Simon states that although Mrs. Jones's anxiety was no greater than he "guess[ed] the median person's would be in her situation," he still thought "she was bound to be disabled by the description of jail as a realistic, even if small, possibility." *Id.*

sion of jail. At no point, however, does Simon consider the possibility of both discussing jail and achieving justice.

It is possible that Simon is a bad refined paternalist and that therefore all I have shown is that his own implementation is flawed. If that is the case, it does not necessarily mean the model is flawed. As my colleague Paul Tremblay has pointed out in a related context, however, rules of thumb or orientations directed toward practice have to be judged not only by their theoretical soundness, but also by how they are likely to be implemented in practice.[94] Therefore, although there may be explanations for the description Simon gives, Simon's example of the refined paternalist in action raises the question of whether Simon's initial orientation as a refined paternalist affects how willing he is to assume that certain information would disable Mrs. Jones.[95]

Simon gives an example of how one's preconceptions can influence behavior when he discusses why the typical lawyer would mention the possibility of jail to Mrs. Jones, but would not mention the possibility of raising the defense of a racially discriminatory prosecution. As he explains it, most lawyers would think that a client would not want to hear about a defense with little probability of success that would likely alienate the judge, particularly in a case with strong conventional defenses.[96] On the other hand, these same lawyers mention the possibility of jail, even though the probability of going to jail is about the same as succeeding on the racial discrimination claim.[97] They do so because they assume most clients would want to hear about jail.[98] Simon concludes that these practices are not based upon an understanding of clients (or the particu-

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94. *See* Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995).

95. The therapeutic privilege in medicine is also justified by the fear that disclosure of information would lead a patient to pick the wrong treatment option. *See* DWORKIN, *supra* note 30, at 119.

96. *See* Simon, *supra* note 1, at 218.

97. *See id.* at 218-19.

98. *See id.* at 218. Nancy Rhoden describes a similar example among obstetric doctors. What she calls the maximin strategy (choosing the alternative that makes the best of the worst possible outcome) of such doctors is so much part of their collective unconscious that these doctors do not see it as one strategy or possibility among many. *See* Nancy K. Rhoden, *Informed Consent in Obstetrics: Some Special Problems*, 9 W. NEW ENG. L. REV. 67, 69-72 (1987).

lar client), but arise from two other influences. One is "the positivist strain of professional legal culture that tends to privilege specific statutory language over common-law or constitutional principle and material over nonmaterial consequences."[99] The second influence is risk aversion. Lawyers may give priority to avoiding disappointing the client over achieving a benefit that the client does not anticipate. By not raising the possibility of making a discrimination claim, the lawyer eliminates the risk that the client will blame him if the claim is unsuccessfully asserted.[100]

The question here is whether a similar mindset[101] influences the refined paternalist, leading to different judgments about client capacities from those made by a lawyer who perceives herself as committed to client autonomy. I have no proof that this is true, but Simon's story suggests that it might be the case.[102] So does evidence from medicine. One study of doctors indicates, for example, that physician-hypothesized negative effects from disclosure rarely materialize.[103] Another concludes that terminal patients are much more likely to want to be told of their illnesses than doctors are likely to tell them.[104] A third states that doctors use the therapeutic privilege as a justification for withholding information and thereby manipulate patients to consent to what the physician considers a medically desirable choice.[105]

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99. Simon, *supra* note 1, at 220.

100. *See id.*

101. This might also be described as a preconception or a disposition.

102. *Cf.* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 553 n.243 (1990) ("[T]here may be nothing inherent in a client-centered approach that causes the lawyer to be more aware of his biases, but it seems plausible that a lawyer who focuses on the relationship factors and is self-conscious about his role will at least be more likely than the traditional lawyer to examine such factors.").

103. *See* BEAUCHAMP & CHILDRESS, *supra* note 31, at 151 (citing Kimberly Quaid et al., *Informed Consent for a Prescription Drug: Impact of Disclosed Information on Patient Understanding and Medical Outcomes*, 15 PATIENT EDUC. & COUNSELING 249-59 (1990)).

104. *See* ROBERT M. VEATCH, DEATH, DYING, AND THE BIOLOGICAL REVOLUTION: OUR LAST QUEST FOR RESPONSIBILITY 229-41 (1976).

105. *See* Charles W. Lidz & Alan Meisel, *Informed Consent and the Structure of Medical Care*, *in* 2 MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 317 (President's Comm'n for the Study of Ethical Problems in Med. & Biomedical Behavioral Research ed., 1982) [hereinafter HEALTH CARE DECISIONS].

I am not arguing that in every case these tendencies make a difference. There may be a great number of cases where the issue of paternalism does not arise or where if it does arise, the refined paternalist and refined practitioner of the autonomy view are doing much the same thing. In cases where the issue of paternalistic behavior is particularly acute, however, one's starting point or default position can matter significantly. It can matter not only because one's psychology or orientation influences behavior, but also because starting points or baselines influence behavior when we are not sure what to do. If one believes autonomy should be the general rule and paternalism a limited exception, there must be more evidence to overcome that presumption. Conversely, if one believes paternalism is prevalent and to some extent inevitable, then justifying any particular exercise of that behavior will be easier. Therefore, despite Simon's claim to the contrary, there are reasons to believe that there are differences in practice between the refined paternalist view and the refined autonomy view.

V. INTENTIONS MATTER

Even if Simon is correct that the refined autonomy view and the refined paternalist view are very similar in practice and that there are no differences in implementation between the two views, there still may be important differences if we focus on the intentions of the lawyers who implement these views in practice. Assume that we have transcripts of a skilled practitioner of the refined autonomy view and a skilled practitioner of the refined paternalist view counseling the same client under the same circumstances, and that these transcripts look quite similar. Does that mean there are no significant differences between the two? In order to answer this question, we have to address the difficult question of whether intentions or motives matter.[106]

Simon's explanation of why he was justified in refusing to give Mrs. Jones his opinion about what to do provides a good

106. Even if the words on the transcript are the same, one could argue that inevitably there will be differences in tone or emotion. If so, this is also relevant to evaluating the actions. *See* Nancy Sherman, *The Place of Emotions in Kantian Morality*, *in* IDENTITY, CHARACTER, AND MORALITY 149, 150-54 (Owen Flanagan & Amélie Oksenberg Rorty eds., 1990).

test. Simon feels he was correct in not providing Mrs. Jones with advice she wanted because he doubted his legal competence in criminal law and because he did not know Mrs. Jones very well. But he does not see this decision as distinctively supported by his respect for Mrs. Jones's autonomy. Rather it could as easily be supported because "it was not in Mrs. Jones's best interests for her to delegate the decision to someone as ignorant about both the law and her."[107] Arguably, an exponent of the autonomy view might also refrain from giving an opinion to Mrs. Jones,[108] but the motive would be different. Presumably, the motive would be to allow the client the time to think about delegating the decision, or to override the client's short-run autonomy in the interests of the client's long-run autonomy.[109] Are these differences in motive merely semantic? Even if they are not, do they matter? From the client's perspective it is the same information being denied—the lawyer's opinion.

It is a familiar principle in law that intentions do matter. The criminal-law requirement of mens rea expresses that viewpoint. In the law of torts, intentional actions justify higher damages through the availability of punitive damages than ordinary negligence.[110] In both these cases, however, the act is wrongful, and one might argue that this distinguishes these situations from the discussion of the refined paternalist's intent. At least within Kantian ethics, however, the reasons for action are critical.[111] Doing the right thing for the wrong reasons is not of the same moral worth as doing the same act for the correct reasons. Moreover, one does not have to be a Kantian to argue that reasons for actions matter. Ethical theories that have virtue or character as their basis also focus upon the motives of agents.

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107. Simon, *supra* note 1, at 217.

108. *See* discussion *supra* in text accompanying notes 73-76.

109. These are the justifications that autonomy theorists have offered for refusing to accept delegation of decision-making power from the client. *See* Gerald Dworkin, *Autonomy and Informed Consent*, *in* 3 HEALTH CARE DECISIONS, *supra* note 105, at 63, 79 ("[T]he difficulty [in deciding whether to accept a waiver] is a practical one—determining that the waiver is not simply psychological denial or a process of infantilization or of giving in to the pressures of the doctor.").

110. To make out a violation of equal protection, current case law also requires a showing of discriminatory motive. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

111. *See* BEAUCHAMP & CHILDRESS, *supra* note 31, at 57.

Virtuous character depends not only upon morally correct actions, but requires correct motives as well.[112]

Still there might be nothing wrong in the intentions Simon expressed.[113] This depends to some extent upon why one values autonomy. An important component of autonomy and its expressive value is that it treats the other person as an autonomous agent.[114] Howard Lesnick, commenting upon a presentation I made a number of years ago, expressed this idea another way. He stated:

> I honestly do not think it matters which position the attorney takes—to leave the final decision with the client or insist on keeping it—so much as I think it matters whether the attorney makes either decision in a way that respects the concerns of both attorney and client, and treats the client as an understanding independent person . . . .[115]

When confronted with a request for an opinion, the dilemma for the autonomy practitioner is deciding whether acceding to that request or ignoring it, in the hope the client will make the decision, shows more respect for the client's capacities as an independent agent. The lawyer's motive is not to prevent the client from making a wrong decision. Her fear is that the client will fail to make any decision at all.[116] The autonomy practitioner

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112. *See id.* at 62-64.

113. Simon is ambiguous as to what his motive was. His exact words are: "My decision to withhold my views could be supported as well by saying that it was not in Mrs. Jones's best interests for her to delegate the decision to someone as ignorant about both the law and her as I was then." Simon, *supra* note 1, at 217. But if his motives are the same as the autonomy practitioner then he is correct that there are no differences, but it is because he is a practitioner of the refined autonomy view. Therefore, I think it is fair to attribute the intentions or motives that I do in the text to see if it makes a difference.

114. *See* Dworkin, *supra* note 109, at 74 ("We desire to be recognized by others as the kind of creature capable of determining our own destiny."); *cf.* BEAUCHAMP & CHILDRESS, *supra* note 31, at 125 ("Being autonomous is not the same as being respected as an autonomous agent. To respect an autonomous agent is, at a minimum, to acknowledge that person's rights to hold views, to make choices, and to take actions based upon personal values and beliefs. Such respect involves respectful *action*, not merely a respectful attitude.").

115. ELIZABETH DVORKIN ET AL., BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 202 (1981) (comment of Howard Lesnick). Another way to express what is lacking is the virtue of "deliberative judgment." *See* Amy Gutmann, *Can Virtue be Taught to Lawyers?*, 45 STAN. L. REV. 1759 (1993).

116. It can be argued that the failure to decide is a decision. In some cases this is true. *See generally* Shapiro, *supra* note 72. But the difficult question is whether the

may get it wrong, but if she takes her task seriously, it is out of respect for the client. Simon's reasons for denying the client this information do not show respect for Mrs. Jones's capacities. Rather they reveal fear that she will make the wrong decision, i.e., she will rely upon an ignorant lawyer.[117]

The impact or harm, however, is not only to the client. Harm is also done to the lawyer. This suggests another reason intentions matter. Intentions as well as actions shape character. And although virtue theory raises difficult questions about what the appropriate virtues are in modern society, Amy Gutmann argues convincingly that a necessary virtue for lawyers is what she calls the deliberative virtues—"the disposition and capacity of lawyers to deliberate with nonlawyers . . . about the practical implications of legal action and its alternatives."[118] Much of Simon's essay can be read as arguing that refined paternalism is consistent with the exercise of deliberative virtue. Yet his own examples do not support this reading. As stated above, Simon suggests that refusing to give Mrs. Jones his opinion can be justified by the likelihood that she would make the wrong decision by relying upon him. In his discussion of the possibility that talk of jail might disable Mrs. Jones, Simon states he would be justified in telling her there was no possibility that she could go to jail.[119] Neither of these options is an exercise of deliberative virtue; rather, they constitute exercises of power to achieve a particular end.

Simon, at the least, needs further argument to establish that there is no difference in moral quality between the refined paternalist and the practitioner of the refined autonomy view. Only if one thinks that reasons for acting are irrelevant, or that there is no significant difference between a refined paternalist's reasons for acting in a particular way and the reasons of the autonomy practitioner, can it be claimed that the refined paternalist and the refined practitioner of autonomy view are the same by showing their behavior is similar. Otherwise, there

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client has "decided" not to decide. *See* Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3, at 83.

117. *But see* Dworkin, *supra* note 109, at 81 ("To fail to seek consent, as in the case of therapeutic privilege, is necessarily an insult to autonomy even though motivated by pure benevolence.").

118. Gutmann, *supra* note 115, at 1759.

119. *See* Simon, *supra* note 1, at 219.

has to be debate as to whether the differences in motives or intentions matter. Moreover, virtues viewed as preconceptions or dispositions inevitably affect behavior. To that extent, even if we have an example of similar behavior in a particular instance, there will inevitably be significant differences over time between the practitioner of the refined autonomy view and the refined paternalist.

VI. CONCLUSION

Professor Simon states that for the thoughtful autonomy proponent "the client's autonomy is as much a goal as a premise of the counseling relation."[120] I agree. We disagree on the significance of having that goal. There are still significant differences in practice between the refined autonomy view and the refined paternalist view because the goals and intent of the lawyer affect both the meaning and the texture of relationships between lawyer and client. Lawyers who believe in refined paternalism will act differently at critical moments from lawyers who believe the decision belongs to the client. Mrs. Jones's story illustrates those differences. Finally, even if Mrs. Jones's story shows that there is similarity in behavior between the two viewpoints, the intentions of the lawyers matter. Even if we accept that the behavior of the refined paternalist and the practitioner of sophisticated views of autonomy are very similar, the lawyer's intentions in each case have moral significance.

Nevertheless, Simon has made a valuable contribution by reminding us that both in theory and in practice the refined autonomy view and refined paternalism may not be as far apart as is sometimes claimed. Moreover, by focusing on the inevitability of lawyers influencing clients, he forces us to consider not only whether lawyers should influence clients, but under what conditions and in what situations we should recognize such influence and to what extent we should be concerned about it. Finally, Simon's willingness to break down these categories suggests further focus on ways in which influence and power travel in both directions, even with lawyer interactions with individuals. Lawyers not only have influence and power over their clients, but clients have influence and power over their

120. *Id.*

lawyers.[121] All this makes attention to context vital. It also may make it unrealistic to adopt general models or theories for application to all lawyer-client interactions. I believe it is important, however, to face those issues directly rather than by suggesting that there is no meaningful difference between autonomy and paternalism.

At the end of his essay, Simon switches the focus to ourselves. "Ourselves" includes both academics who write about these issues and lawyers who are concerned about justifying their behavior. Simon speculates as to why the debate between the autonomy view and the paternalist view inspires so much energy even though in his view it is "so often moot."[122] His answer is that "[t]he crude autonomy view is attractive to lawyers because it absolves them of the burdens of connection and the responsibilities of power."[123] Paternalist views are frightening because they emphasize "the inescapability of lawyer power."[124] Finally, according to Simon, the refined autonomy view through its rhetorical association with the crude autonomy view "evokes some of the psychologically comforting associations of the latter and makes it more palatable than refined paternalism, even when they are functionally indistinguishable."[125]

One obvious response to the above is that the refined paternalist position and the refined autonomy view are not the same. That response is the subject of this article. But I also want to offer some of my own speculation. The attractiveness of the autonomy view can stem from its denial of responsibility and that is a substantial problem. We need a way for lawyers to accept responsibility for their actions without controlling the lives of others. Furthermore, as Simon stated in a more recent article, some of the newer literature about poverty lawyers and their clients seems to romanticize poor clients and to assume that the only problem is lawyer domination.[126] Simon is correct

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121. *See* William L. F. Feltsiner & Austin Sarat, *Enactments of Power; Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93, 96, 125 (1986).

122. Simon, *supra* note 1, at 225.

123. *Id.*

124. *Id.* at 225-26.

125. *Id.* at 226.

126. *See* Simon, *Dark Secret*, *supra* note 28, at 1111-14.

about these problems of the autonomy view. He ignores, however, the parallel problems or difficulties of the paternalistic view. Just as the autonomy view can be psychologically comforting because it allows lawyers to refuse responsibility for their actions, the refined paternalist view can be comforting because it allows lawyers to exercise paternalism while claiming only to be implementing what the client truly desires. Furthermore, although the crude autonomy view may be the easiest stance, the hardest position is to accept responsibility for one's power in a relationship without dominating or asserting power over the other. Ultimately, however, both Professor Simon and I believe that whether one is a proponent of the autonomy view or a paternalist, good lawyering involves more than following mechanical models. It requires serious dialogue with one's client. I offer this Article in the spirit of engaging in such dialogue.