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Understanding Waiver

Jessica Wilen Berg

ARTICLE

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*Jessica Wilen Berg**

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* Assistant Professor of Law and Bioethics, Case Western Reserve University Schools of Law and Medicine, B.A., 1990 and J.D., 1994 Cornell University. I would like to thank Craig Bradley, George Dent, Peter Gerhart, Paul Giannelli, Sharona Hoffman, Lewis Katz, Juliet Kostritsky, Joan Krause, Stephen Latham, Max Mehlman, and Andrew Morriss for providing valuable comments on earlier drafts, and Katherine Kerka and Amanda Upson for their research assistance. All errors and omissions are, of course, the Author's own.

I. INTRODUCTION

> *Waive* (vb.): [T]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily.[1]

Can a defendant waive his right to appeal a death sentence? Can a criminal suspect waive constitutional protections? Can an individual waive, via contract, his right of freedom of association or freedom of speech? Can a patient waive her right to informed consent? How do we establish what rights can be waived? Of those rights that can be waived, which actions, or decisions, should be considered valid waivers of the right in question?

Waiver is a prominent concept in law and appears most recognizably in criminal procedural law.[2] But it also has

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1. BLACK'S LAW DICTIONARY 1580 (7th ed. 1999). I will use the generic term "right" to refer to rights, claims, and entitlements. Resolution of debates about the correct application of the term are not necessary for the argument proposed here and are beyond the scope of this Article.

2. *See, e.g.*, George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977) (arguing that the doctrine of waiver must function to ensure finality of convictions when such convictions are based on waiver of procedural rights); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941 (1997) (discussing the rationale, standards, and constitutional scope of waiver as a right in criminal procedure); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999) (discussing agreements between prosecutors and criminal defendants that waive certain of the defendants' constitutional protections, and arguing that the interests of third parties and the general public may justify restrictions on these agreements); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978) (examining how decisions by the Burger Court affect a criminal defendant's ability to guard against the loss of rights, including rights lost by waiver); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977) (discussing "the relationship between the concept of forfeiture and the . . . notion of waiver"); Kenneth A. Goldman, Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CAL. L. REV. 1262 (1966) (analyzing those factors that affect the binding nature of a purported waiver, specifically as applied to the acts of the counsel, the defendant, and the court). *But see* Richard C. Ausness, *"Waive" Goodbye to Tort Liability: A Proposal to Remove Paternalism from Product Sales Transactions*, 37 SAN DIEGO L. REV. 293 (2000) (arguing that waivers of tort liability should be permitted in the products liability context); Mark A. Hall, *A Theory of Economic Informed Consent*, 31 GA. L. REV. 511

applications in insurance law,[3] labor and employment law,[4] mediation,[5] property law,[6] civil procedure,[7] contract law,[8] tort law,[9] and fiduciary relationships.[10] There are different requirements for waivers of tort liability, statutory rights, criminal procedural rights, and contractual conditions. Moreover, the term "waiver" is used to refer to a variety of actions. For purposes of this Article, it includes any action or decision by an individual[11] to give up a right that is currently functioning (for example, constitutional protections in the Bill of Rights),[12] as well as contractual agreements to give up future rights or entitlements.

(1997) (discussing waiver in the context of informed consent to medical treatment and research); Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141 (1952) (discussing the waiver of the right to bring a negligence action according to the concept of assumption of the risk); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986) (advocating a framework for waiver decisions in civil litigation); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998) (critiquing the rules that govern client waiver of attorney conflicts of interest); Elysa Gordon, Note, *Multiculturalism in Medical Decisionmaking: The Notion of Informed Waiver*, 23 FORDHAM URB. L.J. 1321 (1996) (proposing a doctrine of "informed waiver" in medical decisionmaking to accommodate patients holding non-Western beliefs); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1629 (1985) [hereinafter *Developments in the Law*] (discussing the function of implied waiver in privilege law).

3. *See, e.g.*, 2 LEE R. RUSS, COUCH ON INSURANCE § 22:36, at 22-79 to 22-80 (3d ed. 1995); 13 *id.* § 194:21, at 194–29.

4. *See, e.g.*, Michael C. Harper, *Age-Based Exit Incentives, Coercion and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1294–98 (1993) (explaining how age-based exit incentives lead older workers to waive their rights under the Age Discrimination in Employment Act); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have to? Do You Really Want to?*, 43 DRAKE L. REV. 255, 269–73 (1994) (discussing waiver of statutory rights in employment contracts).

5. *See, e.g.*, 10A N.C. INDEX 4th, *Divorced Separation* § 527 (2002) (indicating that North Carolina law allows the waiver of mandatory custody or visitation matters for mediation, subject to a showing of good cause).

6. *See, e.g.*, 40 AM. JUR. 2D *Homestead* § 187 (1999) (describing scenarios under property law in which homestead rights may be waived); Jay M. Zitter, Annotation, *Waiver of Right to Enforce Restrictive Covenant by Failure to Object to Other Violations*, 25 A.L.R. 5th 123 (1994) (discussing various ways in which restrictive covenants on land use may be waived).

7. *See, e.g.*, 61A AM. JUR. 2D *Pleading* §§ 329, 395 (2002).

8. *See, e.g.*, David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607, 609, 624–26.

9. *See, e.g.*, Ausness, *supra* note 2, at 294 (recognizing that waiver is permitted "under principles of negligence and warranty law").

10. *See, e.g.*, Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 821–22 (1983) [hereinafter Frankel, *Fiduciary Law*] (explaining that parties cannot waive a court's supervision over a fiduciary relation).

11. Waiver, in this sense, is a unilateral act. *See* Snyder, *supra* note 8, at 626–27 (distinguishing waivers from modifications, which are agreements).

12. Dix, *supra* note 2, at 205 ("[W]aiver should be defined as . . . a conscious choice made by a person whose right is at issue."). Compare this with the doctrine of forfeiture. Refer to notes 104–07 *infra* and accompanying text.

Part II of this Article argues that the concept of autonomy can be developed into a framework that will provide a more precise way of understanding waivers. Part III develops the conceptual framework in more detail, identifying the elements necessary for a valid waiver in specific circumstances. This Article stresses that the determination of whether, and how, a right can be waived depends on the nature of the right in question[13] and its implications for individual autonomy. The final part of the Article considers the application of the framework in different contexts. The goal is not to provide a detailed analysis of all possible legal waivers—production of such a tome is beyond the scope of this Article—but rather to suggest a unifying framework under which to analyze waivers. Although examples are drawn from numerous areas of law, this Article will leave the detailed application of the framework to experts in the relative legal subspecialties.

The academic literature contains numerous discussions of waiver, almost all of which have been limited to a specific area of law.[14] None has provided an overarching theory satisfactorily explaining why courts have set different standards for achieving a valid waiver in different legal contexts.[15] Although such meta-

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13. *See* United States v. Olano, 507 U.S. 725, 733 (1993) (explaining that what suffices for waiver depends on the nature of the right at issue). "[W]hether certain procedures are required . . . and whether the . . . choice must be particularly informed or voluntary, all depend on the right at stake." *Id.*

14. Refer to notes 2–10 *supra* and accompanying text. This Article draws from each of these theories, as well as to parallels that can be drawn to discussions of the inalienability of particular rights. *See, e.g.*, Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 766 (1983) (discussing waiver in terms of inalienability). For an excellent general summary of the inalienability debate, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1477–89 (1989). Professor Sullivan identifies four theories that support inalienability: paternalism, efficiency, distribution, and personhood. *Id.* at 1477, 1479–86. Paternalism concerns function in the waiver context as well because a nonautonomous waiver should not be considered valid. *See id.* at 1480–81. Moreover, personhood concerns are analogous to the concept of ascriptive autonomy. Efficiency concerns come into play under the headings of system issues and some across-the-board limitations of waivers of descriptive autonomy. Distribution concerns are also dealt with under descriptive autonomy.

15. Thus far there has been only one attempt at a comprehensive theory of waiver. *See* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981). Edward Rubin proposes that "rights . . . are structuring devices; they can be relinquished only if acceptable alternative means of structuring the relationship are employed." *Id.* at 537. According to Rubin, valid waivers "require that parties who waive a particular right obtain the functional equivalent of that right in the context of their more informal interaction." *Id.* Rubin uses the example of adjudication rights to demonstrate the implications of his theory and suggests that, because their purpose is to assure due process protection, the waiver in question should likewise achieve the functional due process equivalent. *Id.* at 537–39. This translates into requirements that waivers reach the type of result that a court could have reached. Moreover, Rubin states that the waiver must afford the functional equivalent of notice and a hearing, and that the parties must know the right is being waived and they must negotiate the waiver. *Id.* at 539. One problem with Rubin's theory is his apparent contradiction in

theories have their limitations, proposal of a general framework for analyzing waiver should help better clarify what standards should be applied to waivers and what waivers should be allowed. In addition, providing a common language to analyze waiver issues will help avoid compartmentalization of law. It will enable both similar treatment of similar issues and a better understanding of distinctions made between dissimilar issues.

Of the specific theories of waiver that have been suggested, many rely on efficiency or other law and economics rationales for evaluating waivers.[16] While my work does not come out of this tradition, my approach is not uncongenial to the general law and economics approach. First, as will be seen, my approach hinges on an analytical method designed to maximize individual autonomy, and law and economics is, above all, a methodology for maximizing values. Second, I do not believe that the autonomy value that sits at the center of this analytical framework is far removed from the

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acknowledging that the advantage to many alternative dispute resolution mechanisms is their potential to reach results that are novel, *see id.* at 488–89, and his requirement that the process substituted by the waiver achieve a result that a court could have reached if it had adjudicated the matter, *see id.* at 480, 536–40. Nonetheless, Rubin's theory is attractive. It provides a conceptual framework that, in theory, applies across different waiver contexts. But although I agree with his definition of rights as a "means of regulating relationships between individuals or between individuals and the state," and also that "[t]o incorporate this view of rights, a theory of waiver should take account of the entire situation in which the waiver occurs," *see id.* at 529, I do not believe that this is the end of the analysis. Rubin's theory focuses too much on the process protections that rights serve, and not enough on the substantive analysis of the nature of the right itself. So, although he acknowledges that in each case one must determine the "nature of the right that has been waived" and "the kind of protection that the right provides," *id.* at 537, his theory is most well-developed in the context of criminal procedural rights around adjudication, and fails to explain adequately why there are other rights that can or cannot be waived and the standards that should adhere to these waivers. In particular, he labels civil law rights unrelated to adjudication "amorphous" and notes that there is "no single policy that governs the substantive rules that affect private agreements." *Id.* at 540. In contrast, this Article argues that autonomy functions as a guiding overarching principle for both criminal and civil law.

16. Ausness, *supra* note 2, at 298, 301–04 (arguing that waivers of strict liability for products should be allowed because they promote economic efficiency); Dix, *supra* note 2, at 216–19 (listing the interests that must be accommodated by a theory of waiver); Kaplan & Dixon, *supra* note 2, at 953–54 (examining how standards in criminal procedure differ based on the system's needs to promote truth-seeking); King, *supra* note 2, at 117 (arguing that criminal litigation waivers outside of plea bargains should only be restricted if there are public or third-party interests which override the litigants interests); Kronman, *supra* note 14, at 766–74 (positing that contract limitations on waiver are based on, among other things, economic efficiency concerns); Spritzer, *supra* note 2, at 481, 488 (discussing how, in criminal procedure, the standard for not applying strict safeguards around waivers is whether such safeguards would be impracticable); Westen, *supra* note 2, at 1261 (concluding that waiver is part "of the broader principle of forfeiture" and depends on the interests of the state); Zacharias, *supra* note 2, at 420 (positing that conflicts of interest rules for professionals may be unwaivable to ensure that the adversary system functions appropriately); Todd J. Zywicki, *Mend It, Don't End It: The Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Professionals*, 18 MISS. C. L. REV. 291, 308 (1998) (discussing that conflicts of interest rules in bankruptcy may be nonwaivable because of public interest).

kinds of values promoted by efficiency analyses, which are based on respect for the preferences of individuals.[17] But whereas efficiency (or other) concerns should play a role, they alone are not determinative because they fail adequately to explain why there are different standards for waiver in different circumstances.[18]

This Article argues that autonomy[19] is a better basis for understanding waivers of individual rights.[20] Autonomy is the basic

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17. *See, e.g.*, Bailey H. Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893 (1990) (examining the link between autonomy and economic theory). Libertarianism stresses the link between law and economics and autonomy. *But cf.* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431 (1993) (arguing that the modern Court relies primarily on notions of efficiency, while the *Lochner* Court emphasized autonomy). Professor Shell advocates a combined approach incorporating efficiency concerns, along with "sensitivities to context and an appreciation of the limits of markets in allocating important human and economic rights." *Id.* at 518. Labeled "Pragmatic Contract Theory," it is a mixture of neoclassical theory and libertarian views. *Id.* at 518–19.

18. Shell, *supra* note 17, at 515–16 (noting an economic efficiency approach to contracts "provides no principled basis for distinguishing between alienable and inalienable rights").

19. Although respect for the value of autonomy is widely espoused by liberal theory, it has multiple meanings and practical implications. *See, e.g.*, TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 120–21 (4th ed. 1994); THOMAS MAY, AUTONOMY, AUTHORITY AND MORAL RESPONSIBILITY 35 (1998). The term "autonomy" translates literally as "self-rule," but such a simplistic definition does little to identify a concrete goal towards which to work in shaping our societal system of individual rights. BEAUCHAMP & CHILDRESS, *supra*, at 120–21. Professor Rogers Smith argues that initial conceptions of autonomy, both legal and philosophical, appeared to focus on liberty. Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 176–78 (1982) [hereinafter Smith, *Constitution and Autonomy*]. The Framers of the Constitution were concerned with creating a liberal democratic state that allowed individuals freedom from government interference such that they could pursue certain objectives defined by reason. *Id*. Autonomy, in this sense, functions as a means to achieve a certain end—rational decisionmaking—and thus, the concept itself is shaped or limited by the goal—rationality. *See id*. at 178. If people are rational beings in Kantian terms, then they should "want" to maximize rationality, because this is a rational position. *Id*. at 195. In other words, Kant's conception of autonomy was necessarily limited by rationality because an irrational person or act was by definition not autonomous. *See id*. at 195–96. Rationality, under this theory, is an independently established notion. People do not agree or disagree as to its content. Dan Brock discusses this problem in his critique of rights-based limitations on paternalism. Dan Brock, *Paternalism and Promoting the Good*, *in* PATERNALISM 248 (Rolf Satorius ed., 1983). He stresses that a rational person should welcome interference with decisions when the interference will result in better promoting the individual's good. *Id*. Norman Dahl rebuts Brock's assertion and argues that Brock needs to consider an expanded notion of rationality. Norman O. Dahl, *Paternalism and Rational Desire*, *in* PATERNALISM, *supra*, at 261. According to Dahl, if it is rational to act on one's own choices, and this position can be universalized, under Kantian theory, then it is irrational to interfere with an individual acting on his choices, even if to do so would be beneficial because that position could not be universalized. *Id*. at 267–68. Thus, there are rational rights-based limitations on paternalistic action. *Id*. at 267.

Professor Smith argues that the initial conception of the Framers is no longer valid, and he advocates instead that autonomy must be thought of in broader terms as freedom to develop individual intellect and emotion. Smith, *Constitution and Autonomy*, *supra*, at 184 (citing Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928), and *Whitney v. California*, 274 U.S. 357 (1927)). This view of autonomy is a particularly Western, or American, view. JESSICA W. BERG ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 14–15 (2d ed. 2001). For a view that this Western concept of autonomy presents difficulty for patients with non-Western beliefs, see Gordon, *supra* note 2.

20. This Article distinguishes between waivers that relate to individual autonomy and those

value underlying liberal society.[21] In liberal theory, maximizing autonomy is the ultimate goal and governmental interference is appropriate only to the extent that it facilitates this goal.[22] A focus on facilitating autonomy above all else represents the extreme position: minimum limitations on individual rights of decisionmaking and maximum restrictions on societal (governmental) interference. Other theories, such as those that promote beneficence or communitarian goals, provide different reasons to restrict individual waiver decisions;[23] but only autonomy both provides an appropriate baseline from which to work and reflects factors that the courts and legislatures actually consider in analyzing waivers.[24] Although other rationales may help explain legal rules in specific contexts, a focus on maximizing autonomy provides a descriptively valid basis for analysis and also a normative framework that can be applied across different areas. Not only has our society already demonstrated a commitment to this goal,[25] but there are significant psychological benefits for individuals under such a system.[26]

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that have implications for others. Refer to notes 33–37 *infra* and accompanying text.

21. *See* John Stuart Mill, *On Liberty*, *in* MILL: TEXTS COMMENTARIES 50 (Alan Ryan ed., 1997). For various views on autonomy and liberalism, see generally ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969); JOHN GRAY, LIBERALISM (2d ed. 1995); LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984). This Article will begin with the assumption that autonomy forms the basis for our system of laws and does so appropriately.

22. *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1712 (1992) (describing how autonomy is "a value that infuses the Constitution . . . [and] is a central principle of much of our ethical and political theory"). Winick concludes that, although there are problems with an autonomy model, the conception of "the individual as an autonomous decisionmaker . . . is a useful foundation upon which to build a legal system . . . [and] to place limitations on governmental power." *Id*. at 1769.

23. This Article does not examine these other theories in detail. For example, acceptance of communitarian ideals may lead to additional restrictions on individual control over decisionmaking based on promoting community values and needs, and thus, additional restrictions on individual waivers in light of these goals. So, too, may utilitarian theory because the "greatest good for all" may be achieved by limiting individual rights in certain circumstances. Refer to note 29 *infra* (discussing utilitarianism). Although other theories do not necessarily result in further limitations on individual rights or autonomy, each has the potential to do so given its underlying goal. Liberal theory, by contrast, is the least restrictive of individual rights and autonomy, and thus, provides an appropriate baseline from which to begin an analysis of waiver.

24. Refer to Part II *infra*.

25. *Id*.

26. Winick stresses that there are psychological benefits of allowing people to make their own choices and that, because we have adopted a liberal system of government in the United States, "[a]utonomy . . . should be presumptively protected by our law, and government should bear a heavy burden of justification when it seeks to interfere with an individual's choice." Winick, *supra* note 22, at 1771. These benefits include avoiding encouraging "learned helplessness" behavior, promoting self-efficiency and responsibility, increasing personal satisfaction leading to better performance and motivation to succeed.

Moreover, there is a strong argument that commitment to individual autonomy is necessary to produce the best society overall, as well as the best use of resources within that society (as defined by individual wants and preferences).[27]

There are two primary reasons why autonomy is valued and thus sought to be maximized. First, autonomy has instrumental value, or value as a means to achieve other goals. Professor Ronald Dworkin calls this the "evidentiary view"—that the individual is the best judge of what promotes his own welfare.[28] If welfare is the ultimate goal, then autonomy serves an instrumental function in achieving that goal. However, Professor Dworkin advocates the "integrity view" of autonomy—that "[a]utonomy encourages and protects people's general capacity to lead their lives out of a distinctive sense of their own character, a sense of what is important to and for them."[29] In the evidentiary

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Id. at 1765–68.

27. Professor Hayek argues this point based on the knowledge differentials between individuals and the lack of any centralized mechanism that can gather and disseminate such knowledge. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); *see also* 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 55 (1973) ("The thesis of this book is that a condition of liberty in which all are allowed to use their knowledge for their purposes, restrained only by the rules of just conduct of universal application, is likely to produce for them the best conditions for achieving their aims . . . .").

28. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 222–23 (1993); *see also* Winick, *supra* note 22, at 1770 ("Because individual conceptions of happiness inevitably differ, the individual, and not the government, must select his or her own path . . . .").

29. DWORKIN, *supra* note 28, at 224. These two viewpoints demonstrate consequentialist versus deontological rationales for promoting autonomy. Consequentialist theories, such as utilitarianism, determine the ethical or correct course of action by looking at the consequences of different alternatives. The alternative that leads to the best result, however defined, is the ethical one. Rule-utilitarianism seeks to effectuate rules that will generally result in the greatest good. Act-utilitarianism, on the other hand, focuses on individual acts and, in each case evaluates what action will lead to the greatest good. Deontological theories evaluate the ethics of alternative courses of action based on the importance of particular values. One basic form of deontological reasoning is to test the justice of a particular action or practice by universalizing it: if a practice cannot be sustained when everyone does it, it violates our sense that moral rules ought to apply equally to all competent moral agents. *See* IMMANUEL KANT, ETHICAL PHILOSOPHY: THE COMPLETE TEXTS OF GROUNDING FOR THE METAPHYSICS OF MORALS AND METAPHYSICAL PRINCIPLES OF VIRTUE xi–xxii (James W. Wellington trans., 1983). One of the most famous deontologists is Immanuel Kant, who argued that determining the moral or right action in a particular circumstance depends on one's ability to universalize the rule governing the act, otherwise known as the "categorical imperative." *Id*. at xv–xvi. One formulation of his categorical imperative (sometimes referred to as a maxim) is to treat people as ends in themselves and not merely as means. *Id*. at xix. In other words, we must respect an individual's capacity to determine what happens to himself. *Id*. at xix–xx. One of the major failings of Kantian ethics, and many other deontological theories, is the lack of guidance for dealing with conflicting maxims.

John Rawls's adaptation of Kantian ethics attempts to demonstrate how a deontological theory can be applied to understand the social contract existing in a just society. He argues that valid ethical principles governing action are those to which

view, autonomy is valued for its positive consequences.[30] In the integrity view, autonomy is valued in and of itself.[31] Both rationales support maximum respect for autonomy within our society and thus through our laws and legal system.

II. A THEORETICAL FRAMEWORK FOR WAIVER

If waivers are autonomous actions, then most waivers should be allowed with little interference from the state.[32] A society that places primary value on autonomy should not interfere with the individual exercise of autonomy except to the extent that such exercise infringes upon the autonomy of others. Using John Stuart Mill's position as a baseline because he takes a fairly extreme view of limitations on governmental interference with individual freedom, we might begin to consider the justifications for imposing limits on autonomy. As Mill states in his famous essay *On Liberty*, "[t]he only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute."[33] Mill distinguishes the individual realm, in which societal interference is impermissible, from the public realm, in which interference may be appropriate, and sometimes necessary, to assure protection of the individual realm.[34] A government that values autonomy will necessarily be both limited and justified in its actions by this pronouncement—limited to the extent that a government must not interfere with a person's actions within the private realm and, at the same time, justified in taking actions that assure that individuals have

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rational agents would all agree if situated behind a hypothetical "veil of ignorance," for example, blind as to individual interests. *See* JOHN RAWLS, A THEORY OF JUSTICE 516–18 (1971). In this state, we might agree to a rule, or rules, promoting individual autonomy.

30. *See* DWORKIN, *supra* note 28, at 223 (defining the evidentiary view as respecting others' decisions because they know what is best for themselves).

31. *See id*. at 224 (explaining the integrity view as "recogniz[ing] that people often make choices that reflect weakness, indecision, caprice, or plain irrationality" and that it "does not assume that competent people have consistent values or always make consistent choices").

32. Depending on the initial theory one subscribes to, the justification for legal interference will vary. Under an autonomy framework, legal intervention is justified when the rules will result in a situation of greater autonomy overall.

33. Mill, *supra* note 21, at 48.

34. *Id.* at 48–50. There are a number of problems with this dichotomy that have been well analyzed by others. *See, e.g.*, Gerald Dworkin, *Paternalism*, *in* PATERNALISM, *supra* note 19, at 19–22 (questioning Mill's objection "to paternalistic interferences with a person's liberty"); Joel Feinberg, *Legal Paternalism*, *in* PATERNALISM, *supra* note 19, at 3–17 (arguing that state action can be justified "to protect individuals from self-inflicted harm").

freedom to act within the private realm.[35] The latter position implies that to protect one individual's autonomy, the autonomy of another individual will sometimes be subject to state interference to the extent that the actions in question have implications beyond the individual sphere.[36] This Article will not address limits on individual autonomous actions that have effects on other individuals' autonomy because these actions may be limited on that basis alone.[37]

It might appear that, under this framework, waivers within the individual realm should always be given deference.[38] But even under Mill's idealized notion of autonomy, this situation is not so—there are limits on an individual's liberty to give up liberty. Thus, Mill states:

> [A]n engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void . . . . [B]y selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of

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35. These two aspects of autonomy are sometimes referred to as negative and positive autonomy. *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 875–85 (1994) (arguing that this dual conception is flawed, and suggesting an alternative framework). This Article addresses Professor Fallon's arguments in more detail below. Negative autonomy refers to restrictions on governmental action—the right of individuals to non-interference within an autonomous sphere. *Id*. at 876, 880–81. Positive autonomy refers to societal promotion of autonomy—a justifying basis for governmental intrusion into the individual sphere to promote individual autonomy. *Id*. at 876, 883–85.

36. Examples of state interference with individual autonomy due to effects on others are numerous and include: time, place, and manner constraints on freedom of speech; imposition of obligations with regard to marriage and children; tort law protections of persons and property; traffic laws; and criminal laws such as assault and battery.

37. It is, of course, difficult to draw lines between actions that affect only the individual in question and actions that affect others. All actions affect other individuals in some way—persons do not function in a vacuum. This fact is the problem (well discussed by others) with Mill's notion of actions within the individual realm. But, for purposes of this argument, this Article will assume we can draw some distinctions between waivers of rights that pertain specifically to the individual and those that implicate rights of other persons. Limits on autonomous actions that affect others may be justified on that basis—the effect on others. For example, in contracts, one party to a contract cannot waive a condition for the benefit of both parties. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 494 (3d ed. 1987). Of more interest to me (and the focus of this Article) are limits on individual autonomy with respect to actions that do not obviously (or directly) affect others.

38. This presumes that the waiver is itself autonomous. Consider the example of waivers of conflicts of interests for legal professionals. In some situations, courts reject individual choices because they distrust the motivations of the attorneys, and thus appear to question whether the individual's waiver is fully informed and autonomous. Zacharias, *supra* note 2, at 416–17, 422.

> himself. . . . The principle of freedom cannot require that he should be free not to be free.[39]

In other words, promotion of autonomy requires that individuals relinquish the freedom or right to give up (permanently) autonomy itself. Mill seems to give two unrelated reasons for this restriction. The first is utilitarian in nature: slavery is per se harmful or bad, outweighing any harm from restricting autonomy in these situations. The second is Kantian: individuals have inherent sovereignty over themselves that cannot be given up.[40] Professor Gerald Dworkin agrees that limitations on autonomy are permissible and that governmental restrictions or interference are justified "to preserve a wider range of freedom for the individual in question."[41] Eschewing Mill's arguments, he stresses that it is often rational for individuals to agree ahead of time to state interference with their liberty, even within the so-called "individual realm."[42]

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39. Mill, *supra* note 21, at 121; *see also* Kronman, *supra* note 14, at 776–80 (suggesting that a person's inability to enslave himself increases his self control because it protects the person from engaging in a contract which gives the other party the right of specific enforcement). Self-enslavement is problematic because an enslaved person does not have the option to pay damages, but instead, is held to specific performance. *Id*.

40. Professor Gerald Dworkin, in particular, notes that Mill seems to use two different justifications for restricting governmental interference with individual liberty. *See* Dworkin, *supra* note 34, at 24–28. The first justification is that interference causes harm (or that coercive action causes harm). *Id*. at 26. But this justification is an empirical question that would need to be answered in each case and creates no more than a rebuttable presumption against paternalistic action. The second justification is that state interference is per se wrong, regardless of the balance of harm and benefit. *Id*. at 27. This justification is certainly stronger, but cannot be reconciled with utilitarianism.

41. *Id*. at 27–28.

42. *Id*. at 29. John Rawls, one of the most prominent consent theorists, suggests that the state's power to constrain individual autonomy could be based on a type of social contract between individuals who determine the governing rules while behind a hypothetical veil of ignorance, unaware of their individual position or needs. RAWLS, *supra* note 29, at 515–17. Under this concept, individuals may consent to paternalistic interventions "that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will." *Id*. at 249. Refer to Part II.B *infra* (discussing descriptive autonomy). All people wish to maximize their autonomy but are unable to know their needs and the personal limits that will restrict them from achieving their individual preferences. Therefore, they will likely consent to the state's limits on individual autonomy to the extent that the limits are likely to promote the greatest autonomy for the most people. Although this notion of consent provides a theoretical justification for state restrictions on individual freedom, it is problematic in practice because most people do not *actually* consent to governmental interference with their lives, and some people may reject the initial constraints of Rawls's original position. *See* Smith, *Constitution and Autonomy*, *supra* note 19, at 183 (relating democratic theorists' belief that few citizens have ever explicitly consented to obey a majority decision and that tacit consent to the state should not be assumed). Nonetheless, it provides the most promising basis for evaluating autonomy claims.

Professor James Fleming develops Rawls's theory into a practical tool to use in constitutional decisionmaking and argues that, in determining which rights are entitled

Philosopher Joel Feinberg likewise acknowledges that there may be limitations on autonomy, but for practical reasons—because to allow such action we must be certain that it was, in fact, voluntary and because testing voluntariness in all situations would be cumbersome—we presume nonvoluntariness in cases of significant waivers of autonomy.[43] The three viewpoints represent the range of rationales for limiting autonomy.

Even if we agree that slavery or other "waivers" of autonomy within Mill's individual realm are impermissible, several other competing grounds exist, including utilitarian calculations that the harm in giving up autonomy is so great that it outweighs the harm from state interference with individual liberty;[44] Kantian notions that there is something inherent in persons that cannot be given up;[45] social contract or consent theories that allow individuals to choose *a priori* to give up freedom in certain circumstances;[46] and practical concerns about determining voluntariness.[47] Without clear guidance from one or another of these rationales, it may be impossible to determine the range of limits on freedom to waive rights and thus, on waivers of autonomy.[48]

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to significant protection, courts should look at the link between the right and the deliberative quality of autonomy. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995) (positing that "[c]onstitutional constructivism limits the scope of autonomy to protecting basic liberties that are significant preconditions for autonomy"). That is, only those rights that are crucial for assuring an individual's ability to function within a deliberative democracy should be granted the highest protections from governmental interference. He identifies two aspects of deliberation—"capacity for a sense of justice" and "capacity for a conception of the good"—and focuses less on privacy and liberty than on assuring individuals the freedom to associate and interact to develop these two aspects. *Id*. at 18, 36.

43. Feinberg, *supra* note 34, at 14.

44. Refer to Part II.B *infra* (discussing descriptive autonomy).

45. Feinberg, *supra* note 34, at 13 (remarking that "there is something in every human being that is not his or hers to alienate or dispose of"). Refer to Part II.A *infra* (discussing ascriptive autonomy). *See also* Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 399 (1985) (stressing that there are other values at stake such as human dignity and stating that "[i]t is immoral to participate in such consensual [but degrading] transactions and immoral for the community to tolerate them").

46. Refer to Part II.B *infra* (discussing descriptive autonomy).

47. Refer to Part II.C *infra* (discussing system limitations).

48. Mill's answer seems to be that waivers of autonomy should not be allowed, but are sometimes necessary for practical reasons. Mill, *supra* note 21, at 121 (arguing that although freedom should not allow a person to alienate his freedom by allowing himself to be enslaved, the practical "necessities of life" require that people consent to some limitations of their freedom). Joel Feinberg takes the opposite position, arguing that waivers of autonomy should be allowed in all cases except when, for practical reasons, it is too difficult to determine whether the waiver is itself voluntary (autonomous). Feinberg, *supra* note 34, at 15–17 (discussing employment contracts and contracts "in restraint" of trade as examples of agreements to abandon liberty).

Waivers often involve both a gain in autonomy (from the exercise of the autonomy through the waiver) and a loss of autonomy (from having sacrificed the right that is being waived). Accordingly, a sensible analytical approach is to compare the gain in autonomy from the act of waiver with the loss of autonomy when the right is waived and then try to maximize the overall autonomy. Within this framework this Article proposes three categories of rights that might be subject to waiver based on two different conceptions of autonomy.[49]

The first two categories of autonomy are referred to as "ascriptive" and "descriptive" autonomy, respectively, borrowing from the terminology of Professor Richard Fallon Jr.[50] Each has different implications for the permissibility of state interference with individual action.[51] The third category is termed "system" limitations on waivers of autonomy.[52]

Ascriptive autonomy is an inherent characteristic, a right of all competent persons. It refers to basic sovereignty over the self and is limited only by the inherent autonomy (and thus rights) of other people.[53] This notion of autonomy is not quantifiable—"people to whom autonomy is ascribed are neither more nor less autonomous than anyone else; all competent adult persons possess the right to be self-governing to the same degree."[54] Under ascriptive autonomy, paternalistic[55] interventions by the

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49. Refer to notes 50–60 *infra* and accompanying text (reviewing Richard Fallon Jr.'s descriptions of ascriptive and descriptive autonomy).

50. Fallon, *supra* note 35, at 876–77.

51. *See id*. at 877–78

52. Refer to Part II.C *infra* (discussing system limitations).

53. Fallon, *supra* note 35, at 890 (observing that "[a]scriptive autonomy entails sovereignty within a sphere bounded by the requirement of respect for the rights of others").

54. *Id*. at 891.

55. "Paternalistic" refers to those interventions that are done with the individual's well-being as the goal. *See* Feinberg, *supra* note 34, at 3. Paternalistic interventions contrast with state limitations on individual action that are based on other concerns (for example, the rights of others or public health and safety).

Paternalism trumps autonomy under a conception of autonomy either acknowledging that individuals do not function autonomously in all circumstances (weak paternalism), or that in some cases individuals acting "autonomously" are not really acting in their own best interests (strong paternalism). BEAUCHAMP & CHILDRESS, *supra* note 19, at 277–78. Weak paternalism is not inconsistent with autonomy because it is basically designed to facilitate what would have been the individual's decision had all the requirements of autonomy been met (for example, if an individual lacks the capacity to understand the decision at issue, then a choice might be made for him based on an analysis of what the individual himself would have chosen had he truly understood the issue at stake). *See id*. at 277. Arguably, weak paternalism is not really paternalistic action at all. *Id*. at 278. On the other hand, strong paternalism is inconsistent with autonomy. If autonomy is an acknowledgment—both that individuals have inherent sovereignty over their persons and that the individual is the best judge of what is in her

state are not permissible, either to promote individual autonomy or to limit the individual's ability to give up autonomy.[56] Kantian theory supports this notion by suggesting that individuals have inherent worth and self-sovereignty that cannot be given up.[57]

Under a descriptive conception, by contrast, autonomy depends on certain capacities and varies among different people in different circumstances.[58] If someone can be said to be more or less autonomous, paternalistic interventions to promote autonomy may be appropriate.[59] A descriptive theory of autonomy is compatible with governmental interventions (restrictions) designed to assure or increase autonomy of individuals.[60] A descriptive theory also allows for limitations on waivers of autonomy so that autonomy overall may be maximized or, alternatively, where autonomy is not maximized, by allowing a waiver (either because the autonomy given up is too great or because the waiver itself is not truly autonomous). The greater the autonomy given up,[61] the less willing we should be to allow a waiver without strong assurances that the waiver itself is autonomous.[62] In other words, if the ultimate goal is promotion of autonomy, then waivers of rights promoting descriptive autonomy should be allowed only to the extent that the waiver

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interests—then there is no room for a strong theory of paternalism, which presupposes that an external actor can judge what actions would be in an individual's best interests. That is to say, absent some incapacity that interferes with autonomy, there is no room within the notion of autonomy for external determinations of best interests. If the individual's decision is truly autonomous, it is *de facto* in her best interests as she defines them (and that is the only definition that matters). *See id*. at 277.

56. *See* Fallon, *supra* note 35, at 890–94 (describing ascriptive autonomy as "hostile" to paternalism).

57. *See* Feinberg, *supra* note 34, at 13.

58. *See* Fallon, *supra* note 35, at 877 (observing that descriptive autonomy is a matter of degree and that those people with self-awareness may be highly autonomous while others who lack self-restraint may not be autonomous at all).

59. Professor Fallon identifies four elements that comprise descriptive autonomy: (1) "critical and self-critical ability"; (2) "competence to act"; (3) "sufficient options"; and (4) "independence of coercion and manipulation." *Id*. at 886–89. Some of these elements are less developed than others. For example, Professor Fallon appears to include both physical and mental ability under the notion of "competence to act," without much discussion of the different implications of each. *See id*. at 888. Refer to notes 122–26 *infra* (analyzing these elements in depth). Suffice it to say for now that I agree with Professor Fallon's assertion that autonomy has both descriptive and ascriptive components and that both of these notions are crucial for understanding waivers.

60. *See* Fallon, *supra* note 35, at 877–88 (giving the example that regulating cigarette advertising that lures people into smoking may promote descriptive autonomy).

61. Another way to think about this is to consider the extent to which the right in question is linked to autonomy. Refer to note 185 *infra* (reviewing Mill's and Professor Smith's views on the relationship between autonomy and certain liberties).

62. *See* Feinberg, *supra* note 34, at 14 (discussing his reasoning regarding proof of voluntariness).

itself is autonomous, and the autonomy given up is outweighed by the autonomy exercised by the waiver decision.

Although a large proportion of individual rights have some implications for autonomy, not all do. Law in a liberal state is presumably designed to promote or protect autonomy,[63] but each rule within the system is not necessarily designed to recognize or to protect individual autonomy. However, once the system is in place, certain rules are required to assure that the system continues to work as envisioned.[64] This category will be referred to as "system limitations."

A. Ascriptive Autonomy

Waivers of rights designed to respect ascriptive autonomy are the most problematic.[65] This is the paradox of autonomous waivers—to give up autonomy. The state cannot interfere with individual autonomy under an ascriptive conception, nor can the individual give up the "moral entailments of personhood."[66] Rights that implicate ascriptive autonomy can be given up in the sense that the state may not interfere with the individual's decision to give up the right.[67] However, the state cannot uphold a waiver of ascriptive autonomy either.

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63. *See* Smith, *Constitution and Autonomy*, *supra* note 19, at 177, 183.

> The turn from liberty to autonomy reflects a shift from higher law views that justified the liberal state as the means of achieving a specific substantive goal, securing certain natural rights, to more relativistic stances that defend the state because it allows for the pursuit of self-chosen ends, now held to be the only ends that are legitimate.

Id.

64. Refer to Part II.C *infra* (discussing system limitations).

65. *See, e.g.*, Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (stating that "[c]ourts indulge in every reasonable presumption against waiver"). Examples include the waiver of the right to jury trial, to associate, and waiver of rights granted by the Bill of Rights. *See id*.

66. *See* Fallon, *supra* note 35, at 890–91 (remarking that under an ascriptive view of autonomy, "all competent adult persons possess the right to be self-governing"); *see also* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 14 (J.W. Gough ed., Macmillan Co. 1956) (1946) ("For a man not having the power of his own life cannot by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases.").

67. This has some interesting implications for control over bodily integrity. For example, the Supreme Court has concluded that the right to refuse unwanted medical treatment was so rooted in U.S. history, tradition, and practice as to require special protection under the Fourteenth Amendment. Cruzan v. Dir. of Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990). Because, under an ascriptive theory, the state can neither disallow nor uphold a waiver of the right to control bodily integrity, the notion of waiver of informed consent may seem problematic. Refer to Part IV.A *infra* (discussing waiver of informed consent).

In practice, few waivers are barred under ascriptive autonomy.[68] One rare example, however, is the restriction on selling oneself into slavery. Under an ascriptive notion, the state cannot intervene and punish someone who decides to sell himself into slavery, and may not even be able to invalidate the decision unless the decision infringes other individuals' autonomy. Determining what decisions have purely individual repercussions is the crux of the problem.[69] The state cannot step in and restrict autonomy in ascriptive cases based solely on concerns about the individual giving up autonomy, but must justify the interference on some other ground.[70] For example, state restrictions on things such as prostitution[71] and illegal migrant workers[72] (two examples often compared with the sales of one's body or labor into slavery) are sometimes justified because of their effect on other people. In the absence of "other-regarding" concerns, the state can neither restrict nor enforce a contract for slavery if the individual who initially agreed to the servitude chooses not to uphold her end of the bargain. Total and permanent control over one's self (body) is not something that can be transferred (such a contract would be voidable at the very least).[73] Although contracts

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68. Usually ascriptive and descriptive categories overlap. That is, some rights reflect values related to ascriptive autonomy, but the rules (laws) developed to implement or protect the underlying rights focus on descriptive autonomy. For example, the Fifth Amendment right against self-incrimination presumably reflects, in part, the societal value of individual self-sovereignty and thus ascriptive autonomy, but the *Miranda* warnings are designed to facilitate individual knowledge of rights and thus exercises of descriptive autonomy. Many of the rights protected by the U.S. Constitution's Bill of Rights fit this categorization. *See* U.S. CONST. amends. I–IX. Although laws based on an ascriptive conception of autonomy are rare (if not non-existent), laws based on a descriptive notion of autonomy are quite prevalent. Included here are legal protections designed to assure promotion and protection of individual autonomy such as informed consent, fiduciary obligations, and minimum wage laws. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (disallowing waiver of minimum wage laws).

69. The "other-regarding" issue has the potential to swallow the general rule because we might be able to define almost anything in terms of its "other-regarding" effect. One way to address this issue is to require a process for societal agreement regarding restrictions on autonomy. Refer to note 185 *infra* (discussing Professor Smith's preference for a theoretical process where individuals mutually decide upon the limits of freedom).

70. For example, Feinberg notes that a ban on slavery can be justified because weakening respect for human dignity can lead to harm to nonconsenting parties. Feinberg, *supra* note 34, at 13. State interests in protecting nonconsenting parties may be strong enough to justify interference with individual liberty and may even allow for state action (criminal penalties) against the individual parties involved.

71. *See, e.g.*, ALA. CONST. amend. No. 688 (1901) (outlawing prostitution).

72. *See, e.g.*, CAL. LAB. CODE § 970 (West 2003) (outlawing misrepresentations designed to lure migrant workers to another place of work).

73. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219, 227–28, 243–45 (1911) (holding that a state statute which requires compulsory service to pay a debt constitutes involuntary servitude and violates the Thirteenth Amendment of the U.S. Constitution).

for personal services are not slavery, the analysis may be similar. In a contract for personal services, the individual retains the right to refuse to accord the services.[74] While monetary damages are an appropriate remedy in such cases, specific performance is not.[75]

The practical effect of ascriptive autonomy is small, and will generally turn out not to be a limiting factor. In all cases where it is a limiting factor, there should be some prior indications that ascriptive autonomy is at issue. Specifically, the cases should be analogous to the slavery situation, and are likely to be focused on the sale or other "use" of one's physical body. For example, the appropriateness of surrogate gestational motherhood ("womb donation," where a woman carries a fetus genetically unrelated to her and without any intent to rear the child after birth) has raised questions of waiver of ascriptive autonomy.[76] Yet, despite the limited real-world impact, the ascriptive conception is useful for explaining why there are some limits on waivers of certain rights that are essential for autonomy, even when the waiver itself appears to be completely autonomous and the effect on other people's autonomy is insignificant.

B. Descriptive Autonomy

Waivers of rights that promote descriptive autonomy are not inherently inconsistent. A descriptive theory allows waivers of autonomy if, and only if, the waiver both promotes autonomy and promotes more autonomy than is lost by sacrificing the right. Because the goal is to increase autonomy, governmental interference with waiver is permissible if the waiver would have resulted in a decrease in overall autonomy, taking into account the autonomy entailed in the waiver decision. The challenge is to balance the degree to which the waiver decision is autonomous and the degree of autonomy given up because of the waiver. That

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74. *See* Kronman, *supra* note 14, at 783 (noting that a contracting party who later regrets his agreement may abandon that agreement and compensate the other party).

75. *Id.* at 779, 783 (explaining that allowing an employer to compel specific performance would be inappropriate because it would, in effect, make an employment contract enslaving). One way to think about this is to say that a contract for personal services is voidable. It is valid when made, and continues in force until the party obligated to perform the personal services fails to do so. Equity principles can then be applied to allow monetary damages to the other party if appropriate, but specific performance of the contract would not be permitted.

76. *See, e.g.*, David H. Smith, *Wombs for Rent, Selves for Sale?*, 4 J. CONTEMP. HEALTH. L. & POL'Y 23, 33–34 (1988) (considering the analogy between gestational surrogacy and contracts for slavery). However, even this may not be a proper example because womb donors remain free to terminate the pregnancy within the appropriate legal limitations on abortion, and consequently, the "waivers" are not comprehensive.

is, if the waiver of a right decreases autonomy, then that loss of autonomy should be counterbalanced by the increase of autonomy gained by respecting the waiver decision. For correspondingly smaller waivers of autonomy, the waiver itself may be less autonomous.

In some cases the balancing may be done ahead of time, on a general level.[77] For example, Professor Gerald Dworkin points out that some state paternalistic actions are justified because they are "the only feasible means of achieving some benefit which *is* recognized as such by all concerned."[78] Maximum weekly work hours[79] and even strict liability protections[80] fit into this category.[81] These are laws designed to increase overall descriptive autonomy, but to do so, they restrict individual autonomy in specific cases by limiting the extent to which individuals can opt-out of the protection. However, they do so not because individuals in each case are unable to recognize or judge their own interests (for example, because the individual lacks autonomy), but rather because the only way to assure protection of the interests in question (to which everyone agrees initially) is to make an across-the-board rule, enforced by the state.[82] In other words, the

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77. This is based on the concept of a social contract. Professor Gerald Dworkin argues that this includes "consent to a system of government, run by elected representatives, with an understanding that they may act to safeguard our interests in certain limited ways." Dworkin, *supra* note 34, at 29.

78. *Id*. at 23.

79. *Id*. (arguing that legislation forbidding employees to work more than forty hours per week is paternalistic because it is a way for society to impose its own conception of the employees' best interests upon them).

80. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963) (imposing strict liability in tort upon a manufacturer); Linn v. Radio Ctr. Delicatessen, Inc., 9 N.Y.S.2d 110, 111–12 (N.Y. Mun. Ct. 1939) (holding that a pastry manufacturer could not disclaim liability for a foreign substance in its food because it would be against sound public policy). *But see* Ausness, *supra* note 2, at 294, 298 (arguing that individuals should be allowed to waive product liability based on both autonomy and efficiency claims).

Arguably, waivers in the negligence context are limited because of their "other-regarding" effect. That is, the negligence standard is an efficiency standard, so a waiver of negligence would allow an inefficient societal result which has implications for other individuals' autonomy. *See* Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1605–12 (1997) (discussing Judge Posner's view that most tort law rules, including negligence, promote economic efficiency).

81. For example, unemployment compensation and usury laws cannot be waived. *See, e.g.*, Southwestern Bell Tel. Co. v. Employment Sec. Bd. of Review, 502 P.2d 645, 653–54 (Kan. 1972) (unemployment compensation); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1515, at 731–32 (1962) (usury laws).

82. This is a type of rule-utilitarian argument. Refer to note 29 *supra* (noting that "[r]ule-utilitarianism seeks to effectuate rules that will generally result in the greatest good"). The best state of affairs (the maximization of autonomy) occurs if a general rule is applied across the board. The "agreement" here is *a priori*. That is, theoretically, individuals would agree ahead of time, not knowing their individual circumstances at the

interest identified at the outset is in having a maximum work hours standard that applies to *all* situations. If individuals are allowed to opt-out, then the protection would not function.[83] Individual exceptions are not allowed because they would either undermine the general rule (thus implicating other people's autonomy)[84] or because of the belief that some individuals could never make a truly autonomous decision to waive the protection due to the power inequities of the relationship. Autonomy may always be absent from relationships with significant power differentials;[85] furthermore, measuring autonomy in these situations would be so difficult it may be practically impossible or unduly burdensome.[86]

Therefore, waivers of rights designed to promote descriptive autonomy may be restricted on a number of bases. Society (individuals collectively) may determine that the balance of autonomy overall generally favors protection[87] because (1) allowing individual waivers would undermine the autonomy of others; (2) individual waivers could never be autonomous; or (3) the burden of proving that the waiver meets the requisite level of autonomy in each case may be too costly.[88] Alternatively, in a

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time of a later potential waiver, that waivers should not be allowed.

83. *See, e.g.*, Kronman, *supra* note 14, at 772 (using nondisclaimable warranties of habitability as an example of an instrument of redistribution that is nonwaivable because if it were allowed to be waived, poor tenants would "routinely be required to waive their rights to habitable premises, thereby restoring whatever distributional inequities exist at the outset").

84. Rights conferred upon a private party but affecting the public interest cannot be waived, as such waiver "would thwart the legislative policy which it was designed to effectuate." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945).

85. Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 755, 759, 760 (1978) (discussing inequities in bargaining power).

86. Feinberg, *supra* note 34, at 14 (arguing that testing voluntariness is expensive and fallible).

87. This is akin to Mill's utilitarian argument for restricting slavery. Refer to note 40 *supra* and accompanying text (explaining that Mill's argument for restricting slavery suggests that slavery is per se harmful, thus outweighing any harm that occurs from restricting autonomy). *See also* Richard Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 499–500 (1996) (arguing that the U.S. Constitution itself is an example of this "self-paternalism" because "the framers knew the dangers of policy based on emergency and expediency, and the occasional attractiveness of utility-based or even bigotry-based action, it made sense to prospectively limit what government could do to us and what we could do to each other and ourselves").

88. This is akin to Feinberg's argument in the slavery context. Refer to note 48 *supra* and accompanying text (acknowledging the need for limitations on autonomy because of practical concerns). *See also* Kronman, *supra* note 14, at 768–69 (suggesting that a rationale for restricting waivers of certain contractual entitlements may be based on the concern that "if most of the waivers that are given are procured through fraud, and if the fraud can rarely be proven, the inefficiencies of a nonwaiver rule may be outweighed

particular situation the autonomy given up by waiver may outweigh the autonomy of the individual's decision to waive; however, this determination must be made on a case-by-case basis. Part III examines waivers of descriptive autonomy in more detail.

C. System Limitations

Many rights cannot be waived, not because of the link between the right and autonomy, but because of the implications of waiver for the system as a whole.[89] For example, at trial, criminal defendants cannot waive the right to have guilt proven beyond a reasonable doubt,[90] nor can they waive the subject matter jurisdiction of a court.[91] These are examples of procedural protections designed to assure that our criminal justice system functions in a particular way.[92] There is nothing in and of itself valuable, from an autonomy standpoint, about limiting the issues that different courts can adjudicate. In other words, the subject matter jurisdiction of a court is not a right that is designed specifically to promote individual autonomy. Moreover, we can envision a truly autonomous (and rational) decision by an

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by the greater inefficiency of enforcing too many fraudulent bargains"). Kronman also notes that information asymmetries often create this situation. *Id*. at 770.

89. *See, e.g.*, Garnett, *supra* note 87, at 496 (arguing that "we often balance our general preference for unfettered respect for consensual arrangements against other concerns . . . aim[ed] at increasing systemic efficiency").

90. This is true in cases where the defendant does not enter a guilty plea. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that the requirement of proof beyond a reasonable doubt in a criminal charge is constitutionally mandated).

91. King, *supra* note 2, at 133 ("[S]ome deals—an agreement to circumvent subject matter jurisdiction or an agreement to be sentenced by orangutans . . . [are unenforceable] . . . because of the harm such agreements cause to an interest or value independent of the preferences of the defendant and prosecution." (footnote omitted)). Professor King stresses, however, that the category of subject matter jurisdiction encompasses a number of issues and may not serve a useful purpose for identifying unwaivable errors. *Id*. at 145–47; *see also* Zacharias, *supra* note 2, at 420 (discussing system issues with respect to waivers of conflicts of interest).

> Society may also desire unconflicted representation as a means to further the pursuit of truth, or, at least, of appropriate results within the adversary system . . . . [It] has a right to insist that, when the adversary system is invoked, the processes work in accordance with the system's premises.

Id.

92. We might say that these rights are necessary to ensure system integrity (reliability) and thus required to maintain support for the system in a liberal society. Alternatively, it may be possible to argue that these are really issues of waivers of rights that have implications for other individuals. But it is hard to see how this is so, except that waivers in this context would undermine the system as a whole and thus affect other people. The concern in the latter situation is with indirect effects. So someone analyzing these process rights under a "harm to others" theory may come to the same conclusion I do in limiting waivers.

individual to waive a jurisdictional bar, and such a decision would not implicate the individual's inherent right of self-sovereignty or interfere with protections put in place to assure autonomous decisions and actions. But this and other rules promote the type of criminal justice system our society has chosen. Allowing individual waivers of these kinds of rights[93] would undermine the system, and ultimately undermine the goal sought to be achieved by putting the original process or protection in place—to assure a system that guarantees the greatest protections for each individual's autonomy.

Limitations on waivers that do not directly implicate autonomy may appear difficult to reconcile with the theory described here. It is possible, however, to conceive of these rights, and the restrictions on their waiver, as ones that individuals would agree to in advance; individuals may do so either specifically, or more likely, by agreeing to be governed by representatives who then put forward the specific procedural rules.[94] If we accept this social contract explanation, limitations on waiver of such rights are compatible with an autonomy theory. Consider the difference between what cognitive behavioral psychologist Jean Piaget refers to as "constitutive" and "constituted" rules.[95] The former are the rules required for the system to function—they are necessary preconditions for creating any rules in the first place.[96] The latter are rules created under the system of constitutive rules.[97] For example, Rawls's hypothetical construct of a "veil of ignorance" is a type of constitutive rule—that is, all (constituted) rules in a just society should be created under a fair situation where individuals are

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93. The term "procedural right" does not mean a less important right. Thus, one might talk about fundamental procedural rights, such as the right to jury trial. *See, e.g.*, Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (stating that courts will "indulge every reasonable presumption" that the right to a jury trial has not been waived).

94. *See* Dworkin, *supra* note 34, at 29 (drawing a distinction between specifically requesting enforcement of a measure and electing a government to make that decision on the public's behalf).

95. JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 92–93 (1932).

96. *See* Arthur J. Dyck & Herbert W. Richardson, *The Moral Justification for Research Using Human Subjects, Use of Human Subjects*, *in* BIOMEDICAL ETHICS AND THE LAW 245–46 (James M. Humber & Robert F. Almeder eds., 1976) (describing a social system's need for both benefits and structural values that secure those benefits); Hans Jonas, *Philosophical Reflections on Experimenting on Human Subjects*, 98 DAEDALUS 219, 228 (1969) ("Society . . . cannot 'afford' a single miscarriage of justice, a single inequity in the dispensation of its laws, the violation of the rights of even the tiniest minority, because these undermine the moral basis on which society's existence rests.").

97. *See* Dyck & Richardson, *supra* note 96, at 244–45 (explaining that rules that prevent harm to individuals can be waived if the potential benefit outweighs the risk of harm, but violations of structural values cannot be tolerated because such violations could compromise the social systems from which all benefits are derived).

unaware of their particular situation and needs, making them free to be "objective."[98] To the extent that a right implicates a constitutive rule, individuals may not waive it because its absence would undermine our ability to create any other governing rules and to enforce our pre-existing constituted rules.[99] Of course, as with difficulties in drawing lines between individual actions and other actions, it is not always clear which rules may be deemed constitutive and which are constituted.

Alternatively, we might justify system limitations on individual autonomy because the waivers in question affect other people. Allowing an individual to be found guilty (in the absence of a plea of guilty) without the requisite level of proof, even if the individual waives the burden of proof, makes it more likely that the determination of guilt is erroneous. A society that wrongfully labels and punishes innocent people may diminish the autonomy of both the innocent person in question as well as people generally who feel they cannot act freely for fear of wrongful prosecution and punishment. Or, to tie in with Piaget's framework, undermining constitutive rules will lead to a breakdown of society (because other rules cannot be formed or enforced in their absence), thus harming other people. In either event, both arguments serve to justify limitations on individual autonomous waivers of pure process rights.[100]

Alternatively, system limitations may be necessary not because the rule in question functions as a constitutive rule (required for the formation of the system in the first place), but because at this point, given the currently functioning system, changing the rules may result in unintended problems.[101] That is to say, because each individual functioning within the system will be unable to know all the effects of a change, and because society is a complex system, any small change in one part of the system will have implications for numerous other parts.[102] As a

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98. Refer to note 29 *supra* (discussing Rawls's adaptation of Kantian ethics).

99. *See* Dyck & Richardson, *supra* note 96, at 245–46.

100. Many rights have both procedural and substantive components. For example, the Fourth Amendment protections against unreasonable searches and seizures are generally procedural in nature, but ultimately are designed to protect individual privacy, an inherent part of autonomy. *See* Smith, *Constitution and Autonomy*, *supra* note 19, at 190 (discussing the Supreme Court's application of "right to privacy" in Fourth Amendment cases); Spritzer, *supra* note 2, at 478–79 (disagreeing with the Court's decision in *Schneckloth v. Bustamonte* that the Fourth Amendment does not have anything to do with "promoting the fair ascertainment of truth at a criminal trial").

101. *See* 1 HAYEK, *supra* note 27, at 60 (explaining that an ordered society is the result of evolution constrained by certain guiding principles rather than an arrangement of discrete elements).

102. *Id*. This is also the basis of "chaos theory" (also termed "complexity theory").

result, there may be limits on individual waivers of rights that are designed merely to structure the system in a particular way.[103]

Moreover, some rights are considered to be waived if they are not asserted at the appropriate time. The rights in question may be either process protections or descriptive autonomy protections that otherwise could be waived. Failure to act within a specific timeframe results in what might be called constructive waiver, and is sometimes referred to as forfeiture, procedural default, or laches.[104] Timeframe limits are necessary to assure that the system functions. In addition, other people may rely on the waiver, and thus the time limitations function to protect their interests. Arguably this category does not entail true waivers because there are no autonomous decisions about each right given up. A number of experts in criminal procedure have sought to restrict the definition of waiver in such a way. For example, Professor George Dix argues that waivers include only a defendant's "conscious willingness to forgo exercise of a right."[105] Professor Ralph Spritzer distinguishes between waivers and procedural default,[106] and Professor Peter Westen stresses the difference between waiver and forfeiture.[107] Such definitional limitations of the notion of waiver make sense. However, even if included, restrictions on such waivers can be justified because of the reliance of (effects on) others and the need for finality in the system of laws.

Although there remains much to be said regarding system limitations, such analysis is beyond the scope of this Article,

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103. *Id*. at 61.

> The preservation of a free system is so difficult precisely because it requires a constant rejection of measures which appear to be required to secure particular results, on no stronger grounds than that they conflict with a general rule, and frequently without our knowing what will be the costs of not observing the rule in the particular instance.

Id.

104. Laches is the lapse of a right due to a failure to assert it. BLACK'S LAW DICTIONARY 874 (7th ed. 1999). The two elements are: (1) "the plaintiff unreasonably and inexcusably delayed" in bringing his claim, and (2) the delay materially prejudiced the defendant. Laura M. Burson, Comment, *A.C. Auckerman and the Federal Circuit: What Is the Standard of Review for a Summary Judgment Ruling on Laches or Equitable Estoppel?*, 32 LOY. L.A. L. REV. 799, 804 (1999).

105. Dix, *supra* note 2, at 196.

106. Spritzer, *supra* note 2, at 474–75 (defining procedural default as "the loss of a right through a failure by the accused or his representative to assert the claim in a prescribed manner or at a required time").

107. Westen, *supra* note 2, at 1214, 1238 (noting that forfeiture can occur without an individual "ever having made a deliberate, informed decision to relinquish" the right in question and concluding that forfeitures are justified by the overriding interests of the state, not the consent of the defendant as is the case in waivers).

which is designed to focus primarily on autonomy rights and waivers within the individual realm. But even so, we must acknowledge the existence of system limitations on individual autonomy, even in a society that seeks to promote individual freedom over all else. The rationales justifying such limitations include: (1) the necessity of the rule for the system to function initially; (2) the potential effects on others (including reliance); and (3) the unintentional effects of interfering with a currently functioning and evolved system.

D. Summary

This section has identified three categories of "rights" one may seek to waive: ascriptive, descriptive, and systems. It is worth pausing for a moment to consider how this framework might be applied. The issue is whether the state should enforce or recognize an individual's waiver of a particular right. A determination that a waiver is not permissible is not, in itself, grounds for criminal or civil penalties against the person waiving the right.[108] An impermissible waiver would simply not be recognized or enforced, or perhaps be voidable by the individual who waives the right in the first place.[109] Where both parties are satisfied with the result(s) of the waiver, no state interference is warranted. Only where one party—presumably the one who waived the right in question, but possibly another party affected by the waiver—challenges the ultimate outcome must the state decide whether to enforce the waiver (let the result stand) or to negate the waiver (which may involve either a determination that the waiver was invalid in the first place, or voidable). Unlike an invalid waiver, a voidable waiver would be considered valid at the time of inception, but could be voided by the individual who

108. Saying that an action lacks autonomy and need not be respected on that ground does not mean that we, as a society, may not continue to allow the action, or even hold the individual responsible for the consequences of the action. But these determinations must be made on different grounds than autonomy. Actions that are non-autonomous, such as yawning or sneezing or sleepwalking, are not in and of themselves bad or even problematic. But consider the example of a sleepwalker who wanders out of the house and destroys a neighbor's property. Despite the fact that the sleepwalker's actions were not autonomous (in the sense of not being intentional), we may still hold the sleepwalker responsible for paying for the damage. The theory of responsibility is not based on the fact that the sleepwalker could have controlled his actions, but that he should have taken steps to prevent the occurrence (perhaps by installing a door alarm that would awaken him when he attempts to exit the house). Alternatively, we hold the sleepwalker accountable because we believe it to be fairer in this instance to have him pay for the damage than the neighbor, even though neither is morally at fault.

109. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979) (stating that a contract is voidable if the assent to the contract is induced by duress).

waived the right in question.[110] The difference may have implications both for who can challenge the waiver and the results of the challenge.

Because the starting presumption is that waivers should be allowed, the best way to apply the framework identified above is to begin with a consideration of the reasons for limiting waivers. In general, when faced with a question of whether a waiver should be upheld, a court[111] should first consider whether the right in question raises issues of autonomy. If not, the court must determine whether there are system reasons for limiting the waiver. Many of these reasons have already been identified and courts can draw from pre-existing law (for example, the legal doctrines of laches in contract and forfeiture in criminal procedure).[112] Issues of first impression should be determined by analyzing the extent to which the waiver in question either addresses a constitutive rule—that is, a rule that is important for the functioning of the system as a whole—or raises concerns about the unintended consequences of allowing alterations in an established rule. In effect, this is a balancing test involving the individual's right to autonomous waiver and societal interests in system constraints.[113] If the balance favors societal interests (the burden should be fairly high), the waiver may be disallowed.

Where the right sought to be waived involves autonomy, a court should consider whether the waiver should be restricted because of the implications for ascriptive autonomy. As noted previously, such cases should be extremely rare. If we take slavery as our paradigm example, other waivers should be limited only to the extent that they are strongly analogous to the slavery situation. At issue, usually, will be the use of an individual's physical body, such as in the case of contracts for personal services. Finally, if there are neither system nor ascriptive autonomy reasons for limiting a waiver, a court should consider the issue of descriptive autonomy.

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110. For example, waivers involved in contracts for personal services are voidable. Refer to Part II.A *supra*.

111. Courts will generally be the bodies adjudicating waivers. But it is also possible for a legislature to make *a priori* determinations regarding the permissibility of waivers, and it should take into account the same factors when choosing to exercise this power.

112. The system of contracts could not function if there was not a time bar to challenges. Likewise, the criminal system could not function if every conviction were open to re-examination indefinitely. *See* Westen, *supra* note 2, at 1256 (arguing that the issue with forfeiture in the criminal context is the state reliance on the finality of convictions).

113. *See, e.g.*, *id*. at 1258 (proposing that a defendant's freedom of choice, alone, is not sufficient to justify the waiver of constitutional defenses).

III. ELEMENTS OF A VALID WAIVER

The above framework provides two initial bases for determining when waivers should be limited—some because of system constraints, and others because they interfere with ascriptive autonomy. The final task is to develop in more detail limitations on waivers of descriptive autonomy. Most disputed waivers fall into this category.[114] The issue in these cases is whether society ought to respect an individual's decision as autonomous.[115] In general, we assume that individuals who have certain capacities make autonomous decisions—we do not scrutinize every decision made. Only where the risks of the decision are particularly weighty do we attach additional safeguards to assure autonomy. This results in different standards for evaluating different types of waivers and different safeguards around the waiver process. The following sections first evaluate each element of a valid waiver and then consider the safeguards that have been applied to ensure its presence.

There are few discussions regarding the standards for a so-called "valid" waiver (one that demonstrates the necessary and sufficient level of autonomy). In criminal procedure, most references are to the case of *Johnson v. Zerbst*,[116] which speaks of "an intentional relinquishment . . . of a known right."[117] Contract law standards for valid waiver include disclosure, bargaining, and voluntariness.[118] Despite the slightly different terminology, the elements are all aimed at the same underlying requirements and draw from the concept of autonomy.[119] Two conditions are needed for autonomous action: voluntariness (freedom from controlling

114. Refer to note 68 *supra* (describing the overlap of ascriptive and descriptive autonomy). Even when the underlying values or rights are fundamentally ascriptive, the rules protecting these rights focus on descriptive autonomy. *Id*.

115. The primary question is whether the waiver results in an overall increase in autonomy. Refer to Part II.B *supra*.

116. 304 U.S. 458 (1938).

117. *Id*. at 464.

118. *See generally* Rubin, *supra* note 15, at 513–14 (summarizing the contract law requirements).

119. This is where I part most significantly from Rubin's analysis. Rubin argues that the analysis of voluntariness is too vague to permit useful application to evaluations of waivers and prefers, instead, the implementation of his functional equivalence standard. *Id*. at 492–93. I argue, on the other hand, that except for system concerns, the only basis for limiting waivers is autonomy, and thus the validity of a waiver must be judged against autonomy standards. The "confusion" he sees with the interchangeability of the terms "voluntariness" and "intention" stems not from an inherent problem with the terms, but with the failure to identify from where the standards come—the concept of autonomy.

interference) and intention to act (which includes knowledge and capacity).[120]

Courts often use varying terminology. For example, the Court in *Johnson* lists knowledge separately from intention.[121] Likewise, the contractual requirement of bargaining is a way to test voluntariness, and the disclosure requirement is designed to facilitate knowledge. Similarly, Professor Fallon identifies four factors that comprise his category of "descriptive" autonomy: (1) critical and self-critical ability; (2) competence to act; (3) sufficient options; and (4) independence from coercion and manipulation.[122] Critical ability and competence are individual capacities necessary for intention.[123] Independence from coercion is an aspect of voluntariness.[124] The requirement of sufficient options[125] speaks in part to the voluntariness requirement, and in part to the intention requirement. But not all limitations of options necessarily limit autonomy—there will be situations in which individuals may feel they have no choice, but the decisions in those cases should not be deemed involuntary and thus lacking autonomy.[126]

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120. ARISTOTLE, *Nichomachean Ethics*, *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1752 (Jonathan Barnes ed., 1984) (describing involuntary actions as those stemming from compulsion). Aristotle claims that knowledge is also a requirement for voluntariness. *Id*. at 1753 ("Everything that is done by reason of ignorance is *non*-voluntary . . . ."); *see also* RALPH MCINERNY, AQUINAS ON HUMAN ACTION: A THEORY OF PRACTICE 14–20 (1992) (discussing Aquinas's views on voluntariness, knowledge, and intention). Although both Aristotle and Aquinas use the terms nonvoluntary and involuntary to refer to actions that stem from a lack of knowledge, I characterize knowledge as a requirement for intention and restrict "voluntariness" to the absence of controlling influences. *See* BEAUCHAMP & CHILDRESS, *supra* note 19, at 121 ("Virtually all theories of autonomy agree that two conditions are essential: (1) *liberty* (independence from controlling influences) and (2) *agency* (capacity for intentional action. However, disagreement exists over the meaning of these two conditions . . . ."); *see also* Neil Scheurich, MORAL ATTITUDES AND MENTAL DISORDERS, 32 HASTINGS CENTER REP., Mar.–Apr. 2002, at 15–16 (free will means "that a process of deliberation has its own internal momentum and agency and is guided by the individual in question").

121. *See Johnson*, 304 U.S. at 464 ("A waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege." (emphasis added)).

122. Fallon, *supra* note 35, at 886–89.

123. Refer to Part III.B *infra*.

124. Refer to Part III.A *infra*.

125. For a discussion of the role of options in autonomy, see MAY, *supra* note 19, at 36–37, 71–73.

126. Refer to Part IV.A *infra* (advocating waiver of informed consent in medical contexts where the autonomy given up is balanced against the autonomy of the waiver itself).

A. Voluntariness: Freedom from Coercion

There are very few legal definitions of voluntariness, and even the ethical dimensions of the concept remain unclear.[127] Although the exact contours may not be established, it is often stated that actions that occur as the result of coercion are not voluntary.[128]

For example, wills are voided if the testator was subjected to undue influence,[129] criminal confessions are voided if coerced,[130] and contracts entered into under duress are voidable.[131] In *Schneckloth v. Bustamonte*,[132] the Supreme Court stated that a waiver is not valid if "coerced, by explicit or implicit means, by implied threat or covert force."[133] But the definition of coercion has never been clearly established—only what counts as coercion in particular cases.[134]

Actual force is clear-cut,[135] but rare in practice.[136] More complicated are the other pressures on individuals that may

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127. *Black's Law Dictionary*, for example, uses an extremely broad definition of voluntary: "Done by design or intention . . . . Unconstrained by interference; not impelled by outside influence." BLACK'S LAW DICTIONARY 1569 (7th ed. 1999).

128. Dix, *supra* note 2, at 243 ("'[I]t may prove impossible for courts to determine whether a surrender of rights is truly "voluntary." . . . But we can ensure that decisions are not coerced by pressures which the criminal process itself creates or which result from discriminations within the reach of established constitutional protections.'" (alterations in original) (quoting Michael E. Tigar, *The Supreme Court, 1969 Term—Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 25 (1970))); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 109–10 (1996) (noting that consent in contracts can be either voluntary or coerced—implying that coerced agreements are the opposite of voluntary ones).

129. 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 15.3, at 718–20 (1960).

130. Colorado v. Connelly, 497 U.S. 157, 166–167 (1986).

131. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979). There are differing notions of what counts as "coercion" under contract law. *See* Sian E. Provost, Note, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629, 633 (1995).

132. 412 U.S. 218 (1973).

133. *Id.* at 228 (discussing Fourth Amendment waivers).

134. Individual perception appears to play a significant role in determining what constitutes coercion. *See* John Monahan et al., *Coercion to Inpatient Treatment: Initial Results and Implications for Assertive Treatment in the Community*, *in* COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW 3, 23 (Deborah L. Dennis & John Monahan eds., 1996). Nonetheless, the Supreme Court has stressed that voluntariness in the criminal context is "defined not by a defendant's subjective perception, but by public policy concerns." Kaplan & Dixon, *supra* note 2, at 953–54.

135. In fact, the legal concept of voluntariness first appeared in Roman canon law and the German Code of Criminal Procedure, the *Constitutio Criminalis Carolina* of 1532. Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 93 (1988). Both focused on the unreliability of a tortured confession (a common practice at the time). *Id.* at 93–94. Likewise, contract law generally defines duress as physical force. *See* Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 511 (2001).

136. E. Allan Farnsworth, *Coercion in Contract Law*, 5 U. ARK. LITTLE ROCK L.J. 329, 330 (1982) (stating that "cases of duress by physical compulsion are rare"). Professor Farnsworth also notes that cases of duress by threat of physical harm are also rare. *Id.*

compromise their freedom. Human interaction is never free of pressures. Many pressures are inherent and constitute a normal and often desirable part of relationships. Such pressures are often intended to, and do in fact, influence the person to whom they are directed. Establishing which pressures affect behavior so extremely as to deprive it of some legal consequences it might otherwise have may be difficult. The philosopher Alan Wertheimer notes that inducements, persuasion, and authority are all forms of pressure that may be coercive in certain circumstances.[137] He distinguishes between a threat that is coercive and an offer that is not—a proposal that makes a person worse off (judged against the relevant baseline) is a threat, whereas one that does not is an offer.[138] The classic proposal of "your money or your life" is a threat because the individual's baseline immediately prior included both money and life, and the choice limits the person's options. Others have attempted to define influences along a spectrum ranging from persuasion, to inducements, to threats, to force.[139]

Although it may be impossible to establish definitively the range of actions that may be considered voluntary, we can pinpoint which pressures should be considered improper such that the resulting waiver will not be deemed valid. It is important to recognize that the legal discussion of voluntariness focuses on pressures and threats imposed by others.[140] Thus, internal pressures (such as those imposed by illness), or even imagined outside

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137. Alan Wertheimer, *A Philosophical Examination of Coercion for Mental Health Issues*, 11 BEHAV. SCI. & L. 239, 246–48 (1993).

138. *Id.* at 244; *see also* Farnsworth, *supra* note 136, at 331 (distinguishing a threat from a promise and stating that the former "manifests an intention to do or not do something that is *less* desirable from the promisee's point of view than if the alternative were the case"). Similarly, Professor Zaibert notes that an action "is voluntary if and only if at the time it takes place there exists another option open to the agent . . . . Conversely, [a] movement is involuntary if and only if at the time it takes place there exists no other option open to the agent." L.A. Zaibert, *Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis*, 1 BUFF. CRIM. L. REV. 459, 490 (1998).

139. *See, e.g.*, RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 256–62 (1986) (establishing a continuum of influences ranging from coercion, which is completely controlling, to persuasion, which is completely non-controlling); John S. Carroll, *Consent to Mental Health Treatment: A Theoretical Analysis of Coercion, Freedom, and Control*, 9 BEHAV. SCI. & L. 129, 130–32 (1991); Monahan et al., *supra* note 134, at 17–18 (studying the various levels of pressures that may influence a person's decisionmaking process when considering hospitalization).

140. *See* Benner, *supra* note 135, at 128, 139–42 (stating that the trustworthiness of confessions is no longer the focus of the criminal law requirements of voluntariness; rather, the term is defined in terms of police conduct); Joseph A. Lavigne, *A Misapplication of the Exclusionary Rule to Voluntary Confessions: The Fallacy that Knowingly and Intelligently Made Statements Are Constitutional Prerequisites to Admissibility*, 1999 MICH. ST. U. L. REV. 677, 680–81 (noting that criminal confessions may be voluntary even if coerced as long as the coercion was not the result of government (police) action).

pressures may not invalidate a waiver. For example, the Supreme Court has held that a confession is not involuntary when the defendant disclosed information to law enforcement authorities after being directed to do so by voices in his head.[141] Thus, the concern is not necessarily that a waiver was freely given in some psychological or philosophical sense of the term, but that it is not the result of improper pressures.[142]

Respect for autonomy presupposes that the individual in question will determine which pressures to take into account in making decisions. An external observer can decide whether certain pressures are improper from a societal standpoint, but not whether the individual should incorporate them into her decisionmaking process.[143] Which pressures are considered "improper" depend on an evaluation of the role of the parties

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141. *See* Colorado v. Connelly, 479 U.S. 157, 170–71 (1986) (explaining that the "Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion" (quotation marks omitted)).

142. *See* Kaplan & Dixon, *supra* note 2, at 947–48 (stating that a confession may have been coerced if the result of "threats, misrepresentation, or improper promises"); *see also* Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 206 (1996) (stating that "the emphasis of legally cognizable coercion—duress—appears today to have less to do with questions of 'freedom' or 'voluntariness' than with questions of propriety: 'wrongness' or 'unfairness'").

143. *See* ARISTOTLE, *supra* note 120, at 1752 (stating that "with regard to the things that are done from fear of greater evils or for some noble object . . . , it may be debated whether such actions are involuntary or voluntary"). Aristotle suggests that some actions will be considered voluntary because they are "worthy of choice at the time when they are done," but nonetheless may be considered in the abstract involuntary "for no one would choose any such act in itself." *Id.* at 1752–53. He uses the examples of throwing goods overboard during a storm at sea to protect a crew's safety. *Id.* at 1752. Contrast this with Kant's view that any external influences undermine autonomy. *See* MAY, *supra* note 19, at 48–51 (comparing Aristotle and Kant on this point).

For example, in the context of human experimentation, there is a great deal of disagreement about whether and how much financial compensation should be offered in recruiting subjects because of the concern regarding the coercive effect on the decision to participate. *See, e.g.*, Christine Grady, *Money for Research Participation: Does It Jeopardize Informed Consent?*, 1 AM. J. BIOETHICS 40–69 (2001) (including peer commentaries debating the issue of financial compensation for human experimentation). Determining that compensation should not be offered (or that it is excessive) is a reflection of what pressures we (society) feel are appropriate in this context. *Id.* at 42. It is quite another thing to state that subjects should not be choosing to participate in clinical trials based on financial considerations—a paternalistic imposition on individual liberty to decide whether to be involved in a research protocol. *Id.* The latter replaces the subject's right to autonomous decisionmaking (and thus consideration of whatever factors he or she thinks are appropriate) with a societal determination. *Id.* Consider Justice Brandeis's famous quote regarding the dangers of paternalism: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

involved.[144] Moreover, it is important to recognize that voluntariness is not an all-or-nothing determination; there are degrees of voluntariness.[145] Therefore, the legal issue is whether the action in question lacks voluntariness to the degree that it should be considered involuntary and thus the resulting waiver labeled "invalid." Voluntariness, in this sense, is "best viewed as a social construct rather than as discoverable metaphysical reality."[146]

From a legal standpoint then, the voluntariness of a waiver, or the focus of an inquiry related to voluntariness, depends on the context. In the criminal context the focus is on improper governmental (police) action.[147] In the contract setting, on the other hand, the concern is with an improper threat from a private party.[148] Included are threats of physical harm and illegal or unlawful action.[149] In addition, some threats of legal action have also been held to be improper if they are considered by the evaluating court to be unfair.[150] Identifying which pressures a court or legislature will determine to be unfair is beyond the

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144. *See, e.g.*, Provost, *supra* note 131, at 651 (arguing that determining whether a contract should be invalidated because of "coercion" rests on an analysis of the substantive rights of the parties involved). In other words, determining what counts as an improper pressure depends on the rights of the respective parties to make decisions in the absence of certain pressures. According to Provost, the standard in contract law is fairly vague, but encompasses the notion that a party to a contract has the "right to receive the property of whoever chooses to contract with him . . . and a right to receive that property under conditions that are favorable enough to him." *Id.* at 660.

145. *See, e.g.*, Scheurich, *supra* note 120, at 16 (stating that free will is never absolute, but exists by degrees); Cass R. Sunstein, *A Note on "Voluntary" Versus "Involuntary" Risks*, 8 DUKE ENVTL. L. & POL'Y F. 173, 176 (1997) ("[T]he question whether a risk is run voluntarily or not is often not a categorical one but instead a question of degree . . . . Of course there are interesting background questions about why and when a risk 'codes' as voluntary or involuntary . . . .").

146. Scheurich, *supra* note 120, at 16; *see also* Bigwood, *supra* note 142, at 228 (explaining that "coercion" is a broader concept than "duress," and the latter focuses on a normative baseline determination of the condition the individual ought to be in, rather than a purely descriptive baseline resting on the individual's actual circumstances).

147. Refer to notes 151–53 *infra* and accompanying text (exploring problems with police coercion).

148. *See* Farnsworth, *supra* note 136, at 331 (noting that the *Second Restatement of Contracts* implies that one aspect of determining duress is whether the threat . . . is "of a kind that the law condemns"). *But see* Snyder, *supra* note 8, at 677 (suggesting that the courts distinguish duress from coercion and apply a two-prong test for the latter requiring: "(1) . . . a threat to deprive the victim of a legal right, and (2) the victim must act reasonably").

149. *See* Farnsworth, *supra* note 136, at 333–34 (noting that the "first cases to recognize claims of duress involved threats of physical harm" and later cases recognized "wrongful" or "unlawful" threats).

150. *Id.* at 335 ("'A threat is improper if the resulting exchange is not on fair terms, and . . . the threatened act would harm the recipient and would not significantly benefit the party making the threat . . . .'" (alterations in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(a) (1981))).

scope of this Article. Some initial constraints have already been indicated, but a full exploration of what pressures should be labeled coercive in what circumstances remains to be done.

Interestingly, there seem to be few instances where *a priori* safeguards are put in place to assure voluntariness of waivers.[151] The reason may be, in part, because of the difficulty in designing front-end safeguards against coercion, rather than back-end penalties that (hopefully) serve to prevent improper behavior.[152] Because of this difficulty, the remedy in cases of coercion (or involuntary waiver) is to allow the party who waived the right in question to void his action. Thus, the result is usually to return the parties to their initial position, rather than punish the perpetrator of the improper pressure.[153]

The bottom line is that the voluntariness aspect of a valid waiver needs to be determined on a case-by-case basis, usually after the waiver has been executed. There may be some circumstances so egregious that we can predict, ahead of time, that a court would find the actions in question constitute coercion per se, and thus the resulting waiver would be invalid. Threats of

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151. *Miranda v. Arizona*, 384 U.S. 436 (1966), is a possible example of an *a priori* safeguard against coercion, or at least the courts have interpreted it that way. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 170 (1986) (stating that *Miranda* "protects defendants against government coercion"). However, this Article argues below that *Miranda* is more about assuring knowledge, which is part of intention, than assuring voluntariness (protecting against coercion).

There are a number of cases where courts have questioned voluntariness after the fact. For example, there have been inquiries in the criminal context regarding the circumstances of a custodial interrogation. *See, e.g.*, Mincy v. Arizona, 437 U.S. 385, 396, 401–02 (1978) (discussing a case in which the defendant was wounded and under arrest in an intensive care unit, and despite his request for a lawyer and his protests that he could not think clearly due to pain, the police questioned him for four hours); Gallegos v. Colorado, 370 U.S. 49, 53–54 (1962) (reviewing a case where a fourteen-year-old boy was held for five days without access to his parents or a lawyer); Blackburn v. Alabama, 361 U.S. 199, 205–08 (1960) (recognizing that "coercion can be mental as well as physical" when the defendant was insane, denied access to friends, relatives, and legal counsel, and the deputy sheriff composed the confession); United States *ex rel.* Wade v. Jackson, 256 F.2d 7, 10, 16 (2d Cir. 1958) (describing that the defendant was physically assaulted and deprived of food and sleep for almost twenty-four hours).

152. In effect, the exclusion of Fifth Amendment coerced confessions may function to dissuade police from improper action. *See* Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 1005 (1995) (arguing that the primary rationale for excluding coerced confessions is to discourage improper police methods). But this is a not the same as a safeguard put in place to prevent coercion from occurring in particular cases. An example of such a safeguard might be a requirement that all interactions with suspects or defendants be videotaped (on the assumption that this would restrict unwanted behavior).

153. This is not true in all situations. For example, although not common, police officers can be prosecuted for extreme behavior in coercing a confession under 18 U.S.C. § 242, Deprivation of Rights Under Color of Law. *See, e.g.*, Clark v. United States, 193 F.2d 294, 294–97 (5th Cir. 1951) (illustrating the prosecution of a police officer for beating a suspect to extort a confession).

physical force fall into this category. Likewise, there may be some situations that evince such a large disparity of bargaining power, and thus improper pressures, that we make a societal determination not to allow waivers in these contexts,[154] or perhaps require up-front assurances that the waivers are made freely. For example, consider whether a client can waive her attorney's conflict of interest.[155] In some jurisdictions such waivers are not allowed because of concerns that the lawyer has financial incentives to encourage the waiver and the power[156] to convince her client to agree—basically an across-the-board descriptive autonomy limitation on waivers.[157] Other jurisdictions allow the waivers, but provide a safeguard by requiring that the lawyer "think in terms of the conflict rules."[158] For the most part, however, determination of improper or unfair pressures will occur after the fact and depend on societal standards governing at the time of the waiver.[159] Waivers of descriptive autonomy should generally be presumed voluntary, absent a challenge by a party claiming that the waiver was obtained through coercion.

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154. *See* Anderson, *supra* note 85, at 755–56 (stating that "[w]here the relative bargaining power of the parties is unequal, the extent of non-waivable duties implied by law will be much greater").

155. Limitations on client waivers of a lawyer's conflicts of interest are often based on system concerns with assuring a fair and appropriate adversarial process (and thus limiting a client's ability to choose a lawyer whose independent judgment is compromised). *See, e.g.*, Zacharias, *supra* note 2, at 420 (asserting that, although a client has a right to choose her own counsel, "society has a right to insist that, when the adversary system is invoked, the processes work in accordance with the system's premises"); Zywicki, *supra* note 16, at 308 (describing why the disinterestedness requirement may not be waivable in bankruptcy because of the history of ethical abuses in this area and the concern about public confidence in the system). In other situations, these fiduciary requirements are not waivable because of concerns regarding power differentials.

156. The power may rest, in part, on knowledge differentials, and thus the voluntariness and knowledge categories may overlap to a certain extent.

157. *See* Zacharias, *supra* note 2, at 422 (noting that an attorney has a huge incentive to encourage waiver, because by sending his client to another attorney, a lawyer loses not only that particular case but also risks losing future business). To the extent that fiduciary obligations are imposed to ensure efficiency in specialized exchanges, conflicts of interest may not be waivable. *See, e.g.*, Anderson, *supra* note 85, at 760 (asserting that "the greater the inequality in bargaining power, the greater the difficulty of waiver").

158. Zacharias, *supra* note 2, at 423.

159. *See* Bigwood, *supra* note 142, at 230–31 (stressing that duress (coercion) in contracts will be determined by examining societal standards or the reasonable expectation of the parties).

B. Intention: Knowledge and Capacity to Act

Voluntary action, at minimum, is not the product of an improper controlling influence.[160] For a waiver to be valid, we might also require that the actor demonstrate the intention to act.[161] For an act to be intentional, the actor must understand the act and its consequences.[162]

Knowledge requirements have at least two aspects. Consider a waiver of trial inherent in a guilty plea. There is a variety of information linked to the decision—that the plea involves an admission of guilt, that as a result the adjudicatory process will move directly to sentencing and no trial will be conducted, and that the sentencing may include a number of penalties (for example, jail time, probation, and fines).[163] For each decision, we must establish the following: (1) what information the individual must know for the decision to be considered autonomous, and (2) to what extent the individual must know the information, which is a slightly different issue.[164] So, if we require that the individual understand that his guilty plea will involve an admission that he committed the crime in question and that certain punishments may follow, do we also require that the individual be able to apply the abstract understanding to his own situation (for example, that he may serve a number of years in jail)? To answer this question, we need first to examine the different standards of capacity and their relation to levels of autonomy.[165]

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160. *See* BEAUCHAMP & CHILDRESS, *supra* note 19, at 121 (declaring that autonomy requires "independence from controlling influences").

161. *See id*.

162. Knowledge requires both understanding of the current situation as well as understanding of the consequences of different decisions. Dix, *supra* note 2, at 234 ("[V]alid waiver should require an awareness of the consequences of waiver that a reasonable person faced with the choice would consider."). In *Estelle v. Williams*, the Court applied the rule of preclusion, which lacks the knowing element required by waiver. 425 U.S. 501, 512–13 (1976); *see also* Dix, *supra* note 2, at 221, 224, 229, 234, 267 (noting that there is no such thing as "implied waiver"). *But see Developments in the Law*, *supra* note 2, at 1629 n.1 (stating that the doctrine of waiver of evidentiary privilege differs from traditional concepts waiver in contract or constitutional law, and thus "the holder of an evidentiary privilege can waive that privilege without ever being aware that he had it").

163. *See* Dix, *supra* note 2, at 221–42 (listing ancillary categories of information connected to a guilty plea and detailing the judicial treatment of whether knowledge of the information was necessary for a guilty plea to be upheld as an effective waiver of the defendant's rights).

164. *See id*. (discussing the categories of information a defendant might need to know to make autonomous decisions).

165. *Id*. at 260 ("[A]n effective waiver presupposes a defendant's capacity acceptably to evaluate and to choose among different courses of action. [However,] [i]t is less clear what constitutes the requisite capacity . . . .").

If the validity of a waiver depends on an individual's autonomy, how should we conceptualize different levels of descriptive autonomy? It may not be possible to measure the autonomy of each decision; instead, we can focus on whether the individual in question has the *capacity* to make an autonomous decision, a slightly easier determination. Capacity here is evaluated by looking at whether the individual in question demonstrated the requisite abilities in making a particular decision.[166] It involves neither an abstract determination of overall capacity nor an evaluation of the reasonableness or rationality of the end decision.[167] The former would involve many of the same difficulties as an abstract determination of autonomy (possibly leading to significant interference with individual freedom), and the latter would involve external judgments of the end decision that would essentially negate respect for the individual's autonomy.

The MacArthur competence studies identified four capacities that courts and legislatures have required for autonomous decisionmaking in different situations—choice, understanding, appreciation, and reasoning.[168] Choice refers to the individual's ability to actually make a decision; understanding refers to comprehension of critical information; appreciation refers to a type of "deep" understanding or the ability to apply abstractly understood information to one's own situation; and reasoning refers to the ability to rationally manipulate information in conformance with one's particular preferences.[169] Measuring capacity to make an autonomous decision, rather than autonomy

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166. *See* Jessica Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345, 346–47 (1996) (explaining that if a patient's capacity is impaired, the ability to make a competent decision will be weakened).

167. *See id.* at 350–51 (listing the relevant capacities to be considered in an assessment of competence as the following: the ability to communicate a choice; the ability to understand relevant information; the ability to appreciate the nature of the situation and its likely consequences; and the ability to manipulate information rationally).

168. Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 L. & HUM. BEHAV. 141, 146–47, 153–56 (1997) (discussing each capacity in detail). There were two MacArthur Competence studies: one focused on competence to make medical decisions, and the other focused on adjudicative competence. *See id.* at 141–77 (detailing the MacArthur Adjudicative Competence Study); *see also* Berg et al., *supra* note 166, at 362–74 (describing the MacArthur Treatment Competence Study). There are two aspects of adjudicative competence: competence to assist counsel and decisional competence. *See* Hoge et al., *supra*, at 146. These break down into specific competence related abilities (modeled after instruments identified in the treatment context) including understanding, appreciation, reasoning, and choice. *See id.* at 149–56.

169. *See generally* BERG ET AL., *supra* note 19, at 100–06 (discussing the four factors in the treatment competence setting).

directly, has two distinct advantages. First, capacities can often be measured using standardized tools.[170] Second, evaluating capacity requires less intrusion into individual thought processes, and thus may be less of an infringement on individual autonomous decisionmaking.[171]

Once we identify the capacities at stake, we must determine the standard against which we will judge capacity. Applying the standard will entail choosing which of the four elements (choice, understanding, appreciation, or reasoning) will be required,[172] and thus, evaluated, as well as determining how the elements will be applied.[173] For example, in addition to choosing to apply the understanding element, we will also need to establish what information needs to be understood and to what degree (50%, 75%, and so forth).[174]

There has been little discussion of the level of capacity necessary to waive specific rights. In *Godinez v. Moran*,[175] the Supreme Court held that for Fifth or Sixth Amendment rights, the level of capacity needed to waive a right is equivalent to the level of capacity needed to exercise it.[176] This finding may reflect an acknowledgement that the implications of the waiver in terms of potential effects on the defendant (for example, imprisonment) are as significant as those consequences that follow a trial, and

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170. THOMAS GRISSO & PAUL S. APPELBAUM, MACARTHUR COMPETENCE ASSESSMENT TOOL FOR TREATMENT (MACCAT-T) 1–24 (1998) (detailing a test for health professionals to measure patients' decisionmaking capacities with regard to informed consent).

171. *See, e.g.*, Berg et al., *supra* note 166, at 357–58 (discussing that although measuring capacity requires an examination of an individual's thought processes, specifically the ability to rationally manipulate information, it does not require that the decision be conventional).

172. The four elements do not necessarily align into a hierarchy. *See* Berg et al., *supra* note 166, at 357–58 (explaining that missing any one of the elements may cause incapacitation depending on the circumstances). So the person who fails to evidence appreciation (for example, "I know gangrene is deadly, but I don't believe *my* untreated gangrene will result in my death"), but does evidence reasoning skills (for example, "I prefer medical over surgical treatments since I have obligations to support my family that are not conducive to long recovery periods") is not clearly more or less autonomous than the person who demonstrates the reverse capacities. However, compound application of standards are likely to fall into a hierarchy of stringency (for example, choice alone versus choice plus understanding versus choice plus understanding plus reasoning). *See generally id.* (discussing further this notion).

173. This Article will not discuss constructing competence standards for different decisions in detail. For additional discussion, see *id.* at 375–90 (discussing the application of these components to formulate competence standards).

174. *See id.* at 384–87 (debating whether the degree of competence should be determined by a fixed level of performance or a sliding scale).

175. 509 U.S. 389 (1993) (holding that the competence standard required for pleading guilty or waiving the right to counsel is not higher than the competence level required to stand trial).

176. *Id.* at 391.

thus the individual in question must demonstrate the same capacity to waive trial as to stand for trial.[177] But even if we apply the same standard (for example, understanding and appreciation), the actual requirements may be lower in the sense that the information in question is simply easier to understand or appreciate. For example, a defendant who waives his right to trial does not need to understand the intricacies of trial, or be able to assist counsel in preparing and conducting the trial, but merely needs to understand that he has a right to a trial on the facts of the case and that his plea of guilty gives up that right.[178] The end result is to make it easier for an individual of dubious capacity to waive a right than to exercise it.

Moreover, in some situations, we might be less concerned about the harm of letting someone waive a right than the harm of having him exercise it in a non-autonomous way, particularly when the waiver results in a transfer of decisionmaking authority to another party. Allowing waiver in this context has an end result of allowing even a possibly incapacitated individual to control, at least to a certain degree, what happens to him—here, deciding to grant decisionmaking authority to another person.[179] This, in itself, might be a good that we want to encourage. For example, waivers of an individual's right to make decisions by transferring authority to a fiduciary may be best thought of as "delegations."[180] Accepting the individual's waiver

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177. *See, e.g.*, James F. Drane, *The Many Faces of Competency*, HASTINGS CENTER REP., Apr. 1985, at 18–21 (arguing for and describing a sliding scale of standards in medical situations which increases in rigor as the consequences flowing from decisionmaking become more serious).

178. *See generally* Dix, *supra* note 2, at 260–61 (recognizing the U.S. Supreme Court's suggestion of a distinction between competence to waive assistance of counsel and competence to stand trial).

179. *See* Frankel, *Fiduciary Law*, *supra* note 10, at 808 (explaining that in a fiduciary relationship a person can grant authority for someone to act as his substitute in areas he may not be capable or competent to make his own decisions).

180. "Fiduciary" is a term used to describe a particular relationship between two parties that gives rise to certain legal duties including "good faith, trust, confidence, and candor." BLACK'S LAW DICTIONARY 640 (7th ed. 1999). Fiduciaries include agents, partners, directors and officers, trustees, executors and administrators, receivers, bailees, guardians, and some professionals such as attorneys or physicians. *See, e.g.*, Frankel, *Fiduciary Law*, *supra* note 10, at 795–96, 816. Fiduciary relationships are generally marked by power differentials with the entrusting party ("entrustor") being dependent on the fiduciary. *See id.* at 809. In almost all situations, a fiduciary relationship must be entered into voluntarily. *Id.* at 801. The entrustor makes a decision to transfer decisionmaking authority within a defined scope to the fiduciary—in essence a waiver of autonomy. *See id.* at 808 (observing that the fiduciary effectively acts as a substitute for the entrustor). But the waiver in this case does not simply entail giving up the right in question, rather it involves a delegation of decisionmaking authority to a recognized expert (and the delegation is because of that expertise). *See id.* at 809. Because there are often both knowledge and skill differentials between the fiduciary and the entrustor, it is

allows that exercise of autonomy (the choice to have someone else make the decision) to be respected. In fact, the legal obligations imposed on fiduciaries are essentially descriptive autonomy protections.[181] Transfer of decisionmaking authority to an expert through a fiduciary relationship allows an individual to exercise autonomy, both by allowing the transfer and by ensuring that decisions are made in light of the individual's wants and preferences—basically a proxy for autonomy.[182] For delegations to fiduciaries, or other situations where there are safeguards (legal or ethical duties required of one of the actors) in place, we might be comfortable accepting a waiver from individuals who demonstrate minimal capacity—say a basic understanding that they hold the right in question and that their action results in waiving the right. The result is requiring a lower level of capacity to waive a right than to exercise the right.[183] For example, the

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difficult, if not impossible, for the entrustor to monitor all aspects of the fiduciary's actions. *See id.* at 813. As a result, the law imposes certain duties on the fiduciary to protect the more vulnerable entrusting party. Maxwell J. Mehlman, *Fiduciary Contracting Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365, 389–93 (1990) (discussing the disclosures that are necessary in a fiduciary doctor-patient relationship). In all situations, courts require the "fiduciary to act with loyalty and skill, in the entrustor's best interests." Frankel, *Fiduciary Law*, *supra* note 10, at 823; *see also* Mehlman, *supra*, at 390 (stating that "[f]iduciary law obligates the better-informed provider to act in the patient's best interests"). The entrustor can define her best interests in particular ways (and thus direct the fiduciary to take certain actions), but the entrustor cannot waive the fiduciary's obligation to act in her best interests. *See* Frankel, *Fiduciary Law*, *supra* note 10, at 821, 823–24.

181. One of the primary obligations of fiduciaries is disclosure, thus facilitating knowledge and consequently autonomous decisionmaking. *See, e.g.*, Mehlman, *supra* note 180, at 390–91.

182. *See, e.g.*, Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 350–51 (1999) (arguing that fiduciary relationships promote freedom in the sense that the fiduciary functions as an "extension" of the entrustor). The limitation on waiver of certain fiduciary obligations is a recognition that it may be impossible in certain circumstances to evaluate whether the entrustor's decision was autonomous. Mehlman, *supra* note 180, at 395–96 (identifying obstacles which may lessen the ability of a patient to make an informed decision). Refer to notes 43, 86, 88 *supra* and accompanying text. Thus, not only will disclosure be required, but the fiduciary may need to evaluate capacity and knowledge and, furthermore, will bear the burden of proving both if the decision in question is challenged in a court of law. One element that is "unwaivable" is court supervision over the fiduciary. Frankel, *Fiduciary Law*, *supra* note 10, at 821.

183. Conversely, we might require a fairly high standard of capacity when the consequences are unusually severe. Consider the judge's need to act as a teacher as well as judge in the case of Zacarias Moussaoui, who waived his right to legal representation and is defending himself in the September 11 terrorist trial. *See, e.g.*, Neil A. Lewis, *Defendant in Sept. 11 Plot Accuses Judge of Trickery*, N.Y. TIMES, June 26, 2002, at A18 (commenting that Judge Brikema had to explain the meaning of a plea of "no contest" to Moussaoui to protect him from inadvertently pleading guilty). This might have been a situation in which a higher level of capacity should have been applied, restricting Moussaoui's ability to decline legal representation. In fact, the judge in the case required the previously court-appointed lawyers to remain on "standby" in case she determined that Moussaoui could no longer defend himself. *Id.*

capacity needed to enact a health care power of attorney may be much lower than the capacity needed actually to make the health care decisions. In the former situation, the individual need only demonstrate that he understands his right to make health care decisions and that he is granting another person the authority to make those decisions for him. In the latter situation, he may need to demonstrate appreciation and reasoning skills along with basic understanding of the situation.

A legislature or court may have to determine what level of capacity is required to exercise a waiver and how the standard will be applied.[184] Determining this requirement should entail evaluation of the implications of the waiver. This evaluation includes considering the seriousness of the consequences that may flow from the waiver, as well as whether the waiver entails a transfer of decisionmaking authority to another individual. In the latter situation, if there are protections in place to assure that the recipient of the decisionmaking authority is obligated to promote the individual's wants and preferences (autonomy) or, when this is not feasible, promote the individual's best interests, a lower capacity requirement will be appropriate.

C. Disclosure and Other Safeguards

Although there are genuine issues regarding setting standards for evaluating voluntariness and intention, the real focus in most situations is on determining how to measure the level of autonomy at issue, and that translates into the question: How much proof of autonomy will we require? We do not require individuals to prove their autonomy in the abstract; rather we scrutinize certain decisions. This question can be rephrased as whether specific requirements ("safeguards") should be applied around the decisionmaking process. Such safeguards include tests for determining whether the individual actually has, and demonstrates, the capacity and knowledge for intentional action. Which safeguards to apply depends on the level of autonomy at issue.[185] Arguably, any interference with individual

184. Setting standards for capacity is probably one of the least understood and analyzed areas of law. *See, e.g.*, Berg et. al, *supra* note 166, at 347–48 (stating that "[c]ases and statutes generally lack sufficient analysis of competence and its different elements" and relevant terms "may be poorly defined and used indiscriminately").

185. Mill uses the example of freedom of thought and opinion. *See* Mill, *supra* note 21, at 50 (stating that liberty "comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion of sentiment on all subjects, practical or speculative, scientific, moral or theological"). Thought is most closely linked to personal identity, and thus most closely approximates the notion of autonomy. *Id.* Mill adds to this first aspect,

freedom to frame one's own life pursuit, as well as freedom to associate with whom one wants. *Id.*

> Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others.

Id.

Current judicial protections of autonomy encompass privacy in the sense of personal information and personal space, along with freedom to make certain kinds of decisions about one's life. *See* Smith, *Constitution and Autonomy*, *supra* note 19, at 197–98. But the Court, in affording certain protections to autonomous decisionmaking, has clearly limited the notion of freedom to develop individual intellect and emotion to those decisions within traditionally private realms and, in some cases, to only those choices that are themselves considered "traditional." *See id.* at 197–99. Decisions regarding marital privacy and whether to bear or beget a child are considered traditionally private, and thus considered closely related to autonomy. *See id.* at 197–98. Likewise, Professor Smith points out that the standards in both the Fourth Amendment and the First Amendment context have also been linked to traditional social expectations and conventions. *Id.* at 197–99. But as he correctly states, there are a number of problems with the Court's approach, including the following: (1) "the appeal to social morality is difficult to implement, and therefore unpredictable," and (2) "if sincerely applied, it seems likely to undercut the Court's role in opposing conventional prejudices and protecting minorities." *Id.* at 201–02.

The Supreme Court's recent determinations that physician-assisted suicide is not part of the notion of liberty or autonomy protected by the Fourteenth Amendment's Due Process Clause are evidence of the first problem, as current tradition (the last twenty years), at least arguably, encompasses the right of patients to determine the time and manner of their death. *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 804–10 (1997) (holding that a state ban on physician assisted suicide did not violate the Equal Protection Clause because there is a distinction between refusing life-sustaining treatment and suicide); *id.* at 809–10 (Souter, J., concurring in the judgment) (stating that "assisted suicide is [not] a fundamental right entitled to recognition at this time" under the due process standard); Washington v. Glucksberg, 521 U.S. 702, 728, 735 (1997) (holding that a state ban on assisted suicide did not violate the Due Process Clause because it is not a fundamental liberty interest and is rationally related to governmental interests). Yet the Court, reaching back over the past century or more, concluded that within that larger time frame, traditionally, suicide has been impermissible. *Glucksberg*, 521 U.S. at 710–19. Thus part of the problem appears to rest on appropriately identifying the time-relevant tradition. The second concern is of greater scale since it raises significant questions about the role of courts as guardians of individual rights against majority rule. Tradition is most easily defined as those practices embraced by the majority over time. *See id.* at 710–16 (evaluating "tradition" by examining the practices in other states and democracies over hundreds of years). But if protections for individual autonomy are to mean anything, they must accommodate varying practices among vastly different people. Thus limiting autonomy protections to those practices or decisions that are deemed "traditional" seems to undermine the basic goal of allowing individuals to develop in their own unique way.

Rather than jettison autonomy or liberal theory as a unifying framework, Professor Smith proposes three alternatives. *See* Smith, *Constitution and Autonomy*, *supra* note 19, at 203–04. The first is to accept a theoretical process under which individuals jointly define the limits of freedom. *Id.* at 204 (commenting that this may create "standards that the bulk of the modern American community would accept on reflection"). He cites John Rawls and Professor Bruce Ackerman (who advocates deciding "between competing standards by imagining the results of dialogues between their

decisionmaking will infringe upon autonomy, at least the minimal level of autonomy inherent in any voluntary action.[186] If the issue is maximizing autonomy, infringements should only be tolerated when the autonomy at stake is great enough to justify additional scrutiny of the individual's decision. Moreover, imposition of a safeguard should increase autonomy.[187] Given the presumption in favor of allowing individual waivers as autonomous acts and the difficulty in actually measuring the autonomy at stake in particular cases, the question is: Are the consequences of a potential non-autonomous waiver significant enough to justify imposing safeguards around the waiver process?

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adherents, subject to certain constraints"). *Id*. Professor Smith stresses that a problem with this approach is that it does not deal with those people who would refuse to accept Rawls's original position or Professor Ackerman's initial constraints. *Id*. The second alternative is to define autonomy in a limited manner. *Id*. However, Professor Smith notes that such a position is likely to be incompatible with the two premises of autonomy: "first, that one's unique nature provides the highest standards for one's actions, and second, that one's nature is best known to one's self." *Id*. (footnote omitted). And the third alternative is to link the notion of autonomy to the early liberal conception of individual liberty. *Id*. at 205 (noting that such an approach suffers from all of the problems previously identified, including how the notion of autonomy is compatible with such limits as "rationality"). Although he does not go into a detailed analysis, Smith clearly favors the first option. *Id*. at 204 (referring to it as the "most attractive" approach). The alternative formulations for defining autonomy seem incompatible with the underlying concept. *Id*. at 204–05 (questioning the feasibility of the last two proposed approaches to autonomy). Moreover, there is considerable appeal in defining the limits of autonomy using a type of "consent" theory, because it seems most respectful of individual freedom in the first place.

186. *See, e.g.*, Sullivan, *supra* note 14, at 1486 (noting that when a right protects autonomy, scrutiny of the reasons for waiving the right is "inconsistent with protecting individual sovereignty over the decision"); *see also* Garnett, *supra* note 87, at 487–89 (highlighting the inconsistency of both relying on a justifying notion of consent out of respect for autonomy, and scrutinizing individual consent to determine whether it meets some subjectively determined standard of rationality). Garnett uses the example of consent to human experimentation and argues that either individuals should be able to consent to any experimentation (full respect for autonomy), or there should be some experiments that are impermissible regardless of consent (acknowledging other values beyond autonomy). *Id*. at 489–90. Professor Garnett supports the latter position. *Id*. at 511 (concluding that "we must place objective limits on what we permit ourselves to do to each other").

187. *See, e.g.*, Matthew S. Ferguson, *Ethical Postures of Futility and California's Uniform Health Care Decisions Act*, 75 S. CAL. L. REV. 1217, 1249 (2002) (observing that a judge may consider whether statutorily imposed safeguards promote a patient's autonomy). If our goal is maximizing autonomy, then we must apply rules that result in an overall increase of autonomy. However, it is important to recognize that the weighing cannot occur on a case-by-case basis. That is, we cannot justify extreme limits on one person's autonomy because it would increase the autonomy of other people. Nor is it appropriate to reverse the situation and allow an individual to opt-out of a safeguard in order to increase his own autonomy. The rules in question must be ones that individuals would agree to ahead of time because they result in overall maximization of everyone's autonomy, even if this entails limiting autonomy in certain cases.

For decisions with relatively minor implications—for example, whether or not to hire one lawyer versus another[188]—we do not actually evaluate the autonomy of the decision to hire one attorney in lieu of another. In contrast, we require increased safeguards—perhaps requiring a judge's or health professional's explicit evaluation of autonomy—for decisions to represent oneself at trial.[189] We require different levels of proof or different protections of autonomy depending on the circumstances. For example, waivers of the Fifth Amendment privilege against self-incrimination in the *Miranda* context require that law enforcement inform the individual that he has a right to remain silent, that if he says anything it can be used against him in a criminal proceeding, and that he has a right to counsel.[190] Alternatively, we might proceed further and require that in addition to disclosure, someone test understanding by asking the individual questions based on the information. Thus, waivers of the Sixth Amendment right to trial require the judge to inquire into whether the defendant understands that, by entering a plea of guilty, a sentence will be imposed.[191]

The most basic safeguards relate to disclosure requirements. In a variety of settings, the Supreme Court has held that individuals must know they have a particular right before they can waive that right.[192] When the consequences of a potentially

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188. Of course, there may be significant implications of hiring different lawyers, due to varying skill levels. Although we may not provide *a priori* safeguards to ensure autonomous choice between lawyers, the system does have mechanisms to appeal decisions based on attorney incompetence, as well as avenues to recover financially from an inept lawyer through malpractice suits. *See* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1202–05 (1988) (discussing available remedies for poor representation).

189. Faretta v. California, 422 U.S. 806, 835–36 (1975) (holding that when the defendant is found to be literate, competent, understanding, and voluntarily exercising informed free will, a court cannot require representation by a lawyer).

190. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

191. Waivers of the Sixth Amendment right to trial, by entry of a guilty plea, require a judge to explain the nature of the charges, the consequences of a conviction, and that by pleading guilty the defendant waives his right to a trial. FED. R. CRIM. P. 11 (providing that a court must determine the defendant understands the nature of the charge, the maximum and minimum sentences, the right to representation by attorney, and the right to plea not guilty). The consequences of a conviction include any applicable minimum sentence and the maximum possible sentence the defendant may receive. *Id.*; James J. Gildea, *Guilty Pleas*, 72 GEO. L.J. 477, 483–485 (1983).

192. Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (stating that waiver "is ordinarily an intentional relinquishment or abandonment of a known right or privilege" and that ignorance of the right to counsel makes the waiver invalid). Knowledge requirements are not limited to criminal law—there are disclosure requirements in contract law contexts as well. *See, e.g.*, 17A AM. JUR. 2D *Contracts* § 656 (2002) (noting that waivers are not effectual unless made with knowledge of the circumstances); Richard B. Malamud & John E. Karayan, *Contractual Waivers for Minors in Sports-Related*

non-autonomous waiver are minor, this knowledge might be presumed, or at least no additional safeguards will be put in place to assess knowledge. Thus, Fourth Amendment waivers in consent searches are not explicitly required to be knowing.[193] By contrast, in some settings the concern will be greater, and thus specific safeguards will be put in place. For example, *Miranda* warnings are designed to inform defendants of their rights under the Fifth Amendment.[194]

In contrast to the voluntariness prong of waivers, which is generally dealt with on a *post hoc* basis,[195] the intention prong may be addressed through *a priori* safeguards.[196] Whether to apply such safeguards, which include tests of individual capacity or disclosure requirements, depends on the seriousness of the consequences that flow from a non-autonomous waiver. In other words, if we assume that individual waivers deserve deference and that attempts to determine the autonomy of a particular waiver involve state interference with individual decisionmaking, then governmental restrictions on waivers should only be imposed when the risks of allowing a non-autonomous waiver outweigh the impositions on individual autonomy.[197] These

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Activities, 2 MARQ. SPORTS L.J. 151, 160 (1992) (discussing knowledge requirements with respect to disclosure of the waiver provision); Georgette C. Poindexter, *Estopped in the Name of Waiver: The Role of Waiver and Estoppel in Commercial Leasing*, 25 REAL EST. L.J. 267, 268–69 (1997) (stating that knowledge of the existence of the right is required for waiver of contractual rights under a lease); Deborah J. Matties, Note, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 460 (1997) (discussing knowledge requirements for contractual waivers of jury trials).

193. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."). This situation is probably not a case where knowledge is presumed, but no additional safeguards are put in place. Refer to Part III.B *supra*.

194. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

> [T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves . . . . In order to combat [the pressures of interrogation] and to permit a free opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . . .

Id.

195. But refer to note 151 *supra* and accompanying text.

196. Of course, the first time a court decides a case, the safeguards will not have been put in place. Thus, the *Miranda* warnings arose out of a case questioning whether police had to warn suspects. *Miranda*, 384 U.S. at 439–42. Prior to the landmark decision, there were no judicially required knowledge safeguards. *See id*. at 440–42.

197. In contrast, in the criminal procedure context, Professor Spritzer argues that safeguards should be applied in all cases to assure capable and knowing waivers, and only when safeguards prove infeasible or too costly should system considerations be taken into account. Spritzer, *supra* note 2, at 514. He specifically finds fault with the lack of

determinations will depend on an analysis of the descriptive autonomy right or protection in question and the secondary goals of the system.

As mentioned in the introduction to this Article, autonomy is a beginning point of analysis.[198] It best explains why there are different limitations on waivers and why the specific requirements for a valid waiver exist.[199] But even if we assume that the overall goal is to promote autonomy, there may be disagreement about the means of achieving that goal. For example, an efficiency approach would say that creating rules that lead to the most efficient system will result in the most overall autonomy, otherwise governmental interference with individuals will be allowed to a greater extent than necessary.[200] Alternatively, a distributive justice approach will be concerned with the distributive (or non-distributive) effects of particular rules, arguing that equality of treatment is crucial for maximizing autonomy.[201] So, an analysis of the consequences of a potential non-autonomous waiver requires consideration of what measurements will be used to evaluate those consequences.[202] In this sense, an autonomy analysis does not so much displace other theories, as it provides an overarching framework to situate disparate approaches.

IV. APPLICATION OF THE FRAMEWORK

The previous sections of this Article have laid the foundation for evaluating waivers. The Article argues that the framework described above functions both descriptively and normatively. Although there may be additional reasons justifying the outcomes of the cases described, the autonomy framework provides the best basis for analysis.[203] Moreover, it is one that

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safeguards in the Fourth Amendment context. *Id.* His argument reverses the general presumption under an autonomy framework that government interference with individual decisionmaking is inappropriate. Refer to note 19 *supra* and accompanying text (discussing governmental interference on individual autonomy).

198. Refer to notes 19–27 *supra* and accompanying text (discussing the implications of autonomy).

199. *Id*.

200. Refer to notes 16–18 *supra* and accompanying text (discussing the efficiency rationale).

201. *See* C.M.A. McCauliff, *A Historical Approach to the Contractual Ties that Bind Parties Together*, 71 FORDHAM L. REV. 841, 861 (2002) (discussing "the Aristotelian notion of distributive justice," which corrects harm resulting from a disequilibrium in the relationship).

202. The analysis will also depend on what the system's secondary goals are. Refer to Part IV.A *infra*.

203. Refer to notes 19–27 *supra* and accompanying text.

reflects factors the courts actually do and should apply in analyzing waivers. Abstract formulations are always limited, so to elucidate the step-by-step analysis, the following subsections apply the theory to examples. The first part of this section, addressing waiver of informed consent for medical care, tests the application of the theory to a novel case, which will be examined in detail. The second part looks at two areas—waivers of Fourth Amendment rights via consent to search and waivers of statutory protections via contract.

Before delving into the examples, it is worth reiterating the steps a court should take in determining whether to honor a party's decision to waive a particular right. The presumption in all cases is that a waiver is valid, so the question is whether, in the specific case, the waiver should be limited or safeguards should be applied around the waiver process to assure a valid waiver. The first step a court should undertake in evaluating a waiver is to consider whether there are any system or ascriptive autonomy reasons for limiting the waiver.[204] Notably, few waivers will be restricted on these grounds. The second step is to determine whether the waiver may be considered valid based on the descriptive autonomy analysis described above.[205] The examples below involve descriptive autonomy protections.

Recall that there are four reasons why a waiver of a descriptive autonomy protection could be restricted: (1) the rule must be applied in all cases in order to function as an appropriate protection of autonomy; (2) waivers could never be autonomous given the power differentials in the context; (3) it would be impossible or too costly to establish in each case that the waiver lacked autonomy; or (4) in the particular case, the waiver is invalid because it failed either the voluntariness or intention requirements.[206] There are few areas in which we limit waivers based on either requirements that a rule be applied in all cases or prior assumptions about the absence of autonomy in all cases. The third rationale—limiting waivers because of the cost or burden associated with determining autonomy on a case-by-case basis—is more plausible, and thus courts should seriously consider whether a situation is one in which such concerns function to restrict waivers. When the balance does not favor an across-the-board limitation of waiver for any of the first three reasons, the court should focus on the specific waiver at issue and determine whether it meets the requirements for voluntariness

204. Refer to Part II.C *supra*.

205. Refer to Part III.A–B *supra*.

206. Refer to note 88 *supra* and accompanying text.

and intention. With respect to voluntariness, the inquiry entails consideration of whether improper (unfair) coercion deprived the individual's decision of the force it would otherwise have.[207] Both the source of the pressure and the type of pressure will be relevant, and different standards may apply depending on the type of waiver in question and our general societal notions of fairness in different contexts. For example, compare the role of governmental pressure in the criminal procedure context to concerns about private pressure in the contract context.[208] With respect to intention, the court must consider whether the autonomy given up as part of the waiver is significant enough to trigger safeguards to assess capacity and to assure knowledge, rather than simply assume a capable and informed decisionmaker. This analysis will entail an evaluation of the consequences of a waiver. The following three examples will demonstrate how this framework should be applied.

A. Waiver of Informed Consent to Make Medical Decisions[209]

There are a number of reasons for choosing this example to develop in more detail. First, although little attention has been paid to waiver requirements generally, some theoretical work has been done in this area.[210] Second, issues of waiver of informed

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207. *See* BERG ET AL., *supra* note 19, at 88 (noting that "inducements, persuasion, and authority are all forms of pressure that may be considered coercive in certain circumstances, depending on individual perception," but that doctors should nonetheless "feel comfortable advocating for a particular treatment option and attempting to convince a patient to exercise his decisionmaking rights to consent").

208. Refer to notes 147–50 *supra* and accompanying text (discussing waivers in criminal procedure and contract law).

209. These comments do not apply to waivers of informed consent for research participation. First, the term is generally used in that context to refer to "waivers" permitted by independent research boards for research in emergency situations, not to individual waivers—arguably not a situation of waiver at all, at least under this Article's definition. *See* Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 390–91 (2002) (discussing the FDA's regulations pertaining to experimental treatment). Second, the concerns with allowing a non-autonomous waiver in the research context are likely to be greater than those in the treatment context, and thus, the balance may come out differently under the autonomy framework. *Id.* at 390–92.

210. *See* BERG ET AL., *supra* note 19, at 85–90. Although the notion of waiver of informed consent is not new, the contours of the legal doctrine remain undefined. *Id.* at 85. A few cases acknowledge that there are limits to informed consent, but fail to explain important problems of definition and application. *Id.*; *see* Cobbs v. Grant, 502 P.2d 1, 11 (Cal. 1972) ("The scope of the physician's communications to the patient . . . must be measured by the patient's need, and that need is whatever information is material to the decision."); Putensen v. Clay Adams, Inc., 91 Cal. Rptr. 319, 333 (Cal. Ct. App. 1970) (reasoning that when a doctor's "attempts at explanation [are] prevented by [the] patient's insistence on remaining ignorant of the risks involved," the patient cannot later complain that "consent to the procedure was not an informed one"); Kaimowitz v. Michigan Dep't of

consent in this context are particularly timely.[211] For example, waiver has recently been proffered as a solution for some problems involving health care services. One proponent suggests that patients may contractually "waive" their right to receive certain treatments, or information about those treatments, in exchange for paying lower insurance premiums.[212] Waiver of informed consent seems intuitively permissible because the idea behind the doctrine of informed consent is to allow patients to control what happens to them and control over participation in decisionmaking is a crucial element of waiver.[213] Moreover, it is difficult to conceive how one would "force" informed consent on an unwilling patient. Nonetheless, not all commentators agree that waiver of informed consent should be permitted.[214] The uneasiness with the concept seems to stem as much from the uncertainty surrounding application of the informed consent doctrine as from fundamental disagreement regarding the concept of waiver itself. Without further exploration of waivers in general, and informed consent waivers specifically, proposals, like the one regarding waiver of information in exchange for lower insurance premiums, are difficult to evaluate.

In addition, informed consent protections are an obvious example of protections put in place to increase descriptive autonomy. Although the idea that individuals have an inherent right to control what happens to their bodies, including what medical care to receive, it is also linked to an ascriptive notion of autonomy;[215] the disclosure obligations placed upon health care

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Mental Health, No. 73-19434-AW (Mich. Cir. Ct., Wayne County July 10, 1973), *reprinted in* 1 Mental Disability L. Rptr. 147, 149 (1976) ("Generally, individuals are allowed free choice about whether to undergo experimental medical procedures. But the State has the power to modify this free choice concerning experimental procedures when it cannot be freely given, or when the result would be contrary to public policy."); Holt v. Nelson, 523 P.2d 211, 216 (Wash. Ct. App. 1974) (noting that when considering whether a patient's consent was informed, the necessary "causal connection exists when, but only when, disclosure of significant risks incidental to treatment would have resulted in a decision against [treatment]").

211. I initially became interested in the topic of waivers because of my work in the area of informed consent. Working on the assumption that it is best to develop and apply a new legal theory (here of waiver) in an area in which one has some expertise, informed consent seemed the logical place to begin!

212. Hall, *supra* note 2, at 566–69; *see also* Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 351–62 (1997) (critiquing Hall's suggestion).

213. *See* BERG ET AL., *supra* note 19, at 85.

214. *See, e.g.*, JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 122–24 (1984) (arguing that informed consent should not be waived).

215. *See, e.g.*, Samuel Hellman & Deborah S. Hellman, *Of Mice but Not Men: Problems of the Randomized Clinical Trial*, 324 NEW ENG. J. MED. 1585, 1587 (1991) ("The right to be treated as an individual deserving the physician's best judgment and

professionals illustrate a recognition that increased information leads to greater autonomy.[216] Thus, informed consent requirements help to assure autonomous decisionmaking and to promote autonomy in a descriptive sense.

Analysis of waiver of informed consent provides an opportunity to consider waiver of descriptive autonomy protections. Recall that there are four bases for limiting waivers of descriptive autonomy protections, three of which justify across-the-board restrictions.[217] These three are based on a determination that the waiver: (1) would undermine the application of a rule generally, thus affecting other's autonomy; (2) could never be autonomous; or (3) could never be proven to be autonomous.[218] Allowing individual patients to choose how involved they will be in their medical decisions will not undermine either the medical care system as a whole, nor the informed consent doctrine specifically. Although there may be some concern that widespread use of waiver in the informed consent context could dissuade physicians from sharing information,[219] this is unlikely to be the case both because waivers of informed consent will not be prevalent[220] and because

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care, rather than be used as a means to [an end] . . . is inherent in every person. This right, based on the concept of dignity, cannot be waived.").

216. Informed consent is a rule designed to protect an individual's right to bodily integrity (a notion closely linked with autonomy). *See* Heinrich *ex rel.* Heinrich v. Sweet, 62 F. Supp. 2d 282, 312–13 (D. Mass. 1999) (noting that three other district courts, in "well-reasoned opinions," ruled that the U.S. Supreme Court's mandate against invasion of bodily integrity includes the right to consent). The constitutional dimensions of a right to make medical decisions are not entirely clear, but the Supreme Court has supported such a right in two lines of jurisprudence—abortion cases and refusal of treatment cases. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (stating that "the private realm of family life which the state cannot enter" involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and are therefore "central to the liberty protected by the Fourteenth Amendment"); Cruzan v. Dir. of Mo. Dep't of Health, 497 U.S. 261, 269–70 (1990) ("The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."). In both areas the Court has repeatedly stressed that the Constitution creates a sphere of privacy, drawn primarily from the Fourteenth Amendment's Due Process Clause, within which we can ground an individual's right to make decisions concerning her medical care. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the liberty specially protected by the Due Process Clause includes the rights . . . to bodily integrity . . . . We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.").

217. Refer to notes 87–88 *supra* and accompanying text.

218. *Id.*

219. *See, e.g.*, Jay Katz, *Informed Consent—Must It Remain a Fairy Tale?*, 10 J. CONTEMP. HEALTH L. & POL'Y 69, 86 (1994).

220. Waivers are not likely to be prevalent in light of the fact that most patients want to participate in decisionmaking. *See* Krause, *supra* note 212, at 305 (describing

other protections continue to push physicians towards disclosure and encourage patient involvement in decisionmaking.[221] Moreover, although fiduciary protections are put in place because of concerns about the knowledge differentials between doctor and patient, informed consent is not a situation in which it would be impossible in all cases to have an autonomous waiver decision. Furthermore, determining autonomy within the context of a waiver of informed consent is similar to determining autonomy within the context of an informed consent decision itself—something physicians are already required to do—and thus it is neither too difficult nor too costly to require case-by-case analysis. As a result, informed consent waivers should be examined for validity in light of the circumstances of each situation.[222]

The first part of the analysis of validity focuses on voluntariness. For most procedures, and in the absence of obvious coercion (for example, physical force or threats), we should accept a patient's waiver at face value. In fact, this is what occurs when a patient makes the treatment decision herself; the voluntariness of the treatment choice is presumed, absent any indication of improper coercion. Moreover, as previously noted, voluntariness is best evaluated *post hoc* because, apart from a doctor's professional ethical obligations to avoid pressuring patients, there are few safeguards against coercion. Likewise, we are generally unconcerned with pressures from family members because we assume familial obligations will provide appropriate limits.[223] However, we do require that

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informed consent as being grounded on the concept that "when there are several appropriate treatment options for a condition . . . (patients) want to be able to choose for themselves which one to receive" (alterations in original) (quotation marks omitted)); *see also* Charles Sabatino, *Legislative Trends in Health-Care Decisionmaking*, ABA BIOETHICS BULL., Summer 1994, at 10 (reporting that "[t]he consumer movement in health care continues to champion patient autonomy and choice").

221. For example, ethical standards require that physicians disclose information and include patients in decisionmaking. *See, e.g.*, AM. MED. ASS'N, CODE OF MEDICAL ETHICS, opinion 8.08, at 165 (2000).

222. *See generally* Mehlman, *supra* note 180, at 415–16 (arguing that patient decisions to waive information disclosures in the informed consent context should "only be upheld if they represent[] the patient's direct, voluntary and informed choice at the time they were entered into"). There has been some debate about the characterization of fiduciary duties and whether they can be waived under contract law principles. *See, e.g.*, Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1211–12 (1995) (arguing that waiver should be allowed, as long as entrustors are put on clear notice and the fiduciaries provide information to enable the entrustor to make an informed decision to waive).

223. Moreover, it is not clear that pressure from family members (other than threats of force) should even be considered improper pressures such that the resulting waiver is deemed coerced. In fact, these transfers work similarly to transfers to fiduciaries because

physicians, in their fiduciary role, at least reassure themselves that the patient's request to waive informed consent is voluntary.[224] This requirement might entail a simple inquiry into the reasons for the waiver and whether there was any improper external pressure involved.[225]

The second part of the analysis focuses on intent, considering applicable standards for patient capacity to make a waiver, and determining what, if any, safeguards should be put in place to assess capacity and assure knowledge. This Article will address each of these issues in turn. Initially, it is important to recognize that there are two elements of informed consent, disclosure and choice, and a patient may seek to waive either or both.[226] Each possibility has different implications for evaluations of capacity and knowledge.

1. Capacity[227]

> Patients who decide to waive the consent aspect but maintain that they want to receive all information are the easiest to deal with. Essentially the patient may be saying that she will acquiesce in whatever the physician's final recommendation is, but that she wants to remain informed. One way to look at this is . . . [that] the patient [is] actually making a choice between treatments, but basing that choice on the physician's recommendation[—in other words, the patient might be seen as ratifying the physician's recommendation in advance]. Alternatively, the patient may want . . . a family member [to] make the decision. Here too, one might say that the patient is making the choice based on what the family member recommends.[228]

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the family member who was granted decisionmaking authority would be required to choose a treatment based upon what the surrogate knows of the patient's preferences, thus approximating an autonomous decision by the patient himself. BERG ET AL., *supra* note 19, at 110, 113.

224. Refer to notes 179–82 *supra* (discussing delegation to a fiduciary).

225. Of course, this analysis may address concerns about coercion stemming from family members, but it is less likely to address concerns about pressure from the physician herself. But, as noted previously, fiduciaries have fairly clear legal obligations to promote their patients' interests, and this alone might serve to mitigate some fears regarding coercion. *Id.*

226. BERG ET AL., *supra* note 19, at 88–90 (discussing patients who decide to waive consent versus patients who decide to waive information).

227. Material for this and the following subsection was drawn, in part, from chapter four of *Informed Consent: Legal Theory and Clinical Practice*. BERG ET AL., *supra* note 19, at 85–90.

228. *Id.* at 89 (emphasis omitted).

> [I]n both cases there may difficulty in documenting legally valid informed consent. A patient who waives her right to decide may not want to sign a consent form, and may not even want to be asked what her decision is in a particular

Letting a patient of dubious capacity shift decisionmaking authority to the physician or a family member (or any other proxy chosen by the patient)[229] allows the patient to exercise some autonomy. Moreover, as noted previously, in situations where decisionmaking authority is delegated to a fiduciary, we may not require a high level of capacity.[230] The analysis for delegation to a family member is similar. In the absence of capacity, decisionmaking authority usually shifts to the family based on the assumption that close family members are best able to determine what the patient would choose had he been competent ("substituted judgment") or, in the absence of evidence of the patient's preferences, are best able to determine what is in the patient's best interests.[231] Accordingly, a delegation to a family member in the informed consent context is as, if not more, appropriate as a delegation to a fiduciary (physician).[232] Both serve to safeguard the patient's interests because in each case, the proxy is required to make the decision in a manner that best respects the patient's autonomy.[233] Therefore, both should generally be allowed if the patient shows minimal capacity.[234]

> case. These are things she may prefer to have handled by the person chosen to make the decision. But most healthcare proxies are designed to take effect only when a patient is incompetent. Thus it remains unclear whether a proxy would have legal authority to make decisions for a competent patient. In part this is an artifact of the surrogate statutes that are designed to allow designation of a proxy in anticipation of later incapacity, as opposed to traditional proxy statutes that permit immediate assumption of decisionmaking authority. An additional problem is that most of the statutes do not allow physicians to assume surrogate decisionmaking authority, and thus a waiver that essentially entails the patient saying "[c]hoose whichever treatment you think is best, doctor," may not represent a valid transfer of decisionmaking authority.

Id. (footnote omitted).

229. *Id.* at 112 (discussing possible choices for selecting a surrogate).

230. *Id.* at 87.

231. *Id.* at 113–16.

232. It is worth recognizing that most state surrogate decisionmaking statutes specifically restrict the physician, or other treating health care professional, from being designated as the decisionmaker. *See* Colleen M. O'Connor, *Statutory Surrogate Consent Provisions: An Overview and Analysis*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 128, 131 (1996) (noting that only six state statutes authorize a physician to serve as decisionmaker in the absence of an available surrogate). This is a technical legal problem and warrants further attention. *See* BERG ET AL., *supra* note 19, at 90 (discussing waivers of informed consent).

233. Bart J. Collopy, *The Moral Underpinning of the Proxy-Provider Relationship: Issues of Trust and Distrust*, 27 J.L. MED. & ETHICS 37, 37–38 (1999) (noting that "the proxy and physician are morally linked by a mutual commitment to the autonomy and well-being of the patient").

234. For example, we might require the same standard of capacity as needed to designate a proxy, which is a lower standard than that required for actually making the decision. *See, e.g.*, Greg A. Sachs et al., *Ethical Aspects of Dementia Research: Informed Consent and Proxy Consent*, 42 CLINICAL RES. 403, 410 (1994) (finding that a large

Similarly, a waiver of both disclosure and choice should be allowed in most situations as an appropriate transfer of decisionmaking authority.[235]

> [However,] [p]atients who waive the [right to receive information disclosure], but not decisionmaking authority, present . . . difficulties. . . . [A] patient who does not want to hear about the risks of treatment before [choosing an option] arguably is making an incompetent decision.[236]
>
> On the other hand, compelling patients to receive information that they do not want would . . . deny self-determination. The answer to this problem might lie in how much understanding is necessary to make a decision an effective demonstration of self-determination. One possibility is to allow patients to waive information [disclosure] . . . only if they are aware . . . of the nature of the information they are waiving. Thus, a patient who waives information about risks must be aware that the treatment in question involves risk, and perhaps even serious risk, but would be allowed to make a decision without knowing the exact nature of the risks.[237]

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number of dementia patients had the capacity to designate a surrogate decisionmaker, even though they would have failed adequately to understand and make decisions about participation in a research protocol).

235. There may be some limits here, depending on the significance of the decision. We generally place additional restrictions on surrogate decisionmaking regarding end-of-life decisions, such as withdrawal or withholding of life-sustaining treatment. *See, e.g.*, Cruzan v. Dir. of Mo. Dep't of Health, 497 U.S. 261, 280 (1990) (holding that the states may require safeguards around surrogate decisionmaking involving life-sustaining treatment, including higher evidentiary standards).

236. BERG ET AL., *supra* note 19, at 89. From a practical standpoint it might be hard to distinguish these cases from those in which a patient just "tunes out" when risk information is disclosed and makes a decision without incorporating the information. Evaluation of whether the patient exercised the appropriate capacities in making the decision should help (for example, the patient who fails to indicate any understanding or appreciation of risks when questioned would fail to exercise the appropriate capacities), but it will not solve the problem in all cases. *Id.* at 87. The reality of informed consent is that patients may make incompetent decisions, but when those decisions are in accord with the recommendations of physicians, or in accord with the choices of most people, they are rarely scrutinized. *See generally id.* at 106–09 (discussing determinations of incompetence). While this does not provide ideal protections for autonomous decisionmaking, even scrutinizing a decision involves some imposition on autonomy, and thus we may want to limit such interference to cases where the outcome (decision) in question is one that raises particular concern. This is *not* to say that unusual decisions should not be respected—that is, after all, what respecting autonomy is about. But they may be subject to additional scrutiny.

237. *Id.* at 89–90.

> But unlike a waiver of a particular type of information, such as risk information, a wholesale waiver that included all information about a treatment, for example, the patient says "Just tell me the names of the treatments and I'll pick one," would not meet the [capacity] requirement. Physicians justifiably may be wary of relying on the patient's choice under such circumstances. The solution in these

This is in accord with the notion described earlier that the issue in some waiver situations is not application of a different standard for capacity, but that the information in question is simply easier to grasp.[238] Thus rather than understand in detail all of the risks of a particular treatment, the patient who waives risk information need only understand that risks are possible along with the magnitude of the risk, such as life threatening issues versus minor discomfort, and that she has a right to additional information regarding the risks.

2. Disclosure and Safeguards. Decisions about medical treatment are closely linked to autonomy.[239] The significant autonomy given up must be outweighed by an assurance that the waiver itself is autonomous.[240] However, the consequences of a waiver of the right to informed consent are not as significant as situations where a right is given up completely. As pointed out, a waiver of consent authorization results in another party (either a fiduciary or family) making the decision. Both a fiduciary and other surrogates are legally required to make decisions in the patient's interests, as the patient would have defined those interests.[241] Moreover, waivers of information result in greater reliance on the physician's recommendations. Assuming the

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> situations may be the same as the solution in the case where patients waive both information and decisionmaking authority. Ideally patients should be encouraged to identify a third party who can both receive information and make decisions. Again, we [might have] some of the problems outlined [above], since many state statutes are not set up to accommodate competent patients who want to transfer decisionmaking authority. But this is likely to be a technical problem only. Competent patients in these circumstances should be treated as patients who have some capacity, but not full capacity, to make the medical decision at hand. In these cases, patient assent rather than consent would be sought. The assent requirement allows the patient to participate in the decision, but enables the physician to receive legally valid consent from a fully informed third party.

Id. at 90.

238. Refer to notes 175–78 *supra* and accompanying text.

239. It is also an area closely linked to deliberative autonomy. *See, e.g.*, Ken Marcus Gatter, *Protecting Patient-Doctor Discourse: Informed Consent and Deliberative Autonomy*, 78 OR. L. REV. 941, 987–93 (1999) (applying Professor Fleming's theory of "the capacity for a conception of the good" to informed consent for medical care).

240. BERG ET AL., *supra* note 19, at 85 (explaining that "the waiver exception [to informed consent] is focused on promoting the same value as the doctrine of informed consent itself—autonomy").

241. Using a substituted judgment standard essentially requires that the decisionmaker promote the patient's interests, as the patient herself would have defined them, autonomously. BERG ET AL., *supra* note 19, at 112–15 (discussing standards of surrogate decisionmaking). A best interests standard ensures that in the absence of evidence of what the patient would consider to be in her interests, an objective determination will be made of what most people in the situation in question would have wanted—again, hopefully, a rough approximation of what an autonomous person would have decided. *Id*.

protections inherent in the fiduciary relationship function as they should,[242] the harms of allowing a potentially non-autonomous waiver should be minimal.

Furthermore, disclosure safeguards in this context are less appropriate. A *Miranda*-type warning given at the beginning of an encounter, or the start of every informed consent disclosure, is not suitable. Physicians should be required specifically to inform patients of their right to make medical decisions only upon an indication from the patient that she would like to waive her right to participate.[243] If physicians must explain to all patients their rights not to have information disclosed, there is a risk that patients might infer that they ought not to want information or that the physician does not want it disclosed.[244] The patient-physician relationship is not characterized by the same adversarial relationship as between a suspect and a policeman. Therefore, initial warning statements concerning individual rights are appropriate in the suspect-policeman relationship, but the same cannot be said about the patient-physician relationship. As a result, a physician should have no absolute obligation to inform a patient of her rights in an initial encounter, but may assume that the act of disclosing information and requesting patient consent (an obligation the physician already has) implies that a patient has the right to the information and to make a decision about treatment.[245] However, when a patient expresses a desire not to participate in the decisionmaking process, a conditional obligation arises to inform the patient of her rights.[246] Moreover, upon informing a patient, the physician should also be

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242. There is certainly some question of whether the fiduciary protections do function appropriately in the patient-physician relationship, given the competing financial and other incentives that affect physician treatment recommendations. *See, e.g.*, Stephen R. Latham, *Regulation of Managed Care Incentive Payments to Physicians*, 22 AM. J.L. & MED. 399, 399, 415 (1996) (describing the effect insurance incentive schemes have on physicians).

243. *See* BERG ET AL., *supra* note 19, at 85 (stating that "physicians should have no absolute obligation to inform patients of their rights in an initial encounter . . . . However, when patients express a desire not to participate in the decisionmaking process, a conditional obligation arises to inform them of their rights"). In practice, patients must be informed of the following:

> (1) physicians have a duty to disclose information to them about treatment, (2) [they] have a legal right to make decisions about treatment, (3) physicians cannot render treatment without their consent, and (4) the right of decision includes a right to consent to or to refuse treatment. Unless a particular patient is far more knowledgeable than most, [he or] she is unlikely to know all this without being told by the physician.

Id.

244. *See id.* at 86.

245. *Id.*

246. *Id.*

required to test for patient comprehension of her rights to a minimal extent, perhaps by asking a few basic questions regarding the patient's understanding of her right to obtain information and choose between treatments.

3. Summary. In sum, waivers of informed consent to make medical decisions should be permissible in most individual treatment contexts. Moreover, given patients' differing interests in both obtaining information and participating in decisionmaking, legal mechanisms to allow waivers should be developed. But waivers will not be appropriate under all circumstances because the autonomy given up as part of the waiver decision should be counterbalanced by the autonomy demonstrated by the waiver itself. The result may be that using the concept of waiver to solve current health care delivery crises, such as allowing "waivers" of information about certain treatments in exchange for paying lower insurance premiums,[247] are acceptable only when the appropriate balance is struck between the autonomy given up and the autonomy (validity) of the waiver. In many cases, this may be impossible to achieve.[248]

B. Some Initial Thoughts About Application of the Framework to Other Areas of Law

The autonomy framework proposed above may also provide valuable insight into waivers in a number of other areas of law. This part will briefly consider two examples of waivers—one from the criminal procedure area and one from the contracts area—and examine whether the theory can explain the outcomes. These are discrete examples within criminal procedure and contract law, and a full analysis of waiver in these legal areas is not attempted. This part will demonstrate that the framework proposed works descriptively to explain the requirements for waiver and is normatively appropriate. I will leave it to others, better qualified, to examine the application of the framework in more detail.

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247. *See* Hall, *supra* note 2, at 556–57.

248. In his article arguing for allowing such waivers, Professor Hall stresses that changes to the current system are necessary before an "economic" theory of informed consent could be applied, and thus, waivers of this type would be allowed. *Id.* at 586. Moreover, Professor Hall notes that there may be some absolute limits of what kinds of information can be waived, depending on the seriousness of the consequences (for example, information regarding life-sustaining treatments). *Id.* at 584–85.

1. Waivers of Criminal Procedural Rights—Fourth Amendment Consent Searches.[249] Much of the discussion of waivers has occurred in the criminal procedure context. This Part considers specific issues relating to waivers of Fourth Amendment privacy rights that are involved in consent searches. These are waivers of a currently functioning right to privacy, achieved by an individual's consent to allow a search. I chose the Fourth Amendment context because, although the law is fairly settled in this area, the requirements for waiver remain a source of debate.[250] The theory proposed here may help clear up some of the lingering confusion in this area.

First, no system limitations exist to justify restrictions on consent search waivers. The language in the Fourth Amendment referring to "unreasonable searches and seizures"[251] indicates that the system presumably accepts that searches will take place, but merely attempts to restrict those that are unreasonable. Individual waivers of privacy in this context (by consenting to searches) are thus completely compatible with a functioning system. Moreover, there are no reasons to restrict waivers based on ascriptive autonomy. The Fourth Amendment, although its inherent notions of bodily integrity has links to ascriptive autonomy, is intended (as are most criminal procedural rights) to remedy the imbalance of power between the state and individuals,[252] and thus raises concerns about descriptive autonomy. In the absence of system or ascriptive limitations, the issue is whether there are descriptive autonomy reasons to disallow waivers, or to place particular safeguards around the waiver process. After considering the three reasons for across-the-board limitations of waivers of descriptive autonomy, we can discount them. This is not a situation where a restriction must be applied in all circumstances—consent in one case does not necessarily affect the autonomy of another individual to refuse consent in another case. Therefore, privacy protections can be waived by an individual without undermining privacy protections for all other individuals.[253]

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249. I will not address third-party consents. Professor Dix is correct in his assertion that these are not in fact waivers. *See* Dix, *supra* note 2, at 197 n.6.

250. *See, e.g.*, Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 220–21 (2002) (describing the requirements for the waiver of Fourth Amendment rights as an "amorphous standard [that] has proven difficult for lower courts to implement").

251. U.S. CONST. amend IV.

252. *See* Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1377 (2002) ("In adopting the [Fourth Amendment], the Framers of our Constitution were primarily concerned with limiting government power and discretion . . . .").

253. To some extent, this reasoning may be too simplistic. The fact that one

Second, although obvious power differentials exist between law enforcement personnel and private citizens, autonomous waivers can occur in the criminal context. Moreover, this is not likely to be a situation where evaluations of the autonomy of waivers in each circumstance would be so costly as to preclude case-by-case determinations.[254] So the issue reduces to an analysis of whether there should be specific safeguards concerning individual waivers.

Unlike waivers in the Fifth Amendment self-incrimination context where Miranda warnings assure knowledge, consent searches are not explicitly required to be "knowingly."[255] The Court's rationale seems to be based in part on a distinction between "those rights guaranteed to criminal defendant to insure . . . a fair trial and the Fourth Amendment protections which "are of a wholly different order."[256] The determination of whether to impose safeguards depends on evaluating the consequences of a potential non-autonomous wavier. The consequences of an unfair criminal proceeding (unfair because the defendant was unaware

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passenger on a bus consents to a search might have implications on the degree to which any other passenger feels free to refuse. Such external pressures are not considered improper, nor should such concerns require an across-the-board restriction on waivers of privacy.

254. In fact, some might argue that the reverse is true—it would be too costly for the system to restrict waivers in this context.

255. Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

> We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Id.

256. *Id*. at 241–42. It was also based on practical concerns with how such awareness would be assured. *See* Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (holding that it was "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed involuntary").

The Court seems to believe that an arrestee is a more vulnerable individual, and thus in need of additional protections. Arguably, however, the individual confronted in the search situation may be more vulnerable because at least the arrestee is aware that the police are adversaries, whereas the individual confronted in a search situation may cooperate in the hopes of maintaining good will (or indicating innocence). If we assume that it is always a bad idea for a guilty person to consent to a search—but not always a bad idea to talk to the police—then you might think that consent by a guilty person must always be the product of coercion, and thus be involuntary. E-mail from Craig M. Bradley, Professor, Indiana University School of Law-Bloomington, to Jessica Berg, Assistant Professor of Law and Bioethics, Case Western Reserve University Schools of Law and Medicine (July 16, 2002, 10:37 CST) (copy on file with the Houston Law Review). Because I argue here that voluntariness is a matter of determining which pressures we (society) will determine to be unfair, the question is really a matter of public policy, not empirical reality. That is, whether or not all guilty individuals who agree to a search are in fact agreeing due to improper pressure is a question of how we want to view the pressure in question, not a question of true free will.

of any rights he gave up) may be incarcerate an innocent person. The consequences of an unfair search (unfair because the individual did not know he could refuse) do not raise the same concerns about the truth finding.[257] This is not to say that a nonautonomous (due to lack of knowledge) waiver of Fourth Amendment rights in a consent search does not result in a diminution of autonomy for the individual in question. Rather, the significance of this loss has been determined by the Court to be not great enough to justify imposing disclosure requirements on law enforcement personnel seeking to conduct the search.[258] One possible reason is that individual autonomy generally is maximized under a system in which law enforcement is able to gather evidence through consent searches to use against criminals who, by definition, have often infringed upon another's autonomy.[259] So, the lessening of autonomy in any particular case of an unknowing consent allowing a search is offset by the overall benefits to autonomy of individuals generally by assuring the most efficient system of law enforcement.

Although the lack of safeguards in the Fourth Amendment context, when compared with the Fifth Amendment context, can be explained under an autonomy framework,[260] in practice, courts appear to conflate the requirements of intention and volition—using the term "voluntary" rather than "autonomous" to encompass both the absence of coercion and the knowledge requirements. In a recent Supreme Court decision, *United States v. Drayton*,[261] police officers requested permission to search bus passengers.[262] Although the Court mentioned the knowledge

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257. In the Fifth Amendment situation, there is a genuine concern about eliciting false statements (and thus undermining the validity of the judicial process), an issue relating to the reliability of evidence that is not present in the consent search setting. *See* Kaplan & Dixon, *supra* note 2, at 951; Spritzer, *supra* note 2, at 514; *see also* Dix, *supra* note 2, at 227 (noting that the Court in *Bustamonte* perceived Fourth Amendment rights as "serving interests other than accuracy of [the] trial outcome"). Professor Dix, however, argues that this was incorrect and that "the relevant concern should have been the importance of the privacy interests protected by the [F]ourth [A]mendment." *Id.* at 228.

258. Recall that the baseline in all cases is noninterference. Refer to Part III.C *supra*. It is only when the consequences are great enough that there is a basis for imposing additional requirements or safeguards around the waiver process. Thus, there is an acceptance in the Fourth Amendment context that some waivers will be unknowing.

259. This excludes crimes that have no victims, such as may be argued in some drug cases. There is continuing debate about whether such victimless crimes should be prosecuted. *See* 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING xxix (1984).

260. There may be other explanations for this difference.

261. 536 U.S. 194 (2002).

262. *Id.* at 200 (holding that it is not a violation of Fourth Amendment protections for law enforcement officers to pose questions to, and ask for, consent to search belongings of individuals, as long as it would be reasonable for them to believe there was a right to

issues, its analysis improperly focused on whether the officers' lack of notification that the passengers could refuse permission was so coercive as to prevent a freely given waiver.[263] If the issue is potential coercion via police misconduct, imposing a warning requirement is unlikely to have a significant effect.[264] In fact, a number of studies imply that individual susceptibility to authority is similar in both custodial interrogation (Fifth Amendment) and search (Fourth Amendment) situations.[265] However, if the concern is not with the potential for coercion, but rather autonomy, there may be less need to assure the autonomy of the waiver in the Fourth Amendment context. Therefore different standards of knowledge are appropriate.

Of course this argument assumes that the secondary analysis of consequences is driven by law enforcement efficiency goals. If one values distributional goals[266] over efficiency, the disparity between the Fourth and Fifth Amendment context may be more problematic. If more poor and uneducated individuals waive privacy protections, we might be more concerned with the consequences of an unfair waiver via consent to search, than if the focus is merely on the reliability of evidence. An autonomy framework does not preclude such an approach. The analysis would be similar, but

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refuse).

263. *Id.* at 206–07. This Article is not arguing that it is inappropriate for the Court to consider whether the waivers were voluntarily given, only that a warning requirement does not really facilitate the voluntariness prong of autonomy. Rather, a warning assures the intention prong is met. Although informing a suspect that her refusal to talk will be respected may help alleviate some coercion, it is not clear that the warnings effectively prevent the perception of coercion, or encourage suspects to remain silent. Because courts have flatly refused to consider whether knowledge safeguards should be applied in the Fourth Amendment contexts, the result is that they are forced to analyze everything under voluntariness, even when it may be more appropriate to focus on intention (knowledge).

264. Recent years have seen the Court retreat from a robust interpretation of *Miranda*, perhaps acknowledging that even in the Fifth Amendment context, the warnings are both of little value in preventing coercion and of minor practical effect in assuring knowledge. Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 126 (1998) ("Although the Justices are unlikely to overrule *Miranda* in the foreseeable future, one can say fairly that the Court has retreated from the holding of *Miranda* in several significant respects."). Alternatively, it might signal the Court's tougher stance regarding criminals and its dissatisfaction with the expanded scope of *Miranda*.

265. *See* Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974) (describing a study that measured the relative degree of social power possessed by uniformed authorities); *see also* John Sabini & Maury Silver, *Dispositional vs. Situational Interpretations of Milgram's Obedience Experiments: "The Fundamental Attributional Error,"* 13 J. THEORY SOC. BEHAV. 147 (1983) (explaining how subjects in Milgram's experiment exhibited extreme responsiveness to perceived uniformed authority figures).

266. "Distributional" here refers to equal or just application of protections and rules.

would stress that an unfair search and an unfair confession are equivalent because the consequences disproportionately limit the autonomy of a vulnerable segment of the population. Resolution of the debate about which secondary goals to pursue is beyond the scope of this Article. The point here is that an autonomy framework functions best in the initial analysis, and can accommodate a number of secondary factors including efficiency goals, distributional goals, and others.

2. Contractual Waivers of Statutory Rights. There are two types of contractual waivers that will be considered here. The first are waivers of contractual conditions that were previously created and agreed to by the parties. The second are waivers of other rights via contract. With respect to the first situation, the label "waiver" is improperly used in many contexts.[267] Often the term is used to avoid problems with characterizing the conduct as a contractual "modification," although "modification" indeed may be more accurate.[268] When appropriately categorized, for most cases involving the waiver of a contractual condition created and agreed to by equal and autonomous parties, basic contractual doctrines of reliance and fairness will control.[269] These doctrines raise concerns about "other-regarding" effects of the waiver, and as mentioned at the outset, these effects provide an independent basis for limiting individual waiver decisions.[270] Absent fairness concerns, these waivers should be permissible unless the condition is for the benefit of both parties (thus unwaivable by one alone because there are implications for both parties' autonomy),[271] or the condition is a material part of the

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267. *See* JOHN S. EWART, WAIVER DISTRIBUTED 11 (1917) (describing the misuse of the term "waiver" when applied to contracts); John S. Ewart, *Professor Williston's Review of Waiver*, 11 MINN. L. REV. 415, 415 (1927) (same); Snyder, *supra* note 8, at 624–28 (distinguishing the terms "waiver," "modification," and "estoppel" in contract law).

268. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.5, at 374–75 (2d ed. 1990) (commenting on why the term "waiver" may be preferable to the term "modification" in terms of contract analysis).

269. *Id*. § 8.5, at 377. This is not incompatible with the autonomy framework. Essentially, at issue here is whether fully autonomous and equal parties can agree to a change in a previously executed autonomous agreement. If both parties agree to the change, the answer should be yes. If only one party seeks to change the agreement, it should also be allowed, unless the other party has already relied on the agreement and such change would be unfair. As noted in the beginning of the Article, one individual's autonomy may be limited to the extent that its exercise infringes upon another individual's autonomy. Refer to notes 32–37 *supra* and accompanying text.

270. Refer to notes 69–75 *supra* and accompanying text (explaining "other-regarding" effects of waiver).

271. 2 FARNSWORTH, *supra* note 268, § 8.5, at 374 n.6.

contract[272] (and thus the waiver essentially negates the contract).[273]

Of more interest for purposes of this Article is the category of contractual waivers of rights relating to one party's autonomy. One example is the waiver of ascriptive autonomy in contracts for personal services, or contracts involving personal conditions.[274] Limitations on these waivers are discussed under the heading of ascriptive autonomy.[275] A second example are waivers of safeguards that have been put in place to promote descriptive autonomy, such as those designed to remedy disparities in bargaining power between the parties. Often created as statutory requirements, they are designed to grant rights to the weaker party in the transaction,[276] and therefore genuine questions of autonomy are raised when that party seeks to waive the protection.[277]

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272. *See, e.g.*, Anderson, *supra* note 85, at 755. Professor Anderson explains that non-waivable duties between equal parties "are limited to those which go to the essence of the bargain, such as the basic obligation to perform in good faith, or the provision of some minimal remedies for breach." *Id.* But she clarifies, "[w]here the relative bargaining power of the parties is unequal, the extent of non-waivable duties implied by law will be much greater." *Id.* The latter limitations, according to Professor Anderson, are prompted not only by concerns of efficiency, but also with fairness. *Id.* at 756. *But see* Kronman, *supra* note 14, at 765 (stating that although limits on contractual freedom may be based on efficiency and fairness, they may also be based on ideas of personal integrity and notions of sound judgment). The latter two categories coincide with the concepts of ascriptive and descriptive autonomy.

273. *See* 2 FARNSWORTH, *supra* note 268, § 8.5, at 379 ("Parties can most easily waive conditions that are essentially procedural or technical . . . ."). Conditions that are a material part of the contract may be dispensed with by dispensing with the contract altogether. However, such action may be a "waiver" and thus permissible under that doctrine.

274. The latter category is well demonstrated by a case in which an author contracted to write a textbook and, in addition, to refrain from drinking during the drafting. *See* Clark v. West, 86 N.E. 1, 3–4 (N.Y. 1908). This would not be a condition of which a court could force performance. The author continued to drink, but the court found that the contract terms were substantially met, and thus, he was due the appropriate royalties. *Id.* at 3, 5–6.

275. Refer to Part II.A. *supra* (describing ascriptive autonomy).

276. Some rules are put in place through state statutes, while others are common law rules, and others are codified in the Uniform Commercial Code. For a comparison of the attitude toward contractual waivers of statutory protections between the *Lochner* era and the modern Court, see Shell, *supra* note 17, at 472–74, 477–82.

277. *See* Thomas G. Kelch & Michael K. Slattery, *The Mythology of Waivers of Bankruptcy Privileges*, 31 IND. L. REV. 897, 924 (1998) (noting that "a statutory privilege may not be waived when there is a strong public policy for the benefit of the general public underpinning the provision"). This Article argues that the issue is better phrased as analysis of descriptive autonomy. Thus, statutory protections can be waived if they are not ones: for which an autonomous waiver would be impossible, which would be too costly to prove, or which would be lacking sufficient autonomy in the waiver to counterbalance the protection given up.

Consider first contractual waivers of employment rights such as waivers of valid litigation claims, or waivers of litigation rights by accepting a mandatory arbitration clause.[278] For example, under the Older Workers Benefit Protection Act (OWBPA), employees can waive claims for age discrimination in exchange for severance benefits.[279] Among other things, the statute requires that waivers be "voluntary and knowing" and imposes specific safeguards to assure the two elements are met.[280] These include a disclosure requirement, a waiting period, and a rescission period.[281] The OWBPA was enacted in part to remedy some disparities of bargaining power between employees and employers,[282] and thus serves to promote descriptive autonomy. This is not an area where the right must be applied in all cases, or where autonomous waivers are impossible, or too costly to analyze. Thus, at issue is whether the waiver in the specific case should be considered valid. A court determining the validity of a waiver under the OWBPA should first consider the existence of improper pressures (constituting coercion) that may render the waiver involuntary.[283] Second, it should consider the consequences of a non-autonomous waiver and weigh them against the costs of imposing specific safeguards. In this situation, the balance has already been determined legislatively because the statute itself has specific requirements that must be met for the waiver to be considered valid. Because the consequences of a waiver of anti-discrimination claims are significant for both the individual in question and for society as a whole, which has an interest in minimizing discrimination in

278. *See generally* Harper, *supra* note 4, at 1294–98 (discussing the waiver of specific employment rights); Howard, *supra* note 4, at 269–73 (examining the waiver of statutorily guaranteed employment rights); Silverstein, *supra* note 135, at 484 (introducing the principle that a waiver of an employment right must be a "knowing and voluntary" waiver); Ware, *supra* note 128, at 84–85 (describing the surge in the use of arbitration for employment disputes and the waiver of litigation rights).

279. Silverstein, *supra* note 135, at 488; *see also* Wastak v. Lehigh Valley Health Network, No. 00-4797, 2002 WL 468709, at *41 (E.D. Pa. Mar. 27, 2002) (upholding a waiver of an age discrimination claim under the OWBPA as "knowing and voluntary").

280. Silverstein, *supra* note 135, at 488–90.

281. *Id.* at 489.

282. *Id.* at 488–89; *see also* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 962 (1993).

283. Professor Silverstein argues that the safeguards are not sufficient and should be more stringent. Silverstein, *supra* note 135, at 493–94. Specifically, she is concerned that the safeguards promote knowledge and disregard voluntariness concerns. *See id.* at 512–18. This Article has already pointed out the difficulty in putting in place safeguards against coercion, agreeing that it is problematic if, as Professor Silverstein argues, the courts are assuming voluntariness in all cases as long as the statutory requirements for waiver are met. *See id.* at 525. However, I do not accept her broad definition of coercion.

employment,[284] the imposition of safeguards is appropriate. The secondary focus here reflects both efficiency and distributive goals. Allowing individuals to determine whether to waive their rights based on personal financial gain presumably results in more efficient outcomes than mandating litigation in all cases. However, concerns about the distributive (public policy) goals of anti-discrimination statutes led legislatures to impose safeguards against nonautonomous waivers.[285]

Statutory rescission periods for financial contracts provide another example.[286] The federal Truth in Lending Act requires, in any consumer credit transaction in which a creditor will acquire a security interest in a person's principal residence, a mandatory three-day rescission period.[287] In addition, the creditor is obligated to disclose specific information to the consumer.[288] In almost all cases, the rescission period is not waivable.[289] The only exception arises when the consumer provides a written statement specifically: (1) describing a bona fide personal financial emergency, (2) waiving the rescission period, and (3) signed by all consumers entitled to the rescission period.[290] Once again, this statutory protection is designed to facilitate descriptive autonomy. Although these are not situations where the rule must be applied to all cases to function effectively, or where it would be impossible to conceive of an autonomous waiver, they are ones where the cost of evaluating each case may be so expensive or burdensome that an across-the-board determination is made to restrict waivers. The exception in the statute indicates a unique situation where an individual's waiver decision would be rational, and would prevent additional harm to the individual. However, the safeguards imposed around such

284. That is, autonomy overall is facilitated under an employment system which rewards ability rather than race, gender, age, or any other factor; so, safeguards are warranted in this context.

285. *See, e.g.*, ARK. CODE ANN. § 11-10-107 (Michie 2002) (voiding any employee's waiver of rights or benefits when the waiver is related to discrimination, obstruction, or employee payments that are statutorily prohibited); NEB. REV. STAT. § 48-645 (1998) (voiding any waiver of rights that allow employers to discriminate in regard to hiring, rehiring, or tenure of work); N.J. STAT. ANN. § 34:6A-45 (West 2000) (same).

286. *See generally* Elwin Griffith, *Truth in Lending—The Right of Rescission, Disclosure of the Finance Charge, and Itemization of the Amount Financed in Closed-End Transactions*, 6 GEO. MASON L. REV. 191, 194 (1998).

287. *See* 15 U.S.C. § 1635(a) (2000); 12 C.F.R. § 226.23(a) (2002). There are generally state analogs to this statute. *See, e.g.*, OHIO REV. CODE ANN. § 1349.26 (2002) (discussing mortgage loan disclosures).

288. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3); Griffith, *supra* note 286, at 194.

289. *See* 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).

290. 12 C.F.R. § 226.31.

waivers are evidence of the concerns legislatures have with the consequences of a potential non-autonomous waiver.

Both these examples and others in contract law deserve more attention than I can afford them within the context of this Article. The purpose here is simply to show that an autonomy framework can be used both to explain the differing treatment of these particular waiver cases and to better understand why certain types of safeguards were deemed appropriate. The safeguards chosen should be designed to assure the autonomy of the waiver, and not merely to serve whatever secondary goal is at stake.

V. CONCLUSION

Waiver is important in many areas of law, yet there have been few efforts to develop a unifying theory to govern it. This Article uses the concept of autonomy both as a descriptive tool to explain differences in laws relating to waiver and as a normative theory from which to evaluates the appropriateness of waivers in different contexts. There are at least two different senses of autonomy at issue, and these have different implications for the permissibility of waiver. Furthermore, there are system constraints here, as in other areas. Although this Article attempted to apply the framework to different legal areas, experts in the relative fields are better equipped to develop the analysis in more detail.

In all areas of law, waivers are useful and should generally be permitted. Respecting individual waivers respects autonomy. Limitations on waivers are only appropriate when there are either system or autonomy justifications. Where the autonomy given up by the waiver is significant, the waiver itself must demonstrate a corresponding degree of autonomy to counterbalance the loss. Evaluation of the autonomy of the waiver entails two elements—voluntariness and intention. Evaluation of the autonomy given up as part of the waiver of a particular right is more difficult, and requires that courts or legislatures consider the justifications for governmental interference with individual freedom. As we think about specific legal rights and the concepts of autonomy, including how to evaluate the consequences of non-autonomous waivers, we should gain additional clarification of both when waivers are appropriate and the need for particular safeguards around the waiver process.