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## Autonomy Isn't Everything: Some Cautionary Notes on McCoy v. Louisiana

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# ARTICLE

*W. Bradley Wendel*

## Autonomy Isn't Everything: Some Cautionary Notes on *McCoy v. Louisiana*

**Abstract.** The Supreme Court's May 2018 decision in *McCoy v. Louisiana* has been hailed as a decisive statement of the priority of the value of a criminal defendant's autonomy over the fairness and reliability interests that also inform both the Sixth Amendment and the ethical obligations of defense counsel. It also appears to be a victory for the vision of client-centered representation and the humanistic value of the inherent dignity of the accused. However, the decision is susceptible to being read too broadly in ways that harm certain categories of defendants. This paper offers a couple of cautionary notes, in response to *McCoy*, regarding the ethical obligations of defense counsel. The most important caution is that, as a matter of constitutional law and professional ethics, the preference for autonomy and the standard allocation of decision-making authority presupposes a fully competent client, not a client who merely passes the extremely low constitutional bar of competency to stand trial. A client capable of participating in a fully autonomous way in the representation is far more than minimally competent. Where the client has diminished capacity to make adequately considered decisions in connection with a representation, the usual division of decision-making authority within the lawyer-client relationship breaks down. The Supreme Court's 2008 decision in *Indiana v. Edwards* muddles the issue considerably by recognizing a gray area between competency to stand trial and entitlement to self-representation under *Faretta v. California*. The self-representation right in *Faretta* is based on the same autonomy interests that animate *McCoy*. Autonomy is a capacity, and the *Edwards* decision questions

whether a client lacking this capacity can participate in the representation in the usual way. *Edwards*, therefore, casts considerable doubt on whether autonomy should have the same priority over fairness and reliability interests in a representation involving a borderline-competent defendant. Observing that a lawyer's decision has the effect of limiting the client's autonomy is the beginning of the recognition of a complicated issue, not the end of the analysis. In many cases, the lawyer should respect a client's fully-informed decision regarding the representation. There will be other cases, including the representation of questionably competent clients, in which the client's autonomy interest must be subordinated to other legal values. This ranking should not be conducted on an ad hoc basis but in a principled way. This paper, therefore, proposes a sliding-scale approach to autonomy and other professional values, in which the most important consideration is a balance between the importance of the decision and the client's capacity to participate in a meaningful way in the representation. A clearly competent, well-informed client still has the right to make what a lawyer believes to be unreasonable decisions regarding the representation. However, the threshold for concluding that a client is competent and that a decision is fully informed should be set sufficiently high to ensure the protection of "gray area" clients, and also to provide appropriate incentives to trial counsel to conduct a thorough investigation and mount an effective defense.

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The author thanks John Blume for many years of discussion of the ethical

problem that eventually rose to the attention of the Supreme Court in the *McCoy* case and thanks Zohra Ahmed and Justin Murray for helpful comments. The author also gratefully acknowledges the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O’Neil Charitable Trust.

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### I. THE PROBLEM AND THE *MCCOY* DECISION

You are a lawyer assigned to represent a defendant charged with three counts of first-degree murder; the state gave notice of its intent to seek the death penalty. The physical and circumstantial evidence against your client is overwhelming, including security camera footage, cell phone records, a frantic 911 call from one of the victims, a prior incident of domestic violence against a relative of the victims, and ballistics tests matching the defendant’s handgun to the .380 rounds that killed the victims, which a witness testified to having bought with the defendant at Wal-Mart.<sup>1</sup> Your client, however,

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1. *State v. McCoy*, 218 So. 3d 535, 541–44 (La. 2016), *rev’d*, 138 S. Ct. 1500 (2018); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1513 (2018) (Alito, J., dissenting) (“The evidence against [McCoy] was truly ‘overwhelming,’ as the Louisiana Supreme Court aptly noted.” (citing *McCoy*, 218 So. 3d at 565)).

adamantly insists that he is innocent. When you ask him to explain how those three people ended up dead, he tells an elaborate story of a massive conspiracy in which every law enforcement officer involved in the multi-state manhunt and investigation was corrupt, dealing drugs, and somehow had an incentive to murder the victims.<sup>2</sup> After attempting to verify the details of your client's story and finding that none of them check out, and mindful of the importance of presenting a defense that is consistent throughout the guilt and penalty phases of the trial,<sup>3</sup> you conclude that the defendant's best hope for avoiding a death sentence is to admit to having committed the crimes, but rely on mitigating evidence showing that the defendant does not deserve death due to his severe mental and emotional issues.<sup>4</sup> You try every technique you have learned over the years to persuade your client of the wisdom of this strategy, but he continues to maintain that he did not commit the murders. He does not avow any other ethical commitment, such as the desire to take responsibility for his crimes, which would explain his insistence on pursuing this defense strategy. Instead, he simply insists that he did not do it. What do you do, and what professional

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2. *McCoy*, 218 So. 3d at 549 n.15. The U.S. Supreme Court characterized the story as “an alibi difficult to fathom.” *McCoy*, 138 S. Ct. at 1507.

3. Experienced capital defense lawyers understand—and this has been confirmed by empirical investigation—that it is a losing strategy for the defendant to claim innocence during the guilt phase of the trial and then argue for life during the sentencing phase. See John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1044 (2008) (“[M]ost jurors enter the penalty phase with their minds already made up as to the appropriate sentence.”); see also Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1588–89 (1998) (“[I]f the defense does not approach a capital case, even though it is bifurcated, as a unified presentation, it greatly increases the risk that the guilt-phase presentation will doom the case in mitigation during the penalty phase.”). Sundby’s study showed that juries impose a death sentence far more frequently in cases in which the defendant denies guilt than in cases in which the defendant admits guilt and demonstrates remorse. Sundby, *supra*, at 1589. The optimal strategy for the defense team is thus to humanize the defendant throughout the trial, ensuring he (or she—although the overwhelming number of capital defendants are men) does not appear to the jury to be remorseless. Blume, Johnson & Sundby, *supra*, at 1038–39, 1049–50. Actively contesting guilt during the guilt-or-innocence phase risks angering jurors, who then view evidence presented in the mitigation phase as nothing more than another attempt by the defendant to avoid responsibility. *Id.* at 1044–45.

4. See Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1055–71 (2003) (noting the importance of consistency and that “counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime”).

ethical values—whether or not they are contained in your state's rules of professional conduct<sup>5</sup>—inform that judgment?

There are two general answers to that question, representing two distinct clusters of professional ethical values. The first is oriented toward the client's legal rights. It emphasizes the lawyer's obligation to use care, skill, and diligence to protect those rights, but also qualifies these client-regarding duties with constraints on deception and abuse of legal processes.<sup>6</sup> Lawyers must provide reasonably effective assistance to their clients,<sup>7</sup> and are presumed to have the capacity their clients lack to make professional judgments in the course of the representation.<sup>8</sup> The lawyer's fiduciary duty is certainly to protect the client, but the contours of that duty are informed by the purpose of the Sixth Amendment right to counsel, which is to ensure that criminal defendants receive a fair trial through reliable proceedings.<sup>9</sup> As a result, the defense lawyer is not a "mouthpiece or marionette" for the defendant,<sup>10</sup> but a professional who must use experience and judgment in carrying out the objectives of the representation. Lawyers do not pursue their clients' objectives unmodified, but their *lawful* objectives,<sup>11</sup> or their legal rights. A client's asserted interest is the starting point for the lawyer's ethical analysis, but the lawyer must also consider the content of the client's legal entitlements.

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5. Every lawyer in the United States is subject to professional conduct rules promulgated by courts in the lawyer's state of admission. Lawyers often refer to these as rules of ethics, which tends to create unnecessary confusion with the idea of ethics as beliefs about what one ought to do when considering the impact of the decisions on others. David Copp, *Introduction: Metaethics and Normative Ethics*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 3, 4 (David Copp ed. 2006). Ethics in this sense (which, following most ethicists, I will use interchangeably with morality) is distinct from custom, tradition, etiquette, self-interest, and the requirements of law, which is why the term "legal ethics" is notoriously ambiguous. *Id.*

6. See *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (stating the lawyer's overarching duty to advocate the client's cause is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

7. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (defining the lawyer's basic duty as "bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process" (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932))).

8. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (emphasizing "the superior ability of trained counsel" to select arguments for appeal (citing *Douglas v. California*, 372 U.S. 353, 358 (1963))).

9. *Strickland*, 466 U.S. at 689–90.

10. *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010) (en banc) (citing *People v. Schultheis*, 638 P.2d 8, 12 (Colo. 1981)).

11. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2001).

More generally, society as a whole has an interest in ensuring that the power of the state is not misused by inflicting punishment on innocent people.<sup>12</sup> This interest is conceptually independent of the defendant's interest in controlling his defense. Influenced primarily by these societal values, a lawyer may believe that the most ethical course of action is to do anything possible to prevent the client from putting on a preposterous defense. The result of acquiescing to the client's directive will almost certainly be a death sentence, which may be avoidable with a well-crafted mitigation case. Landmark Supreme Court decisions such as *Strickland v. Washington*<sup>13</sup> emphasize the importance of independent professional judgment and deference to the strategic choices of counsel; this deference, in turn, is justified by the assumption that a lawyer will comply with her fiduciary duties of loyalty and care and provide vigorous advocacy for her client's cause.<sup>14</sup> In the hypothetical, the lawyer's most important duty would be to do whatever it takes to convince the client not to rely on a story that will likely result in execution. Doing so not only respects the client's legal rights, but also supports the proper functioning of the criminal justice system.

The second answer focuses not on the values of professional judgment and the reliability and fairness of the proceedings, but on the defendant's autonomy. The Supreme Court held, in *Faretta v. California*,<sup>15</sup> that a defendant who voluntarily and intelligently elects to represent himself at trial has a constitutional right to do so.<sup>16</sup> The Court has also held that a defendant has the exclusive authority to make decisions about such fundamental matters as whether to take the stand,<sup>17</sup> waive a jury trial,<sup>18</sup> or

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12. See *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting) (observing, in the context of a capital case, that the Eighth Amendment "expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments"); see also Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 617 (2000) (contending an autonomous choice does not transform an unconstitutional punishment into a constitutional one).

13. *Strickland*, 466 U.S. 668.

14. See *id.* at 688 ("The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." (citing *Michel v. Louisiana*, 350 U.S. 91, 100–101 (1955))).

15. *Faretta v. California*, 422 U.S. 806 (1975).

16. *Id.* at 832.

17. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987); *Malloy v. Hogan*, 378 U.S. 1, 7–8 (1964).

18. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

plead guilty.<sup>19</sup> The lawyer disciplinary rules recognize an allocation of decision-making authority between clients and lawyers, with clients having the exclusive authority to make decisions concerning the objectives of the representation.<sup>20</sup> Tracking the constitutional entitlements of criminal defendants, the rules provide that in the criminal defense context, a lawyer must abide by the client's decisions about the plea to enter, whether to waive jury trial, and whether to testify.<sup>21</sup> In addition, for the last several decades, legal scholars, particularly those associated with the clinical legal education movement, have advocated a model of client-centered representation.<sup>22</sup> One important implication of client-centered representation is that lawyers should not assume that a client's values, cares, and commitments are exhausted by the client's *legal* interests.<sup>23</sup> A client may prefer a course of action that a reasonable lawyer would recognize as making the client worse off, legally speaking.<sup>24</sup> But the client should be allowed to control his own

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19. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brookhart v. Janis*, 384 U.S. 1, 7 (1966).

20. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2018) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to plea to be entered, whether to waive jury trial and whether the client will testify.").

21. *Id.*

22. *See generally* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (3d ed. 2012) (challenging lawyers to adopt a client-centered approach when gathering information from clients, developing the client's story from their perspective, and when counseling clients so that they may make better decisions regarding their own legal objectives); *see also* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370–71 (2006) ("[T]he client-centered approach has so thoroughly permeated skills training and clinical legal education, it is not an exaggeration to say that client-centered representation is one of the most influential doctrines in legal education today."); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 510 (1990) ("The [Binder and Price client-centered] model's emphasis on the client's role in the counseling process provides a needed response to the worst excesses of the traditional lawyer-dominated model of counseling."). *But see* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 487 (1995) ("The critical and client-centered movements add to our understanding of the role that client voices can and should play in legal representation. But in a rush to embrace client voice, these scholars have virtually ignored the critical role that case theory can play in linking client stories to the narratives that lawyers tell on behalf of clients.").

23. *See* Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 127–28 (2010) (discussing the importance of recognizing the broad scope of clients' interests in client-centered representation).

24. *See id.* (differentiating between counseling with a holistic approach to representation versus a purely legal approach). In his classic article, *Paternalism and the Legal Profession*, David Luban offers a series of hypothetical examples to illustrate the divergence between the legal interests of clients and other values, cares, and commitments. David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L.

fate.<sup>25</sup> Respecting the value of client autonomy may require the lawyer to accept the client's instructions, even if it spells disaster for the client's case. As will be discussed further below, however, respect for the value of autonomy presupposes that the client is competent to make informed decisions concerning the representation. When that assumption does not hold, the lawyer's ethical responsibilities become much more nuanced.

Legal scholars have split on whether the first or second answer represents the most ethical course of action for the lawyer in this case.<sup>26</sup> Near the end of the 2017–18 term, the U.S. Supreme Court, in the case on which the opening hypothetical was based, decisively chose the autonomy-centered approach.<sup>27</sup> It held that even where experienced defense counsel reasonably believes that conceding guilt would offer the defendant the best chance to avoid the death penalty, the defendant is entitled to insist at trial

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REV. 454, 455–57 (1981). For example, he imagines a case in which a workers' compensation award could be increased by showing that a physical injury in the workplace was "exacerbated by psychosomatic factors." *Id.* at 456. However, the "client is a proud 55-year old Slovenian-American machinist who . . . indignantly refuses to see a psychiatrist, now or ever[.]" stating that "[p]sychiatrists are for crazy people." *Id.* He concludes with an example from a great American country song (originally recorded by Lefty Frizzell, and covered by Johnny Cash, the Band, the Chieftains, the Proclaimers, and many other artists) in which the defendant refuses to offer a solid alibi defense to a murder charge because it would require him to admit that he had been in bed with his best friend's wife. *Id.*

25. See *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) ("It is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense." (citing *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985))).

26. See Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1368 (1988) ("Specifically, some argue that attorneys should ignore the wishes of clients who prefer execution so as not to frustrate the judicial obligation to assure that death sentences are valid before they are carried out. . . . [T]his line of argument is fundamentally incompatible not only with traditional conceptions of an attorney's duty to respect the autonomy of a competent client, but also with prevailing preference for judicial restraint."); see also Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1163-74 (2010) ("Because completely depriving the defendant of control over the case is not necessary for the criminal justice system to function, the concomitant autonomy infringement cannot be justified."); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 623 (2005) (asserting "the very idea of defendant autonomy is philosophically incoherent and inconsistent with other fundamental traditions of American criminal justice"); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 699 (2006) (finding a false dichotomy between autonomy and reliability in a criminal defense).

27. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) ("Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.").

on his innocence.<sup>28</sup> Picking up on arguments from the client-centered representation movement, Justice Ginsburg noted that the client's objective may not be simply to avoid death.<sup>29</sup> Rather, "He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration."<sup>30</sup> Thus, the lawyer had an obligation to put on the defense the client wanted, no matter how ill-considered the lawyer believed the client's decision to be.

In Justice Ginsburg's version of the story, lawyers are, at most, supporting characters. Citing *Faretta*,<sup>31</sup> she noted that, historically speaking, self-representation was the norm.<sup>32</sup> Even when the right to the assistance of counsel was recognized, and explicitly provided for in the Sixth Amendment, the right is personal to the accused and, structurally, establishes a division of authority with respect to trial strategy.<sup>33</sup> Tracking the distinction in Model Rule 1.2(a) between the objectives of the representation and the means by which they are to be pursued,<sup>34</sup>

28. *See id.* at 1509 ("If, after consultations with [defense attorney] English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection.").

29. *Id.* at 1508 ("Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But, the client may not share that objective.").

30. *Id.* (citing Hashimoto, *supra* note 26, at 1178); *see also* Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 804 (2002) (observing death row inmates who direct their attorneys to waive appeals may be motivated by "stoic resignation, genuine remorse, the assurances of faith, or the peace that follows contrition").

31. *Faretta v. California*, 422 U.S. 806 (1975).

32. *McCoy*, 138 S. Ct. at 1507. Supporters of *Faretta* and the autonomy interest in criminal defense representation are fond of pointing out that the only English tribunal not to allow self-representation was the Star Chamber. *See Faretta*, 422 U.S. at 821 ("[T]he Star Chamber has for centuries symbolized disregard of basic individual rights. [It] not merely allowed but required defendants to have counsel." (citing L. FREIDMAN, *A HISTORY OF AMERICAN LAW* 23 (1973))); Ashley G. Hawkinson, Comment, *The Right of Self-Representation Revisited: A Return to the Star Chamber's Disrespect for Defendant Autonomy?* [*Indiana v. Edwards*, 128 S. Ct. 2379 (2008)], 48 WASHBURN L.J. 465, 474–75 (2009) (analyzing the development of self-representation in American colonial law). The rhetorical impact of the comparison is undeniable, although ironic, because the Star Chamber was used by the king to keep "great and powerful men" under his thumb, while modern defendants seeking to proceed *pro se* under *Faretta* are among the most powerless in society. *See* Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570–1640*, 51 AM. J. LEGAL HIST. 639, 650 (2011) ("[T]he core jurisdiction of the Court of Star Chamber . . . was closely related to the concern that abuses of powerful men could not otherwise be adequately addressed.").

33. *McCoy*, 138 S. Ct. at 1508–09.

34. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2018).

Justice Ginsburg concluded that McCoy's trial counsel impermissibly overrode his decision to contest the state's evidence that he had committed the murders.<sup>35</sup> Furthermore, the trial court's error in permitting McCoy's

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35. *McCoy*, 138 S. Ct. at 1509. The Court considered other arguments by the state, which will not be considered in detail here, owing to the focus of this Article on the relative priority of the defendant's autonomy interest. The majority correctly rejected the state's argument that Rule 1.2(d) of the Louisiana Rules of Professional Conduct (identical to Model Rule 1.2(d)) prohibited trial counsel from arguing that McCoy was factually innocent. *Id.* at 1510. Rule 1.2(d) states that a lawyer may not assist a client in conduct "that the lawyer knows is criminal or fraudulent." MODEL RULES OF PROF'L CONDUCT R. 1.2(d). The most plausible crime or fraud involved in the defense of McCoy's case would be perjury which, as Justice Ginsburg rightly notes, presents special difficulties for defense counsel. *McCoy*, 138 S. Ct. at 1510. However, she came dangerously close to misreading Rule 3.3(a), which is the prohibition in the Louisiana Rules (and the Model Rules) on presenting false evidence. *Id.* She observes that trial counsel "harbored no doubt that McCoy believed what he was saying." *Id.* The test for a violation of Rule 3.3(a), however, is not whether the client sincerely believes, in perfect subjective good faith, that he is telling the truth; rather, it is whether *the lawyer knows* that the evidence is false. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3). "Knows" and "knowledge" are defined terms in the Rules of Professional Conduct and refer to "actual knowledge of the fact in question." *Id.* R. 1.0(f). The Louisiana rules are identical to these provisions of the Model Rules. The knowledge in question is that of the lawyer, not the client. It is certainly true that a lawyer may acquire knowledge of the falsity of evidence from the client's statement that he intends to lie on the stand. But a lawyer may also conclude from other evidence that the client is lying and would then be required by the Rules of Professional Conduct to avoid introducing the client's testimony. *See, e.g.,* *People v. Andrades*, 828 N.E.2d 599, 602–03 (N.Y. 2005) (finding no deprivation of right to effective assistance of counsel where trial counsel informed the court of an "ethical problem" related to the client's false testimony). Suppose in the *McCoy* case the defendant had denied riding with a trucker from Arkansas to Idaho (which was material evidence because the state wished to prove that a gun found in the truck was the murder weapon), and a police dashboard camera clearly showed the defendant getting out of the truck in Idaho. *State v. McCoy*, 218 So. 3d 535, 543 n.7 (La. 2016), *rev'd*, 138 S. Ct. 1500 (2018). If the defendant insisted on taking the stand and testifying that he had not ridden in the truck, trial counsel would have a real problem under Rule 3.3(a)(3). Some courts have held that nothing will suffice to establish defense counsel's knowledge of client perjury short of a bald statement by the client that the proposed testimony will be a lie. *See* *United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003) ("Midgett never indicated to his attorney that his testimony would be perjurious. Thus, his lawyer had a duty to assist Midgett in putting his testimony before the jury . . ." (citing *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring))); *State v. McDowell*, 681 N.W.2d 500, 513 (Wis. 2004) ("Absent the most extraordinary circumstances, such knowledge [of the falsity of the client's testimony] must be based on the client's expressed admission of intent to testify untruthfully."). Other courts, however, conclude that a lawyer has the requisite knowledge where the state's evidence is overwhelming. *United States v. Rantz*, 862 F.2d 808, 813-15 (10th Cir. 1988); *People v. DePallo*, 754 N.E.2d 751, 753 (N.Y. 2001). The Supreme Court itself has not addressed the weight of evidence necessary to satisfy the requirement under state rules of professional conduct to avoid presenting false evidence—nor could it, since this is a matter for state courts. The most the Court can do is what it did in *Nix v. Whiteside* and conclude that a lawyer's conduct that is presumed to be in conformity with state rules of professional conduct either does or does not violate the Sixth Amendment's guarantee of effective assistance of counsel. *See* *Nix*, 475 U.S. at 171–72 (following the Court of Appeals in

trial counsel to interfere with his authority to make strategic decisions about the objectives of the representation did not affect only McCoy's interest in avoiding wrongful conviction. It was structural, affecting his autonomy interest, which has significance beyond the reliability of the conviction.<sup>36</sup>

*McCoy v. Louisiana*<sup>37</sup> represents a decisive statement of the priority of the value of the defendant's autonomy over the fairness and reliability interests that also inform both the Sixth Amendment and the ethical obligations of defense counsel. It appears to be a victory for the vision of client-centered representation and the humanistic value of the inherent dignity of the accused. The duties stated in *McCoy* are less about the lawyer's professional duties as an officer of the court and personal integrity and emphasizes instead the lawyer's role as an agent of the client. The decision is correct as far as it goes—that is, on the assumption that a fully-informed, competent client made a rational decision not to plead guilty after consultation with his lawyer, who provided reasonable advice regarding the risks and benefits of going to trial.<sup>38</sup> However, one must be careful to understand the principle in *McCoy* in light of that crucial assumption.

The most important note of caution to sound about *McCoy* is that, as a matter of constitutional law and professional ethics, the preference for autonomy and the standard allocation of decision-making authority presupposes a fully competent client, not a client who merely passes the extremely low constitutional bar of competency to stand trial.<sup>39</sup> A client

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assuming that the testimony the defendant proposed to give at trial would have been false). Justice Alito's dissent rightly notes that this is an issue of state law in which the Court should not involve itself. *McCoy*, 138 S. Ct. at 1513–14 (Alito, J., dissenting). It is entirely possible that trial counsel in *McCoy* could have concluded that he had actual knowledge that his client's testimony would be false and was therefore duty-bound to take reasonable remedial measures. MODEL RULES OF PROF'L CONDUCT R. 3.3. There is still a further issue of whether overriding the client's decision to contest his involvement in the crime was beyond the scope of required remedial measures under Rule 3.3. See *Id.* at cmt. 6. Trial counsel could have complied with his obligations under Rule 3.3 by taking less intrusive remedial measures, such as permitting McCoy to testify in a narrative form. *Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978); *Andrades*, 828 N.E.2d at 604.

36. *McCoy*, 138 S. Ct. at 1511.

37. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

38. The Supreme Court has held that the Sixth Amendment right of effective assistance of counsel extends to the plea-bargaining process and that a defendant may obtain relief on *habeas corpus* upon a showing that counsel's advice regarding a plea offer fell below an objective standard of reasonableness. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

39. See, e.g., *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (“[T]he ‘test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the

capable of participating in a fully autonomous way in the representation is far more than minimally competent. Where the client has diminished capacity “to make adequately considered decisions in connection with a representation,”<sup>40</sup> the usual division of decision-making authority within the lawyer-client relationship breaks down. Unfortunately, the rules of professional conduct provide very little guidance for lawyers in this situation, stating only that the lawyer should try, to the extent possible, to have as normal a lawyer-client relationship as possible.<sup>41</sup> A lawyer who turns to Supreme Court caselaw for clarification will find that the Court created uncertainty with a 2008 decision, *Indiana v. Edwards*,<sup>42</sup> which recognized, but did not define, a new intermediate category of “borderline” or “gray-area” competence to exercise the right of self-representation under *Faretta*.<sup>43</sup> The self-representation right is based on the same autonomy interests that animate *McCoy*. Autonomy is a capacity, and the *Edwards* decision questions whether a client lacking this capacity can participate in the representation in the usual way. *Edwards* therefore casts considerable doubt on whether autonomy should have the same priority over fairness and reliability interests in a representation involving a borderline-competent defendant.

The other cautionary note regarding *McCoy* is that the decision may have the unfortunate tendency to encourage lackadaisical representation by misguided, overworked, or incompetent lawyers.<sup>44</sup> The Supreme Court has

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proceedings against him.”). *See infra* notes 77–81 and accompanying text, for further discussion of the *Dusky* competency standard, the Court’s unification of various competency standards in *Godinez*, and the uncertainty created by *Edwards*.

40. MODEL RULES OF PROF’L CONDUCT R. 1.14(a). The Louisiana rule is identical. LA. MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2002). Furthermore, the relationship between this standard of competence (or capacity) and criminal law standards of competency will be considered extensively in Section II.

41. MODEL RULES OF PROF’L CONDUCT R. 1.14(a).

42. *Indiana v. Edwards*, 554 U.S. 164 (2008).

43. *See generally* *Faretta v. California*, 422 U.S. 806 (1975) (discussing a defendant’s right to self-representation, even if issues of competence are of concern, is implied in the Sixth Amendment). Although the Court did not say much about this new category, it is clear that it contemplates a defendant who is competent to stand trial but may not be competent to participate in the representation in other respects.

44. In fairness, not all constitutionally ineffective representation is the result of laziness or incompetence. The excessive workloads of public defender offices, for example, may result in time pressures that make effective representation all but impossible. *See, e.g.*, *Pub. Def., Eleventh Judicial Circuit v. State*, 115 So. 3d 261, 282 (Fla. 2013) (“[A] public defender [should not be prevented] from

emphasized deference by reviewing courts to strategic decisions by trial counsel.<sup>45</sup> A client may initially be inclined to pursue a hopeless line of defense, or may wish to present no evidence at all. In capital cases, clients are often reluctant to allow a thorough investigation and presentation of evidence in mitigation of a potential death sentence, despite a line of Supreme Court decisions holding counsel constitutionally ineffective for failure to conduct a mitigation investigation.<sup>46</sup> A lawyer may be too quick to accept the client's direction, believing that to be the lesson of *McCoy*. Most emphatically, it is not, but the Court's enthusiasm for client autonomy and relegation of trial counsel to a merely instrumental role may cause some less than zealous advocates to give up without a fight.<sup>47</sup>

The value of autonomy informs not only the representation of clients by lawyers, but many other relationships between individuals and institutions in an advanced society. This is necessarily true when the information and capacity necessary to make autonomous choices lies beyond the ability of individuals without specialized training. Professionals such as lawyers and physicians are necessary to help people realize their conceptions of a worthwhile life, and we all must place a great deal of trust in their commitment to ethical norms of loyalty and trustworthiness. Much of the theoretical reflection on the relative priority of autonomy and other values originates in medicine and clinical bioethics, and it is particularly salient in the development of principles of informed consent.<sup>48</sup> The rejection of

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filing a motion to withdraw based on excessive caseload[s] or underfunding that would result in ineffective representation of indigent defendants . . .").

45. *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

46. *Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534–35 (2003); *Williams v. Taylor*, 529 U.S. 362, 363–64 (2000).

47. *See, e.g., DeBruce v. Comm'r, Ala. Dept. Corr.*, 758 F.3d 1263, 1277 (11th Cir. 2014) (reaffirming the Supreme Court's position that a defendant is prejudiced in cases where counsel omits or fails to introduce mitigating evidence of the defendant's cognitive/mental impairments). In that case, trial counsel conducted virtually no mitigation investigation, despite evidence that the defendant exhibited signs of significant cognitive deficiencies and substance abuse. *Id.* The state said trial counsel's decision was strategic, but the Eleventh Circuit concluded it was based on an unreasonable understanding of the applicable law. *Id.* at 1274–75. The point of mentioning this case in connection with *McCoy* is that it may be too easy for trial counsel to make what they believe is a strategic decision to provide a less effective defense if they are representing a client who, because of depression, confusion, mental illness, or simple exhaustion, instructs the lawyer not to pursue a reasonable investigation.

48. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 120–81 (4th ed. 1994); H. TRISTRAM ENGELHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* 262–84 (1986); ONORA O'NEILL, *AUTONOMY AND TRUST IN BIOETHICS* 28–48 (2002).

medical paternalism and the centrality of informed consent in the doctor-patient relationship soon came to be reflected in the law, not only in the tort principles that regulated medical decision-making, but also in the regulation of the lawyer-client relationship.<sup>49</sup> Autonomy is now arguably seen as the central organizing value in legal ethics, just as in biomedical ethics. As in the latter discipline, however, we may ask whether the only, or the most important, ethical issue is whether a patient or client has consented to some course of action. Other values should inform professional ethics—in medicine, promoting the patient's health and well-being (the principle of beneficence), and in law, the reliability of judicial proceedings and the fair administration of justice.

Observing that a lawyer's decision has the effect of limiting the client's autonomy is the beginning of the recognition of a complicated issue, not the end of the analysis. In many cases the lawyer should respect a client's fully-informed decision regarding the representation. There will be other cases, including the representation of questionably competent clients, in which the client's autonomy interest must be subordinated to other legal values. This ranking should not be conducted on an ad hoc basis but in a principled way. This Article therefore proposes a sliding-scale approach to autonomy and other professional values, in which the most important consideration is a balance between the importance of the decision and the client's capacity to participate in a meaningful way in the representation. A clearly competent, well-informed client still has the right to make what a lawyer believes to be unreasonable decisions regarding the representation. However, the threshold for concluding that a client is competent and that a decision is fully informed should be set sufficiently high to ensure the protection of

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49. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 729 (1987) (discussing the importance of autonomy in decisionmaking and noting “[i]f [attorneys] accept that clients are competent—entitled—to make decisions, then we should also accept that they are competent to choose a decisionmaking method as well”); see also Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 310 (1980) (putting forth the argument for attorneys to adopt informed consent as the “process-oriented standard for enforcing competency in the legal profession”); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1061 (1984) (reviewing attorney obligations under the Model Rules of Professional Conduct in comparison to a client's ability to manifest informed consent); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 332 (1987) (addressing the views associated with informed consent in the context of a lawyer-client relationship); Alan J. Weisbard, *Informed Consent: The Law's Uneasy Compromise with Ethical Theory*, 65 NEB. L. REV. 749, 753–55 (1986) (reviewing the legal characteristics and case history of informed consent).

“gray area” clients, and also to provide appropriate incentives to trial counsel to conduct a thorough investigation and mount an effective defense.

The argument in the Article is structured as follows. Section II looks beyond *McCoy* to the general problem of representing borderline-competent clients. Under both Sixth Amendment principles and the law governing lawyers, it is far from clear what a lawyer should do when confronted by a client with diminished decision-making capacity who insists on pursuing a course of action that the lawyer reasonably believes will result in disaster at trial. The Supreme Court’s decision in *Edwards* seems to muddle the issue by recognizing an ill-defined category of “gray area” competency.<sup>50</sup> The representation of questionably competent clients may necessarily involve an infringement on what would be the autonomy interest of a fully competent client. Section III considers the relationship between autonomy and other ethical values as a theoretical matter, drawing from moral and political philosophy, and from the extensive literature in biomedical ethics. Bioethicists have considered numerous justifications for intervention notwithstanding purportedly autonomous patient decisions, the nature of the various countervailing interests, and the competency standards that must be satisfied in order to conclude that there has been informed consent. One cross-disciplinary takeaway is that law could benefit from greater attention to the interests at stake and a more nuanced analysis of competency. The “gray area” category in *Edwards* is actually not a muddle but a promising solution to the problem of representing defendants like Robert McCoy. In many cases in this middle zone of competency, the best ethical and constitutional course of action for lawyers will be to act on fairness and reliability considerations, not the client’s expressed preferences. Section IV concludes by looking more specifically at what ethically may be done in the course of representing gray area defendants.

## II. AUTONOMY AND THE QUESTIONABLY COMPETENT CLIENT: CONSTITUTIONAL AND ETHICAL PRINCIPLES

The problem considered in *McCoy* is certainly not new. Criminal procedure scholars and clinical teachers have been aware for decades that the tension between the values of client autonomy and procedural fairness is exacerbated tremendously by clients whose decision-making capacity is impaired by mental illness, developmental disability, childhood abuse,

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50. *Indiana v. Edwards*, 554 U.S. 164, 172–73 (2008).

trauma, or otherwise.<sup>51</sup> The Court in *McCoy* cited other state court decisions involving defendants who insisted that their counsel put on hopeless defenses that fly in the face of overwhelming evidence of guilt.<sup>52</sup> The problem is sometimes discussed in the context of death-row “volunteers”—that is, inmates who direct their attorneys not to put on a mitigation case, or to waive appeals or collateral review, knowing that the result will be a speedier execution of the death penalty.<sup>53</sup> In any case, in the background of the debate lurk doctrinal complexities and empirical uncertainty concerning the competence of clients to participate in the representation.

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51. See John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 211 (2008) (“In cases involving criminal defendants suffering serious mental impairment, the very reasoning behind the model of . . . client autonomy can fall apart, especially in cases . . . [where defendants] . . . are ‘decisionally incompetent’ and, therefore, unable meaningfully to assist in their own defenses.” (internal citations omitted)); see also Josephine Ross, *Autonomy Versus a Client’s Best Interests: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1353–54 (1998) (discussing trial defense tactics and the challenges associated when raising the “[i]ncompetency to [s]tand [t]rial” defense); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 519–20 (1987) (addressing the various options available to lawyers when representing a client with issues of mental competence); Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court*, 1988 WIS. L. REV. 65, 69 (1988) (highlighting the difficulties faced by a criminal defense lawyer when representing a mentally impaired client, particularly as it pertains to the client’s ability to produce informed consent).

52. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018) (citing *Cooke v. State*, 977 A.2d 803 (Del. 2009); *State v. Carter*, 14 P.3d 1138 (Kan. 2000)); *id.* at 1510 (citing *People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010)).

53. See John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 942 (2005) (studying the competency of “volunteer” inmates on death-row who seek speedier executions by directing their attorneys not to pursue mitigation evidence, and the ethical complications faced by the attorney who follows the client’s direction and indirectly engages in assisted-suicide); see also Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 143 (1987) (arguing defense attorneys should not be required to present mitigating evidence when the defendant clearly states that they want no efforts to be made on behalf of life; conversely, Carter argues for court appointed attorneys to present mitigating evidence in situations where defendants are advocating for their death); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 78 (2002) (contending a defendant should be able to accept the death sentence and waive proceedings, however, not at the trial stages of pleading); Garnett, *supra* note 30, 804 (explaining the waiver of appeals by death row inmates); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 856 (2000) (discussing the ethical dilemmas created during post-conviction appeals and the resulting tug-of-war between the “volunteer” defendant seeking an expedited death sentence versus the defense attorney zealously advocating to save the client’s life); Williams, *supra* note 26, 699 (exploring autonomy for criminal defendants).

Before considering the conflict between autonomy and other values in hard cases, it is important to point out that there are many easy cases where a lawyer need not defer to the client's expressed preferences. State rules of professional conduct recognize a distinction between decisions concerning the objectives of the representation and those concerning the means by which they are to be pursued; the former decisions are for the client to make, and while lawyers should consult with clients about means decisions, they are presumptively within the lawyer's authority.<sup>54</sup> The client may be "the master of his or her own defense[.]"<sup>55</sup> but the lawyer is "captain of the ship"<sup>56</sup> when it comes to matters of trial strategy. The Supreme Court has emphasized that "[t]here are countless ways to provide effective assistance in any given case[.]"<sup>57</sup> that reviewing courts should not second-guess the judgments of trial counsel,<sup>58</sup> and that the client is not entitled to be consulted on every tactical decision.<sup>59</sup> Strategic choices made after a reasonable investigation (where the reasonableness of the investigation is

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54. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2018). Justice Ginsburg in *McCoy* analyzes defense counsel's argument, in which he conceded his client's guilt, to a guilty plea. *McCoy*, 138 S. Ct. at 1508. Interestingly, in an earlier case she criticized a state court for equating defense counsel's concession argument to a guilty plea. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004) ("On the record thus far developed [in the state court], [the defense counsel's] concession of [the defendant's] guilt does not rank as a 'failure to function in any meaningful sense as the Government's adversary.'" (quoting *United States v. Cronin*, 466 U.S. 648, 662, 666 (1984))). In *Nixon* the defendant was unresponsive when his lawyer attempted to discuss trial strategy with him. *See id.* at 181. Because his silence did not constitute express consent, the Florida Supreme Court believed it was not sufficient to support a guilty plea; the U.S. Supreme Court concluded, however, that the lawyer's decision fell within the range of reasonable professional judgment, particularly in the context of a capital case with its characteristic two-stage adjudication. *Id.* 190–91. Experienced capital defense lawyers recognize that it would be counterproductive to argue innocence and then try to make a sound mitigation case. *Id.* Thus, a reasonable lawyer might decide to "attempt[] to impress the jury with his candor and his unwillingness to engage in 'a useless charade'" while arguing to spare the defendant's life. *Id.* at 192 (quoting *Cronin*, 466 U.S. at 656–57 n.19). The Court in *McCoy* distinguished *Nixon* because, in the latter case, the client was unresponsive while the client adamantly objected to his lawyer's strategy in the former case. But the principle stated in *Nixon*, that defense counsel sometimes must make the hard decision to concede guilt and make the strongest possible case in the penalty phase of the trial, will have considerable weight in the representation of borderline-competent clients.

55. *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (quoting *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985)).

56. *Bergerud*, 223 P.3d at 693 (quoting *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008)).

57. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

58. *Jones v. Barnes*, 463 U.S. 745, 754 (1983).

59. *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988).

itself a question of reasonable professional judgment) are virtually unchallengeable.<sup>60</sup>

Defense lawyers are not deemed to have provided ineffective assistance of counsel if they make reasonable judgment calls, even if the client (particularly with the benefit of hindsight) would have preferred a different approach. For example, in *Darden v. Wainwright*,<sup>61</sup> trial counsel in a capital case decided not to introduce mitigating evidence because it would have opened the door to rebuttal evidence that, in the judgment of the defense lawyers, would have been highly prejudicial to the defendant.<sup>62</sup> The Court held that the lawyers' actions were within their authority to make decisions regarding sound trial strategy.<sup>63</sup> To be sure, a defense lawyer cannot expect to utter the magic words "trial strategy" or "reasonable professional judgment" and avoid scrutiny. There are some mistakes or omissions unrelated to the objectives of the representation that will require a new trial. Complete failure to conduct a mitigation investigation, for instance, clearly constitutes ineffective assistance of counsel,<sup>64</sup> as does the decision to introduce testimony by an expert whose report had listed the defendant's race as a factor supporting a conclusion of future dangerousness.<sup>65</sup> Blatant legal mistakes caused by failure to perform basic legal research are also not immunized as judgment calls.<sup>66</sup> The lawyer's judgment with respect to the

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60. *Hinton v. Alabama*, 571 U.S. 263, 273–74 (2014).

61. *Darden v. Wainwright*, 477 U.S. 168 (1986).

62. *Id.* at 184–85.

63. *Id.* at 186.

64. *See Rompilla v. Beard*, 545 U.S. 374, 390–91 (2005) (“[C]ounsel’s failure to look at the file fell below the line of reasonable practice, there is a further question about prejudice, that is, whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (holding failure to present mitigating evidence for a criminal defendant at trial would support a claim for ineffectiveness of counsel); *Williams v. Taylor*, 529 U.S. 362, 372 (2000) (finding counsel ineffective at trial and listing five categories where counsel failed to introduce evidence indicating that the case could have resulted differently). Other failures to perform very basic factual research have been deemed ineffective assistance. *See, e.g., Gerisch v. Meadows*, 604 S.E.2d 462, 463 (Ga. 2004) (commenting on how a defense lawyer did not determine whether defendant had in fact been previously convicted on the same charges, which would have supported a double-jeopardy argument).

65. *Buck v. Davis*, 137 S. Ct. 759, 775 (2017).

66. *See Hinton v. Alabama*, 571 U.S. 263, 274–75 (2014) (discussing the failure to discover that state had made resources available for hiring additional experts); *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010) (addressing the failure to determine that guilty plea would subject client to deportation); *Riggs v. Fairman*, 399 F.3d 1179, 1181 (9th Cir. 2005) (noting lawyer’s misunderstanding of California’s

means of the representation must be, in fact, reasonable. But if it is, then the client's autonomy is beside the point. Decisions about trial strategy are for the lawyer to make.<sup>67</sup> The autonomy interest underlying *McCoy* pertains only to fundamental decisions about the objectives of the representation.

It is a bedrock principle of constitutional law that a person may not stand trial who "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense."<sup>68</sup> The Supreme Court defined the standard for competency to stand trial as having two parts: (1) a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "a rational as well as factual understanding of the proceedings against him."<sup>69</sup> Following those early cases, the Court returned again and again to

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"three strikes" law was behind advice to client to turn down an offered plea deal), *vacated*, 430 F.3d 1222 (9th Cir. 2005).

67. The principle stated in text must be qualified to the following extent. The rules of professional conduct provide that the lawyer "shall consult with the client as to the means by which [the client's objectives] are to be pursued." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR. ASS'N 2018). Decisions about the means are presumptively for the lawyer to make. "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." *Id.* at cmt. 2. The comment does not provide for a resolution if there is an impasse between the lawyer and client regarding a "means" or tactical decision. It addresses only that the parties should try to work out an acceptable resolution, and if that is impossible, the lawyer may withdraw. This is most unhelpful. Where the lawyer has entered an appearance in a litigated matter, the lawyer must obtain the permission of the court to withdraw. *Id.* R. 1.16(c). Trial courts will be highly unlikely to grant a motion by trial counsel to withdraw merely because the lawyer and client are having a hard time agreeing over a matter of trial strategy. In an interesting twist on the problem, the defendant in *State v. Ali* made a tactical decision, over the advice of his lawyers, not to use a peremptory challenge to remove a juror. *State v. Ali*, 407 S.E.2d 183, 189 (N.C. 1991). The defendant later claimed ineffective assistance of counsel based on the lawyers' failure to stop him from making a disastrous tactical decision. *Id.* at 188. The court held that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Id.* at 189. The court in *Ali* has it exactly backwards. The lawyer made a mistake by not overriding the client's ill-considered tactical judgment not to exercise the peremptory challenge. Perhaps the lawyer anticipated *McCoy*, and its misinterpretation, by several decades and believed that the client's autonomy was the most important value to be served by the representation. As a matter of professional ethics, however, it is clear that as long as the lawyer reasonably communicates with the client about tactical decisions, those decisions are within the lawyer's authority. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) cmt. 2.

68. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *see also Pate v. Robinson*, 383 U.S. 375, 385 (1966) ("Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to [state statute for procedure]." (citing *People v. Shrake*, 182 N.E.2d 754 (Ill. 1962))).

69. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

competency issues in connection with various stages of the proceedings and rights given up by the defendant. For example, it is well and good to recognize the right of self-representation in *Faretta*, but one might believe that a higher level of mental competency would be required to actually perform the functions of a lawyer, as compared with simply communicating with one's lawyer and assisting in the defense. But the Court held in *Godinez v. Moran*<sup>70</sup> that the competency standard to waive counsel and proceed *pro se* was not heightened above that level of competency which is required to stand trial.<sup>71</sup> Because the defendant satisfied the standard of competency to stand trial, and he “‘knowingly and intelligently’ waived[] his right to . . . counsel, and . . . ‘freely and voluntarily’” pleaded guilty, he was not permitted to change his guilty pleas.<sup>72</sup> Although the Court reasoned in terms of competency, *Godinez* also states a principle concerning autonomy, because competent actors are those whose autonomous decisions must be respected by others.<sup>73</sup> The implication of *Godinez* would therefore appear to be that defense counsel must defer to the client's wishes concerning the objectives of representation, as long as the client passed the fairly low bar of competency to stand trial.

The Court subsequently complicated the unified test of *Godinez* by recognizing, in *Edwards*, a new intermediate category of what it called “gray area” defendants, who pass the low threshold for competency to stand trial but may not be competent to conduct trial proceedings on their own.<sup>74</sup> The Court distinguished *Godinez* on the fairly thin ground that the prior case involved a state court's decision to *permit* the defendant to represent himself, while the present case arose from the defendant's demand to proceed *pro se* and the trial court's refusal to permit self-representation.<sup>75</sup> Again translating into autonomy terms, *Edwards* recognized that there is a liminal area between full autonomy and incompetence, in which the self-representation right of *Faretta* is inapplicable.<sup>76</sup> A defendant may satisfy the *Dusky v. United States*<sup>77</sup> standard of sufficient ability to *work with* trial counsel,

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70. *Godinez v. Moran*, 509 U.S. 389 (1993).

71. *See id.* at 399.

72. *Id.* at 393 (citation omitted).

73. *See* BEAUCHAMP & CHILDRESS, *supra* note 48, at 133, 135.

74. *Indiana v. Edwards*, 554 U.S. 164, 172–73 (2008).

75. *Id.* at 173.

76. *See id.* at 175 (noting cases decided around the time of *Faretta* had established a “competency limitation on the self-representation right” (quoting *Faretta v. California*, 422 U.S. 806, 813 (1975))).

77. *Dusky v. United States*, 362 U.S. 402 (1960).

yet be unable to *serve as counsel*.<sup>78</sup> The Court referred to empirical research establishing that competence is a more finely-grained concept than the unified standard that *Godinez* recognizes; a defendant may be competent to stand trial, but be incompetent at performing the tasks necessary for self-representation.<sup>79</sup> As that study rightly emphasizes, although it appears to be an empirical finding, competence is actually a highly contextual normative judgment, having to do with whether the state ought to seek to hold the defendant criminally responsible for his actions.<sup>80</sup> Because competence is a normative judgment, it is sensitive to the values that inform the content of the defendant's constitutional entitlements. In other words, it is not a straightforward inference from a finding of competence to stand trial to the conclusion that it is the defendant's right to insist on self-representation.

There is, of course, a further required step in the analysis. *Edwards* deals with a defendant's demand to discharge trial counsel and proceed *pro se*. *McCoy* and similar cases involve a defendant who has no wish to exercise the constitutional right of self-representation, but only to be listened to by his lawyer (and obeyed). The principle in *Edwards*, however, is more general than the specific holding with respect to self-representation. It is curious that the Court in *McCoy* did not even mention *Edwards*, let alone attempt to distinguish it. The Court notes that the defendant was competent to stand trial, citing *Godinez*, without acknowledging the modification to *Godinez* in *Edwards*.<sup>81</sup> And in a footnote Justice Ginsburg concedes that on several occasions McCoy's lawyer expressed his doubts regarding his

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78. See *Edwards*, 554 U.S. at 175–76.

79. *Id.*

80. See JOHN MONAHAN ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 2 (2002). “[C]ompetence to stand trial—like competence to consent to treatment or to execute a will—is fundamentally a normative judgment. As applied, such normative judgments inevitably are highly contextual, depending heavily on the circumstances of the particular case and the impact of the defendant’s perceived impairments—if any—on the values [of fairness, the accuracy of factual judgments, the dignity of the criminal process, and the promotion of the defendant’s exercise of self-determination].” *Id.*; see also BEAUCHAMP & CHILDRESS, *supra* note 48, at 133 (“Even though [competence] judgments . . . are normative, they are sometimes incorrectly presented as empirical findings.”).

81. Compare *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (protecting the defendant’s Sixth Amendment right by stopping counsel from admitting evidence against the defendant’s request), with *Edwards*, 554 U.S. at 173 (expounding *Godinez*’s standard by claiming defendant can stand trial but cannot represent themselves at trial), and *Godinez v. Moran*, 509 U.S. 389, 402 n.14 (1993) (citing the defendant possessed sufficient present ability to consult counsel).

competency.<sup>82</sup> It seems reasonable to infer that McCoy would qualify as a gray area defendant under *Edwards*. A reader is therefore left without explicit guidance concerning the application of the autonomy interest recognized by the Court to the representation of gray area defendants.

Although it is not explicit about this, a careful reading of *McCoy* shows that autonomy does not displace other objectives that bear on the defense lawyer's ethical duties. The *Edwards* Court says something extremely important regarding the relationship between standards of competency and the underlying ethical values that inform the defendant's rights:

[I]nsofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial. . . . "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer[.]"<sup>83</sup>

Recall that competency is a normative judgment. The Court in *Edwards* suggests that autonomy is not a trump card that the defendant can play to end the normative analysis. All of the institutional actors who comprise the criminal justice system—defense counsel, prosecutors, and judges—may properly be influenced by the values of fairness and reliability in adjudication. The defendant's autonomy must be given appropriate weight in the analysis, but it is not decisive.

Defense lawyers must not only be aware of the constitutional principles applicable to criminal proceedings, but also their obligations under state rules of professional conduct. The Supreme Court has an unfortunate tendency to ignore, ridicule, or misunderstand attorney-conduct rules.<sup>84</sup> Much as it may sometimes disparage state rules of professional conduct, the Court does not have the power to relegate them to some kind of lower status as law. Lawyers are always bound by the rules of professional conduct of

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82. *McCoy*, 138 S. Ct. at 1509 n.3.

83. *Edwards*, 554 U.S. at 176–77 (quoting *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 162 (2000)).

84. See John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-Conviction Representation Posed by Martinez v. Ryan*, 68 FLA. L. REV. 765, 778–90 (2016) (analyzing discrepancy between Court's analysis of lawyers' duties and the duties recognized by rules of professional conduct in cases including *Mickens v. Taylor*, *Nix v. Whiteside*, *Holland v. Florida*, and *Maples v. Thompson*).

their admitting state.<sup>85</sup> The rules are enforceable through disciplinary proceedings, but also may play a role in setting the standard of care for tort, agency, and Sixth Amendment ineffective assistance of counsel purposes. Moreover, the Court in *Strickland* highlights “the constitutionally protected independence of counsel” as a reason to defer to the strategic judgments of defense lawyers.<sup>86</sup> If lawyers are to be protected from over-regulation by courts, a necessary condition is respect for professional conduct rules that support the self-government of the legal profession.<sup>87</sup>

The rules of professional conduct reveal profound ambivalence concerning the representation of what the *Edwards* Court refers to as “gray-area defendants.”<sup>88</sup> Model Rule 1.14(a) takes up the problem of clients whose “capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason[.]”<sup>89</sup> The ABA Capital Defense Guidelines remind lawyers that many of their clients fall into this category:

Many capital defendants are . . . severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that “[i]t must be assumed that the client is emotionally and intellectually impaired.”<sup>90</sup>

Even if a client did not begin with diminished decision-making capacity, a lengthy stay on death row while post-conviction proceedings are pending

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85. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (AM. BAR ASS'N 2018).

86. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (citing *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1976)).

87. MODEL RULES OF PROF'L CONDUCT preamble ¶¶ 9, 10.

88. *Edwards*, 554 U.S. at 173–74.

89. MODEL RULES OF PROF'L CONDUCT R. 1.14(a).

90. Am. Bar Ass'n, *supra* note 4, at 1007 (alteration in original) (quoting Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, THE ADVOCATE 31 (Mar. 2000)); see also Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 635 (2013) (mentioning the role of the Guidelines in judicial review of the performance of defense counsel).

can “play[ ] all kinds of mind games with people.”<sup>91</sup> Incapacity can be episodic and can wax and wane over the course of the proceedings.

With respect to clients with diminished capacity, the only mandatory duty stated in the Model Rules is to “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”<sup>92</sup> Comments to Rule 1.14, and to the comparable provision in the Restatement, remind lawyers that gray-area defendants may retain the capacity to participate to some extent in the representation.<sup>93</sup> Lawyers should therefore explain matters as reasonably necessary to involve the client in the decision-making process, particularly since a client may be capable of participating in some ways while being incapable of participating in others. The mandatory “shall,” indicating an actual professional obligation as opposed to an aspiration or best practice, does not appear elsewhere in Rule 1.14.<sup>94</sup> The remaining provisions of the rules are nothing more than aspirational standards, but provide no concrete guidance to lawyers dealing with a client who wishes to act in ways that are manifestly against his legal interests.

The duty to maintain a normal relationship as far as possible, and the recognition that clients with disabilities may retain some capacities to participate in the representation, in effect creates a gray area within a gray area. A lawyer must not only assess the client’s overall competence, under *Godinez* and *Edwards*, but must be prepared to make more granular determinations of the client’s competence with respect to a particular issue. Making things more difficult for lawyers, the Restatement warns against

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91. Harrington, *supra* note 53, at 866 (quoting a capital defense attorney). Another lawyer reports:

People on death row are not in an ideal position for making tough emotional, moral decisions. A lot of them are cognitively limited. . . . Many of them are brain damaged. Some of them are mentally ill. . . . Then you add to that the fact that they’re living in an environment where they don’t get sufficient rest, they’re not well fed, their health isn’t well taken care of and they’re treated like animals. . . . None of those people are in a position to make a reasoned, difficult decision of the magnitude of “I am going to give up my life.”

*Id.* at 867 n. 24 (quoting attorney #6).

92. MODEL RULES OF PROF’L CONDUCT R. 1.14(a).

93. *See id.* at cmt. 1 (“[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. c (AM. LAW INST. 2001) (“Clients should not be unnecessarily deprived of their right to control their own affairs on accounts of such disabilities.”).

94. *See* MODEL RULES OF PROF’L CONDUCT R. 1.14(b), (c).

inferring lack of competence from the client's desire to pursue a foolish course of action:

Lawyers . . . should be careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views.

....

. . . A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided.<sup>95</sup>

A lawyer may obtain an independent evaluation of the client's competency, and in fact may wish to raise competency issues with the court. If an evaluation concludes that the client is competent for some purposes and not for others—i.e., is within the *Edwards* gray area—the lawyer still has to somehow determine the right balance between having a normal lawyer-client relationship (which includes deferring to the client's instructions) and taking some sort of protective action. Rule 1.14(b) permits the lawyer to take other protective action, including consulting with medical professionals and seeking the appointment of a guardian, but does not require the lawyer to do anything.<sup>96</sup> It is very uncommon to see a guardian appointed to make decisions on behalf of a criminal defendant with respect to the defendant's legal rights. It is generally up to the lawyer and client to make these decisions. If the client lacks the capacity to make adequately considered decisions but insists on directing the lawyer to do something that would be a catastrophe at trial, the guidance of Rule 1.14 runs out.

The Restatement arguably handles this situation in a far more satisfactory manner, although it appears to be in tension with *McCoy*. First, comments to section 24 frankly admit that a lawyer must sometimes choose among imperfect alternatives.<sup>97</sup> It runs through the same steps as Rule 1.14, first reminding the lawyer to try to maintain a normal lawyer-client relationship

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95. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmts. c, d.

96. See MODEL RULES OF PROF'L CONDUCT R. 1.14(b) cmts. 5–7 (“Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.”).

97. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. b.

if possible,<sup>98</sup> suggesting the possibility of protective action such as a guardian,<sup>99</sup> and requiring the lawyer to accept direction from the guardian if one has been appointed.<sup>100</sup> It then departs radically—and controversially<sup>101</sup>—from the Model Rules by explicitly giving the lawyer permission to “pursue the lawyer’s reasonable view of the client’s objectives or interests *as the client would define them* if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.”<sup>102</sup> The italicized language is important. The Restatement does not license wide-open paternalism by lawyers, allowing them to substitute their own judgment for that of their clients. The client’s autonomy is still protected by the requirement that the lawyer act on the client’s own determination of what is in his or her best interests.<sup>103</sup>

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98. See *id.* § 24(1) (“[T]he lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2).”); accord MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (“[T]he lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”).

99. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24(4) (“A lawyer representing a client with diminished capacity as described in Subsection (1) may seek the appointment of a guardian[.]”); accord MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (“When the lawyer reasonably believes that the client has diminished capacity, . . . the lawyer may take reasonably necessary protective action, including . . . in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”).

100. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24(3) (“[T]he client’s lawyer must treat that person as entitled to act with respect to the client’s interests in the matter[.]”); accord MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 4 (“If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.”).

101. Cf. Colo. Bar Ass’n, Formal Ethics Op. 126 (May 6, 2015) (“The duty to maintain a normal client-lawyer relationship precludes a lawyer from acting solely as an arm of the court, using the lawyer’s assessment of the ‘best interests’ of the client to justify waiving the client’s rights without consultation, divulging the client’s confidences, disregarding the client’s wishes, or presenting evidence against the client.”).

102. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24(2) (emphasis added). Comments to Model Rule 1.14 do lean slightly in the direction of the Restatement approach, even if the black-letter text of Rule 1.14 does not go as far as Restatement § 24. Comment (d) states that, in determining the extent of a client’s diminished capacity, a lawyer should consider, among other factors, the consistency of a decision with the known “long-term commitments” and values of the client. Compare *id.* at cmt. d., with MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 6. This consideration suggests a split between the client’s preferences and interests, and that a lawyer may be justified in acting on the latter.

103. In theoretical terms, the lawyer acts not on the client’s interests, but on the client’s presumptive will—that which the client would choose if not incompetent. JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 322 (1986). Somewhat confusingly, this standard is referred to in bioethics as the “substituted judgment” standard. BEAUCHAMP &

However, the Restatement does permit the lawyer to override the client's expression of a contrary view if the lawyer reasonably believes the client lacks the capacity to make adequately considered decisions.<sup>104</sup> It contemplates cases like *Florida v. Nixon*,<sup>105</sup> in which the client says nothing in response to the lawyer's efforts to communicate about trial strategy, but it goes beyond that narrow situation to permit the lawyer to ignore contrary instructions from an impaired client if the lawyer believes the client would express a different preference if not residing in the *Edwards* gray zone.<sup>106</sup> Doing so vindicates the lawyer's obligation to ensure the fairness of the proceedings against the defendant.

The Restatement also represents an instance of so-called "soft" paternalism. The following section shows that not all interventions by professionals are an objectionable interference with the client's autonomy, properly understood. Soft paternalism involves acting on the genuine preferences of another, as compared with those expressed preferences that result from lack of information, disability, delusion, or some other interference with the capacity to make fully autonomous choices. The principle stated in *McCoy* must be understood as modified by the duty of lawyers representing gray zone defendants to protect the interests of their clients, notwithstanding their clients' objections.

### III. AUTONOMY AND ANTI-PATERNALISM IN THEORY

Professionals, including physicians and lawyers, have considerable power over their patients or clients.<sup>107</sup> Professionals have specialized knowledge and expertise which is opaque to non-professionals who have not undergone extensive training and socialization.<sup>108</sup> Their patients or clients

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CHILDRESS, *supra* note 48, at 171. The substitution is not of the agent's conception of the principal's best interests, however, but of the principal's judgment for that of the agent. The risk of the substituted judgment standard is that, in the absence of probative evidence of what the client (or patient) would actually have wanted, the professional has no alternative but to fall back on considerations of what a hypothetical reasonable person would do under the circumstances. *Id.* at 172. This can invite a substitution of the professional's own conception of a wise decision for that of the client or patient.

104. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d.

105. *Florida v. Nixon*, 543 U.S. 175 (2004).

106. *Id.* at 177; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d.

107. *See, e.g.*, TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* 93 (2009).

108. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b ("A lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results. Special safeguards are therefore necessary.").

consult them in matters that pertain to important matters connected to their health or legal rights. The relationship is often a one-off engagement or consultation, so there is little opportunity to develop trust through repeated interaction and observation. Patients or clients are therefore in a position of vulnerability, dependent for their well-being upon the professional's compliance with stringent standards of ethics.

One of the great themes in professional ethics in the second half of the twentieth century is the assault on the paternalism inherent in the imbalance of power between lawyers and clients, doctors and patients.<sup>109</sup> Paternalism means acting on behalf of another in such a way that overrides the other's rights or freedoms for the sake of their own good.<sup>110</sup> Physicians traditionally were permitted to make their own judgments about their patients' needs for treatment or information; the ethical justification for overriding their patients' expressed wishes was not only the impossibility of most patients appreciating the issues and tradeoffs involved in making these judgments, but also the primacy of the Hippocratic duty to improve the health of the patient.<sup>111</sup> The physician's primary obligation *qua* physician was to act for the patient's medical benefit, and since the physician was in an authoritative position, to determine the patient's best interests.<sup>112</sup> The pushback against physician paternalism, both in law (primarily tort principles of medical malpractice) and philosophy, went under the banner of informed consent.

Informed consent rules require a physician to provide sufficient information and obtain the patient's consent before performing treatment. Early cases raising informed consent were actually pled as claims for battery. The idea was that the patient's consent was a defense to what would otherwise be a battery by the surgeon—a harmful contact with the patient's body—but if the surgeon exceeded the scope of consent, the contact would be actionable as a battery.<sup>113</sup> The wrong is not that the doctor made a

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109. See O'NEILL, *supra* note 48, at 18 (“[I]here was one point of agreement about necessary change in the early years of contemporary medical ethics, it was that this traditional, paternalistic conception of the doctor-patient relationship was defective . . . .”); see generally PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982).

110. ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 161 (1980).

111. BEAUCHAMP & CHILDRESS, *supra* note 48, at 272.

112. *Id.* at 274.

113. See *Schloendorff v. Society of N.Y. Hospital*, 105 N.E. 92, 93 (N.Y. 1914) (“[A] surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in

mistake in the course of performing a procedure, but that the doctor did something the patient had not expressly given permission to do. As the doctrine of informed consent evolved, courts had to consider the issue of how much information a patient was entitled to, and whether the adequacy of the required disclosure should be evaluated from the perspective of the physician or the patient.<sup>114</sup> As the law continued to develop, and particularly as some courts detached the standard for assessing the adequacy of disclosure from prevailing custom in the medical community,<sup>115</sup> it became clear that the law was recognizing a separate interest, over and above the patient's interest in receiving competent medical treatment. That interest is patient autonomy. Autonomy as protected by informed-consent doctrines is not reducible to the interest of patients in quality medical care, and it may in fact require a physician to refrain from doing something that would be best for the patient's health.<sup>116</sup> Respect for autonomy requires respecting the self-determining choices of other rational agents.<sup>117</sup> Informed consent therefore serves a function beyond protecting a patient from harm—namely, protecting autonomous choice.<sup>118</sup>

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damages.” (citing *Pratt v. Davis*, 79 N.E. 562 (Ill. 1906); *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905)), *rev'd on other grounds*, *Bing v. Thuning*, 143 N.E.2d 3 (N.Y. 1957); *see also* *Kennedy v. Parrott*, 90 S.E.2d 754, 758 (N.C. 1956) (“Hence the courts formulated the rule that any extension of the operation by the physician without the consent of the patient . . . constituted a battery . . .”).

114. *See* *Bang v. Charles T. Miller Hosp.*, 88 N.W.2d 186, 187 (Minn. 1956) (“The sole issue raised by the plaintiff on appeal is: Should the question of whether or not there was an assault or unauthorized operation have been submitted to the jury as a fact issue?”); *see also* *Largey v. Rothman*, 540 A.2d 504, 504 (N.J. 1988) (*per curiam*) (“The single question presented goes to the correctness of the standard by which the jury was instructed to determine whether the defendant, Dr. Rothman, had adequately informed his patient of the risks of that operation.”); *Scott v. Bradford*, 606 P.2d 554, 556 (Okla. 1980) (“The issue involved is whether Oklahoma adheres to the doctrine of informed consent as the basis of an action for medical malpractice, and if so did the present instructions adequately advise the jury of defendant's duty.”).

115. *See, e.g., Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972) (“The scope of the standard is not subjective as to either the physician or the patient; it remains objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation.”).

116. *See* Norman Daniels, *Understanding Physician Power: A Review of the Social Transformation of American Medicine*, 13 PHIL. & PUB. AFF. 347, 347 (1984) (“The philosophical task has been to show that the importance of the good which competent medical care delivers does not justify ignoring patient autonomy or rights.”).

117. *See* BEAUCHAMP & CHILDRESS, *supra* note 48, at 125 (“To respect an autonomous agent is, at a minimum, to acknowledge that person's right to hold views, to make choices, and to take actions based on personal values and beliefs.”).

118. *Id.* at 142–43.

The theoretical question is what justifies preferring the duty to respect the patient's autonomy over the duty to act for the benefit of others (often referred to in modern bioethics as the principle of beneficence).<sup>119</sup> Addressing this question requires consideration of the grounds for the principle of respect for autonomy. Understood merely as choice, autonomy seems to be an empty value. The mere fact that something was freely chosen does not confer value upon it, without a connection to some deeper set of reasons that explain why the agent made the choice she did.<sup>120</sup> Nevertheless, it is a strongly-held intuition that autonomy in general is a positive moral good. The most persuasive general accounts of the value of autonomy begin with a first-personal perspective on ourselves as self-originating sources of value.<sup>121</sup> On this essentially Kantian conception of human dignity, each person has a practical identity—"a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking."<sup>122</sup> Dignity flows from the reflective self-consciousness that consists in having reasons to act and to live—in less theoretical terms, having a one's own story to tell.<sup>123</sup> A moral agent is one who has the "capacity to recognize, assess, and be moved by reasons."<sup>124</sup> The value of human dignity requires that people be given an opportunity to endorse or reject the reasons for treating them in a

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119. See ENGELHARDT, *supra* note 48, at 284 ("The central moral difficulty lies in the problem of establishing the priority of duties of beneficence over duties of autonomy.").

120. See O'NEILL, *supra* note 48, at 28 ("Individual autonomy is not a matter of mere, sheer independence, of the sort praised by pop-existentialists . . . . Whatever else people think about individual or personal autonomy, they do not equate it with mere choice.").

121. See DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY 71 (2007) ("Intuitively, it seems plain that, elusive or not, our own subjectivity lies at the very core of our concern for human dignity. To deny my subjectivity is to deny my human dignity.").

122. CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 101 (Onora O'Neill ed. 1996) [hereinafter KORSGAARD, NORMATIVITY]. I use the weasel words "essentially Kantian" here advisedly, in order to foreground the idea of humans as self-originating sources of value without fully endorsing Kant's account of autonomy as pure practical reason, unconnected with any objects of inclination—i.e., ends that are already given. Kantian autonomy is not concerned so much with *free* will as with *rational* will. See FEINBERG, *supra* note 103, at 36 (discussing John Rawls's interpretation of Immanuel Kant); CHRISTINE M. KORSGAARD, *An Introduction to the Ethical, Political, and Religious Thought of Kant*, in CREATING THE KINGDOM OF ENDS 3, 22–24 (1996); JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 226–30 (Barbara Herman ed. 2000); J.B. SCHNEEWIND, *Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy*, in ESSAYS ON THE HISTORY OF MORAL PHILOSOPHY 248 (2010).

123. KORSGAARD, NORMATIVITY, *supra* note 122, at 120–21; LUBAN, *supra* note 121, at 70.

124. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 23 (1998).

particular way.<sup>125</sup> Because of the centrality of practical identity to moral agency, each of us may justifiably demand that we be treated only in ways that we can accept. Autonomy means not being “subject[] to the will of another.”<sup>126</sup> Therefore, one wrongs another by acting against that person’s formed judgments and preferences, even if the act is supposedly meant to benefit that person.<sup>127</sup> The wrong involved in disrespecting another’s autonomy is a violation of the other’s personhood, understood as the right to determine for oneself what to do.<sup>128</sup>

David Luban has written movingly in opposition to lawyers who “ride roughshod over the commitments that make the client’s life meaningful and so impart dignity to it.”<sup>129</sup> Ted Kaczynski, for example, the Unabomber who committed several murders and attempted murders in pursuit of his utopian fantasy of a world without technology, had an autonomy and dignity based interest in not being portrayed by his lawyers as mentally ill.<sup>130</sup> By presenting him to the fact-finder as crazy, and thus not deserving of the death penalty, his defense lawyers “made nonsense of his deepest commitments, of what mattered to him and made him who he was.”<sup>131</sup> It must be said, however, that Luban’s argument tacitly depends on Kaczynski’s competency. If he were seriously mentally ill, but nevertheless smart enough to fool the state’s examiner into concluding he was competent, his lawyers would be justified in acting on what they reasonably

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125. *Id.* at 169. Note the difference between this conception of dignity and the Court’s concern in *Edwards* that allowing a mentally ill defendant to proceed *pro se* could result in a spectacle that “is at least as likely to prove humiliating as ennobling.” *Indiana v. Edwards*, 554 U.S. 164, 176 (2008). The Kantian notion of dignity discussed here should not be confused with the Court’s concern for whether the trial is conducted in a *dignified* manner.

126. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 155 (1986).

127. *Id.* at 151.

128. FEINBERG, *supra* note 103, at 27.

129. LUBAN, *supra* note 121, at 76.

130. *See generally* MICHAEL MELLO, *THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI: ETHICS, POWER AND THE INVENTION OF THE UNABOMBER* (1999) (defending Kaczynski’s interest, based on his autonomy, in defending his case in a manner that increased his likelihood of being sentenced to death).

131. LUBAN, *supra* note 121, at 79. Luban argues that Kaczynski’s lawyers violated his dignity but not his autonomy, but the account of autonomy I am developing here is close to Luban’s conception of human dignity. Nothing in the overall argument of this paper turns on whether the relevant value motivating anti-paternalist conduct by lawyers is best described as the dignity or autonomy of clients. Because the majority in *McCoy* talks in terms of autonomy, and due to the *Edwards* Court’s confusion between human dignity and an undignified spectacle, noted *supra* note 74, I will also analyze the ethical issues in terms of the defendant’s autonomy interest, not dignity.

believed would be his own interests if he were competent to define them. Ultimately this is a mixed empirical and normative question. Luban's argument is normatively attractive, but only in the case of a competent defendant.

Joseph Raz, who has contributed considerable insight about autonomy to moral and political philosophy, cautions against seeing it as the only, or the most important, thing of value to persons:

[T]hough coercion often, even usually, adversely affects people's well-being it does not deserve the special importance attributed to it in much of liberal political thought unless one holds personal autonomy to be of very great value. But even if one does it is easy to exaggerate the evils of coercion, in comparison with other evils or misfortunes which may fall to people in their life.<sup>132</sup>

It is widely accepted that some interventions against a person's expressed desires may be justified by the person's own good. Ignorance, for example, may permit others to intervene in pursuit of a person's fully-informed self-interest. Mill's famous example, in *On Liberty*, shows that one may seize a person and prevent him from crossing a bridge he does not realize is unsafe; "liberty consists in doing what one desires, and he does not desire to fall into the river."<sup>133</sup> This is a clear case of justified paternalism (sometimes called "weak" or "soft" paternalism), because there is no ambiguity concerning the other's long-range preferences and views about his own

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132. RAZ, *supra* note 126, at 156. Note an interesting and subtle framing of this issue in terms of the burden of proof. Raz asks, in this passage, why autonomy deserves special importance and whether it has very great value. Raz's view is close to that of Beauchamp and Childress, who contend that autonomy "has only *prima facie* standing and can be overridden by competing moral considerations." BEAUCHAMP & CHILDRESS, *supra* note 48, at 126 (emphasis added). "The most plausible justification of paternalism views benefit as resting on a scale with autonomy interests, where both must be balanced . . ." *Id.* at 281. They caution that an excessive emphasis on autonomy may displace or distort other moral values. *Id.* at 128. Engelhardt differs from Raz and Beauchamp and Childress in the allocation of the burden of proof, contending that "[t]he central moral difficulty lies in the problem of establishing the priority of duties of beneficence over duties of autonomy." ENGELHARDT, *supra* note 48, at 284. While he does not deny that the principle of respect for autonomy can be overridden, on his view the burden is higher for one who would intervene against another's expressed preferences.

133. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER WRITINGS* 96 (Stefan Collini ed. 1989) (1859).

good that are served by the intervention.<sup>134</sup> The intervention is not motivated by concerns with the wisdom or prudence of the choice, but by doubts that the choice is genuine. A much more difficult case—“strong” or “hard” paternalism—involves an intervention aimed at benefitting a person, notwithstanding the informed and voluntary nature of the other’s choice.<sup>135</sup> Following *McCoy*, defense lawyers seeking to protect their clients from making choices that will lead to almost-certain conviction, and possibly also a death sentence, would do best by relying on strategies of soft paternalism.

An important insight from the bioethics literature is that competency is closely related to the justification of paternalism. Engelhardt writes: “[o]ne should note that requiring greater certainty of competence when an individual’s choices are likely to be dangerous is a form of weak paternalism.”<sup>136</sup> Weak paternalism, to emphasize, is arguably not paternalism at all, because it is justified by an assessment of the other’s true interests, if he or she were able to define and act on them.<sup>137</sup> It respects autonomy by relying on the other’s hypothetical consent. This is the form of paternalism recognized in the Restatement provision on representing clients with diminished capacity.<sup>138</sup> On a sliding-scale approach to competency, the greater the risk for a patient, the higher the level of ability that will be required before the patient is deemed competent to elect or refuse the intervention.<sup>139</sup> By analogy, the more important the client

134. FEINBERG, *supra* note 103, at 98–100; GOLDMAN, *supra* note 110, at 162. It should also be clear that explicit fiduciary entrustment of one’s interests to the judgment of another does not represent morally objectionable paternalism. Engelhardt’s examples of joining a package tour, trusting the tour guide to select worthwhile place to see, and a patient telling a physician, “You decide what . . . is the best form of treatment,” do not involve interference with autonomy. ENGELHARDT, *supra* note 48, at 279–81.

135. BEAUCHAMP & CHILDRESS, *supra* note 48, at 277. Requiring drivers to wear seatbelts or motorcycle riders to wear helmets is a familiar example of hard legal paternalism. See FEINBERG, *supra* note 103, at 134–42. The law also prohibits numerous transactions or relationships between parties that both parties (presumably autonomously) consent to, including assisted suicide, gambling, prize-fighting, duels, bigamy, and prostitution. *Id.* at 172.

136. ENGELHARDT, *supra* note 48, at 283; see also FEINBERG, *supra* note 103, at 118.

137. BEAUCHAMP & CHILDRESS, *supra* note 48, at 277–78, 281; FEINBERG, *supra* note 103, at 14.

138. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24(2) (AM. LAW INST. 2001) (stating a lawyer must “pursue the lawyer’s reasonable view of the client’s objectives or interests as the client would define them if able to make adequately considered decisions”).

139. BEAUCHAMP & CHILDRESS, *supra* note 48, at 138. The irrevocability of the harm is also a consideration to be taken into account by the sliding-scale model. See FEINBERG, *supra* note 103,

interests at stake, the more a lawyer may have to require by way of client competency before following a client's instructions to do something foolhardy. This may appear to involve a conceptual confusion, as competency refers to a *capacity* to do something, which is unrelated to the risk of that activity.<sup>140</sup> No confusion is involved, however, if the sliding-scale approach is understood as relating to the decision whether to override another's expressed preferences, not an empirical assessment of competency.<sup>141</sup> The principle articulated in *McCoy* is a preference for autonomy, but it must be qualified by the obligation of defense counsel and the legal system generally to ensure that a client's decisions are the product of a rational, deliberative process. Where they are not, the lawyer may act instead on the client's interests if he or she were able to act on them.

#### IV. APPLICATION OF THE RESTATEMENT'S WEAK PATERNALISM PRINCIPLE

Articles about competency and the autonomy interests of clients are full of accounts by experienced criminal defense lawyers of representing delusional clients; in many of these stories, the clients were deemed competent to stand trial under *Godinez* and the hard question for the lawyer was whether to follow the client's instructions.<sup>142</sup> As the Court observed in *Edwards*, "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways."<sup>143</sup> The "gray area" category was created to recognize the unworkability of the one-size-fits-all standard of *Godinez* when measuring the defendant's ability to conduct his own defense. The

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at 120. Obviously a capital case involves the irrevocable harm of being killed by the state, which weighs heavily in favor of permitting a lawyer to intervene to protect the client's true interests.

140. BEAUCHAMP & CHILDRESS, *supra* note 48, at 140–41.

141. *Id.* at 141.

142. See John H. Blume & Morgan J. Clark, "Unwell": *Indiana v. Edwards* and the Fate of Mentally Ill Pro Se Defendants, 21 CORNELL J. L. & PUB. POL'Y 151, 151–53 (2011) (recounting representation of client who believed she was God's daughter called to lead God's army against evil demons and believed her murdered husband was engaged in occult practices and devil worship); Garnett, *supra* note 30, at 802 (describing defendant who believed man-elf "Fro" had been reincarnated on earth as defendant's murdered girlfriend and that he would rejoin Fro on the planet Terracia after his execution); Hawkinson, *supra* note 32, at 465 (reporting *pro se* representation by capital defendant who dressed in a purple cowboy suit and tried to subpoena Jesus, the Pope, and JFK).

143. *Indiana v. Edwards*, 554 U.S. 164, 175 (2008).

trouble, of course, is that an amorphous standard is difficult to apply.<sup>144</sup> The trial court may have to apply it when a defendant insists on proceeding pro se. The Court in both *McCoy* and *Edwards* seems to fail to appreciate, however, that the standard must also be applied by defense lawyers, without assistance of the court, throughout the course of the representation. The defendant's invocation of the *Faretta* self-representation right is a singular moment during which the attention of both sides, and the trial court, are concentrated on making a determination of the defendant's competency to conduct trial proceedings. Preliminary empirical evidence suggests that trial courts are taking a fairly hands-off attitude to the determination of competency to self-represent, even where defendants have been diagnosed with severe mental illness.<sup>145</sup> Since trial courts are not protecting gray area defendants from making disastrous decisions, a defense lawyer may feel isolated, as the only institutional actor looking out for the defendant's best interests. In addition, defendants ask things of their lawyers that do not bring the proceedings to a halt while a critical issue is determined. Defense lawyers have to decide, on the fly, whether to accept instructions from a client whose competency they seriously question, or to take a different action to protect the client's interests.

In light of the silence of the Model Rules regarding how to proceed with the representation of a gray area defendant, lawyers may fall back on their assumptions concerning the ethical theory that lies in the background of their more specific professional obligations. The widespread view that autonomy is the paramount value in professional ethics may cause lawyers to go through the following simplistic analysis: the lawyer's role is to protect the client's rights; one of the client's rights is to make autonomous decisions; interfering with the client's decision-making is a violation of the principle of autonomy; therefore, the lawyer acts against the client's rights, and acts wrongly, by not accepting the client's instructions to take an action that will be contrary to the client's interests.<sup>146</sup> The most important message of this

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144. See Harrington, *supra* note 53, at 853 (observing the competency standard is highly contextual, depending on the nature of the decisions that must be made at various stages of the proceedings).

145. Blume & Clark, *supra* note 142, at 164–65.

146. Tremblay, *supra* note 51, at 557. It is noteworthy that Tremblay's 1987 article, and his belief that lawyers are lacking ethical guidance, are still relevant, even though written before *Godinez*, *Edwards*, and *McCoy*. In other words, the Supreme Court isn't helping defense counsel figure out what to do in these extremely difficult cases.

Article to lawyers going through this simple ethical analysis would be, “hold on—not so fast.”

First, autonomy is not the only value that bears on the ethical obligations of defense counsel. *McCoy* shows that it is weighty, but it is not absolute. Second, the valorization of autonomy and the centrality of informed consent in professional ethics presupposes a fully competent, rational client. Where there are departures from this ideal, the ethical analysis will necessarily be different. The sliding-scale approach to competency ensures that interferences with client autonomy will be minimized if relatively inconsequential client interests are at stake. Only in cases like *McCoy*, where the client’s interest is in avoiding the death penalty, will lawyers be permitted to override the decisions of “gray area” defendants. Third, the client’s rights at trial are those provided by the law’s framework of substantive and procedural rights. The client does not have all the rights he wants to have—only those provided for by law. To take a simple example, a client may wish to represent herself on appeal, but she does not have that right.<sup>147</sup> Finally, a lawyer does not interfere with the client’s autonomy when making decisions based on the client’s interests or objectives as the client would define them if capable of making adequately informed decisions.<sup>148</sup> Lawyers must be careful to ascertain what their client’s interests actually are, and not merely assume that they are as the lawyer would define them. In principle, however, a lawyer does not engage in impermissible paternalism by acting on an incompetent client’s fully-informed interests that the client’s incapacity makes difficult to express.

Although the Model Rules are not particularly helpful, the Restatement of the Law Governing Lawyers supports this model of weak paternalism. It also offers several caveats that will be helpful to lawyers when deciding how to act when representing a client in the *Edwards* gray area of competency. (I will add a couple of my own).

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147. See *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 163 (2000) (“Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government’s interests outweigh an invasion of the appellant’s interest in self-representation.”).

148. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24(2) (AM. LAW INST. 2001) (explaining that when a client has diminished capacity, a lawyer may step in and make decisions for his client, without the client having to instruct the lawyer to do so).

1. A lawyer should ensure that a client in fact lacks the capacity to make adequately considered decisions and should not “construe as proof of disability a client’s insistence on a view of the client’s welfare that a lawyer considers unwise or otherwise at variance with the lawyer’s own views.”<sup>149</sup> A client in a grip of a “flamboyant[,] talking-to-spaceships”<sup>150</sup> delusion is an easy case. Much more difficult is a case like the representation of Ted Kaczynski, the Unabomber—“a coldly methodical killer who . . . destroyed human lives with clinical detachment[,]”<sup>151</sup> and did so in furtherance of a goal to resist the technology he believed was destroying the world.<sup>152</sup> His neighbor in Montana stated that he sent bombs through the mail for reasons of hatred and revenge,<sup>153</sup> which are rational, if not admirable motivations. Kaczynski can be understood as radical, but not crazy—a serious, compelling, but extremely dangerous person.<sup>154</sup>

The lawyers representing Kaczynski did obtain independent psychiatric evaluations, which concluded he was suffering from paranoid schizophrenia,<sup>155</sup> so they should not be criticized for jumping to an unfounded conclusion that their client lacked sufficient decision-making capacity. But it is certainly possible to imagine someone (Michael Mello’s example is John Brown) who commits acts of violence out of a sense of duty and is not mentally ill.<sup>156</sup> Lacking specific evidence of what a client would have preferred if not incapacitated, a lawyer may rely on assumptions about what a reasonable person would do in the same circumstances.<sup>157</sup> Like any application of an objective reasonable-person standard, this process can be dismissive of idiosyncratic preferences because it is sensitive to the community’s expectations. As O.W. Holmes famously observed, “a man [who] is born hasty and awkward” is still troublesome to his neighbors, who will force him “at his proper peril, to come up to their standard[.]”<sup>158</sup>

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149. *Id.* at cmt. c.

150. Garnett, *supra* note 30, at 803.

151. MELLO, *supra* note 130, at 28.

152. *Id.* at 30.

153. *Id.* at 35–36.

154. *Id.* at 41–42.

155. *Id.* at 32–33. See the Restatement comment instructing lawyers that “[w]here practicable and reasonably available, independent professional evaluation of the client’s capacity may be sought.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d. (AM. LAW INST. 2001). As noted above, it may be that Kaczynski was simply smart enough to fool the examiner.

156. MELLO, *supra* note 130, at 157–63.

157. BEAUCHAMP & CHILDRESS, *supra* note 48, at 172.

158. O.W. HOLMES, JR., THE COMMON LAW 108 (Neill H. Alford, Jr. et al. eds., 1982) (1881).

Even on the assumption that John Brown was more like a prophet than a psychopath, it is unlikely that the community whose standards inform the construction of the hypothetical reasonable person would be able to endorse fully the idea of becoming a martyr for the abolitionist cause. It may be that mental illness is hard to diagnose in prophetic social critics who indict the entire society and its norms,<sup>159</sup> and it is hard to generalize to the ethics of ordinary cases from the representation of an extraordinary character like Ted Kaczynski or John Brown. As long as lawyers use the sliding-scale approach and consider overriding their client's instructions only where the client interests at stake are significant, the Restatement approach should not result in widespread paternalism by lawyers.

2. The Restatement warns lawyers not to stray from their usual role as advocate.<sup>160</sup> The line between weak and strong paternalism is crossed when a lawyer is no longer seeking to promote *the client's* interests, as the client would define them if able to make adequately considered decisions,<sup>161</sup> but is instead making a judgment about what is in the client's interests. Here is an example from David Luban's article on paternalism in the legal profession:

You are the court-appointed attorney representing the interests of a thirteen-year-old boy in a custody case. You must make a report to the court about who should get custody; such reports usually have a major impact on what is decided. Your client, an inarticulate and unhappy-looking boy in a faded jean[] jacket, is sullen and suspicious. He says he would rather live with his father, but falls silent when you try to find out why. The father is a glad-handing, sporadically employed alcoholic; the mother is a hard-working disciplinarian who lives with her mother in a tidy row-house. Both women appear concerned for your client's welfare. In your opinion, the boy prefers his father because his father lets him get away with more; the social worker on the case tells you that the boy is part of a drinking and doping crowd.<sup>162</sup>

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159. MELLO, *supra* note 130, at 159.

160. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. c. ("The lawyer should adhere, to the extent reasonably possible, to the lawyer's usual function as advocate and agent of the client, not judge or guardian, unless the lawyer's role in the situation is modified by other law.").

161. *Id.* § 24(2) ("A lawyer representing a client with diminished capacity . . . [must] pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.").

162. Luban, *supra* note 24, at 455.

Luban's hypothetical puts the attorney in the role of a guardian *ad litem*, called upon to make a determination of what is in fact in the thirteen-year-old's best interests and report that conclusion to a decisionmaker. Imagine instead that the attorney was asked to *represent* the child, as an advocate. (New York has this procedure,<sup>163</sup> and other states may as well.) The attorney's role would then be to act upon the child's instructions—assuming he was otherwise competent—to pursue the alternative of living with his father.<sup>164</sup> It would then be for the decisionmaker to consider the lawyer's argument, along with the positions of the other parties, and make the best-interests determination. Luban cleverly embeds some ambiguity in the hypothetical with the fact that the child is silent on why he wants to live with his father. The attorney should certainly attempt to find out what is behind the child's request, but even if it is nothing more than finding his father more enjoyable to be around than his mother, the attorney's role is to advocate for the child's position, not a view about what is in his best interests.

Lawyers sometimes resist the characterization as “officer[s] of the court[,]”<sup>165</sup> fearing that it may compromise the single-minded loyalty and zealous advocacy they rightly believe they owe to their clients, particularly in criminal defense representation. But there is a difference between zealously representing *clients* and zealously representing client *interests*. Plenty of loose dicta in *McCoy*, some citing to *Faretta*, valorizes the defendant as the object of the lawyer's duties. Individual choices, Justice Ginsburg writes, “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’”<sup>166</sup> Properly understood, however, the defense

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163. See N.Y. FAM. CT. ACT § 241 (McKinney 2018) (“This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by assigned counsel.”).

164. “If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.” N.Y. CT. RULES § 7.2(d)(2) (McKinney 2018) (“Function of the Attorney for the Child”).

165. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (“Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients.”).

166. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018) (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)). The Court also cites Erica Hashimoto's article on the value of autonomy. See *id.* at 1508 (citing Hashimoto, *supra* note 26, at 1178). Commentary on *McCoy* notes the reliance by both amici and the majority opinion on the Hashimoto article; an article in *Slate*, for example, states that Justice Ginsburg's opinion “is essentially a vindication of Resurrecting Autonomy's central thesis,

lawyer's duty is to pursue the lawful objectives of the client, as the client defines them after consultation.<sup>167</sup> The "officer of the court" characterization can be understood as the prerogative of lawyers to exercise their professional expertise and judgment to best protect the client's

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writing its arguments into constitutional law." Mark Joseph Stern, *Justice Ginsburg's Groundbreaking Opinion in McCoy Revives Criminal Defendants' Right to Autonomy*, SLATE (May 15, 2018, 7:43 PM), <https://slate.com/news-and-politics/2018/05/justice-ginsburgs-opinion-in-mccoy-v-louisiana-revives-criminal-defendants-right-to-autonomy.html> [http://perma.cc/3NSX-RCA2]. If this article is really to be seen as part of constitutional law, however, a few caveats are in order. Hashimoto says the *Edwards* problem is a special problem that affects only a small minority, and so the concern for mentally ill defendants does not justify abandoning the autonomy interest of fully competent defendants. See Hashimoto, *supra* note 26, at 1151 ("Sacrificing the autonomy interest of all defendants in order to deal with special problems that affect only a small minority makes no sense."). *McCoy* is not a marginal problem for the capital defense community. She refers to the concern for "abuse" of the autonomy interest by mentally ill clients. See *id.* at 1184 ("The final argument against recognizing an autonomy interest arises from a concern that mentally ill defendants will use the autonomy interest to hurt their own interests."). However, the issue is not abuse, but rather the failure of a basic assumption upon which the deference to autonomy is based. The word "abuse" suggests that the client may be acting in subjective bad faith, but an incompetent client may very well believe—wrongly—that the best defense would be to assert an elaborate conspiracy involving all of the judges, political officials, and police officers in the state. A lawyer is not asserting reliability and fairness issues as against the client's well-considered views about what is in his best interests; instead, the lawyer is protecting a client who is unable to form well-considered views. Finally, Hashimoto suggests that the standard for competency to stand trial may need to be lowered to protect questionably competent defendants. See *id.* at 1186 ("This fact results from the exceedingly high standard for establishing incompetence to stand trial."). The standard for competency to participate meaningfully in the representation has, in *Edwards*, already been lowered as compared with the *Godinez* standard of competency to stand trial. And as a matter of the law governing lawyers, the Model Rules and the Restatement recognize a standard of meaningful participation in the lawyer-client decision-making process, which in principle is independent of standards of competency for various procedural purposes. Thus, her article does not speak to the hard question concerning the proper balance between autonomy and other constitutionally protected values in the representation of gray area clients (*Edwards*) or clients with diminished decision-making capacity (Model Rules and Restatement).

167. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2001) ("[A] lawyer must, in matters within the scope of the representation . . . proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation[.]"); MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2018) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.") For a political and jurisprudential argument for this way of understanding the ethical obligations of lawyers, see W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010) (furthering the political and jurisprudential argument of a lawyer's ethical obligations).

interests.<sup>168</sup> As noted above,<sup>169</sup> professionals serve their clients in areas in which non-professionals lack the expertise to know how to proceed in their best interests. Just as the Hippocratic principle prohibits physicians from taking actions that harm the health of their patients,<sup>170</sup> an analogous duty for lawyers might be understood as refusing to represent a client in a manner that will inevitably lead to the deprivation of the client's rights, which in a capital case include the client's right to life. The law may protect the individual, but lawyers still have a duty to promote the best interests of their clients.

In the course of supporting the lawyer's role as advocate for the client, Justice Ginsburg attacks a straw person. The Louisiana Supreme Court had stated that the defense lawyer's concession of his client's guilt might be necessitated by Rule 1.2(d), which prohibits assisting a client in conduct the lawyer knows is criminal or fraudulent.<sup>171</sup> However, the lawyer did not know that McCoy intended to testify falsely, so the relevant crime could not be perjury.<sup>172</sup> As long as client perjury is not involved,<sup>173</sup> no sensible person believes that a defense lawyer must refuse to put on the best possible case for the client, forcing the state to prove every element beyond a reasonable doubt. The prohibition on defending a proceeding without a sufficient basis in law and fact is expressly qualified by a permission for criminal defense lawyers to "so defend the proceeding as to require that

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168. See Carter, *supra* note 53, at 133–34 ("A typical aspirational use of the term by the Supreme Court is found in *Hickman v. Taylor*: 'Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients.'" (quoting *Hickman*, 329 U.S. at 510)).

169. See *supra* notes 110–45 and accompanying text.

170. See, e.g., BEAUCHAMP & CHILDRESS, *supra* note 48, at 189.

171. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

172. See *supra* note 35, for a discussion of the Court's subtle misreading of the requirement of Rule 3.3(a).

173. Some commentators would even relax the rule against presenting false testimony in recognition of the psychology of persuasion—i.e., that it takes a story to beat a story. See, e.g., John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339, 33–40 (1987) (discussing the ethics of a criminal defense lawyer within the criminal justice system and arguing the nature of the criminal justice system is not dedicated to the pursuit of truth). Monroe Freedman famously argued that the duty of candor to the tribunal should be subordinated to the lawyer's duty to represent the interests of the accused. See generally Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469–70 (1966).

every element of the case be established.”<sup>174</sup> The state did not identify any rule of professional conduct requiring the lawyer to concede McCoy’s guilt,<sup>175</sup> because it *could* not—no one thinks that the lawyer’s role as an officer of the court extends to refusing to provide a vigorous defense of even a weak case.

As mentioned above, there is reason to worry that lazy or incompetent lawyers will read *McCoy* as tacitly permitting a half-hearted defense where the client appears insistent upon pursuing a bizarre theory of the case, or perhaps not putting on any evidence at all. The digression in *McCoy* prompted by the state’s inapposite speculation about the lawyer’s ethical duties in that case, should not be understood as contemplating anything other than a full-throated defense of the client’s interests. The only issue dealt with in *McCoy* is the allocation of authority between lawyer and client to determine the content of those interests. It does not diminish the lawyer’s advocacy role one bit.

3. The decision-making process contemplated by the Restatement is highly contextual. It requires consideration of “the client’s circumstances, problems, needs, character, and values, including interests of the client beyond the matter in which the lawyer represents the client.”<sup>176</sup> It is unrealistic to expect any court to articulate a meta-norm that is general enough to be useful beyond a specific case, yet specific enough to capture all of the factors relevant to the lawyer’s decision. A critical part of the decision-making process is specifying the relevant values and balancing among them.<sup>177</sup> The lawyer’s deliberation may resemble the process by which a court considers competing factors before making a decision and articulating a reason for it.<sup>178</sup> This task demands judgment and experience, and a lawyer may benefit from seeking the guidance of colleagues.<sup>179</sup> In many cases there will be no alternative to muddling through, with due

174. MODEL RULES OF PROF’L CONDUCT R. 3.1.

175. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1510 (2018) (“Louisiana has identified no ethical rule requiring English to admit McCoy’s guilt over McCoy’s objection.”).

176. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d. (AM. LAW INST. 2001).

177. *See* BEAUCHAMP & CHILDRESS, *supra* note 48, at 28–37.

178. *See, e.g., id.* at 34 (suggesting a good decision-making process is one in which the act of balancing involves the specification of norms that incorporates one’s reasons).

179. The Model Rules permit revelation of confidential information to the extent reasonably necessary to secure legal advice concerning compliance with the rules of professional conduct. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4).

sensitivity to the values of autonomy, loyalty to the client and the fairness and reliability of the litigation process. Moreover, the Restatement emphasizes that the lawyer will often be facing a series of imperfect alternatives and will, in effect, be looking for the least-worst option.<sup>180</sup> As a result, it recommends that a lawyer who “acts reasonably and in good faith in perplexing circumstances” should not be exposed to professional discipline or an action by the client for malpractice or breach of fiduciary duty.<sup>181</sup> The “reasonably and in good faith” qualification is important, but one aspect of proceeding reasonably is not assuming that autonomy or countervailing values (fairness, reliability, etc.) are absolute and should necessarily determine what should be done in a particular case.

4. Both the Restatement and the Model Rules direct the lawyer to maintain a normal lawyer-client relationship, to the extent possible.<sup>182</sup> One of the hallmarks of a well-functioning lawyer-client relationship is trust. A client who believes his lawyer is working against his interests will likely begin to mistrust the lawyer. Attempts at persuasion are of course lawyers’ stock in trade, but they must never attempt to deceive or manipulate their clients into making the decision that the lawyer believes is consistent with the client’s long range-interests. The Restatement comments do contemplate a limited role for deception in instances where conveying truthful information would cause the client to commit suicide or harm others.<sup>183</sup> Outside that unusual situation, outright lying is a clear violation of the rules of professional conduct,<sup>184</sup> as well as a breach of the lawyer’s fiduciary duty to the client. The interesting questions pertain to the permissibility of cajoling, pleading, shading the truth, slow-walking a decision, and other strategies short of outright untruthfulness. Lawyers whose clients wish to “volunteer” for execution report employing a wide range of strategies, enlisting family members and friends, listening patiently to client concerns, and appealing to

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180. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. b. (“This Section recognizes that a lawyer must often exercise an informed professional judgment in choosing among those imperfect alternatives.”).

181. *Id.* at cmt. d.

182. *Id.* § 24(1); MODEL RULES OF PROF’L CONDUCT R. 1.14(a).

183. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. c. (“A lawyer may properly withhold from a disabled client information that would harm the client . . .”).

184. MODEL RULES OF PROF’L CONDUCT R. 4.1 (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . .”).

interests such as not wanting to let down one's family or give in to the system.<sup>185</sup> In fact, many lawyers believe (rightly in my view) that neglecting to attempt to persuade the client to act in his own best interests would be a violation of their ethical duties.<sup>186</sup> This requires a great deal of effort to build trust, including many hours of listening to clients (not just talking to them), going off on a few wild goose chases suggested by the client, and otherwise acting like someone the client can believe has his best interest at heart.

5. Finally, and to reiterate, the degree of competency required by gray zone defendants to make a self-defeating choice should vary directly with the importance of the interest at stake.<sup>187</sup> The sliding-scale approach to competency and autonomy is relatively easy to reconcile with decisions regarding trial tactics—what Model Rule 1.2(a) refers to as decisions with respect to the means by which the client's ends are to be pursued.<sup>188</sup> Justice Ginsburg implies without saying so expressly that the lawyer's concession of guilt in *McCoy* is tantamount to a guilty plea, and under the allocation of authority in Rule 1.2(a), the decision to plead guilty is exclusively for the client to make.<sup>189</sup> However, it is also arguable that, where the non-autonomy interests of the client are sufficiently weighty—for example, where the defendant's life is at stake—a court may permit defense counsel to represent the client in a way that upsets the usual allocation of decision-making authority. The self-representation right in *Faretta* is qualified in many ways. There is no constitutional prohibition, for

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185. See Harrington, *supra* note 53, at 863–64 (explaining three strategies lawyers use when dissuading clients from volunteering are: “the ‘direct’ approach, the ‘indirect’ approach, and the ‘listening’ approach”).

186. See *id.* at 863 n.19. As one lawyer put it, upon learning of the client's desire to waive appeals and proceed to execution, it would be irresponsible to simply accept that instruction without conducting a further investigation and trying to talk the client out of the decision.

187. See, e.g., FEINBERG, *supra* note 103, at 118–19.

188. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (defining the scope of a lawyer's representation).

189. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508–09 (2018). Justice Alito, in dissent, distinguishes (1) admitting guilt of an offense and (2) conceding the factual predicate for an element of the offense. See *id.* at 1514–17 (Alito, J., dissenting). Technically Alito is correct, but the only difference it makes for the ethical analysis is that a decision to plead guilty is inherently, non-waivable within the client's authority, while a decision to concede factual but not legal guilt is almost certainly a decision concerning the objectives of representation, which is the client's to make. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (“In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

example, on the appointment of standby counsel to assist in various ways at trial.<sup>190</sup> The Court in that case noted that *Faretta* establishes the defendant's right to have his voice heard, but does not limit the participation of others in the defendant's trial.<sup>191</sup> However, because the core of the *Faretta* right is "to preserve actual control over the case [the defendant] chooses to present to the jury[.]"<sup>192</sup> there should be a strong presumption in favor of the usual allocation of decision-making authority, particularly in non-capital cases.

## V. CONCLUSION

One of the ironies of *McCoy* is its subordination of the values of fairness, reliability, and professional control in a case presenting the most serious risks to the client if the lawyer provides ineffective representation. The client's most urgent need in a capital case is for a lawyer with the capability of sparing his life. In cases involving less weighty matters, lawyers have a stronger claim to decision-making authority. Indeed, outside the context of criminal defense, lawyers have a duty to ensure that the claims and defenses they assert have adequate factual and legal grounding.<sup>193</sup> Those cases also involve interference with the client's autonomy, but that interference is accepted as necessary for the vindication of other values, such as the fairness and reliability of the proceedings. Lawyers rightly must consider both values in determining the ethical course of action, but *McCoy* seems to suggest that autonomy has near-absolute weight in a context in which the need for effective representation is greatest.

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190. *McKaskle v. Wiggins*, 465 U.S. 168, 187–88 (1984).

191. *See id.* at 176–77 (“*Faretta* itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement.”).

192. *Id.* at 178.

193. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”); *see generally* FED. R. CIV. P. 11 (defining the standards of representations made to a federal court, along with outlining possible sanctions).