Autonomy versus a client's best interests

The defense lawyer's dilemma when mentally ill clients seek to control their defense

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I. Introduction

The prosecution of "Unabomber" Theodore Kaczynski drew this country's attention to the difficult question of whether a mentally ill client should be able to prevent his lawyers from introducing his mental illness in his defense.[1] Mr. Kaczynski, who was found competent to stand trial despite a diagnosis of paranoid schizophrenia, obduralely resisted his lawyers' plans to portray him as mentally ill during the guilt and sentencing phases of the trial.[2] In his lawyers' opinion, a mental illness defense offered the only hope that Mr. Kaczynski would avoid the death penalty.[3] The lawyers faced a difficult dilemma. By allowing Mr. Kaczynski to waive his best defense, they would

[1] Official Trial Transcript Proceeding at *1, United States v. Theodore John Kaczynski, 1998 WL 1930 (E.D. Cal. Trans.) (CR No. S-96-0259GEB) (relating Mr. Kaczvnski's interruption of opening statements with a request to fire his court-appointed lawyers because he disagrees with their defense strategy). *See* William Glaberson, *Unabomb Trial Halted Abruptly as Suspect Battles His Defense, N.Y. Times,* Jan. 6, 1998, at *A*1.

[2] Mr. Kaczynski's lawyer, reached an agreement with him whereby they would forego an insanity defense but would still argue that his mental illness negated the Unabomber's intent to murder. *See* Order at *1. *Kaczynski.* 1997 WL 797428 (E.D. Cal. Trans.) (CR No. S-96-0259GEB); Pre-Trial Transcript In Camera Discussion (Redacted), *Kaczynski.* 1997 WL 812617 (E.D. Cal. Trans.) (CR No. S-96-0259GEB). *See also* Pre-Trial Transcript Discussion of Molions and Change of Plea, *Kaczynski,* 1998 WL 22017 (E.D. Cal. Trans.) (CR No. S-96-0259GEB). As part of this agreement, defense counsel would not call expert witnesses to prove mental illness, but would rely instetd on civilian witnesses during the guilt and penalty portions of the trial. *hi.* Mr. Kaczynski agreed reluctantly, stating, "Your Honor, as you know, I do not agree with counsel concerning major strategic decisions, but I've become aware that legally I have to accept those decisions whether I like them or not." Pre-Trial Transcript Proceedings at *5, *Kaczynski,* 1998 WL 10757 (E.D. Cal. Trans.) (CR No. S-96-0259GEB).

It is unclear whether the lawyers' concessions to their client were based at all on autonomy considerations. Certainly, on the record, they appear to be based on a realistic calculation that the insanity defense would be struck because of Mr. Kaczynski's refusal to submit to a mental examination by government psychiatrists. *See* Pre-Trial Transcript Hearing on Government's Motion to Preclude Expert Mental Health Testimony at Guilt Phase and Hearing Re: for Cause Challenges, *Kaczynski*, 1997 WL 810297 (E.D. Cal. Trans.) (CR No. S-96-0259GEB); Government's Motion to Preclude Defendant From Relying on Expert Mental Health Testimony at the Guilt Phase and to Require the Defendant to Undergo a Mental Examination Before Sentencing, *Kaczynski.* 1997 WL 716539 (E.D. Cal. Trans.) (CR No. S-96-0259GEB). *See also* Fed. R. Crim. P. 12.2(d). In justifying their right to assert a mental illness defense contrary to their client's wishes, Mr. Kaczynski's lawyers conceded that the client must decide whether to assert an insanity defense, but that a lawyer may decide to raise other mental illness defenses including diminished capacity or lack of mens rea. *See* Defendant Kaczynski's Response to Government's Motion for a Hearing on Issues Concerning the Defendant's Representation, *Kaczynski.* 1998 WL 27878 (E.D. Cal. Trans.) (CR No. S-96-0259GEB).

[3] "It is unconscionable for the government to ask the Court—in a capital case—to order defense counsel to forego the only defense that is likely to prevent the defendant's conviction and execution."

give their client autonomy—after all, it was his life. On the other hand, the client's decision to forego his best defense was suicidal and, thus, an incompetent decision.[4] His lawyers chose his best interests over his autonomy, asserting that they had a professional obligation to present the case in such a way as to maximize his chance of success on the merits.[5]

Should a criminal defense practitioner raise the defense of nonresponsibility against the client's wishes when the practitioner believes a mental illness is preventing the client from following the sound advice of her attorney? Several years ago, I handled a criminal case where I believed my client was mentally ill and that her misdeed was caused by an illness over which she had no control. What clearly seemed the client's best interests lay contrary to her express wishes. I believed that it was in my client's best interests to raise mental illness concerns and, ultimately, to raise a nonresponsibility defense.[6] Yet my client had no conception of her mental illness. Moreover, she clung to a misguided belief that she would win at trial on the merits of the case and be exonerated of any wrongdoing. In the end, I took the unorthodox approach of substituting my judgment for hers, and I asserted mental illness as a defense to the charges. The ultimate result was good—the case was dismissed—but not until my client had spent time locked up in a mental institution for an evaluation. To this day, I am unsure if I made the best ethical decision when I overruled my client's choice of defense.

By writing about a particular case, I hope scholars will glean the complicated nature of lawyer decisionmaking. I also hope to write something other defense attorneys will consult when facing similar dilemmas. No ethical code or rule dictates which course a criminal defense attorney must take when a client, her judgment apparently clouded

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Defendant Kaczynski's Response to Government's Motion For A Hearing On Issues Concerning the Defendant's Representation at *3, *Kaczynski,* 1998 WL 27878 (E.D. Cal. Trans.) (CR No. S-96-0259GEB I.

[4] Counsel asserted that "for his entire life" Mr. Kac/ynski had "a deep and abiding fear that he would be presented" as mentally ill. Official Trial Transcript at *10. *Kaczynski.* 1998 WL4657 (E.D. Cal. Trans.) (CR No. S-96-0259GEB). The defense team took the position that if the judge ruled that Mr. Kaczynski controlled his defense, they would then dispute his competency to assist counsel and argue that he was unable to make a rational decision to waive a mental illness defense. *See id.* (recording discussion between Judge Garland E. Burrell. Jr. and Defense Law yer Judy Clarke . The judge ruled that the lawyers controlled the presentation of the defense, but he displayed anxiety about the correctness of that ruling: "1 just had a flash on—the point that I tried to make earlier. I'm not sure I made it clearly. It involves a possible error. Mr. Kaczynski could argue that he is being forced to represent himself... because of my ruling on the mental status issue ..." *Id.* at *8.

[5] Attorney Clarke arguet that "it is the lawyer's professional obligation to make strategic decisions and present the case in the way that the lawyer professionally believes is accurate and appropriate. And I think to say otherwise to counsel would pit a lawyer against his or her oath, professional oath." *Id.* at * 10.

[6] The American Bar Association prefers the term "nonresponsibility" to "insanity " because the term insanity is "both offensive and stigmatizing." ABA *Criminal Justice Mental Health Standards 323 (2d* ed. *1989)* [hereinafter ABA *Standards* . "Terms like insanity and criminally insane conjure up visions of beastlike derangement." *Id.* In contrast, the term "nonresponsibility" focuses on "the moral nature of the inquiry into whether a person should be exculpated for his or her acts." *Id.*

by mental illness, resists following counsel's advice. This is one of those questions that is "at the margins" of ethical decisionmaking.[7] Paul Tremblay recently wrote that there should be a body of work created to help guide practitioners in making the multitude of decisions they make in these margins. He posits that "the only true teaching of ethics at the margins will come within real cases."[8] Tremblay's work can be seen as part of a growing body of clinical scholarship that recognizes that theory is more likely to be right when it emerges out of the practice of law.[9]

The very act of substituting judgment negates a client's autonomy. Thus, even as I advocate surrogate decisionmaking as an option for mentally impaired clients, I recognize the necessity of limiting its scope. At a minimum, criminal defense lawyers should reserve surrogate decisionmaking for those occasions when a mentally ill client's best interests outweigh the client's right to autonomous decisionmaking.[10] Once a lawyer determines a client's judgment is impaired, a lawyer must weigh the client's best interests against the client's interest in self-determination. Inexorably, lawyers will be guided by their own values when they decide whether to substitute judgment for a mentally impaired client. Thus, Mr. Kaczynski's appointed lawyers concluded that Mr. Kaczynski's right to autonomous decisionmaking was outweighed by his interest in having his lawyers save his life by using a mental illness defense—albeit not an insanity defense— while another lawyer proposed to represent him exactly as he wished.[11]

When I weighed my client's best interests against her right to autonomy, undoubtedly my definition of best interests was a product of my own values, as was the weight I gave to my client's autonomy. I wanted to help this woman get her life back on track and I thought it unfair that she should be branded a criminal. Generally a rights-based lawyer, I found myself pulled by what could be called an *ethic of care.*[12] Still a zealous

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[7] Paul R. Tremblay. *The Role of Casuistrx In Legal Ethics: .4 Tentative Inquiry,* I *Clin.* L. Rev. 493. 493 (1995). The "margins" include "a substantial chunk of ethical decisionmaking [left| up to the discretion of individual practitioners" who are without the specific ethical mandates. *Id.*

[8] *Id.* at 503.

[9] As Phyllis Goldfarb noted in her seminal essay on the connection between feminist and clinical theory, "clinical education is rooted in the notion that theory formed through a clinical process is more likely to be useful and more likely to be right." Fhyllis Goldfarb. 4 *Theory-Practice Spiral: The Ethics of Feminism and Clinical Education.* 75 MINN. L. *Rev.* 1599. 1615 (1991). *See also* Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship. -S Hastings* L.J. 1187, 1194 (1992); Clark D. Cunningham. *The Lawyer As Translator. RepresentalUm as T :xt: Towards An Ethnography of Legal Discourse.* 77 *Cornell* L. *Rev.* 1298. 1340 (1992): Robert D. Dinersteiii. 4 *Mediation ott the Theoretics if Practice.* 43 *Hastings* L.J. 971.984. 981 tt. 18. 984 n.31 & 33 (1992).

[10] Clients generally vveigi these competing interests, but mentally ill clients are often incapable of doing so.

[11] *See* Ex Parte in Camera Pre-Trial Transcript Proceedings (Redacted). *Kaczynski.* 1998 WL 10758 (E.D. Cal. Trans.) (CR No. S-96-0259GEB) (referring to Attorney Tony Serra's offer to represent Mr. Kaczynski pro bono). *See also* Pre-Trial Transcript Proceedings at *1, *Kaczynski.* 1998 WL 3338 (E.D. Cal. Trans.) (CR No. S-96-0259GEB).

[12] *See generally* Stephen Ellmann. *The Ethic of Care as an Ethic for Lawyers.* 81 Gt.o. L.J. 2665 (1993) (discussing *ethic of care* as a model for ethical lawyering). *See also infra* Part lll.B.

advocate, still a protector of rights, I defined her best interests more broadly than most rights-based lawyers, looking at long term therapeutic interests as well as a good outcome for the criminal charges. I valued her autonomy less than another lawyer might because, in my opinion, the disease was destroying her life, disconnecting her from people and from reality. Because I viewed the illness as controlling her decisions, I placed less value on her autonomous decisionmaking. It is inherent in the nature of surrogate decisionmaking that a lawyer's own personal philosophy will influence the lawyer's decision to substitute her judgment for a mentally ill client.[13] It thus follows that a principled exercise of surrogate decisionmaking requires lawyers to examine their own attitudes and values.

Of the small amount of scholarship addressing whether a lawyer may waive or assert nonresponsibili ty over a client's objection, most writers oppose surrogate decisionmaking and take the position that, once the client has been found competent to stand trial, the lawyer is bound to accord the client full autonomy in decisionmaking for important decisions such as whether to waive the nonresponsibility defense.[14] One notable exception is Richard Bonnie's seminal article championing surrogate decisionmaking for marginally competent clients who meet the low threshold of competency to stand trial but whose decisions are nevertheless impaired.[15] Bonnie's work is aimed at changing the theory of competency within the legal system to recognize a large class of marginally mentally ill clients who are fit to stand trial under the constitutional standards enunciated in *Dusky* and *Drope,* but whose decisionmaking abilities are nevertheless impaired.[16] Bonnie's theoretical proposition is that the law ought to distinguish between "decisionally incompetent" clients and those unfit for trial because they are "incompetent to assist counsel." For the purposes of this Essay, it is immaterial whether readers disagree with Bonnie and insist that, in a perfect system, judges should prevent the trial of all mentally ill defendants when their lawyers declare them unfit to make important decisions such as whether to assert or waive a nonresponsibility defense.[17] As the system now functions, defense lawyers occasionally find themselves representing people adjudicated competent to stand trial who are incompetent to make decisions in their cases.

[13] This is not a criticism of surrogate decisionmaking by lawyers, for the other options provide difficulties as well. For example, if judges made the decision, then a judge's personal philosophy would control. Or if substitute judgment were forbidden, then probably Mr. Kaczynski would have gone to trial w-ith no defense.

[14] *See infra* note 69 and accompanying text. *Cf* Rodney J. Uphoff. *The Rote of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?,* 1988 Wis. L. *Rev.* 65, 80–82 (1988) (defending right of defense lawyer to assert diminished capacity defense for mentally ill client who wanted his lawyer to argue mistaken identification).

[15] Richard J. Bonnie. *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. *Miami* L. *Rev.* 539 (1993).

[16] *See id.*

[17] *See id.* at 585.

Bonnie's work stops short of addressing how a defense lawyer decides if surrogate decisionmaking is the right action to take. In Bonnie's proposed system, a judge serves as gatekeeper. The lawyer who believes his client's decisions are irrational informs a judge who, in turn, determines whether surrogate decisionmaking is appropriate in that case. This Essay examines the benefits and pitfalls of delegating this ethical decision to a judge. Unlike Bonnie, I am primarily concerned with how lawyers should practice within the current system. I am interested in surrogate decisionmaking for both marginally incompetent clients, like Mr. Kaczynski, and for fundamentally incompetent clients like John Salvi whose lawyers believe the judge should have found unfit to face prosecution.[18] This Essay focuses on the difficult and contextual questions facing defense lawyers who are considering overruling their client's irrational decisions.

My case, like the Kaczynski and the Salvi cases, portrays the confusion that reigns in the criminal courts over the allocation of decisionmaking for mentally ill defendants deemed competent to stand trial. The lack of guidelines in this area—shocking given the prevalence of these issues for practicing defense attorneys—points to larger unresolved questions such as the meaning of competency to stand trial, the value that should be given to autonomous client decisionmaking for mentally ill clients, and, at core, ambivalence over whether to assess blame against the mentally ill.

My case haunts me still. I am troubled now as I was then by the lack of options available to people who fall into the criminal justice system needing help —skillful psychiatric help—rather than adjudication or punishment.[19] I am troubled as well by the almost impossible choices defense attorneys face when mental illness causes clients to make bad decisions.[20]

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[18] John Salvi was convicted in 1995 of murdering two women in family planning clinics in Boston, Massachusetts. Mr. Salvi told his lawyers that he was free of mental illness and did not want his lawyers to challenge his competency or raise an insanity defense. Mr. Salvi's lawyers considered their client not only decisionally incompetent but also fundamentally incompetent to stand trial, hut their motions to declare him unfit to stand trial were denied. Counsel raised and lost an insanity defense while their client spent his trial "preoccupied with psychotic thoughts which center around the persecution of Catholics and the use of a credit and debit monetary system." Affidavit of Counsel In Support of Motion For Hearing Concerning Competency (Sup. Ct. Nos. 99518–524). *See* Matt Bai & Paul Langner, *S.J.C. Ruling Denies Salvi New Competency Hearing in Clinic Killings. Boston Globe,* Sept. 7, 1995. Information was also obtained through conversations with Attorney Carney. *See infra* notes 72, 83. 146–149 and accompanying text (discussing the Salvi case).

[19] Far from being an isolated situation, the case study presented here is typical. Many clients are mentally ill. and many of those mentally ill clients deny their disease and its extent. As the ABA reported in the introduction to the ABA *Standards, supra* note 6, at xvi: "Clearly the economically, educationally, and mentally disadvantaged are disproportionately represented at all stages of the criminal justice process." One figure released regarding prisoners in the Massachusetts state prison system estimated that *2suffer* from mental illness and up to \ *0(*< suffer from major mental illresses such as schizophrenia or manic depression. Zachary R. Dowdy, *Counseling Increased For Inmates*, *Bost*< >\ *Globe.* July *24. 1997.*

[20] While law traditionally evolves through the appeal of real cases with specific facts, ethical decisions are generally not the subject of appellate review. When criminal trial attorneys talk about a "real case." we are talking about the process of meeting a client, learning about the charges that client

Part II of this Essay describes the facts of the case I handled in which I believed the client's mental illness was affecting the way she wished the case tried. I also describe and weigh the three options available to me as her defense lawyer: (1) following my client's wishes; (2) challenging my client's competency to stand trial; and (3) raising the nonresponsibility defense. Part III raises and addresses the paternalism inherent in surrogate decisionmaking. First, I investigate my reasons for substituting my judgment for that of my client. Second, I consider whether my decisionmaking in this case was influenced by an *ethic of care* orientation. I examine both the manner in which lawyers tend to make these decisions, and the manner in which we as lawyers should make these decisions. Finally, Part IV proposes changes in the system to alleviate some of the difficulties illustrated by the case.

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faces, and helping the client resolve the charges through trial, plea, or alternative disposition. In order to ground ethical decisionmaking in real cases, we have to write about those ease histories and expose our ethical decisions. This Essay discusses a case that would otheru ise be known only by word of mouth. *See* Laura Gardner Webster, *Telling Stories: The Spoken Narrative Tradition in Criminal Defense Discourse.* 42 *Mercer* L. *Rev.* 553 (1991).

II. A Real Case

A. Meeting Lee TepIinski

When Lee Teplinski[1] walked into my office for her first appointment, I wondered fleetingly about her competency. She had a big purple circle on her forehead which was the size of a golf ball that looked like it had been made by needle pricks, and there was something odd about her manner. Nevertheless, I concluded that she was competent to stand trial under the current legal definition because she was able to understand all the rudiments of a trial.[2] She followed my explanation of the players in the system, understanding the roles of the judge, the prosecutor, and the jury. She understood that I was on her side, or at least that I was supposed to be on her side. According to the police report, Ms. Teplinski was driving a car in a parking lot in the middle of the day, when her car brushed lightly against the arm of a pedestrian. Ms. Teplinski then got out of her car with a crowbar, the report continued, chased the man, swung at him with the crowbar, and eventually struck him. Ms. Teplinski, however, swore that she was not there. My client wanted me to try the case as one of mistaken identification.

A mistaken identification defense would have had little, if any, chance of success. In addition to the unmistakable purple circle on her forehead, the police report noted that Ms. Teplinski waited for the police to arrive. She was a short Vietnamese woman in her thirties who spoke English with an accent.[3] When the officer arrived, he took down her name and address from her license, noted the model of the car, and wrote down the license plate number. All the evidence was consistent with the charge that Ms. Teplinski was the assailant.

I met with Lee Teplinski several times in my office over the course of two weeks. As time went by, I became convinced that Ms. Teplinski truly did not remember the whole event. Because Ms. Teplinski had no memory of being there, it was logical that she would want the case tried as one of mistaken identification. Less logical, however, was her inability to accept the fact that even if she was not there, she could still be identified as having been there. In other words, she did not seem to comprehend a guilty verdict premised on what she considered mistaken identification. Whether we spoke of identification or misidentification, Ms. Teplinski was firm in her belief that

[1] Lee Teplinski is a pseudonym.

[2] *See infra* note 44 and accompanying text.

[3] Ms. Teplinski's last name was not Vietnamese because she changed her name when she married. Her husband was a man of Polish de scent.

she would win because she was not there and, therefore, no one could possibly identify her as the assailant.

Ms. Teplinski's behavior, including other examples of significant memory lapses, convinced me that she was mentally ill. Unfortunately, she had no history of mental treatment or diagnosis, and so I had no medical records to aid me. In addition, I had no access to a forensic psychologist or other professional with whom to confer about her symptoms and diagnosis.[4] Without the aid of psychiatric advice, I could not be sure of the correct diagnosis for her symptoms.[5]

Ms. Teplinski grew up in Vietnam where she met and married an American soldier. Although Ms. Teplinski was estranged from her husband, I took the liberty of talking to him.[6] An estranged husband is often a risky source of information about a client's character given the enormous amount of abuse present in the lives of many clients.[7] Nevertheless, this communication provided some additional insight.

If I were correct that Ms. Teplinski was suffering from a major mental illness, then the nonresponsibility defense, commonly called the insanity defense, was a possible defense to the charges against her.[8] Although the insanity defense is best known for its use in cases involving heinous crimes, lack of criminal responsibility is a defense to

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[4] In Massachusetts, I would have had to petition for funds from the court in order to get advice from a psychiatrist about my client's mental health. If I made this motion, the judge would have screened the request by ordering a competency exam from the doctors employed by the courthouse. *See infra* Pan II.B.2. In contrast, John Salvi's lawyers were provided funds for an independent examination to light the murder charge. However, one judge expressed dismay that his lawyers had hired two experts on the issue of competency and insanity.

[5] I thought it possible that she was suffering from Post-traumatic Stress Disorder. Post-traumatic Stress Disorder [PTSDJ is defined in the DSM-IV as a mental disorder caused by a traumatic event and includes physical symptoms of avoidance, such as forgetting the underlying event, and arousal, such as outbursts of anger. *See American Psychiatric Association, Diagnostic and Statistical Manual of Psychiatric Disorders* 424–29 (4th ed. 1994) [hereinafter DSM-IV], One author succinctly discussed PTSD this way: "It appears that the human organism is not biologically programmed to integrate and fully work through massive psychic trauma." *Kirkland C. Peterson et al., Post-Traumatic Stress Disorder:* A *Clinician's Guide* viii (Plenum Press ed. 1991). I suspected PTSD partly because memory lapse is a possible symptom. *See* DSM-IV. *supra,* at 425. Growing up in Vietnam during the Vietnam War suggested that she may have been traumatized during those years. PTSD is often associated with the horrors experienced by American soldiers in Vietnam. *See* Wilson & Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Posttraumatic Stress Disorder to Criminal Behavior,* 1 *Bf.hav.* Sci. & L. 70 (1983). PTSD was first recognized as a valid diagnostic category when the DSM-I1I was published in 1980. *Posttralmatic Stress Discrder:* A *Behavioral Approach to Assessment and Treatment,* 1–6 (Philip A. Saigh ed. 1992). *See Peterson, supra,* at vii.

[6] My client was angry that I had spoken to her husband.

[7] Ethicists who urge that the family be consulted do not deal with this basic truth about the lives of many indigent criminal defendants: often, they are either estranged from their families or would be better off adrift from their partners or spouses.

[8] While criminal responsibility concerns a defendant's mental state at the time of the offense, competency involves a client's present mental ability. Legally, the two concepts—competency on the one hand, criminal responsibility on the other—are distinct and impose different ethical obligations on defense counsel. *See infra* Parts II.B.2, II.B.3.

all crimes charged in Massachusetts. A defendant is not criminally responsible for the crime if, as a result of either mental disease or defect, she lacks the substantial capacity to appreciate the criminality or wrongfulness of her conduct, or lacks substantial capacity to conform her conduct to the requirements of the law.[9] Legally, if she chased the man with a crowbar because her mental illness prevented her from conforming her conduct to the law, then she was not criminally responsible, and thus not guilty of the crime.[10]

As Ms. Teplinski's lawyer, I faced a two-fold dilemma. First, what was the best way to proceed with her case? Was it in her best interests to raise competency or criminal responsibility issues? Second, if a mental illness defense was in her best interests, should I raise it even though I lacked my client's consent to question her competence or criminal responsibility?

B. Three Options in Ms. Teplinski's Case

Ms. Teplinski needed treatment, not prosecution. I wanted the criminal charges against her dismissed. I also hoped to find a way to get her diagnosed and on the road to recovery. I suspect that if the American public were given the specifics of Lee Teplinski's situation, most would agree that dismissal of the charges against her, and getting her the appropriate help, would be the just outcome.[11] Yet, in the criminal justice system as it exists, no legal option was without danger of conviction, loss of liberty, or violation of client trust.

Without some proof that Ms. Teplinski was mentally impaired, the district attorney or judge was not going to dismiss the case. Therefore, three possible courses of action

[9] *See* Commonwealth v. Brown, 434 N.E.2d 973,980 (Mass. 1982); Commonwealth v. McHoul. 226 N.E.2d 556, 557–58 (Mass. 1967).

[10] PTSD would help exp ain her behavior in the parking lot; something in the present may have triggered an unconscious memory of the past traumatic event and caused her to lash out. A traumatic event may be persistently re-experienced by "acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience of the trauma, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intox cated)." DSM-IV, *supra* note 25, at 428. Ms. Teplinski may have experienced the event in the parking lot as defending herself from a (past) attack in Vietnam. For a case in which PTSD was recognized as a mental illness permitting a *not criminally responsible* verdict, see Commonwealth v. Mulica, 401 Mass. 812, 813 n. 1 (1988). Although PTSD as a category was initially associated with (primarily male) Vietnam war veterans, several studies have found that PTSD occurs more frequently in women. *American Psychiatric Association. Work Group on* DSM-IV-PC 583 (1995).

[11] In contrast, the public tends to oppose treatment in prosecutions involving horrendous crimes. In fact, the public reaction to the successful use of the insanity defense by John Hinckley after shooting President Reagan caused legislation curtailing the use of the insanity defense in many states. *See* Charles J. Ogletree. Jr., *The Death of Discretion7 Reflections on the Federal Sentencing Guidelines,* 101 *Harv.* L. *Rev.* 1938, 1945 n.42 (1988). The Insanity Defense Reform Act of 1984, Pub. L. No. 98^473, tit. 2, ch. 4, 98 Stat. 1837, 2057 (codified at 18 U.S.C. 20 (Supp. II 1984); 18 U.S.C. 4241–4247 (Supp. Ill 1985)), was largely a response to the enormous public outcry following the acquittal of John Hinckley.

remained. First, I could follow her wishes and argue mistaken identification. Second, I could try to have Ms. Teplinski declared incompetent to stand trial. Third, I could argue that my client lacked responsibility to commit the crime, raising the defense contrary to her wishes. The ethical dilemmas surrounding this third course of action form the central focus of this Essay. In this section I will set forth the pitfalls inherent in each option.

1. Option #1: Following the Defendant's Wishes

My first option was to follow Ms. Teplinski's wishes and mount a mistaken identification defense. If I tried the case the way Ms. Teplinski wanted, she would certainly lose. No jury was going to believe that the eyewitness and the police officer were both either mistaken or lying about her presence there. The only evidence that she was not there would be her solemn testimony on the stand, and then on cross-examination she would honestly confirm that the car identified by the police officer belonged to her and that no one else drove it.

Although this was not a major crime, it was still a felony. The maximum sentence Ms. Teplinski could receive in district court for the charge of assault and battery with a dangerous weapon was incarceration for two and one-half years.[12] Because my client had no criminal record, I expected that if Ms. Teplinski went through a jury trial and lost, she would be placed on probation, perhaps receiving a one year sentence, suspended for two years.[13] Under such a sentence, Ms. Teplinski would be considered a convicted felon, although she would not be completely deprived of her liberty as long as she obeyed the terms of her probation for two years. During :hose two years, Ms. Teplinski would be required to come to the probation department regularly, and perhaps pay a monthly fee to the probation department. Once she successfully completed probation, she would have a criminal record, but that would be the end of the case.

If Ms. Teplinski were later accused of violating the terms and conditions of her probation, there would be a hearing about her violation of probation, but it would be assumed that during the crowbar incident she had been sane. At the hearing, the only question would be whether she had violated the conditions of her probation. If she had, particularly if she were being charged with another crime of violence, a judge

[12] *See Mass.* Gln. *Laws* ch. 265, § 15A (1990 & Supp. 1998). "Whoever commits assault and battery upon another by means ol a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or b> a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years."*Id.* Although t ie statute calls for up to ten years incarceration in stale prison, this sentence is not applicable to defendants tried in district court.

[13] Although the Assistant District Attorney never made an offer on Ms. TeplinskTs case. I knew that if she entered a plea admitting to the charge. Ms. Teplinski would almost certainly receive a sentence known as a < *ontinuance withom a finding. See infra* note 106 for definition and effect.

might incarcerate her for one year.[14] If Ms. Teplinski had no ability to control her impulses when she ran after the man with the crowbar, how could I assume that she possessed the ability to complete her probation successfully? In my estimation, the mental illness was starting to take over her life, and if she were to be released from the criminal justice system with no services, but with probationary strings attached and a criminal record, her future would be bleak.[15]

2. Option #2: Raising Incompetency to Stand Trial Defense

The second option was to challenge Ms. Teplinski's competency to stand trial.[16] If I moved for a competency evaluation, the judge would order an evaluation by psychologists on staff at the court. If the psychologist reported doubts about Ms. Teplinski's competency, a judge might commit her to Worcester State Hospital for evaluation for up to forty days.[17] While theoretically not punishment, a commitment for observation would constitute a complete deprivation of liberty for whatever period of time it took to evaluate Ms. Teplinski.

The very hospital Ms. Teplinski would be sent to was described as follows by a plaintiff in a malpractice action against his defense attorney and others for making him spend a single night in that institution:

> That's where I spent the night, with these disturbed patients walking around, looking at me, and would come up and start asking questions,

[14] The only way to attack the earlier conviction would be to find a lawyer who would ask for a new trial on the ground that I had been ineffective counsel in failing to raise the criminal nonresponsibility defense. For ineffective assistance of counsel cases in this state on failure to raise insanity defense, see Commonwealth v. Street. 446 N.E.2d 670, 672 (Mass. 1983) Commonwealth v. Westmoreland. 446 N.E.2d 663, 665 (Mass. 1983); Osborne v. Commonwealth, 389 N.E.2d)81, 985 (1979). For the proposition that the insanity defense is unavailable at revocation of probation hearing, see People v. Allegri. 487 N.E.2d 606. 609 (III. 1985).

[15] Probation officers may recommend services to the defendants, but generally, the client still must pay for these services. Traditionally, probation officers recommend substance abuse counseling or programs of that nature. Based on my experience with mentally ill clients, I cannot imagine a probation officer arranging to have her evaluated by a trustworthy psychiatrist or mental hospital, and Ms. Teplinski's problems were not likely to disappear. "In some cases. P'i'SD symptoms diminish over time, probably in association with many differing factors. In other cases, they do not diminish and may worsen in the absence of treatment." *American Psychiatric Association, Work CJroi'p on* DSM-IV-PC 589 *(*1995).

[16] In Massachusetts, the process of finding someone incompetent to stand trial generally begins when the defense attorney moves for a competency evaluation, although a prosecutor or judge may also request an evaluation of competency. *Mass.* Gen. *Laws* eh. 123. $ 13(a) (1986 *&* Supp. *1998).* Generally, the judge will order a competency evaluation by a court psychologist on defense counsel's request. *See* Bruce J. Winick. *Restructuring Competency to Stand Trial.* 32 UCLA L Rhv. 921. 923 n.8 (1983). The competency evaluation generally takes place that day. at the courthouse, by a court psychologist. *See Mass.* Gen. L |*ws* ch. *123, §* 13(a) (1990).

[17] *Mass.* Gen. *Laws* ch. 23. § 13(b) (1986 & Supp. 1998).

> and I totally ignored them, with the fear that if I said something wrong to them, they would do harm to me ...
>
> I never got out of that chair the whole night, and these people wandered around. These people don't sleep like we go to sleep at night, these people wander around. They are always walking around. They are seated in the hallway. They sit next to you and they mumble to themselves and they come by and look at you and mumble. It's a frightening situation, especially when you're sane.[18]

If a judge found Ms. Teplinski incompetent, the trial would be delayed until the defendant regained competency unless a judge dismissed the charges in the interests of justice.[19] If Ms. Teplinski were adjudged incompetent, that could be the end of the case and the end of forced hospitalization—but not necessarily. In addition to the risk of commitment during the evaluation period, there was a further risk of long-term commitment.[20]

A client is *incompetent to stand trial* if she lacks "sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding" or lacks "a rational" or "factual understanding of the process against" her.[21] There is disagreement among appellate courts about the relationship between a client's ability to make specific decisions in her case and an overall determination of competency to stand trial.[22]

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[18] Wagenmann v. Adams. 829 K2d 196. 203 (1st Cir. 1987).

[19] Ms. Teplinski could be held at the same state hospital until she became competent. *See* Winick. *supra* note 36. at 925. Reviewing the stat sties of incompetency determinations. Winick notes that "almost all of those found incompetent to stand trial will be hospitalized for treatment." *hi* If Ms. Teplinski continued to be incompetent, after fifteen months the charges against her would be dismissed. *See Mass. Gen. Laws* ch. *123. § 16(f) (1986* & Supp. 1998). That represents one-half the maximum sentence for the charge against her. Although Massachusetts law allows for a court to dism ss the charges against an incompetent defendant for "lack of substantial evidence." counsel is precluded from raising the defense of nonresponsibility at such a proceeding. *See* M *ass. Gen. Laws ch. 123 § 17 (1986* & Supp. *1998).*

[20] In Massachusetts, an incompetent defendant may be committed or recommitted to a state hospital for observation for up to forty days. *See Mass. Gen. Laws* ch. 123, § 16(a) (1986 & Supp. 1998). During this period, the district attorney or the hospital itself may petition for commitment. *See id.* The judge may order the commitment of a defendant only if the state proves that the person is mentally ill *and* "the discharge of such a person from a facility would create a likelihood of serious harm." *Mass. Gen. Laws* ch. 123, § 8(a) (1986 & Supp. 1998). The commitment order is valid for six months, and may be renewed after that on a yearly basis until the defendant is deemed competent or the defendant has served one half of his maximum sentence (fifteen months). *See Mass. Gen.* LAWSch. 123. § 16(b)-(f) (1986 & Supp. 1998).

[21] Dusky v. United States, 362 U.S. 402, 402 (1960), *quoted in* Commonwealth v. Kostka. 370 Mass. 516, 522(1976).

[22] Drope v. Missouri, 42C U.S. 162, 172 (1975); Bonnie, *supra* note 15, at 594. See *also* Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits and a Proposal for Reform*, 39 *Ritgers* L. *Rev.* 243 (1987) (discussing costs of "incompetency process" and proposing a restructuring of current practices to minimize costs to defendants and the state).

Some courts have held that decisionmaking ability should be part of a determination of competency to stand trial while other courts focus exclusively on a defendant's ability to understand the proceedings and consult rationally with counsel.[23] Even when ability to make reasoned decisions is included among the criteria for adjudicating competence, it is only one of many factors considered.[24] Competency is not a rigid construct, but relies on an overall assessment.[25]

Rules of ethics require defense counsel to raise competency issues whenever there is a good faith basis to believe that the client is incompetent to stand trial.[26] To try an incompetent defendant would be a violation of due process.[27] Yet, I did not consider Ms. Teplinski incompetent to stand trial as that concept has been legally defined. On the one hand, I suspected Ms. Teplinski's mental health problems affected her ability to determine what had occurred in the parking lot, affected her ability to recognize the blossoming signs of mental illness, and precluded her from rationally deciding whether it was in her best interest to mount a defense based on mistaken identification or mental nonresponsibility. On the other hand, she was superior to many of my other clients in her comprehension of the system and even in her desire to help steer the defense.

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[23] Critics in this area have analyzed the problems associated with finding a defendant incompetent to stand trial, such as the attendant delay in the proceedings caused by the bar against trying incompetent defendants, and the likelihood of forced hospitalization for the client during the delay period.

[24] For an overview of competency standards, see T. *Grisso. Evaluating Competencies: Forensic Assessments and Instruments* 62—78 (1986). Grisso reviews four assessment instruments that were designed for mental health examiners to use to determine functioning: the Competency to Stand Trial Assessment Instrument: the Competency Screening Test: the Interdisciplinary Fitness Interview; and the Georgia Court Competency Test. *Id.* at 78. "The law specifies no particular level of deficiency within any of these areas of functioning as dispositive of the legal competency question." *Id.* at 64. Grisso writes that although the relationship between the anticipated demand> of defencant's trial and the defendant's competency is recognized, it is not being done: "We have no systematic methods for assessing and describing future trials and no methods designed to compare defendants' abilities to trial demands." *Id.* at 77.

[25] "To a large extent the term remains a legal one, and its boundaries often have been drawn by courts. It is. however, essentially a matter of psychology or perhaps philosophy." Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 *Utah* L. *Rev.* 515. 537 (1987). *See* Bonnie, *supra* nole 15. at 549 (arguing that current court standards for assessing competency lack a "normative texture" and are tierefore "highly discretionary"); P. *Applebaum et al.. Informed Consent* 83–90 (1987): Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position*, *in Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Toug h Questions* 31–32 (R. Uphoff ed., 1995): Grisso, *supra* note *44. at* 63–78.

[26] Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may m ove for evaluation over the client's objection. In any event, counsel should make known to the court and to :he prosecutor those facts known to counsel which raise the good faith doubt of competence. ABA *Standards* 7–4.*2(c)* (1989).

[27] Pate v. Robinson. 384 U.S. 375, 378 (1966) (holding that trying an incompetent defendant violates due process).

One way to think about Ms. Teplinski's inability to remember the event is to compare it to cases in which defendants suffer from amnesia. It could be argued that her inability to recall what occurred at the incident deprived her of the ability to "consult with [her] lawyer with a reasonable degree of rational understanding" because she could not aid her lawyer by telling her the facts.[28] But amnesia about events surrounding a charge rarely renders a defendant incompetent to stand trial.[29]

Ms. Teplinski exemplifies Richard Bonnie's definition of "decisionally incompetent" for although she generally could confer with me in a rational manner and thus "rationally assist counsel," her illness rendered her incapable of rationally making choices about how her case should be tried.[30] By "decisional incompetence," Bonnie means that the client lacks the abilities required for legally valid decisionmaking.[31] He distinguishes this from the low threshold of competency required by the Supreme Court for a case to proceed. "The key move, conceptually, is to unhinge decisional competence from the *Dusky* formula."[32] To some extent, Bonnie's theory is already embedded in the case law. For example, criminal defendants have been deemed competent to stand trial but incompetent to waive counsel.[33] ' Yet the concept of decisional incompetence is generally unrecognized today.

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[28] Dusky v. United States, 362 U.S. 402. 402 (I960). The other prong—whether she possessed rational as well as factual understanding of the proceedings against her—she met. Most states have adopted the *Dusky* standard, some with minor modifications in wording. *See Grisso. supra* note 44. at 63.

[29] *See* Note, *Amnesia: A Case Study in the Limits of Particular Justice,* 71 *Yale* L. J. 109 (1961); Donald H. J. Hermann, *Criminal Defenses and Pleas in Mitigation Based on Amnesia,* 4 *Bhhav.* So. & L. 5, 20–23 (1986). *Commonwealth* v. *Lombardi* set forth a variety of factors to help judges determine whether due process prevented the trial of a defendant suffering amnesia. 393 N.E.2d 346 (Mass. 1979). One factor is whether an alibi or some other defense could be established but for the amnesia. "It must be recalled that many defendants, especially innocent ones, must proceed w ith less than perfect knowledge as to the circumstances of the alleged crime, and yet trials are not unfair for that reason alone." *Id.* at 349. *See also* United States v. Rinchack. 820 F.2d 1557, 1564 (11th Cir. 1987) (stating that the facts and circumstances of a defendant's amnesia need to be examined in light of the usual standard for assessing competency).

[30] One could argue that Ms. Teplinski's inability to make rational decisions about trying her case rendered her unable to meet the *Dusky* standard of ability to "consult with [her] lawyer 'with a reasonable degree of rational understanding.'" *Dusky.* 362 U.S. at 402. If judges found all defendants who made irrational decisions incompetent, this would be a much broader definition of competency than presently exists. The bar against prosecution is used sparingly because delay is hard on the government and many defendants. Delays give witnesses the opportunity to disappear; witness's memories may fade; victims may want trial evidence returned to them. In addition, there is a danger to defendants that they will spend the intervening months hospitalized when they might he free alter trial. See Winick. *supra* note 36. For a discussion of the problems associated with the ban on trying incompetent clients.

[31] *See* Bonnie, *supra* note 15. at 547.

[32] *See id.* at 600 (referring to the Supreme Court's decision in *Dusky* which held that in order to proceed, a defendant must have an ability ;o consult with a lawyer with a reasonable degree of rational understanding).

[33] *See,* c.,g., Blackmun \. Armantrout, 875 H2d 164. 166 (8th Cir. 1989).

Under the present construction of competency, if a defendant is deemed competent to stand trial, then she is deemed competent to make all the decisions necessary in the course of a trial. If the client disagrees with the choice of the defense, then the question becomes whether that decision ultimately belongs to the client or to the lawyer.[34] The difficulty in trying to categorize trial decisions as belonging to lawyer or client is evident in the *Kaczynski* hearings. The judge in *Kaczynski* ruled that the decision to employ a mental illness defense rests with the lawyers, but other cases indicate an understanding that the client has the ultimate say on whether to raise an insanity defense.[35] The focus of the competency hearing then becomes how to categorize the decision to be made rather than the client's rationality in making the decision. It strikes me that the insanity defense is more similar to than distinct from a mental illness defense or a diminished capacity defense, and that the courts and the judges are confused because the present formulation makes little sense. Another problem with the analysis is that it is circular, to-wit: (1) the client is deemed competent to stand trial; (2) she is not competent to waive the insanity defense; (3) if waiving the insanity defense belongs to the client alone, then she should be deemed incompetent to stand trial; and (4) the judge can still deem her competent to stand trial. The importance of Bonnie's argument is that it brings us aw ay from the circular thinking and allows us to discuss our clients' irrational decisions without implicating the ban against trying defendants who are unfit to stand trial. As the *Kaczynski* hearings indicated, there is a real need for a better theory of competency, and the adoption of Bonnie's theory would go a long way towards ending the inconsistent and haphazard way these issues are addressed.

Whether or not one thinks decisional incompetence should be separate from incompetence to stand trial, it is unlikely that a judge would find Ms. Teplinski incompetent to stand trial. Retarded individuals, schizophrenics, and even overtly psychotic patients

[34] *See* Uphoff. *supra* note 14.

[35] *See, e.g.,* People v. Morton. 173 A.2d 1081. 1084. 570 N.Y.S.2d 846. 849 (3d Dep't 1991): Treeee v. State. 547 A.2d 1054. 1069 <Ct App. Md. 1988); People v. MacDowell. 133 Misc. 2d 944. 946–47. 508 N.Y.S.2J 870. 872 (Sup. Ct. 1986).

have been deemed competent.[36] Ms. Teplinski had no prior mental health hospitalizations or diagnoses, and she comported herself well.

In short, the inconpetency route would be fruitless unless it served an alternative purpose, namely, to gather proof of the defendant's mental illness and thereby alert the judge or assistant district attorney to the propriety of dismissing the charges.[37] Should I fail in obtaining a dismissal, I could use the incompetency report to begin to prepare an insanity defense. These alternative purposes I contemplated constituted a divergence from the way the client wished to control the case.

3. *Option #3: Raising A Nonresponsibility Defense*

The third option was to raise a nonresponsibility defense. Unless I could convince Ms. Teplinski of the wisdom of this option, raising this defense would involve substituting my judgment for hers. I will first address whether her best interests lay in a nonresponsibility defense. Then I will consider whether I had the authority to exercise substituted judgment.

Let's imagine that I successfully argued lack of criminal responsibility at trial. By statute, if Ms. Teplinski were found not guilty for lack of criminal responsibility, a judge could send her to a state hospital for observation to determine if she merited civil commilment.[38] The test applied is whether she is a danger to herself or to oth-

[36] Psychotic patients are the most likely to be deemed incompetent: nevertheless, even overtly psychotic patients may be deemed coirpetent. *See id.* at 62. 64: United States v. Butterfly. Nos. 94–30412, 94–30413. 1995 WL 729484 at **2* (D. Mont. Dec. 7. 1995) (finding competency despite retardation which "severely compromised" defendant's ability to think abstractly); United States v. Adams. 297 F. Supp. 596. 597 (S.D.N.Y. 1969) (iinding schizophrenic competent to stand trial): Winick. *supra* note 36, at 924 n.4. Colin Ferguson represented himself in a case in which he was charged with going on a shooting rampage on a commuter train in New York. Criticizing the decision that Colin Ferguson was competent to stand trial, let alone competent to waive counsel, the authors w rite: "Colin Fe guson was clearly incapable of assisting in his ow n defense in any meaningful way. He lacked the capacity to trust any attorney enough to actually and rationally evaluate the advice the attorney provided ... Colin Ferguson was so delusional and so paranoid that he was incapable of knowing what was in his own best interests ..." Ronald L. Ruby and William M. Kunstler, *So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard.* 5 *Cornell* J.L. & *Pub. Pol'y* 19. 25 (1995).

[37] It is not unusual for defense attorneys to call for incompelency evaluations to obtain information about the potential for a later insanity plea. R. *RoitscH* & S. *Golding. Compktkncy to Stand Trial* 49–50 (1980): Winick. *supra* note 36, at 933. Standard 7–4.2(c) and Commentary of ABA Mental Health Standards condemn use of the incompetence evaluation for any reason other than incompetence to stand trial. ABA *Standards* 7—*1.2(c)* ("Incompetence evaluations have been misused ... to obtain information to support a later defense of nonresponsibility [insanity].").

[38] *Mass.* Gkn. *Law s* ch. 123. § 16(a) (1997). The statute permits but does not mandate the judge to commit a criminal defendant who has been found not guilty due to lack of criminal responsibility to a state mental hospital fora period of forty days. Once the defendant is hospitalized, the district attorney or medical director of the mental hospital may petition before the local district court for the involuntary civil commitment of the defendant to a mental hospital. In order to commit a defendant who is not guilty by reason of mental illness, a district court would have to find that the defendant was mentally ill and

ers.[39] If not dangerous, she would be released. Given the relatively mild nature of the charges, it seemed unlikely that Ms. Teplinski would be committed to a state hospital after being found NGI (not guilty by reason of insanity). Nevertheless, that risk did exist. The other risk was that a not guilty verdict due to insanity would not truly be viewed by society as an acquittal. Some scholars opine that NGI is more like a double conviction.[40] While I doubted Ms. Teplinski would be committed post verdict, I hoped that a prosecutor or judge would dismiss the charges after I gathered proof of her illness and before I ever had to go to the jury.[41]

Did I have authority to exercise substituted judgment on the issue of criminal responsibility?[42] The areas of decisionmaking that rest exclusively with the client are

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that her discharge would create a likelihood of serious harin. *Mass. Gen. Laws* ch. 123, § 8(a) (1997). *See* Commonwealth v. Nassar, 406 N.E.2d 1286, 1288 (Mass. 1980). "A person is not to be committed under the statute unless the substantial risk is proved by the Commonwealth beyond a reasonable doubt." *Id.* at 1290. *Cf* Addington v. Texas, 441 U.S. 418, 431 (1979) (holding that standard must be higher than *preponderance of evidence,* but that *beyond a reasonable doubt* standard is not constitutionally required). The first commitment is for a period of six months. Thereafter, the district attorney's office or others could petition for a six month commitment, and renew the order of commitment for one year periods after that. *See Mass. Gen. Laws* ch. 123, § 16 (a)-(c) (1997). Once the defendant has been committed to the hospital, the district court can order subsequent yearly commitments if the court again finds that the patient is mentally ill and that the patient's discharge from a facility would create the likelihood of serious harm. *Mass. Gen. Laws* ch. 123. §§ 8(d), 16(c) (1997). There is no cap on the number of yearly commitments the defendant can receive, for the commitments are then governed by civil commitment statutes. *See* Jones v. United States. 463 U.S. 354. 368–69 (1983).

[39] "Likelihood of serious farm" is defined as (1) a substantial risk of physical harm to the person himself as manifested by evidence of threats of. or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the commurity. *Mass .Gen. Laws.* ch. 123. § 1 (1997). *See Nassar,* 406 N.E.2d at 1288. In addition to this test for a defendant to be committed, there is "a doctrine of 'least restrictive alternative' in connection with involuntary commitment of the mentally ill." *Id.* at 1291.

[40] *See* David Cohn. *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection.* 15 *Hastings Const.* L.Q. 295, 309–10 (1988) (citing Frendak v. United States, 408 A.2d 364,377(D.C. 1979)); Winick, *supra* note 36, at 944. *See also* Treece v. State. 547 A.2d 1054, 1059. 1063 (1988) (stating that counsel may not impose insanity defense over defendant's objection because such a defense, if successful, still carries the stigma of a conviction and only relieves the defendant of the consequences of such a conviction).

[41] What I wanted was a return to the days when sanity w as pan of the mens rea requirement the prosecution must prove, and where a finding of not guilty based on lack of responsibility would not force defendants into hospitalization which was more like punishment than help. Although Massachusetts does not formally include sanity as part of the mens rea. a judge or assistant district attorney could still derail the prosecution based on mental illness, thereby informally achieving the same results.

[42] "The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA *Standards* 4–5.2(b). *See*

whether to plead guilty, whether to waive a jury, and whether or not to testify.[43] Most scholars opine that the decision to raise the insanity plea also should rest with the client.[44] "Because the defense of insanity implicates a defendant's personal values more than any other defensive theory, the decision to invoke or forego the insanity defense now is generally held to belong to the client."[45] Although the Supreme Court has never declared that defendants have a Sixth Amendment right to raise a non-responsibility defense against counsel's advice, the Supreme Court's language in *Faretta v. California*[46] suggests this possibility. "The Sixth Amendment ... grants to the accused personally the right to make his defense," the *Faretta* Court stated, holding that a competent defendant may waive counsel and represent herself.[47] In allowing a criminal defendant to fire her lawyer and proceed pro se, *Faretta* effectively ruled that a criminal defendant's right to autonomy outweighed her best interests. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[48] Of course, there is a difference between Ms. Teplinski's right to fire me so she can defend the case her way and a right to force her lawyer to do her bidding, especially if her plan constitutes ineffective assistance of counsel. To date, the Supreme Court has never broadened *Faretta*'s reach to encompass a right to direct the lawyer as to which defense shall be used.

No case in Massachusetts directly addresses whether a lawyer can argue nonresponsibility over a client's objections.[49] Although there are appellate cases in which the

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Brookhart v. Janis, *384* U.S. *1,8c* 1966) ("| A1 lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."); Rodney J. Uphoff. *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court*7, 1988 Wis. L.Rf.v. 65, 81–82 (1988). *Cf* Bonnie, *supra* note 15, at 560 n. 77 (citations omitted) ("In response to a perceived pattern of attorney dominance in the attorney-client relationship, several commentators have proposed that the informed consent doctrine be implanted in the law of attorney-client relations. To date, however, facilitation of informed client decisionmaking remains an aspirational ethical norm rather than a legal duty.").

[43] *See Model Rules of Professional Conduct* Rule 1.2(a) (1983). *See also* Brookhart v. Janis, 384 U.S. I. 7–8 (1966) (holding client decides whether to plead guilty).

[44] *See* Paul *A.* Chemoff & William *G.* Schaffer, *Defending the Mentally til: Ethical Quicksand, 10 Am. Ckim. L. Rev. 505. 524* (*1972);* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution. 3 Geo.* J. *Legal Ethics 799, 815–16 (1990).* "Clearly both the Model Code and the Model Rules designate the client as the autonomous decision maker when deciding whether to raise the insanity defense." David R. Katner. *Raising the Insanity Defense, in Ethical Problems Facing the: Criminal Defense Lawyer: Practical Answers to Tough Questions 48. 52* (R. Uphoff ed. *1995).*

[45] Bonnie, *supra* note 15, at 569.

[46] 422 U.S. 806 (1975).

[47] *Id.* at 819 (holding that a criminal defendant has the right to proceed pro se). *See* North Carolina v. Alford. 400 U.S. 25, 38 (1962) (allowing defendant to plead guilty while maintaining his innocence). *Alford* also stresses the importance of permitting a defendant to make decisions controlling his defense. *See id.* at 37.

[48] *Faretta.* 422 U.S. at 819–820.

[49] In one Massachusetts case, counsel wanted to raise nonresponsibility, w hile the defendant was "unwilling to predicate his defense on that theory." Commonwealth v. Blackstone, 472 N.E.2d 1370. 1371

decision to raise the insanity defense is termed "counsel's tactical choice," these cases only probe whether counsel has been ineffective in raising or not raising the defense.[50] Cases that arise in the posture of an ineffective counsel claim do not delve into the allocation of decisionmaking power between attorney and client; rather they assume that the client is willing to go along with counsel's judgment.[51] One reason these issues are rarely discussed is because they only surface when a client like Mr. Kaczynski actively objects on the record. Otherwise, the court does not check whether the lawyer is following the client's wishes or whether the client has acquiesced, nor does the court investigate whether the client is too mentally ill to notice what the lawyer has done.[52] Only when the defendant pleads guilty does a court inquire about a defendant's independent decision.

(Mass. App. Ct. 1985). The court allowed defendant to plead guilty to second degree murder, although the defense lawyer thought it best to go to trial on an insanity defense; the court only addressed whether the defendant w-as competent to plead guilty, not what counsel's options would be at trial. *Id.*

[50] Commonwealth v. Mamay, 553 N.E.2d 945, 952 (Mass. 1990). In *Mamay.* the Supreme Judicial Court addressed the question of whether trial counsel had been ineffective for forgoing the insanity defense and arguing instead, that that the defendant, a doctor charged with sexual assaults in his office, "did nothing except what was medically required." *Id.* Although there was "some indication that an insanity defense might have been fruitful," trial counsel was not ineffective, the Court held; in fact, given defendant's court-ordered evaluation, "counsel's tactical choice seems all the mere wise." *Id.*

[51] For other Massachusetts cases that address ineffective assistance of counsel regarding tactical decision to raise or forgo the insanity defense, see Osborne v. Commonwealth. 389 N.E.2d 981. 985–86 (Mass. 1979): Commonwealth v. Street. 446 N.E.2d 670, 672–73 (Mass. 1983) (holding that defendant was deprived of effective assistance of counsel where the lawyer abandoned the nonresponsibility defense during the closing argument referring to the insanity defense as a "tactical or strategic judgment"); Commonwealth v. Callahan. 519 VE.2d 245. 251 n.13 (Mass. 1988); Genius v. Pepe. 50 F.3d 60, 61 (1st Cir. 1995). *rev*'g Commonwealth v. Genius. 442 N.E.2d 1157. 1159 (Mass. 1982) (holding that the insanity defense will not be disturbed unless the judgment is "manifestly unreasonable"). The highest Court in Massachusetts refused to overturn the conviction. Commonwealth v. Genius. 524 N.E.2d 1349. 1351 (quoting Commonwealth v. Lalibertv. 366 N.E.2d 736 (19771) ("Trial counsel made a reasonable *tactical choice* not to press an 'insanity' defense."). Although the First Circuit reversed, the circuit court agreed that the decision was a tactical one. holding that counsel's decision not to pursue an insanity defense was not a reasonable choice in the circumstances of that case. *Genius.* 50 FJd at 61. Other cases which hold that it is a tactical choice include Commonwealth v. Maimoni, 670 N.E.2d 189, 198 (Mass. App. Ct. 1996) l noting that defendant was "insistent on claiming he was 'not guilty' " and not insane, but rejecting ineffective assistance of counsel claim on counsel's failure to raise insanity because lawyer's decision was reasonable choice with better chance of winning at trial); Commonwealth v. Williams. 571 N.E.2d 29, 32 (Mass. App. Ct. 1991) (discussing insanity defense in tactical terms); Commonwealth v. Bannister. 443 N.E.2d 1325. 1329–30 (Mass. App. Ct. 1983) (attributing defense failure to reasonable tactical decisions).

[52] In John Salvi's case, his attorney. Carney, recalls that at first "John told me that people said I was saying he was crazy and he didn't want hat," but "later, when I told him we were going to court that day to put on an insanity defense, he just muttered something like 'oh.' Fie had decompensated a lot by that time." Earlier Mr. Salvi had stated clearly that he did not want the insanity defense used; he did not want his lawyer calling him crazy. *See* Carney, *supra* note I 8.

Other jurisdictions that have directly confronted the issue have held that the insanity defense cannot be imposed upon an unwilling defendant.[53] Nevertheless.

these same courts also view the issue, at least initially, as a tactical one. The lawyer is expected to pursue measures to determine if nonresponsibility is in the client's best interests and to file a notice of intent to use the insanity defense. The courts, therefore, will consider the issue a tactical one unless the defendant clearly objects or later proves his will was overborne.[54] The client's decision to waive or assert nonresponsibility is not regarded the same as pleading guilty, even by those courts holding that a client may veto the nonresponsibility defense.

Even as the Supreme Court gave autonomy an edge over reliability in *Faretta,* it only granted this autonomy to those who "knowingly and intelligently" exercised the right to terminate counsel.[55] Those without the necessary decisionmaking powers would be forced to retain a lawyer they did not want. Similarly, those cases which hold that a defense lawyer cannot raise the nonresponsibility issue over the objections of

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[53] *See* Frendak v. United Mates, 408 A.2d 364. 368 (D.C. 1979) (finding court must allow a defendant to reject an insanity defense wher defendant fully understands the consequences of doing so); Treece v. State. 547 A.2d 1054. 1059, 1062(Md.Ct App. 1988) (discussing courts'emphasis on defendant's right to choose defense); United States v. Marble, 940 I72d 1543. 1547 (D.C. Cir. 1991) (holding that "courts must defer to strategic-decision of a competent defendant" to waive insanity defense); People v. Morton. 173 A.D.2d 1081. 1085 (N.Y. App. Div. 1991) (holding that defense counsel was not ineffective in not presenting insanity defense where defendant wished case tried as self-defense, stating "[tjhat being the case, counsel had no authority to pursue any defense other than the one authorized by defendant."): Dean v. Superintendent. Clinton Correctional Facility. 93 F.3d 58. 59 (2d Cir. 1996) (holding that defendant had not proved that he objected to insanity defense or that his will was overborne); People v. MacDowell, 508 N.Y.S.2d 870. 873 (Sup. Ct. 1986) (holding that defendant had sufficient intelligence to understand and appreciate counsel's advice and to waive the insanity defense); Jacobs v. Commonwealth. 870 S.W.2d 412. 418 (Ky. 1994) (holding that if defendant is found capable of voluntarily and intelligently waiving the defense, both counsel and trial court must proceed according to defendant's wishes); State v. Cecil. 616 A.2d 1336. 1344 (N.J. Super. Ct. App. Div. 1992) (holding that defendant was able to make knowing, intelligent, and voluntary waiver against counsel's advice).

The insanity defense landscape is truly one of "shifting sands of statute and case law." *Marble.* 940 F.2d at 1547. The history of the ronresponsibility defense from 1300 to the present is succinctly covered in the introduction to Part VI of the ABA *Standards, supra* note 6. at 323–327. *See also* Richard J. Bonnie. *The Moral Basis of the Insanity Defense.* 69 A.B.A. J. 194 (1983) (discussing issue of responsibility with respect to an insanity defense, and arguing for proposals to narrow insanity defense and shift the burden of proof to defendant). A full analysis of the case law is beyond the scope of this Essay. As *Dean* states: "the case law reveals significant uncertainty surrounding the constitutional status of a defendant's right to reject an insanity defense. Moreover, the different bases on which courts have relied in disapproving of insanity defense imposed over defendants' objections highlight both the importance and the difficulty of the question presented." *Dean.* 93 F.3d at 61.

[54] *See, e.g., Dean.* 93 F.3d at 59 (holding that defendant was not denied effective assistance of counsel because he did not meet his burden of proving that he objected to the insanity defense, nor that his will was overborne): *Treece.* 547 A.2d at 1057 (stating counsel would be ineffective "if he did not. at minimum, fully advise his client to enter a plea of not criminally responsible").

[55] *Faretta.* 422 U.S. at 8 35. *See generally* Westbrook v. Arizona, 384 U.S. 150 (1966) (holding competency to waive assistance of counsel is a different inquiry than competency to stand trial).

a competent defendant require the decision by the defendant to be intelligent and voluntary.[56]

Richard Bonnie's theory of decisional competency recognizes that clients who fit the minimum category of competence to stand trial may be incapable of making rational decisions such as whether to waive the nonresponsibility defense.[57] In my opinion, Ms. Teplinski's reluctance to follow my advice on how to try her case belonged in the category of "decisionally incompetent." While she was competent to stand trial in the eyes of the judge, she could not rationally decide whether an identification defense was in her best interests.[58]

The Model Rules provide some support for the notion that counsel can act where the client lacks the mental competency to waive the insanity defense.[59] A lawyer may act as a "de facto guardian" where a client suffers a disability. Surrogate decisionmaking is allowed where a client under a disability does not have "the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[60] However, some commentators assert that, no matter how severe :he mental

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[56] *See* Frendak v. Unitec States. 408 A.2d 364, 379 (D.C. 1979) (holding court has discretion to raise insanity defense sua sponte if defend int is unable to make intelligent and voluntary decision). *See also* Commonwealth v. Jacobs. 870 S.W.2d 412. 418 (Ky. 1994) (holding neither counsel nor court has power to contravene defendant's voluntary and intelligent decision to forgo insanity defense); State v. Cecil, 616 A.2d 1336. 1343 (N.J. Ct. App. 1992) (same); State v. MacDowell, 508 N.Y.S.2d 870, 873 (Sup. Ct. 1986) (holding because defendant capable of making intelligent and voluntary decision, district court was justified denying counsel's request of insanity defense due to defendant's objection to it); *Treece.* 547 A.2d at 1062 ("Obviously a defendant who does not have the mental capacity to device whether to reject the defense of not criminally responsible cannot be allowed to make that decision.").

[57] Bonnie probably assumes that the lawyer would have more proof of incompetent decisionmaking than I had. Bonnie criticizes those appellate decisions that fail to distinguish between competency to waive the insanity defense with competency to stand trial. In those jurisdictions, a lawyer would have to raise the competency issue if the client's decision seemed incompetent, but if the client w as found competent to stand trial, then the law yer would have to follow the client's washes. *See* Bonnie, *supra* note 15, at 564.

[58] Theodore Kaczynski should also be deemed "decisionally incompetent" if his self-image as a sane person was also a product of his particular mental impairment. Mr. Kaczynski was high-functioning, even brilliant, and therefore w ould be deemed prosecutable by a judge follow ing the constitutional model now in place. Nevertheless. if his lawyers were correc that abiding fear of being labeled mentally ill w-as itself a product of his mental illness, then his illness affected his choice of defenses and rendered him "decisionally competent."

[59] Massachusetts had no ethical rules pertinent to this issue so this query is advisory in nature. Massachusetts has since implemented the equ valent to Rule 1.14 of the Model Rules of Professional Conduct. Massachusetts Rules of Conduct Rule 1; 14 (Adopted June 9. 1997, effective January 1, 1998).

[60] *Model Rules of Professional Conduct* Rule 1.14 emt. (1997). The rule also requires that the client have "no guardian or legal representative." Substituted decisionmaking by a lawyer for a client is a discrete exercise of "de facto guardianship." Similarly EC 7–12 states: "If a client under a disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client." *Model Code of Professional Responsibility EC* 7–12 (1980).

For a full discussion of the Model Code and Model Rules relating to surrogate decisionmaking for marginally incompetent clients, see Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decision-*

disability, the ethical rules do not authorize the lawyer to make choices reserved for the client, such as the decision to plead guilty.[61] The rules are silent on whether an insanity defense constitutes "a plea to be entered" or is to be treated as a type of defense, akin to diminished capacity.[62] In short, while the ethical rules are clear that competency should be raised over a client's objection, they are not clear about raising nonresponsibility without a client's consent.

John Salvi's lawyers faced the same ethical dilemma: whether to raise, against their client's wishes, a nonresponsibility defense as to the murder of two women at Brookline clinics.[63] His two experienced and well-respected criminal defense lawyers considered the dilemma complex enough to assemble a team of trusted defense lawyers to help guide them. That team reached the same conclusion that I did in Ms. Teplinski's case, that raising a nonresponsibility defense was not barred in Massachusetts where the client appeared incompetent to waive the defense.[64]

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making and the Questionably Competent Clien\ 1987 Utah L. Rev. 515. 540^47 (1987). Note that *the* ethical rules do not say who should determine compelency; lawyers are not excluded from determining that clients are marginally incompetent.

[61] David R. Katner. *Raising the Insanity Defense*, *in Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions* 48, 52 (R. Uphoff ed. 1995). *See also* 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, 108 (1988) (discussing the conundrum of a defense lawyer who wishes to raise a diminished capacity defense against the wishes of a mentally ill client). Tremblay, however, reasons that this reading of the Ethical Code would make the lawyer's obligation to competent and incompetent clients identical. Tremblay, *supra* note 80, at 5–2 ("A more sensible construction is that EC 7–12 permits the lawyers to make decisions that otherwise would be 'exclusively' for the client including what plea to enter.").

[62] "[T]he lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury irial and whether the client will testify." *Model Rules of Professional Conduct* Rule 1.2. *Standards Relating to Administration of Justice: The Defense Function* 4–5.2(a) and (b) [hereinafter *Defense Standards!* also divides control and direction of the case into those decisions reserved to the accused, including what plea to enter, and those strategic and tactical decisions which should be made by defense counsel. Although not explicitly adopted in any jurisdiction, Rule 4–5.2 of the *Defense Standards* is encoded in the more recent Model Rules of Professional Conduct. *Model Rules of Professional Conduct* 1.2 (1997). Similarly EC 7–7 of the Model Code also reallocates the decision on what plea to enter to the client. *Model Code of Professional Responsibility* EC 7–7 (1980). EC 7–12 of the Model Code states that the lawwer "obviously ... cannot perform any act or make any decision which the law requires the client to perform or make, either acting for himself, if competent, or by a duly constituted representative, if legally incompetent." *Model Code of Professional Responsibility EC 7–12 (1980).*

[63] Unlike my situation where I agreed that Ms. Teplinski should be deemed competent to stand trial, John Salvi's defense lawyers believed the judge should not have ruled him competent to stand trial. Whatever the theory7 of competency, lawyers sometimes will find themselves in the same position as Mr. Salvi's lawyers, representing someone they believe to be incompetent. This Essay applies as much to those situations as it does to those where the client is only decisionally incompetent but able generally to assist counsel.

[64] Lawyers have enough difficulty determining whether surrogate decisionmaking is the right action to take in a particular instance, without worrying about their authority to do so.

Autonomy was a factor to be reckoned with before I substituted my judgment for that of my client and raised a nonresponsibility defense. Unlike the other two routes of competency and mistaken identification, the path of substituted judgment is ethically precarious. The ethical rules allow the lawyer to make important decisions as the de facto guardian of mentally ill clients, but they do not discuss when the lawyer should resort to such strong medicine. Likewise. Bonnie's article does not discuss how defense lawyers decide whether to exercise their option. "To say that this option [surrogate decisionmaking] should be available, however, is not to say it should be routinely exercised."[65] I will therefore set forth a view of when a lawyer might deem it right to act. In my opinion, the decision as to whether I should substitute judgment and thereby deprive Ms. Teplinski of autonomy over her criminal case turned on how I evaluated all of her options. If Ms. Teplinski had a reasonable chance of success on a mistaken identification defense, clearly it would be in her best interests for me to try the case that way. However, because I believed her chances to be nil, I also evaluated the merits of a mental illness route, and then looked at more subtle issues such as why she insisted on her course of action. For example, while Theodore Kaczynski or John Salvi might have derived satisfaction from a political-style trial, all Ms. Teplinski sought was exoneration— which was unattainable through a mistaken identification defense. There was an added practical hurdle in deciding whether to employ surrogate decisionmaking in my case. Unlike the lawyers representing Mr. Kaczynski and Mr. Salvi, I had no diagnosis to support my belief that Ms. Teplinski was either nonresponsible or that she was decisionally incompetent. There was no forensic psychologist I could ask without first getting funds through the court.[66] Nor could I seek a decisional competency evaluation, as Bonnie's theory had not yet been adopted. To request a responsibility exam would be tantamount to requesting a competency exam. If I asked for a responsibility exam, or funds for an exam, the court would order a competency and responsibility evaluation by a staff psychologist, to be followed potentially by a period of commitment and evaluation at Worcester State Hospital.

How bad did the consequences of her choice have to be before I decided that my client's best interests trumped autonomy concerns? How good did my choice—nonresponsibility—have to appear before her interest in autonomy was outweighed by best interests? These were difficult questions and ones that are presently not answered in the cases, ethical rules, or scholarship.

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[65] Bonnie, *supra* note 15 at 601.

[66] As the client was indigent, she could not afford to pay for a psychiatric consultation without obtaining funds. In Massachusetts, the judges control the purse strings for funds of this nature. *Mass.* Gun. *Laws Ann.* ch. 261, §27C (West 1997).

C. Weighing the Options

Weighing two years on probation against two weeks in a chair in the state hospital as described above is not an easy task.[67] It is not easy to advise a client on how to weigh these options; it is harder still to weigh these options as a lawyer when one's client does not admit to mental disability.

Most lawyers believe that if a client is involved in a minor matter, such as shoplifting, where the penalty is likely to be a fine, it would be wrong to embark on the competency or criminal responsibility route.[68] The viewpoint rests on an attitude wrought out of experience that the criminal justice system is no place to get help. The mental: ty becomes, pay the fine, dispense with the case, and then, if you need help, find it outside of the criminal justice system.[69] While I agree that the last place I would want

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[67] Of course, I could not be sure the sentence would be probation, just as I could not be sure that when I requested funds for a private doctor to examine her on an outpatient basis, a judge would order her into Worcester State Hospital. Nor could I be sure the hospital would release her if they determined her to be incompetent to stand trial.

[68] The specter of commitment to an institution that is deficient of any real therapeutic value causes many defense lawyers to defy this rule whenever the length of commitment at a mental hospital exceeds the likely length of incarceration if the case were tried and lost. *See* Stan Goldman, *When, You're Thinking Of Using the Insanity Defense7 Are You Crazy | in Massachusetts Continuing Legal Education, Inc.. Massachusetts Criminal Deelnse Manual* 7–1.7–2, 7–3 (1995). Goldman, the Director of Mental Health and Litigation of the public defenders' office in Massachusetts, discusses the push to remove the mentally ill from the criminal justice system to the mental health system as follow's:

> Do not fall into this trap! [S|uch diversion is not likely to be beneficial to the vast majority of defendants, even those who are truly in need of care and treatment. Only those facing significant jail-time ... will fare better ... the vast majority will likely spend far more time in confinement w ithin the mental heaLh system, in dilapidated facilities at which little, if any. real treatment is provided.

Id. One reason is mistrust of the justice system. For a full-fledge indictment of the legal system's handling of the mentally ill, see Michael L. Perlin, *Pretexts and Mental Disability Leiw: The Case of Competency.* 47 U. *Miami* L. *Rev.* 625, 678–80 (1993). Pei iin argues that "the entire relationship between the legal process and mentally disabled litigants is often pretextual. This pretextuality is poisonous." *Id.* at 627. He notes four major problem areas in the context of incompetency considerations: (I) courts adhere to the belief that defendants feign incompetence despite social science literature to the contrary. (2) judges willfully misunderstand the distinction between incompetency and insanity, (3) judges misunderstand the relationship between competency and commitment, and (4) courts ' regularly accept patently inadequate expert testimony in incompetency to stand trial cases." *Id.* at 678.

[69] Chemoff and Schaffer, *supra* note 64, at 520–21. The authors argue that, contrary to the ethical rules, the lawyer might elect to proceed to trial with an incompetent defendant where the offense charged is so minor that hospital confinement is like y to be longer than even the maximum possible sentence, or where the lawyer believes he can win the case without active participation by his client. "Defense counsel in such cases may find that, to represent his client effectively and achieve a result which is in his best interest, he has to conduct himself in a matter that is inconsistent with established notions of legal ethics and professional responsibility." *hi.* at 505. *See* Uphoff, *supra* note 14, at 108. The Commentary to ABA Standard 7—4.2(c) recognizes that there are times when lawyers will not want :o obey this prescription because it is not in the client's best interests owing to the "perceived pragmatic failure of the criminal justice system to live up to its promise." ABA *Standards.* Standard *1*—4.2(c) cnit. However, the standards resolve the issue by demanding that lawyers report incompetence. The commentary urges

to get help if I were ill would be the criminal justice system, I think this case also illustrates how difficult it is to get help at all.[70]

What made me decide that it was important to follow up on the client's mental health was my own sense that it was wrong to allow Ms. Teplinski to be convicted for something that was really a product of her mental illness. In addition, I believed the chance of diagnosis and help at a mental institution was better than no chance at all. My experience has led me to view the criminal justice system as a machine that embroils many defendants, branding them as criminals, and then detaining them in court through violations of probation hearings.[71] Thus, a defendant's first case may be the only chance for a defense attorney to prevent the client from being permanently categorized as a criminal.

Ultimately, I decided to serve Ms. Teplinski's best interests, I would request funds for a psychologist to evaluate the question of criminal responsibility. I anticipated that, as a counter-offer, the judge would suggest a competency and responsibility exam oy the court psychologist. That, I would not oppose.[72] The alternative, and the only real option I could perceive, was to get some clinical backing for my diagnosis that Ms. Teplinski was mentally ill, with the goal of having the case dismissed. Then, if my efforts at dismissal failed, I could use the clinical diagnosis to prepare a lack of criminal responsibility defense for a jury trial.

D. Pre-Trial Maneuvers in the Case

I made a motion for funds for a forensic expert so that Ms. Teplinski could be diagnosed by a doctor. Had the motion been granted, I would have tried to persuade Ms. Teplinski to visit a private forensic psychologist. The judge denied the motion. I then requested a free examination with the court psychologist. That request was granted.[73]

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lawyers to strive to reform the system of its unfairness rather than place the client's best interests over their obligation to the courts to raise incompetency.

[70] I tried several times to obtain a civil lawyer for Ms. Teplinski from the overworked legal assistance corporation. Ms. Teplinski had many non-criminal matters that merited representation, but I also felt that a civil lawyer might be more helpful in getting mental help and evaluation for a client. The lawyer she received did not have any advice on what to c o regarding her mental condition. In fact, he did not consider her mental condition something that he should address since it did not aid him in the housing and employment issues he was handling.

[71] *But see generally* Goldman, *supra* note 88 (discussing similar experience of clients in mental health systems).

[72] The courts confuse the two exams. As a practical matter. I could not raise issues of criminal responsibility without raising competency issues and triggering competency exams. Whenever criminal responsibility issues are raised, judges also tend to ore er competency exams. Hence, if I asked for a psychological evaluation to determine criminal responsibility. I would probably get a competency exam. This is true in my experience. *See also* Perlin. *supra* note 88. at 678 ("lC|ourts stubbornly refuse to understand the distinction between incompetency to stand trial and insanity.").

[73] In my experience, court psychologists generally interview a defendant for twenty minutes and write up a recommendation based on the inswers obtained in the interview. Thus, if the client admits to

As Ms. Teplinski did not hear voices and had never been to a mental hospital, she was deemed competent.[74] The psychologist informed me, in fact, that since Ms. Teplinski said she was not at the scene of the incident, he had to assume that she was not there, notwithstanding the police reports or my discussion with him. Although I think the psychologist erred in failing to consider evidence beyond the interview, it may be beyond the capacity of any examiner to diagnose Post-traumatic Stress Disorder in a twenty-minute or one-hour interview.[75] Although I renewed my motion for funds, it was denied again. I now had no choice but to go to trial.

Trial in this case was initially in front of a judge, not a jury.[76] If Ms. Teplinski was unhappy with the court's verdict or sentence, she could still appeal and obtain a jury trial. Under the two-trial system in Massachusetts, which was abolished in 1994, the bench trial was sometimes used to gain discovery to determine if a jury trial was appropriate, or to resolve disputes less formally.[77] It is troubling to envision the outcome of this case had it occurred today when the only informal resolutions come from discussions at the bench at first call or lobby conferences where the client is not present.

E. The Trial

The state called, as its first witness, the man who was hit by the crowbar. He positively identified my client, and told the court how her car had grazed his arm one

hearing voices, the doctor is likely to conclude tiat the defendant may be suffering from a mental illness. If the client cannot understand the concept of a lawyer or judge, the court psychologist may write that the client is incompetent. If the attorney brings in proof that the client has already been diagnosed as mentally ill, the court psychologist will incorporate that into his report. Otherwise, the psychologists generally conclude that there is no issue of competency or criminal responsibility.

[74] Only qualified physicians and psychologists—those meeting the Department of Mental Health regulations— may perform evaluations under chapter *123,* section *15* of the Massachusetts General Laws. *Mass. Gln. Laws* ch. 123. § *15 (1990).* For an in-depth description of the criteria and an overview of the Massachusetts court clinic system, see David Finkelman .& Thomas Grisso, *Therapeutic Jurisprudence: from Idea to Application,* 20 Nr.w *Eng.* J. *on Crim.* & Civ. *Confinement 243, 243–56 (1994).* The authors state, "There is reason to believe ... this system in Massachusetts, and tie quality of the professionals who provide these services, is among the best in the nation." *Id.* at *255.*

[75] There is a difference between a lawyer's hunch about a client's illness and a psychiatric assessment where the diagnosis depends upon the reporting and observation of specific criteria. The literature calls for a structured interview followed by a formal mental status examination, psychometric and psychodiagnostic testing, and finally, behavioral testing. Peterson, *supra* note *25,* at *107–115.* If doctors rely solely on the interview method, it is impossible to diagnose PTSD in clients who do not disclose the underlying trauma. *See infra* note *104.*

[76] Fortunately, this case occurred when there was still something called "trial de novo" in Massachusetts. That means my client could waive her right to a jury trial without permanently waiving it. The issues in this case would have been even more complex, perhaps unworkable, if we had been in front of a jury. That system was changed in 1994. *Mass. Ghn. Laws* ch. 218. § 26A(1992).

[77] Louis *D.* Coffin, *Pretral Conferences in a One-Trial System,* in *District* Court *Bar Advocate Training Program* 60, 60 (Massachusetts Continuing Legal Education, Inc. 1993).

day in a parking lot. The witness testified as to how Ms. Teplinski had gotten out of her car and chased him with the crowbar. He had never seen my client before that day in the parking lot. After being hit, the witness went inside the restaurant and watched her outs: de as everyone waited for the police. On cross-examination, I asked questions which pointed to the peculiarity of the incident:

> Question: Anything that provoked Ms. Teplinski to act this way?
>
> Witness: No.
>
> Question: Did she appear agitated?
>
> Witness: Yes.
>
> Question: Could you understand everything she was saying?
>
> Witness: No.[78]

The police officer was the state's second witness; he testified that he responded to the scene, and noted the car's license plate, make, and model. Yes, he agreed, pointing at Ms. Teplinski, this was the woman he had spoken to at the scene. She had accused the man of hitting her car with his hand. Finally, a third witness corroborated what the other witnesses had described.

I called Ms. Teplinski to the stand.[79] She testified that she was not there. Yes, they had described her car, and yes, that was her license plate. But she had never done this act nor seen these witnesses before today. The distinctive purple mark on her forehead accented the absurdity of her identification defense.

The judge asked the assistant district attorney and me to approach the bench. The judge and I had an interchange along these lines:[80]

> [The Judge]: I believe your client really does not remember being at the scene.
>
> [Defense counsel]: So do I, your Honor.
>
> [The Judge]: I think something is wrong with this nice lady causing her to act
>
> that way. It makes no sense.
>
> [Defense counsel]: So do I, your Honor.
>
> [The Judge]: What do you want me to do?

[78] I chose non-leading questions because I hoped to draw out more helpful information this way. I also styled the questions to impress upon the judge that we were all on the same side, concerned for Ms. Teplinski. and puzzled about her motivation.

[79] This was her choice i.nder the ethical rules, and even without my advice that she testify, I am sure she would have chosen to do so.

[80] This is a paraphrase as remembered by counsel.

> [Defense counsel]: Find her not guilty or dismiss the charges. All along. I have felt that she was suffering from Post-traumatic Stress Disorder. I don't think she should be convicted of this when, if I am right, she is not criminally responsible.
>
> [The Judge]: How do I do that? I don't want this lady to just walk out of here. I want this lady to get some help.
>
> [Defense counsel]: Unfortunately, the court psychologist found her competent and criminally responsible, so my motion for funds for a private diagnosis was denied. If you would grant my motion for funds, we could come back in a couple of weeks—
>
> [The Judge]: Ms. Ross, you are always spending the Court's money. What about Worcester State Hospital?
>
> [Defense counsel]: My client does not want to go to Worcester State Hospital.

The judge considered his options, and, in the end, sent Ms. Teplinski to Worcester State Hospital for a two-week evaluation.[81] Worcester State Hospital is a locked facility run by the state. My client felt that I had betrayed her.

For the next week, her incarceration in the state hospital weighed heavily on my conscience. After one week, the hospital diagnosed Ms. Teplinski with Posttraumatic Stress Disorder and we were back in court with the report. The judge, without opposition, dismissed the criminal charges.

[81] The judge ordered her to be evaluated under *Blaisdell v. Commonwealth.* 364 N.E.2d 191. 195 (Mass. 1977) (holding state statutory law permits the court to order psychiatric examination of accused on issue of w hether he lacked criminal responsibility at time of the alleged offense).

III. Reflections on the Paternalistic Action Taken

A. Substituting My Judgment for Hers

In essence, I raised the defense of criminal responsibility without my client's consent. The tack I took in cross-examining the witnesses involved a mental health defense, not a rigorous examination of the witness' ability to identify my client. Although my client told me she was not there, I indicated to the judge that I believed she was. When the judge suggested that my client was at the scene with a crowbar but had amnesia about the event, I encouraged the judge to see the case in a manner contrary to that to which Ms. Teplinski had testified. Is this not treachery of the attorney-client relationship? What gives me the right to give up the presumption of Ms. Teplinski's innocence? Clearly, I had not represented Ms. Teplinski the way she wanted.

I determined that my client's decision to try the case as one of mistaken identity was based on mental illness. I ignored her express wishes and instead, tried the case the way I concluded would benefit her more. I sacrificed Ms. Teplinski's autonomy for what I believed to be her best interests. By definition, the substitution of the lawyer's judgment for that of the client constitutes a deprivation of autonomy. The primary justification for the substitution of the lawyer's judgment for that of the client is that the client is incompetent to make the judgment. What value has autonomy when the decision is being controlled by a disease? How ironic it would be if the same mental illness that got Lee Teplinski into trouble with the law in the first place could then dictate to her lawyer how to try the case.

Was substituting my judgment for that of Ms. Teplinski the right thing to do?[1] Certainly, there were other choices, although none of them were satisfactory either. I could have urged a mistaken identification defense. She would have lost and been placed on some kind of probation; still, that would have given my client full autonomy in her decisionmaking.

[1] One way to look at my handling of Ms. Teplinski's case is that I acted consistently with Bonnie's theory (before it was published) by substituting judgment for a client who was competent to stand trial but whose decisionmaking was impaired. However, Bonnie promotes a lawyer's ability to exercise this judgment, without discussing how a lawyer maxes such a difficult determination. This case illustrates the complexity of choosing whether to employ surrogate decisionmaking. *See generally* Bonnie, *supra* note 15.

Arguably, I achieved an excellent result both in getting the case resolved and in getting Ms. Teplinski help. As a result of the hospital's diagnosis of Ms. Teplinski with Post-traumatic Stress Disorder, she was provided with counseling and the means to support herself.[2] She also walked out of court with no criminal record and no strings attached. Thus, my actions served to resolve the charges with a favorable result—dismissal—and also to provide long term therapeutic benefit to Ms. Teplinski.

On the other hand, she was deprived of her liberty for a week in a mental hospital for a charge on which, at most, she would have been placed on probation if convicted. Although I did not ask for her to be sent there, by taking the risk of bringing up mental illness and criminal responsibility under the present system, I must take responsibility for her being sent there. If I had not mentioned Posttraumatic Stress Disorder or renewed my motion for funds on the issue of criminal responsibility, she would not have been hospitalized. Thus, one outcome of the way I tried the case was a loss of freedom, not to be confused with her loss of autonomy, caused by substituting my judgment for hers. Most chilling of all was my conversation with the doctor regarding the diagnosis. Apparently, he only reached the conclusion he did because my client's husband called him. as I had requested, and told the doctor about the bus that exploded in Vietnam, with my client on it, during the Vietnam War. Without that information, the psychiatrist would not have diagnosed her, he said, even though all the present symptoms conformed to a PTSD diagnosis.[3]

Most lawyers, I believe, would *not* go the incompetency or criminal responsibility route.[4] They woul d try to convince Lee Teplinski to plead the case and receive a *continuance without a finding.'*[5] If that failed, they would try the case as one of mis-

[2] Once she was diagnosed as having PTSD, the legal assistance office was able to do much more for Ms. Teplinski. including getting her disability payments from the government which included health insurance to cover her treatment. Perhaps, the civil lawyer could have taken steps to gather a diagnosis another way, but he did not.

[3] Indeed, the first diagnostic criteria for PTSD is that the person experience a traumatic event. DSM-IV. *supra* note 25. at 427. In order to assess PTSD, the diagnostician needs "the presence of a specified trauma." Peterson et al.. *supra* note 25. tit 116, 136; R. *Carl Sipprlli.l.* A *Vet Center Experience: Mui.tievent Trauma, Delayed Treatment Type in Treating* PTSD: *Cognitive-Behavioral Strategies* 13. 16 (David *W.* Foy ed.. Guilford Press 1992). Thus, w ithout knowledge of the bus incident, the doctor could not have diagnosed Lee Teplinski as suffering from post-traumatic stress disorder. Ironically, one of the dissociative reactions common to those suffering from PTSD is amnesia around the underlying event. DSM-IV, *supra* note 25, at 425, 428; Peterson et ah, *supra* note 25. at 24. Ms. Teplinski's lack of memory about the exploding bus (and perhaps other unrecalled stressors) w as a symptom of PTSD; yet. she could not be diagnosed with PTSD if no one told the doctor about the bus incident. My client never gave me permission to urge her husband to telephone the doctor. If I had followed my client's w ishes in this regard, she never would have been diagnosed properly.

[4] Some lawyers would avoid the mental health system out of a perception that that system is as bad as the criminal justice system. Others would consider a *continuance without a finding* tantamount to an acquittal, and so would push the case in that direction. *See* note 104 and accompanying text.

[5] *A continuance without a finding* means that the judge finds there is enough evidence to convict but instead of convicting, he continues the case for a period of time, to be dismissed if the client obeys the conditions of the continuance. *See generally* Commonwealth v. Duqette, 386 Mass. 834 (1984)

taken identification, letting the chips fall where they may. Had Ms. Teplinski been represented by a traditional lawyer, she would have probably left the court system with probationary conditions only—no jail time or hospital time involved.

If I were representing Ms. Teplinski all over again, I might not argue lack of criminal responsibility. I might decide that the benefits of a helpful diagnosis were outweighed by the risk that she would receive either no diagnosis at all or a diagnosis that would not aid her.[6] However, I think most readers would agree that if there were fewer risks in the route I took, substitute decisionmaking would be the best option. Thus, the question here is how I came to make the decision I did in the face of such risks and how lawyers should make these decisions.

When Bonnie writes that the lawyer can substitute his judgment for that of the decisionally incompetent client, it is unclear whether he expects that the lawyer will try to make the decision that the client would have made if she were competent.[7] The lawyer, as a de facto guardian, should make the decision the client would make if she were not so afflicted. In Lee Teplinski's case, that seemed impossible. How could I decide what stigma she assigned to mental illness versus what stigma she assigned to a

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(finding that district court could continue a case on condition cf restitution once defendant admits to sufficient facts). At the time this case took place, this could be accomplished by admitting to sufficient facts, losing at the bench trial, and not appealing. The case would be dismissed if she stayed out of trouble, but if she were to violate her probation, she would face possible incarceration of up to two and a half years on the crow-bar incident. However, on violation of probation hearings. I have seen judges sentence defendants to two years in the house of corrections on cases where the initial sentence was a *continuance without a finding.* Thus, although a *continuance without a finding* often leads to a dismissal of the charges, equat ng a *continuance without a finding* w-ith a dismissal is an overstatement.

Given Ms. Teplinski's insistence that she w-as not there, I felt that pleading was out of the question. However. I expect that most lawyers would do what they could to encourage Ms. Teplinski to enter a plea in order to receive a *continuance without a finding.* If she refused, most lawyers would try the case in front of a judge and, if the judge gave her a *continuance without a finding,* urge her not to appeal, explaining to her that a *continuance without a finding* is essentially a dismissal.

[6] The problem of obtaining a proper diagnosis compounded the problems of in-patient hospitalization pending diagnosis, the slim chance of winning on lack of criminal responsibility if the case went to a jury, and the risks associated w-ith such a win. It is difficult to diagnose PTSD. Peterson, *supra* note 25, at 118: *Brett T. Litz. et ah. Assessment of Post Traumatic Stress Disorder, in Post Traumatic Stress Disorder: A Behavioral Approach to Assessment ant Treatment* 50, 50 (Phillip A. Saigh, ed.. Allyn & Bacon 1992). There is always *a* risk that clients with PTSD will be diagnosed with having an anti-social personality disorder and that diagnosis makes the client appear much less sympathetic. Peterson, *supra* note 25, at 118. Exacerbating a complicated situation is the fact that many people who suffer from PTSD also suffer from depression. *Id.* at 116. It is possible that Ms. Teplinski could have been suffering from multiple problems, such as PTSD *and* clinical depression.

Thus, my actions easily could have created a poor result, namely, hospitalization followed by no diagnosis or a diagnosis like personality disoder which stigmatizes without triggering helpful services. Reflecting on the narrow escape from disaster, if I had it to do over, I am not sure I would do the same thing again on these precise facts. When substituting my judgment for the client's judgment based on her best interests, I prefer a better margin of error in determining her best interests.

[7] Bonnie, *supra* note 15, at 581,591–92.

conviction? How would she later balance a week in the mental hospital against a clean record? I will never know.[8]

Realistically, when I evaluated the stigma of conviction as worse than a mental health diagnosis, it was my own principles and values, not Ms. Teplinski's, that guided me. When I concluded that the week in the hospital, although grim, was better than becoming further enmeshed in the criminal justice system, I was guided by my own values, not my client's. Nor was it possible for me to be guided by a *competent, sensible* Teplinski whom I had not met. My client forbade me from talking to her estranged husband. While I felt some continuation of conversation with him to be justified, I certainly could not allow him to make choices for her. We must recognize the limits of a lawyer's ability to truly know her clients' wishes better than her clients themselves. In the words of Phyllis Goldfarb, we must "acknowledge the need for genuine dialogue across differences while remaining sharply cognizant of the social structures that impede its accomplishment."[9]

How can we trust paternalistic lawyers to make the right decisions?[10] Conflict of interest is always a danger. Even with an altruistic lawyer, the danger of subtle conflicts of interest remains. What if my decision to raise the insanity defense were motivated by my reluctance to lose a jury trial? What if I were unconsciously influenced by a fear of appearing incompetent in front of the judge—and later a jury—when I argued mistaken identification? Any time a lawyer considers using substituted judgment, some soul searching is required on the part of the lawyer.

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[8] How can I still argue for lawyer discretion? I can because criminal law is based upon trying to find the least harmful option within an imperfect system. The alternative is worse. Failing to give discretion to the lawyer means that mentally ill clients, who are adjudicated competent to stand trial, will make these decisions. While this arguably would have been acceptable in Ms. Teplinski's case, there will be cases where the client's mode of defense is so indefensible that, to follow that course of action, would require the lawyer to engage in ineffective assistance of counsel.

[9] Goldfarb, *supra* note 9, at 1611. Feminism at once urges lawyers to try to connect with the client, while admitting limits to the extent connection is possible. Lucie White cautions: "We must not discount the risks imposed by theories that make human connection seem too easy to obtain." Lucie E. White, *Seeking* " *... The Faces of Otherness ... A Response To Professors Sarat, Felstiner. and Calm, 11 Cornell* L. *Rev.* 1499. 1506 (1992): *see* Naomi *R.* Cahn, */I Preliminary Feminist Critique of Legal Ethics, 4 Glo. J. Legal Ethics 23,* 24 (1990) (arguing that feminism may transform legal ethics by requiring lawyers to consider their own contexts).

[10] Sec Tremblay, *supra* note 80, at 515, 547,584 (1987) (criticizing the rules for allowing civil lawyers to act as de facto guardians). Tremblay changed his position in Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians,* 62 *Fordham* L. *Rev.* 1429, 1435 (1994). Although he continues *to* caution about the dangers *of* paternalism, Tremblay concedes that surrogate decisionmaking may be the best option. He expresses "a resigned view that leaves these matters for lawyer discretion" because, "while tar from perfect, [substitute judgment! may not be any worse than the available alternatives" such as asking the court for an appointment of a real guardian, *Id.* at 1439. He also states that "if one accepts a standard rationale for informed consent, that it serves to overcome attorney conflicts of interests, acceptance of good faith lawyer intervention demands an accompanying insistence on a generous amount of that good faith." *Id.* at 1437 (footnotes omitted).

B. An Ethic of Care Approach

When attorneys use substituted judgment, there are no checks and balances that permit attorneys to insulate themselves from blame. I cannot say to myself, "well, it was not the best outcome in the world, but I did adequately explain the risks and benefits, and hey, it was the client's choice.""[11] While I was right about a lot in this case, I was not necessarily right about what my client, if sane, would have judged to be her best interests. Lawyers' own viewpoints often color the kind of advice they give and the kind of choices clients end up making. However, when the lawyer is the one making the ultimate decision, the disparity between counsel is highlighted.[12] This is one of the risks inherent in surrogate decision-making.

As a feminist, the value system I brought to this problem differed from that brought by most traditional lawyers. At the time, I felt uncomfortable with the feeling that I was taking an unorthodox approach. In hindsight, I recognize that I was guided in part by an *ethic of care.* This was not my standard approach to clients. In fact, it was my use of the *ethic of care* approach with Ms. Teplinski in a profession that is extremely rights-based that made me less certain about the w isdom of my choices. I label my lawyering in Ms. Teplinski's case as an *ethic of care* approach because I was concerned about her life and not just concerned with minimizing the harm caused by the criminal charge pending against her.[13] I felt, in some way, responsible for doing something to end the downward spiral her mental illness was causing. *Ethic of care* is

[11] The truth of the matter is that what we need when we make decisions affecting the well-being of othe r people is correct intuition about their needs and an attitude of respect for their autonomy. Nothing else will help. And even intuition and respect may do no good at all. There isn't any guarantee that you'll get it right, but when it's wrong, you're still responsible.

Duncan Kennedy, *Distributive and Paternalistic Motives In Contracts and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power.* 41 Mn. L. Rev. 563. 646 (1982).

[12] A decisionally incompetent client would have her case resolved differently depending upon who represented her. For example, Mr. Salvi's lawyers went to trial arguing nonresponsibility while another lawyer might have argued necessity, contending that force is necessary to prevent abortions. *See generally* Bai & Langner, *supra* note 18. The Dwyer's own views shape which defense they determine best represents their client's interests.

[13] *See* Stephen Ellmann. *The Ethic of Care as an Ethic For Lawyers.* 81 *Geo.* L.J. 2665. 2685 (1993) (characterizing an *ethic of care* lawyer in part as taking into account the extent of the client's need and wanting to respond to it, and recognizing actual caring for the client as part of the *ethic of care* model). *See also* Naomi R. Cahn. *Styles of Lawyering.* 43 *Hastings* LJ. 1039. 1047—50 (1992) (discussing the *ethic of care* and a female style of lawyering): Cahn. *Feminist Critique of Legal Ethics, supra* note 110. at 45. 47. *Ethic of care* philosophy was first enunciated by educational psychologist and feminist theorist, Carol Gilligan. *See generally Carol. Gili.igan.* In *a Different Voice: Psychology Theory and Women's Development* (1982). *Ethic of care* is not synonymous with feminism. Rather, it describes a moral philosophy that tends to be more common among girls and women, and which some feminists theorists have claimed as part of feminism. For a refutation of *ethic of care* approach as simply the symptoms of women's oppression, see *Catherine* A. *MacKinnon,* Tow *ard* A *Feminist Theory of the State* 49–50 (1989) (arguing that women are said to ''value care because men have valued women according to the care they give").

a form of moral judgment that emphasizes people's interconnection and responsibility rather than their independence and autonomy."[14] Actually caring for the client is one hallmark of the *ethic of care* approach."[15] Carrie Menkel-Meadow defines the difference between traditional, rights-based lawyering, and a lawyering tempered with an *ethic of care* this way:

> [T]he key to an *ethic of justice* is a rights consciousness that is located in the right not to be interfered with, in other words, personal and individual liberty
>
> Juxtaposed against this philosophy of liberal individualism is the *ethic of care* that struggles with rules, prefers to make decisions in contexts, tries to keep the parties in relation, and conceives of a responsibility to others.[16]

Little has been written on the *ethic of care* construct in criminal defense practice."[17] Perhaps this is because criminal defense is more role-defined than other areas of law. When Rand and Dana studied how lawyers implemented their morality into the practice of law, they found that when the ethical or professional norms are clear, almost all lawyers responded with a justice or rights orientation: "[I]n criminal defense advocacy, differences emerged only when there was less clarity in the professional expectations."[18] The very fact that the decisionmaking in Ms. Teplinski's case took place at the margins is what allowed the differences to emerge.

Analyzing an *ethic of care* approach is difficult because it is never altogether distinct from a justice-based approach. "Gilligan never expressly sought to displace the male ethic of 'justice' or rights," Menkel-Meadow observed; rather, Gilligan always

[14] Ellmann. *supra* note 12. at 2703–04. *See* Cahn. *Styles of Lawyering, supra* note 114, at 1066–68 (discussing dangers of connection in *ethic of care* model).

[15] Ellmann. *supra* note 12. at 2685.

[16] Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics.* 2 Va. J. Soc. *Pol'y* & L. 75. 94 (1994) (emphasis added).

[17] *See* Paul J. Zw ier & Ar n B. Hamric. *The Ethics of Care and Reimagining the Lawyer/Clicnt Relationship.* 22 J. *Contemp.* L. *383, 432* (I *296)* (noting that the *ethic of care* approach is less appropriate in cases of tort and product liability litigation, and crimes between strangers). There are some notable exceptions. *See generally* Abbe Smith. *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender, 28 Harv.* C.R.-C.L. L. *Rev.* 1 (*1993)* (positing an approach that combines the *ethic of care* with the *ethic of rights* in the context of feminism and criminal defense advocacy): Stephen Ellman. Symposium, *Critical Theories and Legal Ethics: The Ethic of Care for Lawyers. 81 Geo.* L. J. *2665* (*1993)* (considering how the *ethic of care* alters the contours of lawyers' ethical responsibilities); Phyllis Goldfarb, *A Clinic Runs Through It, 1 Clinical L. Rev. 65 (1995)* (proposing that an *ethic of care* perspective be taught and examined in clinical courses and in clinical scholarship): Charles J. Oglctrec, *Beyond Justifications: Seeking Motivation Sustain Public Defenders.* 1*06 Harv.* L. *Rev. 1239 11993*] (writing about empathy by public defenders). Jack and Jack's study of the responses of male and female lawyers and the use *of ethic of care* morality included a criminal case scenario. *Rand Jack & Dana* C. *Jack. Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers, 55–56 (1989).*

[18] Jack & Jack, supra *note 118. at 65–72.*

saw it as a complimentary approach.[19] According to Abbe Smith, who explicitly discussed the interplay between feminism and criminal defense lawyering, most lawyers and law students with an *ethic of care* orientation *subjugate* their personal morality into a professional role, muting the personal voice.[20] A few *integrate* their personal morality into the role, living with the tension.[21] Feminists of either the *subjugating* or *integrating* kind make excellent defense lawyers, Smith observes, but the process of integrating one's morality is more difficult; "Two legitimate pulls—personal values and professional role, care and rights, feminism and traditional defense advocacy—vie for control of decisionmaking. These advocates have a wider, richer mix of moral views, but sometimes considerable internal distress as well."[22] Borrowing from Smith, I see myself as a lawyer who subjugates my morality for that of the professional role until a marginal case comes along and I begin to integrate—and worry.

The difficulty of definition can be a stumbling block to analysis.[23] My paternalism was motivated, in part, by my belief that it would be unjust for Ms. Teplinski to be judged guilty because she was not responsible for her actions. One colleague commentec that a concern about justice indicates that the lawyer is taking a traditional rights-based approach, but I disagree.[24] Defense lawyers traditionally express little concern

[19] Menkel-Meadow, *supra* note 117, at 83: Gilligan never expressly sought to displace the male ethic of "justice" or rights. Instead she sought to supplement or complement it. add to it, and make it more robust, by including another level of moral consciousness in justice reasoning. The need to establish and clarify rights, individual autonomy, and predictability of clear rules, must be tempered by acknowledging needs as well as rights, minimizing harm to people when making choices, and being certain that particular rules, when applied, do not wreak havoc in specific situations. This is equity modifying law, mercy tempering justice, common law interpreting statute, discretion softening rules. Whether moral reasoning, legal ethics, and lawyering behavior are protean enough to contain all of these values at one time is a difficult question. But the structure of Gilligan's argument is to let more into our ratio decidendi in order to make moral decisions and actions more textured and more fully justified, rather than to limit the factors we consider when making them. As one commentator stated, 'justice need not be uncaring and caring need not be unfair.

[20] Abbe Smith agrees with Menkel-Meadow.

The coming together of Amy and Jake's methods, of care and rights, of the individual and community, of the personal and the professional, of feminism and criminal defense advocacy, promises something vital to those of us engaged in the practice of criminal law and to society. Dualities need not be dualities: two voices can sing a duet... In the end. both voices "speak to a quality of justice."

Smith, *supra* note 118, at 59. S imilarly, Ogletree writes that the dual motivations of a public defender are empathy, in the feminist sense, and heroism, a more traditional approach. Ogletree, *supra* note 118. at 13–15.

[21] Smith, *supra* note 118, at 56–59.

[22] *Id.* at 56.

[23] The language of the care perspective is still evolving and is. admittedly, fuzzy. *See* Zwier & Hamric. *supra* note 118, at 401.

[24] On the surface, this i-eems to fit equally well with a traditional rights approach or an *ethic of care* viewpoint. However, the tradit onal rights approach is based, in part, on the insanity law itself. Where the insanity law has changed from a right to be found not guilty to a tactical decision fraught with negative consequences, the traditional lawyer is likely to feel less strongly about the right of the client to be found not responsible. In contrast, I continue to believe that sanity should be considered

about the guilt or innocence of their clients— little concern about larger questions of "truth" or "justice."[25] Traditional lawyers are guided more by roles, believing that the system should resolve the truth and justice issues. "In the end, both voices [feminist and traditional] 'speak to a quality of justice.'"[26]

Defense lawyers weigh their clients' right to autonomous decisionmaking on one side of the scale and put long term autonomy (liberty issues) on the other. In the debate over the place of autonomy in an *ethic of care* approach, one commentator, William Simon, theorizes that the autonomous model of lawyering and the paternalist model of lawyering are virtually the same, as long as the term "best interests" in the paternalistic model includes autonomy, and as long as the autonomous model requires that the choice be rational.[27] Under Simon's theory, a traditional rights lawyer representing a mentally ill client would also value her right to autonomy less if the lawyer believed the client's decisions to be irrational.[28]

The heart of the *ethic of care* is connection.[29] When a person is mentally ill, connection to others becomes enormously important. Those of us in the public defense field often find our mentally ill clients with little family support, if any, and little connection to others. We are sometimes our client's closest link to reality.

There is no doctor, no guardian; if there is a parent or relative, he or she, having little or no exposure to the study of mental illness, is often more confused than we are. In fact, the connection with us may be what saves our clients from self-destruction.[30]

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part of the mens rea, a belief not dependent upon how the case law reads in any particular jurisdiction. To the extent I was guided by my belief that Ms. Teplinski should not be considered responsible, inslead of simply trying to protect her rights, the *ethic of care* viewpoint changed the course of the case.

[25] Smith, *supra* note 118, at 3; *see also* Zwier & Hamric, *supra* note 118, at 403 (equating an *ethic of care* with resistance to role playing). "Doing the loving thing, doing what care demands, even doing justice, is not now the primary focus of the lawyer." *Id.* at 430.

[26] Smith, *supra* note 118. at 59.

[27] William H. Simon, *La vyer Advice and Client Autonomy: Mrs. Jones' Case,* 50 *Md.* L. *Rev.* 213, 224–25 (1991). The *ethic of care* approach to Ms. Teplinski's mental illness affected both sides of the scale. First, I tended to value her autonomous dec sionmaking less because I saw the disease as controlling her decisionmaking. Second, diagnosis was the key to getting her help, so even though diagnosis came with hospitalization, I tended to consider her liberty interest in :erms of long term freedom from disease.

[28] *Id.*

[29] This connection played itself out in two ways in Ms. Teplinski's case. First, there was my connection to Ms. Teplinski; it made me feel responsible to help Ms. Teplinski, not just to obtain a favorable disposition or to litigate well. Second, there was my attitude towards mental illness; because mental illness severs connections between Ms. Teplinski and her family, co-workers, and friends, I believe autonomy interests w-ere trumped by the necessity of trying to find help.

[30] *See William Styron. Darkness Visible:* A *Memoir of Madness* 76 (1990). Styron considers it almost a religious devotion to help a suicidal individual resist the impulse to end the agony by taking her own life:

> Most people in the grip of depression at its ghastliest are. for whatever reason, in a state of unrealistic hopelessness, lorn by exaggerated ills and fatal threats that bear no resemblance to actuality. It may require on the part of friends, lovers, family, admirers, an almost religious devotion to persuade

If we simply value our client's autonomy interests and ignore the pain, are we not like the doctor who takes out a splinter and ignores the bullet wound because the patient denies having a bullet wound? Should it not be our policy to rescue the suicidal jumper from the water and then worry later if he w anted to be rescued?[31] For many clients with mental disabilities, the importance of connection overshadows autonomy.[32]

Most traditional lawyers would also evaluate a sentence of probation differently than I did. Under a traditional autonomy model, as long as a lawyer gives adequate warning to his or her client and the client says he or she will stay out of trouble, then the lawyer need not worry about the client's behavior during the probationary period. In contrast, under the *ethic of care* model, the lawyer has to take some responsibility for the possibility that the client will later run afoul of probation due to her mental illness. If Ms. Teplinski had no ability to control her impulses when she ran after the man with the crowbar, how can I assume that she has the ability to get through probation without violation? It would be misguided for Ms. Teplinski's lawyer to say, "Well, she chose her defense, now it is up to her to get through probation." Looking to the future could be viewed as a way of evaluating her best interests. In essence, I was rejecting the myth of autonomy for a mentally ill woman.

I valued Ms. Teplinski's choice and autonomy less than I valued it in my other clients because I believed that she was a woman in mental anguish. Choice and autonomy have little meaning to a person in the convulsions of a mental disease. It is typical of modern society to minimize the effects of disease, perhaps so that we feel insulated from its ravages. One of the most eloquent and honest books about mental illness is William

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ihe sufferers of life's worth, w hich is so often in conflict with a sense of their own worthlessness, but such devotion has prevented countless suicides.

[31] Traditional rights lawyers tight the death penalty even if their client says she wants death—if the lawyer believes that the client will regret the decision later. *Sec* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution.* 3 *Geo.* J. *Legal Ethics* 799. 801 (1990) (noting that capital defense attorneys report that it is common for clients to express desire to end appeals to advance execution, but later, in general, change their minds). Interestingly. Dieter suggests challenging competency whenever a physically healthy client wants to hasten his or her own death: Dieter argues that, at a minimum, threats to commit suicide are "an indication that further mental problems might be present." *hi.* at 815. To illustrate this. Dieter cites the case of Gary Gilmore who tried to commit suicide two months before his execution, *hi.* at 813.

[32] Some writers, including Anthony Alheri, have resisted the dichotomy of autonomy versus connection. AI fieri. based upon feminis. theory, redelines autonomy so that "autonomy is tied to community and the associated values of nurturing, care. love, and empathy." Anthony V. Alticri, *Speaking Out of Turn: The Story of Josephine V.* 4 *Glo. J. Leg.m. Ethics* 619. 650 (1991). *I* resist the change in definition of autonomy because *I* believe it obscures the dilemmas rather than *eradicates* them. *See also* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case. supra* note 128. at 213 (arguing "against the autonomy view that any plausible conception of good practice will often require lawyers to make judgments about clients' best interests and to influence clients to adopt those judgments"): William H. Simon, *Visions of Practice in Legal Thought.* 36 *Sian.* L. *Rev.* 469. 470 (1984) (outlining a critical vision which "envisions the lawyer as having at least a moderate degree of autonomy in the conduct of her work and the client at least moderate!) dependent on or vulnerable to the lawyer").

Styron's memoir about his own descent into depression. *Darkness Visible: A Memoir of Madness.*[33] When Styron went to the hospital, he found it a relief, a refuge:

For in fact, the hospital was my salvation, and it is something of a paradox that in this austere place with its locked and wired doors and desolate green hallways—ambulances screeching night and day ten floors below—I found the repose, the assuagement of the tempest in my brain ...[34]

I do not think that Lee Teplinski experienced relief at being in the hospital, although I suspect there was relief upon being diagnosed and getting help.[35] My point is that we, lawyers, cannot simply decide that the hospital is automatically a horrible place. The hoTor of the hospital needs to be weighed against the horrors of no help, against the horrors of the mind. While this is not w hat we are trained to do as lawyers, and although we might not be any good at it, it seems better than to practice in platitudes such as *hospitalization is bad, autonomy is good*, or *avoid the stigma of mental illness* in every case.[36]

Styron considers the issue of "stigma" almost beside the point when dealing with himself or any truly hurting individual. Styron's doctor told him "to avoid the hospital at all costs, owing to the stigma I might suffer. Such a comment seemed then, as it does now, extremely misguided; I had thought psychiatry had advanced long beyond the point where stigma was attached to any aspect of mental illness, including the

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[33] *Styron. supra* note 131. at 46–47.

[34] *Id.* at 68–69. Styron. a man of means, would be hospitalized in a private hospital. Perhaps the distinction between private hospitals and public hospitals makes Styron's relief inapplicable. However, two recent *Globe* "Spotlight" articles suggest that both public and private hospitals are taking indigent patients. The articles criticize private hospitals for being interested in the insurance money, not the client. Dolores Kong & Gerard O'Neill. *Locked Wards Open D ior to Booming Business: Along the* WWv, *Some Patients Are Interned for No Good Reason, Boston Gi.obl.* May 11. 1997, at Al: Mitchell Zuekoff. *Flawed Law Tarns Patients to Prisoners; 'Sectitm 12 'Admissions Fuel a Boomitu' Hospital Business. Boston Globk.* May 12. 1997. at A 1.

[35] I talked to her civil lawyer once or twice about her after our case was resolved. Her lawyer informed me that Ms. Teplinski blamed me for a foreclosure on her house which she unreasonably connected with her hospitalization.

[36] Speaking of platitudes, one young prosecutor recently said of my student's paranoid schizophrenic client: "he needs to start taking responsibility for his mental illnesv" That comment indicates to me how little guidance lawyers receive in understanding mentally ill members of our society. Since defense lawyers also know so little, we sometimes grab on to the nuggets of truth of those who do knows but it can lead to oversimplification. Defense lawyers also recognize how fraught with ethical complications these cases are, leading many lawyers, understandably. to take the path that protects the lawyer from subsequent accusations.

hospital."[37] If Ms. Teplinski's mental state was similar to Styron's, then her mental illness itself was a prison and the lack of autonomy in a hospital could be liberating.

I am aware of the potential for abuse. Especially when our clients are women, the penchant to consider them mentally ill or incompetent increases. Consider Janet Frame, a writer locked in a sanitarium for years because she was different.[38] It would be ironic if feminism brought us back towards a situation where it was easier to disregard women's rights by labeling them *mentally ill.* Overall, a rigid adherence to autonomy helps to cure the ills of the old patriarchal tradition, but there are situations where such rigid adherence brings poor results.

Although I valued Ms. Teplinski's right to autonomous decisionmaking, I considered it only one of many interests to be weighed as I mentally battled the paradoxes of the case. In my view, this right did not automatically trump all other interests. And in the end, I determined that this right was outweighed by her interest in getting the criminal matter resolved without probationary conditions, especially because this alternate route also offered the possibility of help through proper diagnosis.

It is generally assumed that an *ethic of care* approach will be more client-centered and therefore, more likely to allow autonomous decisionmaking by the client.[39] Ironically, it was my *ethic of care* approach that caused my paternalism toward Ms. Teplinski. This is what Ellmann predicted. "Breach of autonomy is not a central vice within the ethic of care," Ellmann writes; "indifference is."[40] I believe that the difference between a traditional approach and my approach is not in the value ascribed to autonomy, but in how the options were weighed.

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[37] *Styron supra* note 131, at 67–68. Styron's main point is that our society has been diminishing the true effect of clinical depression: "someone's mood disorder has evolved into a storm—a veritable howling tempest of the brain . *Id.* at 38. Although his wake up call is hardly pointed at lawyers, it seems as if we, lawyers, have avoided confronting the horrible reality of mental disease in our practices and in our writings. I do not know whether Lee Teplinski's brain resembled a howding tempest, although I suspect it was extremely confusing to be in her head. Had she killed herself during our representation or afterwards, I would not have been surprised. "Our perhaps understandable modem need to dull the sawtooth edges of so many of the afflictions we are heir to has led us to banish the harsh old-fas tioned words: madhouse, asylum, insanity, melancholia, lunatic, madness. But never let it be doubted that depression, in its extreme form, is madness." *Id.* at 46^-7.

[38] *See generally Janet Frame. An Angel at* My *Tabi.e* (1984). The autobiography was made into an excellent movie *by* the same name. *An Angel at my Table* (New Line Cinema Corporation 1992). In the same vein, consider *Phyllis Chesler, Women and Madness* (1972); *Barbara Ehrenreich, For Her Own Good:* 150 *Years oe the Experts Advice to Women* (1978).

[39] By definition, a lawyer who employs an *ethic of care* tries to be sensitive and empathetic toward the client. *See* Carrie Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women's Lawyering Process.* I *Berkeley Women's* L.J. 39. 50 (1985); Smith, *supra* note 118. at 35 (equating foot-stomping with traditional lawyering).

[40] Ellmann, *supra* note 118, at 2709 (positing that an *ethic of care* approach to lawyering is more likely to be paternalistic). *See* Cahn, *Sty'es of Lawyering, supra* note 110, at 1066–68 (discussing dangers of connection in *ethic of care* model). Many disagree with Ellmann. *See, e.g.,* Ogletree, *Justifications, supra* note 118. at 16.

Rights-based lawyers in the criminal arena are often paternalistic.[41] Traditional lawyers tend to devalue client decisionmaking because they view autonomy considerations as double-edged. By definition, criminal cases involve the government's attempt to take away the client's autonomy, by probation, jail, or execution.[42] "How important is autonomy to an inmate serving eight to ten in an eight by ten?"[43] Clients are often hesitant to face up to these facts and hope that, if they ignore the threat, it will go away. Of course, the case does not go away, but moves inexorably towards this colossal deprivation of autonomy. Thus, traditional lawyering often involves treading on present autonomy concerns to avoid long term deprivation of autonomy. Lawyers often cajole and coerce a reluctant client to face up to the threat of prison after trial and therefore to enter a plea. In Ms. Teplinski's case, most defense lav/yers would have, as their highest concern, avoiding the risk of hospitalization because it is a deprivation of liberty.[44]

Traditional lawyers might have chosen conviction and probation for Ms. Teplinski and the insanity defense for Mr. Salvi. For these lawyers, the difference between Mr. Salvi's case and Ms. Teplinski's was that Mr. Salvi faced life in prison without parole if he lost, a nonresponsibility defense while Teplinski faced probation if she lost and perhaps hospitalization if she won.[45] Thus, the different long term autonomy interests justified the different choices made in the two cases.[46]

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[41] *See* Smith, *supra* nole 118, at 29 (noting the paternalism and elitism of lawyers).

[42] It strikes me that the 'ole of autonomy is stronger for civil lawyers, because there is no governmental force on the other side seeking to take away autonomy, as in criminal law.

[43] Smith, *supra* note 118 at 37.

[44] This values autonomy by avoiding deprivation of liberty, but does not value autonomy in terms of trying the case the way my client wanted. See Rodney J. Uphoff, *Zealous Advocate or Officer of the Court,* Wis. L. *Rev.* 65, 80–82 (1988) for the recounting of a traditional rights-based lawyer who ignored his client's desire to put on a self-defense, raising a diminisned capacity defense instead. As Uphoff wrote, "arguing that the defendant never killed White or that he acted ir self-defense—was tantamount to pleading guilty." *Id.* at 80.

[45] If John Salvi won by reason of insanity, he would have been committed to a prison-like hospital w ith a chance of eventual release. A lawyer exercising the *ethic of care* approach might be spurred to grant a client like Mr. Salvi autonomy in decisionmaking due to the improbability of his ever being released. *See* Smith, *supra* note 118, at n. 127 (discussing conversation with Phyllis Goldfarb).

[46] John Salvi killed himself in prison in November 1996 by fastening a plastic bag around his neck. His death drew attention to the lack of psychological services for state prisoners. Eight months after his death, the line item for mental health care professionals w>as increased from approximately $3.2 million to approximately $5.2 million. *See* Zachary R. Dowdy. *Counseling Increased For Inmates in Aftermath of Salvi Suicide, Prisons Get Extra $2M for Mental Health, Boston Globe.* July 24, 1997. at B1.

It is unclear whether the defense team's decision to raise the insanity defense was based upon their desire to obtain psychological help for Mr. Salvi. Mr. Salvi was likely to spend his life in a secured state mental facility for dangerous persons if he w as acquitted on insanity charges, as compared with life in prison and without parole if he lost. Liberty interests were implicated; the hospital was a less severe place, and he would have had a chance of gaining his liberty. Perhaps hi;, counsel also viewed a mental hospital as a better choice than a prison because of the availability of psychiatric resources.

Certainly the Salvi defense team was as paternalistic as was I. For fear of being fired, Mr. Salvi's lawyers concealed the fact that they were challenging his competency.[47] They moved for amicus counsel to be appointed to litigate the competency hearing s.o that Mr. Salvi would not recognize that his own attorneys were defying him by raising the issue of competency. Contrary to Mr. Salvi's washes, they raised an insanity defense.[48]

Mr. Kaczynski's lawyers were also paternalistic, traditional rights-based lawyers. They justified overruling his autonomy on grounds that they were saving his life. The goal of saving someone from the death penalty, a cornerstone of traditional rights-based theory, is also the overarching goal of an attorney acting under the *ethic of care* model. Under both approaches, autonomy concerns dwindle in comparison with the magnitude of what is at stake. Mr. Kaczynski's fear of experts appeared irrational as he made it clear that he wanted to live and that he wanted the jury to reject the death penalty. His rejection of the mental illness defense conflicted with these goals. The more difficult issues were whether this irrational fear was a product of mental impairment, and whether surrogate decisionmaking would have been appropriate. Assuming that Mr. Kaczynski's illness affected his choice, lawyers following both the traditional and the *ethic of care* models could justify infringing upon his autonomy by asserting an insanity defense and calling expert witnesses to the stand.[49]

Ethic of care theorists have not singled out the mentally ill as specially benefiting from their model.[50] Yet, the model seems particularly well-suited to guiding practitioners unfamiliar with making decisions for the mentally disturbed. An *ethic of care*

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[47] *See* John Ellement. *SJC Ruling Denies Salvi New Competency Hearing in Clinic Killings. Boston Globe.* Sept. 7, 1995. at 29 ("Should Salvi opt to represent himself. Carney said, it will make a 'mockery' of the criminal justice system. 'Mr. Salvi would make Colin Ferguson look like Clarence Darrovv.' he said.").

John Salvi's lawyers were rights-based and overrode their client's wishes just as I did my client's. In the view of Mr. Salvi's defense team, it was clearly in his best interests to raise the insanity defense rather than to argue that the case amounted to religious persecution. Since Mr. Sahi faced life without parole if convicted, traditional considerations of the client's best interests advised in favor of overruling the client's choice of defenses.

[48] "John told me that people said I was saying he was crazy and he didn't want that." Mr. Carney remembers. "Later, when L to; d him we were going to court that day to put on an insanity defense, he just muttered something like 'oh.' He had decompensated a lot by that time." Earlier he had clearly stated that he did not want the defense used. He did not want his lawyer calling him crazy.

[49] Mr. Kae/vnski appeared to be thinking clearly and rationally w hen he tried to prevent his lawyers from setting forth a mental illness defense. Yet his paranoid schizophrenia may have caused hi^ hatred of a mental illness defense. Thus, although Mr. Kaczynski was high-functioning, his law vers could still justify overruling his decisions because the decisions were irrational.

If the theory of decisional incompetency were accepted by the courts, a judge might not strike the insanitv defense based on the client's failure to cooperate w ith the defense.

[50] Though *ethic of car3* theorists have not focused on the mentally ill. *therapeutic jurisprudence* has concentrated on the treatment of the mentally ill in the court system. This concept, created by David Wexler. calls for a shift from a rights perspective to one that would allow the law to serve as a therapeutic or curative agent, a perspective he calls "therapeutic jurisprudence."

philosophy requires that "ethical dilemmas ... be seen as situational and contextual, calling for a mixture of justice and care to meet each situation."[51]

Therapeutic jurisprut enee has been remarkably influential in its short history. It was first introduced by VVcxler in a paper written in the summer of 1987 for a workshop sponsored by the National Institute of Mental Health. By 1991. two edited volumes on the topic had appeared. Since then, it has influenced the thinking of an increasing number of scholars in both the legal and mental health fields.

David Finkehnan & Thomas Grisso. *Therapeutic Jurisprudence: From Idea to Application. 20* Nt-;vv *Eng.* J. *on Crim.* & Civ. *Continhmknt* 243. 245 (1994).

Like the *ethic of care* debate, the *therapeutic jurisprudence* movement is fueled by the lack of answers in a rights-based system. Like the *ethic of care* approach, *therapeutic jurisprudence* encourages paternalism. *See* Joel

Haycock, *Speaking Truth to Power; Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law.* 20 New Eng. J. *on Crim. & Cl\. Confinement 301.316 (1094) (assessing the risk that* therapeutic jurisprudence will be construed as "a new version of doctor knows best").

The two movements, *ethic of care* and *therapeutic jurisprudence,* are distinct and not known to be discussed together in any law reviews to date. Yet the *ethic of care* approach answers the call of *therapeutic jurisprudence* for lawyering that helps people by providing an improved framework in which to evaluate a client's best interests.

[51] Menkel-Mcadow, *supra* note 117, at 97.

IV. Some Proposals for Change

A. The Disadvantages of Judge as Gatekeeper

Bonnie appears to endorse the use of a judge as gatekeeper of surrogate decisionmaking, the approach detailed in *Frendak.*[1] Cases that follow *Frendak* mandate that the judge "conduct an inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the defense, and freely chooses to raise or waive the defense."[2] *Frendak* permits surrogate decisionmaking on behalf of clients who make irrational decisions to waive the insanity defense.[3] Under this paradigm, counsel must respect a defendant's right to forgo an insanity defense if a judge concludes the defendait's decision is knowingly and freely made.[4]

The *Frendak* model provides certain advantages. First, it serves as a check on attorney power. The nope is that a judge will curtail the misuse of surrogate decisionmaking by lawyers.[5] Second, the *Frendak* model attempts to unburden lawyers by delegating the decisionmaking to the judge. A good argument can be made that a judge's role

[1] *See* Bonnie, *supra* note 15, at 594 n. 181 (explaining Frendak v. United States, 408 A.2d 364 (D.C. Ct. App. 1979) is a "multiple test" approach).

[2] *Frendak.* 408 A.2d at 380. *Frendak* holds that a defendant who is competent to stand trial may not be competent to waive an insanity defense and that surrogate decisionmaking may be appropriate. *Id.* at 367.

[3] *Id.*

[4] *Frendak* has been followed in other jurisdictions. *See, e.g.,* Jacobs v. Commonwealth. 870 S.\V.2d 412. 418 (Ky. 1994) (citing *Frendak* and noting the decision to assert an insanity defense may "compromise the defendant's chosen alternative defense, as well as threaten his liberty and reputational interests and other legal rights."): United States v. Moody. 763 F. Supp. 589, 602 (Cla. 1991) (observing the *Frendak* approach constrains a judge's effort to force an insanity defense on a defendant): People v. Gettings. 530 N.E.2d 647. 649 [158] App. Ct. 1988) (following the *Frendak* approach). The ABA also prefers the *Frendak* approach. ABA Criminal Justice Mental Health Standard 7–6.3(b) states: "Neither the court nor the prosecutor should assert a defense based on abnormal mental condition over the objection of a defendant who is competent to make a decision about raising the defense." ABA *Criminal Justice Standard Committee.* ABA, *Criminal Justice Mental health Standards* 353 (1989). The commentary to this section notes that "the competency envisioned in this context is affecting the specific function of deciding, in consultation with defense counsel, whether or not to advance a mental nonresponsibility [insanity} or *mens re a* defense, not competency to participate in trial proceedings as a w hole." *Id.* at 359 ernt.

[5] James A. Cohen. *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant.* 52 U. Miami L. Rev. 529. 585 (1985). Cohen concludes that "the competency determination is too important to be entrusted to anyone else" but the judge. Cohen argues that the ethical rules should be

is suited to this type of decisionmaking function. After all, judges already determine competency to stand trial and judges already determine whether defendants are acting with sufficient knowledge and intelligence when they plead guilty. It seems logical that the question of competence to make decisions should also fall to a judge.

While the judicial gatekeeper model has the benefit of decreasing the misuse of power by lawyers, it is not without its own pitfalls. While the model of a judicial gatekeeper would prevent defense counsel from exercising de facto guardianship absent a court's permission, it is not clear that judges make better decisions than counsel.[6] How would a judge understand the particular client well enough to make a judgment about the value that this decision has to the client? How will the judge evaluate the chance of success of a defense on the merits when he is not privy to the defense's case? Consider the lengthy soul searching I did in Lee Teplinski's case to decide if a nonresponsibility exam was in Ms. Teplinski's best interests. Judges are not in the business of determining a defendant's best interests.[7] After all. judges routinely sentence defendants, including mentally ill defendants, to prison. The judge is the referee, not the advocate. If we want a client's best interests to be a part of the equation in overruling a client's choice, then we cannot delegate the balancing to a judge.

Some of the problems of the gatekeeper model can be gleaned from the cases themselves. The judge who presided over Theodore Kaczynski's trial served as gatekeeper. The *Kaczynski* transcripts reveal a judge who was extremely uncomfortable with his role as *ex parte* mediator between counsel and client.[8] The judge ruled that counsel could overrule Mr. Kaczynski's choice of defense because, if counsel were empowered to put on the best defense possible, that would lead to a more reliable verdict. He did not perform any balancing act that looked to the client's best interests.[9] In addi-

altered to allow di sclosure of attorney-client confidences in order to facilitate correct decisionmaking by a judge. *Id.*

[6] If Lee Teplinski were arrested in a state that followed *Frendak,* I could have flagged the issue to the judge as I did at sidebar, but I wo aid not have been able to try the case as I did. with an informal nonresponsibility defense. And if the case w en: to a jury trial, I could not have raised lack of responsibility unless a judge gave me permission to do so: it is far from certain that a judge would. Under the *Frendak* model, the defense lawyer is relegated to the sidelines, bound by the client's wishes. Counsel's only input w ould be to inform the court of the problem. The judge appoints *amicus curiae* to argue that the defendant is incompetent to waive an insanity defense. Then, if the judge finds the defendant incompetent to waive the defense, the *amicus curiae* argues the nonresponsibility defense to he jury. *Frendak*, *supra* note 154, at 368. In Lee Teplinski's case, no judge was going to spend money for *amicus curiae.*

[7] The defense lawyer is in a much better position than the judge to decide (1) w hether the client's best interests are served by an insanity defense; (2) whether the client seems to be rejecting it because of incompetency: and (3) whetaer to present an insanity defense through cross-examination as well as presenting witnesses.

[8] *See generally* Pre-Ttial Transcript In Camera Discussion, United States v. Kaczynski. 1997 WL 812617 (E.D. Cal. Trans.) (No. S-96–0259GEB); Pre-Trial Transcript Proceedings. United States v. Kaczynski. 1998 WL 10757 (E.D. Cal. Trans.) (No. S-96-0259GEB).

[9] Pre-Trial Transcript Proceedings, United States v. Kaczynski, 1998 WL 3338 (E.D. Cal. Trans.) (No. S-96-0259GEB); Pre-Trial Transcript Discussions on Motions and Change of Plea, United States

tion, Judge Burrell released portions of the *ex parte* conversations to the government lawyers.[10] Judges' power to disclose harmful *ex parte* communication to the opposition makes them the wrong players to entrust with these fine ethical balancing questions.

As we see from Ms. Teplinski's case, the judge was the one with the power to commit her to a mental hospital. If Ms. Teplinski's case had been tried in a jurisdiction following *Frendak,* the onus would still be on defense counsel to determine whether to bring the issue to the judge. In fact, the largest impediment to my decision was the gatekeeping function that blocked funds for a private psychiatric evaluation. Ms. Teplinski's case illustrates a need for less gatekeeping— not more.

Most judges would have determined Ms. Teplinski's choice of defenses to be knowing and voluntary under *Frendak.*[11] Despite a footnote to *Frendak* stating that "the inability of one who is currently mentally ill to recognize his or her condition" would be a common factor in impeding an intelligent choice, Ms. Teplinski would probably pass the *Frendak* criteria for demonstrating a knowing and intelligent waiver.[12] A judge would also have deemed Theodore Kaczynski to be fully competent to make decisions.[13] It is even possible that a judge would have found John Salvi competent to waive his nonresponsibility defense if *Frendak* had been the rule. His lawyers would then have been expected to argue their client's incoherent conspiracy theory.

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v. Kaczynski, 1998 WL 22017 (E.D. Cal. Trans.) (No. S-96-0259GEB) ("[B]y allowing Kaczynski to abandon the defense would in effect allow him to use, 'the system of criminal justice ... as an instrument of self-destruction.' Further, in light of this position taken by his trial counsel, and considering their extended period of representing Kaczynski, a contrary ruling risks impugning the integrity of our criminal justice system, since it would simply serve as a suicide forum for a criminal defendant.").

[10] *See* Pre-Trial Transcript In Camera Discussion, *supra* note 160, at *4–9 (redacting portions of the transcript for release). The judge shared a good deal of the *ex parte* communications among defense counsel, defendant, and himself with the government lawyers to allow them to second guess his decision that Mr. Kaczynski is competent to stand trial. *See id.* at *4 ("[T]he Government is not in a position, without seeing that aspect of the transcript, to know whether I have adequately covered the matter. I could have made a mistake: ... the Government is not in a position to look at the record and second-guess the judge. And that's what's troubling to me.") Judges are not accustomed to *ex parte* communication. Lawyers are always going to withhold certain information from a judge because of the danger that the revelations could hurt the client during the trial or sentencing.

[11] *Compare* Lee Teplinski's case *with* People v. Morton, 570 N.Y.S.2d 846, 847 (N.Y. App. Div. 1991). Mr. Morton was deemed competent to waive the insanity defense even though he (1) was "acutely psychotic" and (2) intended to pursue a problematic strategy pursuant to which he asserted that he acted in self-defense against his frail mother who—according to Morton—became dangerous because she learned a "devine [sic] oriental assassin dance." *Id.* at 847.

[12] *Frendak*, 408 A.2d at 379–81. Consider Commonwealth v. Blackstone, 472 N.E.2d. 1370 (Mass. App. Ct. 1985), where the defendant denied being mentally ill despite proof that he was psychotic. *Blackstone* held that the defendant was competent to stand trial under the *Dusky* formula and therefore competent to plead guilty: "the present defendant's refusal to admit to his own mental illness ... is not necessarily a manifestation of the mental illness itself. The world is full of people who do not own up to their limitations, often with remarkable success." *Id.* at 1372.

[13] Pre-trial Transcript Proceedings, *supra* note 161, at *4.

Chances are that an insanity defense is most likely to succeed when there is a client with some serious mental health problems. If the courts prohibit a lawyer from making the decision to raise the insanity defense for those who do not recognize their condition, then the mentally ill client whose best case rests with an insanity defense will often be poorly served. *Frendak* would not really lessen the ethical dilemma for defense counsel. Zealous advocates would simply defy the judicial ruling in order to serve their client's best interests where required. Counsel would still have these tough decisions, but they would be tougher yet without any systemic support.

Despite the difficulty of surrogate decisionmaking by counsel, defense lawyers are the players best suited to know their client's values and the extent of their client's impairments. We must trust the lawyers to make the decision because no one else in the system—not the judge, not the prosecutor—is charged with protecting a defendant's best interests.

B. The Uneasy Relationship Between Mental Illness and Criminal Law

I hope that readers have come to understand that the criminal justice system is unsuited for many of the people that come before it. Lee Teplinski's case uncovers a complex and uneasy relationship between mental illness and the criminal justice system. The case illustrates the penalties built into the criminal justice system for the mentally ill, as well as the need for change. Were incompetent clients not routinely institutionalized, my dilemma would have been lessened. Imagine if a finding of incompetence meant treatment in an outpatient setting. Instead of being a threat, a finding of incompetence would then be a viable alternative. If the hospital to which she was sent was a good place to be, or if I could have been certain that the judge would dismiss the case once the client was diagnosed, that too would have lessened my dilemma.

Perhaps lawyers should be permitted to consult with psychologists without going through a judiciary gatekeeper. That option would have improved my ability to predict whether Ms. Teplinski was decisionally incompetent, to predict the outcome of a nonresponsibility defense, and to prevent the risk of hospitalization while gathering data. Another possible change would be to set aside funds to allow criminal defense lawyers to be assigned to a doctor or panel of doctors to make sure the lawyer is not misinformed.[14]

The penalties for mental health diagnosis built into the criminal court system are a product of the uneasy relation between mental health and criminal justice. As our criminal justice system spirals toward the abolition of the mens rea requirement of

[14] A better connection between criminal defense lawyers and doctors would be the easiest change to implement. For this to work, however, both lawyer and medical provider must be interested in helping the patient/client, and be aware of the abuse perpetrated by medicine. They must consciously avoid abusing their power.

criminal responsibility, we as lawyers and scholars aid this reactionary thrust by writing about the "more important" cases we have—the murders rather than the assaults and batteries. At the root of this reactionary thrust is a public concern that criminals will literally *get away with murder* if the insanity defense is too easily asserted or has too few negative consequences. Stringent requirements and negative consequences are then added by the legislature, making it likely that the insanity defense will only be used in hopeless murder cases. In turn, the public hears of mental health issues arising in cases like John Salvi's (who gunned down two women), not in cases like Ms. Teplinski's. Thus the public continues to pressure the legislature to abolish the insanity defense or to make it even more onerous for those who raise it. If the public were educated about the plethora of cases like Ms. Teplinski's, they would be inclined to accept a determination of "not criminally responsible." I expect the public would vote for Ms. Teplinski, and others like her, to receive help, not punishment.[15] By writing about a case that is more representative of the mentally ill clients in our court system, I hope the reader learns how the criminal justice system processes the mentally ill through its mill with few alternatives available for judges, prosecutors, defense lawyers, and, finally, for those accused.

[15] For an uncannily similar example of a client with undiagnosed mental problems facing minor criminal charges, see Dinerstein, *supra* note 9, at 972–81. Dinerstein suggests that theories of client-centered counseling fail to address "the vexing problems of lawyer-client conflict; the client's volatile mixture of irrationality and certitude; and the real-world constraints on our ability to craft a creative legal argument on the client's behalf." *Id.* at 985. He writes about the case in order to challenge academia to come up with a theory that is complex enough to handle these cases. I hope this Essay meets his challenge.

V. Conclusion

The case I handled raises questions regarding the manner in which lawyers substitute their judgment for that of mentally ill clients, and whether the deprivation of autonomy is justified in cases where the best interests of the client are far from obvious. I encourage lawyers to avoid the easy answer of doing the client's bidding without truly considering whether the client is competent to know. The clearer the best interests, the easier it is to justify substitute judgment. Nevertheless, I defend the right of criminal defense lawyers to make these difficult choices and to employ surrogate decisionmaking even in the difficult cases. I point out that it is in these marginal areas where a lawyer is likely to rely on his or her own personal moralism in deciding cases, and I condone—even encourage—the use of an *ethic of care* moralism when making these decisions.[1] In short, the lawyer may regard autonomy as one of the client's interests but not necessarily the overarching one. When determining best interests, the lawyer may consider the effects of the disease, how it interplays with the charges, the client's ability to make it through probation, and the client's interest in getting help. Whatever one thinks of my actions in Ms. Teplinski's case, there will always be criminal defendants with mental disabilities that the court system is not equipped to handle. Defense lawyers are the only players in the system who have the clients' best interests at heart. The choices are never going to be easy. The best we can do is to try to reason contextually, with as much understanding of the client and her situation as possible, analyze our own motivations, and strive to act with integrity.

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[1] Moralism is "a belief in or practice of a system of ethics apart from religion." *Webster's New World Dictionary* (Webster's New World 1988). When Carol Gilligan wrote about moral development she meant "different notions of what is of value in life." *See* Gilligan, *supra,* note 114, at 5.

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The American Criminal Law Review; Chicago Vol. 35, Iss. 4, (Summer 1998): 1343–1386.
<https://law-journals-books.vlex.com/vid/autonomy-versus-client-s-685644849>
For a different perspective on the court case see Michael Mello's book The United States of America versus Theodore John Kaczynski.
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