# Labels versus Contents: Variance between Philosophy, Psychiatry and Law in Concepts Governing Decision-Making

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The author investigates the four concepts of autonomy, self-determination, competence and voluntariness as they are defined and used within the disciplines of philosophy, psychiatry and law to govern decision-making by individuals concerning themselves. It is proposed that, although the three disciplines share a common terminology, the content and use of these concepts vary between them. First, it is essential to understand the nature of this variance in situations where the disciplines of philosophy, psychiatry and law interact as they do, for example, in clinical ethics consultations in a psychiatric context. Second, comparison of the concepts in the different disciplines provides important insights with respect to their nature and function, and opens up the possibility of more precise use and either expanding or limiting their content or operation. Third, when working in a transdisciplinary context, the danger of misleading assumptions from so-called "faux-amis" is avoided if one is aware of the difference in meaning of the same term when used in different disciplines. Fourth, the aims sought in defining and using these concepts, especially protection of persons to whom they are applied, can only be achieved if their function is clearly understood, both in each discipline and in the interaction of disciplines in which they are relevant. It is concluded that, in practice (especially in applied ethics, psychiatry and law), we must define and use these concepts in ways that promote respect for all persons (regardless of the characteristics of these persons) and that do not deny such respect. This requires us, first, to view persons and their characteristics separately from persons' decisions and their characteristics and, second, to respect the decisions of all persons unless doing otherwise is clearly justified.

L'auteure étudie les concepts d'autonomie, d'autodétermination, de compétence et de plein gré, tels qu'ils sont définis et employés dans les domaines de la philosophie, de la psychiatrie et du droit, pour régir le mécanisme de prise de décision personnelle des individus. Quoique ces domaines utilisent un vocabulaire commun, l'auteure suggère que le contenu des quatre concepts susmentionnés, ainsi que l'usage qu'on en fait, varient d'un domaine à l'autre. Premièrement, il est essentiel de comprendre quelle est la nature de cette différence dans les cas où la philosophie, la psychiatrie et le droit interagissent — par exemple, en ce qui concerne les consultations cliniques de psychiatrie ayant pour objet essentiel des questions d'éthique. Deuxièmement, la comparaison entre ces concepts provenant de différents domaines nous donne un important aperçu de leur nature ainsi que de leur rôle; elle rend également possible un usage plus précis conduisant à un élargissement ou un rétrécissement de leur contenu et de leur application. Troisièmement, une personne œuvrant dans un milieu transdisciplinaire peut éviter d'être entraînée par des faux-amis vers des hypothèses trompeuses si elle sait reconnaître les différents sens que peut prendre un même mot lorsqu'il est utilisé dans des domaines différents. Quatrièmement, les objectifs poursuivis par la définition et l'utilisation de ces concepts, particulièrement la protection des personnes auxquelles ils s'appliquent, ne peuvent être atteints que si le rôle de chacun est clairement établi tant à l'intérieur de chaque domaine que dans leurs interactions. L'auteure conclut qu'en pratique — plus particulièrement en droit, en psychiatrie et dans l'application des notions d'éthique — on doit définir et utiliser ces concepts de façon à promouvoir le respect de la personne, sans égard à ses caractéristiques et surtout sans nier ce respect. Ceci exige, tout d'abord, que l'on considère la personne et ses caractéristiques séparément de ses décisions et leurs caractéristiques et, ensuite, que l'on respecte ses décisions à moins que le contraire ne soit clairement justifié.

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*Synopsis*



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## I. Introduction

For some time now, I have been hearing noises ranging from rumblings to thunder claps that the practice of psychiatry is becoming impossible because of the application of law. One psychiatric resident told me that she was thinking of leaving psychiatry because it seemed too difficult — not the profession itself, but because of the intervention of law.

I suggest, however, that psychiatry and law are essential and complementary to each other, and can and must be integrated. Both have a common aim

— the relief of suffering. But, in some cases, they may see this aim as being best achieved by different means, which are not always compatible. We must build bridges between the two disciplines, and that can only be done if they understand each other. Understanding requires use of a common language in terms of content, not just in terms of terminology. In order to achieve such understanding, we need to explore whether hidden differences in language could be blocking its realization. This paper examines four concepts — autonomy, self-determination, competence and voluntariness — which are often explored in philosophy, including the sub-discipline of ethics, and which govern decision-making in psychiatry and law, in an effort to determine their content in each discipline and whether it differs from one to the other. But before starting this examination, I would like to address, very briefly, three preliminary matters, all of which are characteristic of and relevant to philosophy, psychiatry and law. These considerations involve: words as tools of trade; discretion in decision-making; and the need to identify the essential requirements for an acceptable decision-making process.

### *A. Words As "Tools of Trade"*

Words are the "tools of trade" of philosophy, psychiatry and law.

Words can be used to *involve* oneself and one's discipline in a situation or to *distance* oneself and one's discipline from a situation. Words can be used to *attach emotionally* to a situation — to become involved — or to *detach emotionally* from a situation, that is, to disengage, or to dis-identify from, which does not always mean to become uninvolved in, the situation. One can usefully compare being uninterested, that is, not involved; disinterested, that is, involved, but not emotionally involved; and interested, that is, emotionally involved. Each of these concepts is of relevance to philosophy (in particular, ethics), psychiatry and law.

The use of words may be just descriptive or communicative, or their use can be regarded as in the nature of a "verbal act". The use of words in philosophy, psychiatry and law is often of the latter nature. The difference between the two uses of words envisaged here can be summarized as the difference between "talking about" psychiatry and "doing" psychiatry — for example, practising psychoanalysis, or "talking about" law and "doing" law — for example, rendering a judgement. The use of words as "verbal acts" is usually not neutral, in the sense that one seeks an outcome, decision or change through their use, not simply a discussion.

The distinction between "talking about" and "doing" is of interest with respect to the recent major development of the field of applied ethics, in particular, clinical ethics, of which psychiatric ethics is an important part. Applied ethics can be regarded as "doing" philosophy as compared with the traditional pastime of "talking about" philosophy.

Moreover, "doing" philosophy — applied ethics — is not neutral or detached, in the sense that no identified people are involved or affected, as is true for much theoretical philosophy, which is neutral in this sense, at least on

a direct and immediate basis. This change gives philosophy a common characteristic with law and psychiatry, the lack of which used to be a distinguishing feature of philosophy as compared with law and psychiatry. There is still debate, in some circles, as to whether or not the evolution of applied ethics is a good development for philosophy.

The use of words, whether descriptively or as "verbal acts", can be a means of taking control and, therefore, of taking power. One may, through the application of descriptive words, define a matter into one's orbit of control and take power as a result, for example, by both professionalizing it, in general, and bringing it within a certain professional domain, in particular.

### *B. Discretion in Decision-Making*

Autonomy, self-determination, voluntariness and competence may all be discretionary concepts in the sense that their content, or their application when their content appears to be defined, has a large discretionary component. In turn, the presence of such discretionary features in these concepts may allow them to be used for the protection of discretionary, unarticulated, perhaps even unarticulable factors.

This may be a valid function of these concepts. It means that they can be used to allow decisions to be made which are justified in the particular circumstances, without setting a precedent which could inflict harm in the future. In future cases, any such precedent can be avoided by a different exercise of the discretion with respect to the relevant factor, for example, with respect to a finding of whether or not a person is competent or his or her decision voluntary. But the issue remains how these concepts are used in practice and how they ought to be used. This is the issue explored in this paper. In almost all decision-making situations, and certainly in those involving law, we operate from initial presumptions, although these are not always articulated. It is proposed that the initial presumption regarding the validity of persons' decisions concerning themselves (for example, regarding medical treatment), should be like those governing sanity or competency, where one presumes a person sane or competent, respectively, until the contrary is proven. In other words, the presumption should be that persons' decisions concerning themselves are valid and persons wanting to override such decisions should have the burden of proving that they are justified in doing so.

Use of the concepts of autonomy, self-determination, competence and voluntariness allows either the application or the exclusion of other principles and concepts to the decision-making of the person to whom they are applied. They can be regarded as "gate-keeping" concepts. When the requirements of these concepts are fulfilled with respect to a given person, other concepts that can be activated include liberty, justice, fairness, and respect for persons and their rights to inviolability, privacy and confidentiality, to list only some possibilities. In contrast, when the concepts of autonomy, self-determination, competence and voluntariness are held not to be fulfilled with respect to a given person, yet other principles and concepts can dominate in the decision-making. These include paternalism, protection and beneficence, but again include justice and fairness.

The presence of the latter two features in both cases, that is, regardless of whether or not the concepts of autonomy, self-determination, competence and voluntariness are operative, provides an important insight. What constitutes justice, for example, can vary, not only with the circumstances of a given situation, but also with the person involved in it. It would be unjust to characterize a competent person as incompetent in order, for instance, to override the person's decisions. But one may be acting justly (or at least more justly[1]) towards a person by holding him or her to be incompetent when this is clearly the case, and unjustly (or less justly) by ignoring the incompetence or acting on a façade of competence. It should also be noted that the decision concerning whether or not the discretionary content concepts of autonomy, self-determination and voluntariness are applicable depends upon whether the person is held to be competent or incompetent, which likewise involves a concept and decision of discretionary content. In one sense, therefore, competence can be regarded as the "gatekeeper" of the "gate-keeping" concepts.

It is also possible that, through their discretionary content, the concepts of autonomy, self-determination, voluntariness and competence allow the introduction of non-cognitive factors into the decision-making situation. These factors could include examined or unexamined emotional reactions to the situation from which decision-making arises, or intuitive responses to the situation.

We need to "unpack" the concepts of autonomy, self-determination, voluntariness and competence to see how we use them in, and to affect, decision-making. In philosophy there has been much talk about these concepts, but only very recently, with the development of applied ethics, has there been any direct, practical use of them. It is interesting that in both law and psychiatry, in contrast to philosophy, we have constantly used these notions — both descriptively ("talking about" law and psychiatry) and prescriptively ("doing" law and psychiatry) — but have had little in-depth analysis of their contents or definition of their exact nature. For example, most psychiatrists believe that they know what competency is, but cannot readily define it when asked to do so. This may seem surprising in view of the extensive and still evolving literature dealing with competence, especially in the area of psychiatry and law.[2] But a distinction needs to be made here between definition of competence and criteria for the determination of competence.[3] The literature deals with the latter, not usually

[1]It is interesting to consider whether justice is a digital or binary concept (that is, it is either present or absent), or an analogue concept (that is, there can be degrees of justice and injustice). For a discussion see M.A. Somerville, "Justice across the Generations", *Social Science & Medicine* 1989; 29:385-394.

[2]See *e.g.* K.C. Glass, *Elderly Persons and Decision-Making in a Medical Context: Challenging Canadian Law* (Ph.D. Thesis, Faculty of Law, McGill University, March 1992); G. Sharpe, *The Law and Medicine in Canada*, 2d ed. (Toronto: Butterworths, 1987) at 394-406; D.N.Weisstub, *Law and Psychiatry in the Canadian Context* (New York: Pergamon Press, 1980) at 175-253.

[3]The distinction being made here can be compared with that made between the definition of death, which is generally not undertaken in law, and the definition of criteria for the determination of death, which is. See Law Reform Commission of Canada, *Criteria for the Determination of Death* (Working Paper No. 23) (Ottawa: Supply & Services Canada, 1979); Law Reform Commission of Canada, *Criteria for the Determination of Death* (Report No. 15) (Ottawa: Supply & Services Canada, 1981).

the former, although it is true that exploration of criteria for the determination of competence necessarily, but indirectly, throws light on the definition of competence.

It may be, indeed it is proposed that it is likely, that psychiatrists have difficulty defining competence itself, because there are intuitive and other non-rational elements in the decision-making concerning the presence or absence of competency. Such elements should not, indeed must not, be excluded; but decision-making in which such unconscious components play a major role needs safeguarding. This need is also demonstrated by studies which show that there is a value judgement and other subjective elements in decisions that determine competency. It was found, in one such study, that the more serious the outcome of a person's decision in terms of its being a threat to the person's life or health, and the more it differed from what the psychiatrist thought he or she would decide in the same circumstances, the more likely it was that the person would be adjudged incompetent.[4] The effect of such a determination is to take decision-making power away from the person, and to give control over the person to someone else.[5] This could be someone whom the psychiatrist is able to influence more than the person or, even, in some cases, at least in the past, the treating psychiatrist, himself or herself.

Exploring the content and definition of these four concepts governing decision-making in philosophy, psychiatry and law — namely, autonomy, self-determination, competence and voluntariness — is not a neutral activity. To the extent that it results in trying to define these concepts comprehensively and, as a result, has the effect of tying them down, they could lose their ability to function as discretionary mechanisms, which may be their most important function. This is yet another example of the dilemma faced constantly by law: how to balance certainty with flexibility. We tend to be uncomfortable with identified uncertainty (in this case, identified uncertainty in the definition and application of these concepts), but not with the very same uncertainty when it is not identified. Perhaps one of our tasks is to train ourselves to live more comfortably with a higher degree of identified uncertainty, when doing so will be more beneficial than will either failing to identify uncertainty, or, having identified uncertainty, seeking certainty.

Concepts such as autonomy and its companions are like icebergs, in that only the tips are visible. There is a need to explore the submerged parts of the complex functioning of these concepts: how they function unconsciously and symbolically, as well as consciously, with respect to both individuals and society. The increased awareness of the nature of these concepts that will result will not necessarily mean that we will want to use them any differently. We may wish and need to retain, for example, the ability of these concepts to function in a discretionary manner. But we will be choosing to allow this, rather than

[4]L.H. Roth, A. Meisl & C.W. Lidz, "Tests of Competency to Consent to Treatment", *American Journal of Psychiatry* 1977; 134:279-283, at 283.

[5]M.A. Somerville, "Determinations of Competence as a Mechanism for Control of Persons" in D. Greig & E. Berah, eds., *Civil Rights in Psychiatry, Psychology and Law*, Proceedings of the 6th Annual Congress of the Australian & New Zealand Association of Psychiatry, Psychology and Law (Melbourne: Australian & New Zealand Association of Psychiatry, Psychology and Law, 1985) 37.

having it occur because we have not identified that we are dealing with an "iceberg concept" — a concept that has important functions at more than just the conscious level.

It should also be kept in mind that we may, in some circumstances, choose to have uncertainty present, for instance, through choosing decision-making mechanisms that operate more on the basis of chance than choice. In summary, there is a difference, first, between uncertainty being present and its being identified; and second, between choosing to have uncertainty present and its being unavoidably present.

### *C. The Decision-Making Process*

Finally, the need to identify the essential requirements of the decision-making process used in philosophy, psychiatry or law will only be mentioned here, but must be recognized.

Form is no mere formality and the processes we use, particularly when faced with uncertainty as to the substantive principles which should be applied, which is often the case with issues presented at the intersections of philosophy, psychiatry and law, can have a major impact on decision outcomes.

Law has by far the most formal decision-making processes of the three disciplines and the best articulated procedural rules. Among the most important of these are those of natural justice, which require an impartial decision-maker and establish the right of all interested parties to be heard. Such rules have become increasingly relevant to medicine and, therefore, to psychiatry. For example, when approval of an ethics committee is required before research involving human subjects may be carried out, these rules and others are applicable to the functioning of the ethics committee, although this is often not recognized unless the decision of the committee is challenged in some manner. Much less formal rules are also relevant. For example, whether records of decisions, including those taken by committees, are kept can influence a particular decision before the committee — it is possible that some persons would decide differently depending upon whether or not a record were kept. Keeping or not keeping records can also influence future decisions through either the availability or unavailability of a precedent.

## II. The Concepts

I now wish to attempt to define the content of each of the concepts of autonomy, self-determination, competence and voluntariness. This will be done, in part, by comparing and contrasting these concepts. Both negative and positive definitions of these concepts are relevant: what is not regarded, for instance, as self-determination can tell us much about what it is, and *vice versa*.

### *A. Autonomy and Self-Determination*

#### 1. What Is Autonomy and What Is Self-Determination?

In law, the terms "autonomy" and "self-determination" are used interchangeably, although very frequently there is reference to both concepts, usu-

ally in the context of rights to autonomy and self-determination. According to the rules of legal construction against redundancy (that is, if two terms are used instead of one, both are assumed to be necessary, neither being superfluous), this would indicate that the two terms have different meanings.

The issue is: What are these meanings and how are they relevant to the law? One possibility is that the term "self-determination" might refer to the concept of a person's ability to express his or her wishes; that is, the person has the ability simply to say "yes" or "no" to some proposal, and saying "yes" or "no" constitutes a decision for the purposes of the law. Under such an approach, incompetent persons could be self-determining, because, despite their incompetence, they may be able to respond positively or negatively when asked to make a decision. This is to propose that self-determination is a dispositional capacity: if a person can do "x" (say "yes" or "no"), then he or she is "y" (self-determining), which is to rely on a behaviourist theory of mind. Under such an approach, the decisions of incompetent persons could not be disregarded on the basis that the persons were not self-determining. However, this is not to say that the decision of an incompetent, self-determining person could not be overridden. It could be, but only with justification. The burden of proof of such justification (for instance, avoidance of harm) would be on the person seeking to rely on it. This means that in cases of equal doubt as to whether or not a justification applies for overriding an incompetent person's decision, the general rule — that all persons' decisions must be respected — would prevail. For example, when an incompetent person refuses medical treatment and there is equal doubt as to whether the harm avoided by undertaking the proposed intervention on the person is sufficiently serious, or whether the benefits and potential benefits outweigh the harms and risks of the proposed intervention, overriding the incompetent person's refusal would not be justified.

One important effect of adopting an approach that deals with the issues of competence and self-determination separately, as suggested above, is that it would require that the wishes of incompetent but self-determining persons be respected, unless there were good reason to override them. Such an approach is most person-respecting. It is also likely to assist in overcoming some of the very real dangers that exist in labelling persons incompetent and, therefore, non-self-determining. These include, first, that this labelling either is taken to indicate global incompetence of the person, which may be inaccurate, or, alternatively, it is simply treated as having a global effect of rendering the person incompetent for all purposes, which leads to the same outcome. A person may be incompetent in one respect and competent in others. A second danger is that labelling a person as incompetent is usually taken to indicate that the person need no longer be consulted or have his or her wishes taken into account. This can lead to the brutal disregard of such a person's wishes in circumstances where they should at least be taken into account, if not respected. An effect of such attitudes and conduct is the de-personalization and de-humanization of incompetent persons.

If self-determination is defined as above, but autonomy requires competence, then self-determination is a concept with less exacting requirements than

autonomy. Conversely, however, self-determination may be defined as a concept with more exacting requirements than autonomy. This position is reflected in another possible approach to the distinction between autonomy and self-determination, which is that autonomy does not require for its exercise that "a self" be present, whereas self-determination does.

What would constitute "a self" for the purposes of a person being able to be self-determined? Must there be some minimal presence of the person? If so, what would constitute this? One issue raised here is whether the concept of person and that of self-determination are linked. If they are, and the concepts of autonomy and person are linked, then the concept of self-determination and that of autonomy are necessarily linked. Indeed, they may become synonymous, although one could argue that autonomy refers to the *capacity* for self-determination, which can be present without it being exercised, whereas self-determination refers to the *exercise of this capacity*. If only autonomous beings are considered to be persons, and the definition of autonomy is a "full" or "packed" one, then a "full" or "packed" definition of person will result. This represents the philosophical approach, which also uses autonomy as the marker of personhood. Likewise, pursuant to such analysis, a minimalist definition of autonomy would result in a minimalist definition of person. In other words, the term "person" could be treated as more or less equivalent to that of "human being", which seems to be the approach of the law. This approach would also result in a minimalist definition of what is required for the presence of self and, therefore, of self-determination, if the concepts of person and self are linked. This could be to return to the content of the first approach to defining self-determination discussed above, that persons are self-determining if they can say "yes" or "no". But here the content of the definition of self-determination is made to depend on that of another concept, personhood.

According to some philosophers, the word "autonomous" should be used to describe the decision of a free, self-realizing, self-directed agent (that is, the person's decisions are autonomous when they are authentic ["his" or "hers"] and independent [his or her "own"]).[6] These philosophers also make reference to greater and lesser degrees of autonomy.[7] To some extent, a value judgement is involved in determining what constitutes greater or lesser degrees of autonomy, because greater autonomy is said to be present when the person acts free of unacceptable influences, including unacceptable intrinsic psychological influences, and determining what are acceptable and unacceptable influences is far from value-free. It seems that according to this philosophical view, persons are regarded as becoming more autonomous as they become more aware of what influences them and are more psychologically able to decide whether or not to allow this influence to operate (in a sense, they could be characterized as "psychologically free"), and *vice versa*. This concept of autonomy is also value-laden in at least two other respects. First, greater autonomy is regarded as a "higher state of being"; second, it postulates a particular kind of person as being most autonomous, namely, one who is self-aware, reflective and insightful. Per-

[6]G. Dworkin, "Autonomy and Behavior Control" (1976) 6 *Hastings Center Report* 23 at 24.
[7]*Ibid.*

sons who are impulsive, act on instinct, or are emotionally influenced, and as a result, are impetuous, are likely to be regarded as less autonomous. In other words, persons whose cognitive functioning clearly dominates, as compared with their emotional functioning, are likely to be regarded as more autonomous. This would matter if certain rights or privileges were conditional on a person being regarded as having a certain degree of autonomy, or even if being regarded as less autonomous were in some way a detraction from the worth of the person, or an implied or express derogatory statement about him or her.

In comparison with philosophy, the law has no definition of autonomy and, as mentioned previously, tends to equate the concepts of autonomy and self-determination. The law does, however, seek to establish the conditions in which it is presumed or hoped that autonomy will be present or fostered, when it is used to articulate and implement rights to autonomy and self-determination in relation to decision-making. But what constitutes autonomy, itself,[8] as compared with a right to autonomy, is not defined in law. In practice, whether or not a person is autonomous seems to be treated more as a question of fact than theory, to be determined, if at all, on an individual case by case basis, usually by a court as a passing reference to a given person's state of mind. This is probably the situation because the determination of whether or not a person is autonomous is not usually of direct relevance to the law, whereas the determination of a person's competence and the voluntariness of his or her decision-making are considered relevant. These are linked to autonomy in that they may reflect the presence or absence of autonomy in the philosophical sense. This is true because a decision by an incompetent person may not be authentic ("his" or "hers"), and one which is not voluntary is not likely to be regarded as independent (his or her "own"). The issue for the law is at what level of lack of authenticity or independence a person will be held to be incompetent or his or her decisions will be regarded as involuntary, respectively. Persons and their decisions may well be regarded as non-autonomous in the philosophical sense, before they or their decisions are seen as incompetent or involuntary, respectively, by the law.

To the same effect, if the philosophical definition of an autonomous person is one whose second order desires endorse his or her first order desires (that is, he or she not only recognizes and acts on his or her desires, but likes being as he or she is), it is possible that a person who is competent legally and whose decisions are voluntary, but whose second order desires conflict with his or her first order desires, is not fully autonomous philosophically.

### 2. What Is the Relationship between Autonomy and Other Person-Protecting Concepts?

#### *a. Informed Consent*

It merits noting that autonomy is a purpose or aim of the doctrine of informed consent, but not one of its elements. One might assume that if informed consent

[8]For discussion of the concept of autonomy, see below at 193-95. See also M.A. Somerville, "Refusal of Medical Treatment in 'Captive' Circumstances" (1985) 63 Can. Bar Rev. 59.

were being used in such a way that it inhibited rather than promoted autonomy, this would be a relevant consideration in relation to the validity of the consent, but this may not be true from a legal point of view. An example, in this regard, is that of the psychological coping mechanism of denial. A patient can refuse to be given information in order to be able to remain in a state of denial of his or her illness or of its implications. Persons, however, need some minimal consciousness of a matter in order to be able to suppress consciousness of that matter, so as to be in a state of denial concerning it.[9] Are we promoting or reducing autonomy, if we insist on informing the patient in order to obtain informed consent? Does this depend on the extent of the information we insist on providing? Can informed consent be present without informing? This is probably best described as a situation for the application of the legal doctrine of waiver. Waiver applies when the person with the right to be informed gives consent (*quaere* informed consent) to not being informed, in circumstances in which the person with a legal obligation to inform is ready, willing and able to do so, and makes this known to the other person. Waiver can be regarded either as an exception to requiring informed consent, or as allowing informed consent to be obtained on the basis of less than the usually required scope of disclosure of information. The latter may seem to present a contradiction in terms — how can a person give informed consent if he or she is not informed?

The confusion arises because although information disclosure was the initial focus of the doctrine of informed consent, that doctrine is now much more all-encompassing, nuanced and subtle in terms of what is sought to be achieved through its use, and includes promotion of patient autonomy. In particular, the patient's autonomy could be promoted by accepting his or her waiver of the right to be informed and treating the resulting consent as valid, that is, as fulfilling the requirements of the doctrine of "informed" consent.[10] To the contrary, there could be a detraction from the patient's autonomy by refusing to accept a consent given pursuant to a waiver of information. In short, waiver can be regarded as another example of an exercise of autonomy by the patient, because the patient chooses not to be informed. But whether or not a decision taken in such circumstances should be regarded as an autonomous one depends upon one's definition of autonomy. This raises the interesting paradox, which will not be explored here, that one could, through the same mechanism, simultaneously promote a person's autonomy and detract from the autonomy of his or her decisions.

### *b. Inviolability*

The law speaks of a right to autonomy, that is, a right to determine what happens to oneself in particular, to determine what is done with or to one's body.

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[9]See E.E. Shelp & M. Perl, "Denial in Clinical Medicine: A Reexamination of the Concept and Its Significance", *Archives of Internal Medicine* 1985; 145:697-699.

[10]Professor Jay Katz would disagree that this promotes autonomy (*The Silent World of Doctor and Patient* (New York: Free Press, 1984) at 127). Katz's concept of autonomy appears to be closer to the philosophical concept (see text accompanying note 6), than the legal concept (such as it is) or what is proposed here.

This right overlaps with that to inviolability, which comprehends the right not to be touched without one's consent. The right to inviolability can also be regarded as a negative-content expression of the right to autonomy. The latter right also has positive content, for example, the right to demand to be touched. Such a right exists, for instance, in Quebec by virtue of the fact that there is a legal right to necessary medical care.[11] If this care were refused without justification, such as a reasonably unavoidable shortage of resources, it could be demanded and obtained through legal action.

*c. Privacy*

The right to autonomy also encompasses a right to privacy. In fact, the most famous development of this right in Anglo-American legal systems was in the reverse order: United States' courts interpreted the right to privacy as requiring recognition of a person's right to autonomy, in order to give adequate protection to the right to privacy. One of the landmark decisions in this regard is *Roe* v. *Wade*,[12] in which the United States Supreme Court held that a "penumbra" right of privacy was to be found in the United States Constitution. The Court held that this right required recognition of a right to autonomy, which, in the circumstances of the case before the Court, allowed a woman to decide for herself, during the first trimester of pregnancy, what should be done with respect to her body. This meant that the State could not interfere with her decision not to continue a pregnancy by undergoing an abortion. Such a privacy-autonomy right is of negative content, that is, it is a "right against". Positive content rights of privacy, for example, the right to inspect and take a copy of one's own medical records[13] and have these corrected if they are in error,[14] are an implementation of a right to autonomy and of self-determination in yet another sense. They allow one to exercise one's ability to express one's wishes and to have them implemented when such implementation requires action on the part of another. Both negative and positive content rights of privacy and autonomy reflect and implement the rights of freedom and liberty. This is a "freedom from" in the case of negative content rights of privacy, which are rights not to be physically or mentally invaded. Such rights may be necessary conditions precedent to autonomy and self-determination to the extent that these depend upon the power to control the inputs to which one is subject. Positive content rights of privacy contemplate "freedom to" do, or see, or change something, which are also forms of control over what happens to one, and hence, are closely related to autonomy and self-determination. Both forms of freedom may also be related to autonomy in the broader philosophical sense described above, in that persons who are free from unwanted interferences and free to act as they see fit have at least the circumstances present in which their psychologically free (that is, "their" authentic and "own" independent) decisions can be taken and implemented. In short, autonomy, self-determination, liberty and freedom

[11] *An Act Respecting Health Services and Social Services*, R.S.Q. c. S-5., s. 4.
[12] 410 U.S. 113 at 152-54 (1973).
[13] *An Act Respecting Health Services and Social Services*, *supra* note 11, s. 7.
[14] *Privacy Act*, R.S.C. 1985, c. P-21, s. 12(2)(*a*).

have a common element, that of *control* of both what one does not want and what one does want to happen to one.

3. What Are the Dangers of Abuse of a Concept of Autonomy?

There would be danger in the law adopting the philosophical notion of autonomy if this meant that only autonomous persons or autonomous decisions, in the philosophical sense, needed to be respected. Promotion of a right to autonomy is intended to be protective and promotive of a person's liberty, freedom and rights to self-determination, that is, of the person's right to decide what should happen to himself or herself. But it could have the opposite effect for those persons adjudged to be non-autonomous. These persons may be deprived of their liberty, freedom and rights to self-determination on the basis of their non-autonomous state, when they would not necessarily be deprived of these if autonomy were irrelevant. In short, there is danger in promoting the adoption of autonomy as a factor relevant to legal rights in relation to personal decision-making, because this could result in the invasion of the human rights of, a lack of respect for, and wrongful discrimination against, persons characterized as non-autonomous.

This same phenomenon, namely, that a doctrine which is meant to promote respect for persons or to protect them can be used to the opposite effect, can be seen in relation to the doctrine of informed consent. This doctrine is meant to protect patients from unwanted or unconsented to treatment, and requires that the patient be informed of the nature and consequences, including material risks, of the proposed treatment, of its alternatives, and of foregoing all treatment. But the doctrine can also be used to deny treatment. This can occur when it is argued that not enough is known about a treatment, such as an experimental drug, for instance for AIDS, to allow the person to give an informed consent to its use; or that it is impossible for a certain person's consent to be sufficiently free or voluntary and, therefore, that he or she is incapable of giving an informed consent, such as when he or she is a prisoner. In short, the doctrine of informed consent, which has a primary purpose of protecting persons from the wrongful imposition of treatment, can, when stringently defined and applied in a certain manner, also be used as a means of denying access to treatment. It is interesting to contemplate, however, that such instances rarely occur in relation to mentally ill persons, even though there are many new experimental psychopharmacotherapeutic agents that offer such persons hope of vastly improved treatment, and even though involuntarily hospitalized mentally ill persons can be compared with prisoners, in some respects. The reason for this is that most court cases involving the application of the doctrine of informed consent to mentally ill persons concern the reliance by these persons on the doctrine in order to have their refusals of treatment respected, when health care professionals regard this treatment as essential. These cases do not concern the use of the doctrine by health care professionals to deny such persons' claims to access to treatment.

In the remainder of this paper, unless otherwise stated, a minimalist definition of both autonomy and self-determination are adopted.

### *B. Competence*

#### 1. What Is Competence?

In law, the doctrine of competence has two limbs: legal and factual. Adult persons are legally competent unless they are subject to a court order declaring them incompetent. On the whole, factual competence, which is defined below, is of much greater importance to health law than legal competence. In the discussion which follows, it is assumed that all persons are legally competent.

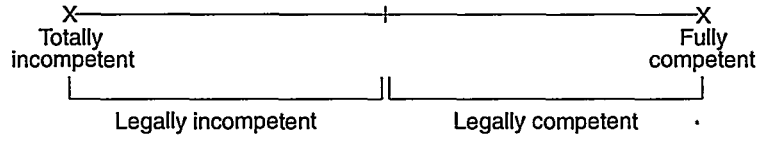
In law, only the decisions of factually competent persons are binding. Factual competence is defined by cognitive mental functioning. A person is functionally, and therefore factually, competent if he or she has the capacity to understand the nature and consequences of the proposed course of conduct. Competence does not depend on rationality or rational decision outcomes. Irrationality is only legally relevant in terms of voiding a person's decisions if it indicates a defect in cognitive functioning in the nature of a lack of capacity to understand the information required to be disclosed. That is, at least in theory, competence is judged according to a person's cognitive capacity, and not on the basis of the exercise of this *per se*, and therefore, not on the basis of the content of the decision the person reaches. In practice, these latter features often play a role in the determination of competence, because they can be used as evidence indicating a lack of the necessary cognitive capacity.

At present, the law does not incorporate any separate or distinct concept of emotional competence or incompetence. Emotional functioning is only relevant to the law and its definition of competence if it affects cognitive functioning and, hence, capacity for understanding. There are arguments both for and against incorporating a concept of emotional incompetence into the law.[15] The dangers are those of abuse in that decisions which should not be overridden, will be, on the basis of emotional incompetence. The benefit is that the decisions of some seriously emotionally disturbed, but cognitively competent, persons could be overridden when the decisions are far outside any range that could be considered "normal". For instance, many paranoid persons may be cognitively competent, but their paranoid delusions can dominate their decision-making, sometimes with seriously harmful results. If an approach that took emotional competence into account were to be adopted, strict safeguards would be needed. In particular, the presence of emotional incompetence should not, in itself, justify overriding the decision of a cognitively competent person. The overriding must be clearly justified, that is, necessary, in that no less invasive or restrictive approach will suffice, serious harm is avoided, and the benefits and potential benefits to the emotionally incompetent person clearly outweigh any harm and risks of harm to him or her. The intervention of a court could also be required as a safeguard in declaring cognitively competent persons emotionally incompetent in order to override their decisions concerning themselves.

The legal approach to competence does not function on a continuum, but on a bi-polar model: a person is adjudged either competent or incompetent for

[15]See Somerville, *supra* note 8 at 65ff.

the purposes of law. In fact, however, all incompetent persons will not be equally incompetent nor all competent persons equally competent. This can be illustrated diagrammatically as follows:




2. What Is the Relationship between Competence and Self-Determination?

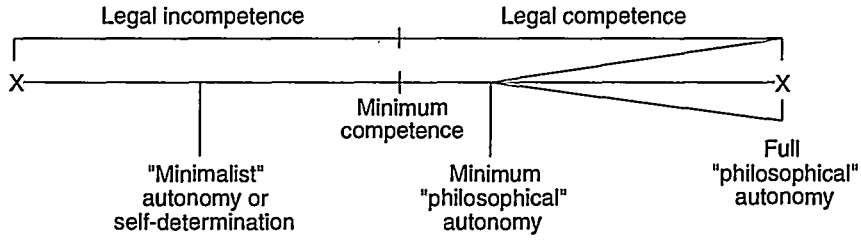
If the right of self-determination — the right to have one's decisions concerning oneself respected — depends on one's competency, then competence acts as a condition precedent to the exercise of the right of self-determination. Under such an approach, the contents of the concepts of competence and self-determination are different, but related. On the one hand, determining competence involves an assessment of the person's mental capacity, in terms of cognitive functioning, for decision-making. On the other hand, the exercise of the right of self-determination assumes, but does not demand, the exercise of that capacity in decision-making, when it is found to be present. This means that the irrational decision of a competent person will be respected and this respect will be accorded on the basis of respect for that person's right of self-determination. In such a model, competence has a prescriptive function and self-determination a descriptive role. In comparison, if self-determination does not depend on the presence of competence, there is no necessary relationship between competence and self-determination; they can be regarded as independent variables in a decision-making context. Whether the concept of either self-determination or competence functions prescriptively or descriptively will depend upon how it is used. In law, competence tends, in practice, to be used prescriptively, and self-determination descriptively. In short, in practice, the outcome in law tends to be the same whether competence and self-determination are regarded as dependent or independent variables, which means that it is difficult to determine the theoretical approach of the law to this question. Which theoretical approach is taken becomes important when one theoretical base would give a certain outcome in a given situation, and the other theoretical base a different outcome in the same situation.

3. What Is the Relationship between Competence and Autonomy?

The analysis outlined above can be applied directly to a second comparison, that of the concepts of competence and autonomy, if the concept of autonomy is regarded as being interchangeable with that of self-determination, which is one possible definition of autonomy.

But, what is the relationship between competence and autonomy in the philosophical sense described above? One can regard competence as the beginning of a continuum which ends with "full autonomy". But this philosophical concept of full autonomy includes a great deal more than simply full and free

capacity for cognitive functioning and even the exercise of this. It also contemplates full and free emotional and psychological functioning, in the sense that a person's decisions, in order to be regarded as fully autonomous, must be free of what are classified, either by the person himself or herself, or sometimes by others, as unacceptable influences on the person, including intrinsic ones. Consequently, the continuum is better envisioned as a triangle rather than as a straight line. The triangle, the apex of which is competence, represents a series of factors overlying competence. It should be noted that legal competence can exist prior to autonomy in the philosophical sense being present. As well, the commencement of competence in the legal sense, and autonomy in the philosophical sense can coincide, depending on the circumstances of the case. On the other hand, it is not possible for autonomy in the philosophical sense to exist prior to legal competence. However, if autonomy is defined only to require that a person be able to express his or her wishes, that is, as equivalent to the least demanding definition of self-determination, it would not be dependent on the presence of competence and could precede its presence. The general scheme contemplated here can be illustrated diagrammatically as follows:




Some authors, for example, Professor Jay Katz in *The Silent World of Doctor and Patient*,[16] have proposed that one can invade a person's rights to privacy and self-determination for the purpose of promoting autonomy. Promotion of autonomy is seen as being undertaken, despite the invasion of autonomy involved in the intervention, when one seeks to give the person every opportunity or to help or even to force the person to achieve the fullest possible state of psychological freedom of which he or she is capable in relation to decision-making. For instance, when a patient refuses treatment and the refusal carries a material risk of serious harm unaccompanied by any compensating benefits, Katz, who is both a psychiatrist and a professor of law, argues in favour of *imposing* "clinical conversation" on the patient for a limited time, in order to ensure that the patient has the fullest possible perspective on the situation and every opportunity to change his or her mind. It is obviously open to debate whether this indeed promotes autonomy or infringes upon it, even in an overall sense of whether this approach achieves the greatest net augmentation of autonomy as compared with a non-interventionist approach that simply respects the competent patient's refusal of treatment. It may well be that law would see it as invading autonomy on the basis that it infringes the person's *rights* in this respect, whereas psychiatry would view it as promoting autonomy on the

[16]*Supra* note 10 at 141.

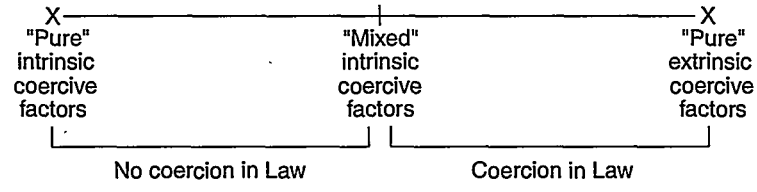
grounds that it best responds to the person's *needs* in this regard. This touches on one of the differences between law and psychiatry: when there is conflict between respecting a patient's rights and needs, law tends to give priority to the former, psychiatry to the latter.

### *C. Voluntariness*

#### 1. What Is Voluntariness?

Voluntariness requires that a person's decision be the result of a free act of his or her will; stated negatively, the decision must not be the result of coercion, duress or undue influence. A voluntary decision is one that is *willed*, in the sense of freely taken, by the decision-maker. An involuntary or non-voluntary decision is one taken by, but *against the will* of, the decision-maker. An "avoluntary" decision is one taken in the *absence of will*, for example, in a state of automatism.

The factors which have the potential to affect voluntariness can be classified as extrinsic or intrinsic. Holding a gun to a person's head to make the person agree to a certain course of action is a clear example of extrinsic coercion. On the whole, these factors are easier to assess and to deal with than intrinsic ones. Intrinsic factors, which could be regarded as coercive, include some psychopathological states (for instance, obsessive disorders, megalomania or paranoia) or drugs which affect a person's psyche in a way that causes the person to make a decision that otherwise he or she would not have made. The former group of factors could be labelled "'pure' intrinsic coercion" and the latter "'mixed' intrinsic coercion" and both can be compared with "extrinsic coercion". Again, one has a continuum and, again, the law must draw a line below which coercion will not be regarded as being present and above which it will.




This diagram indicates that "pure" intrinsic coercive factors will not in law render a person's decision involuntary and this is probably true. This does not mean, however, that these factors are irrelevant in determining the legal validity of a decision of a person subject to them. The factors which can be classified as "pure" intrinsic coercion may, for example, also indicate incompetence, or could block sufficient understanding by a person of the information required to be given to him or her (for instance, a person whose informed consent is required), with the effect of rendering the decision invalid in law on the basis of lack of information. That is, it is not sufficient in law for the information to be delivered, it must be received. The test in this latter regard, it is proposed, is whether the person legally required to inform the other person would, as a

reasonable person giving information, believe that the recipient of the information *apparently* understood it.[17] If the answer to this enquiry is negative, any consent of the person receiving the information is legally defective because there has not been a legally adequate reception of the information. In summary, for legally valid decision-making in situations where the legal validity of the decision-making depends, in part, on the provision of information, the law has minimum requirements that must be fulfilled not only with respect to giving information, but also with respect to receiving it.[18]

In law, extrinsic coercive factors are more likely than intrinsic ones to be regarded as voiding a decision on the grounds of lack of voluntariness. The law has a pervasive doctrine of "take your victims as you find them", which means that defendants take the risk that their wrongdoing will cause much greater than expected damage, because of the plaintiff's personal susceptibilities or circumstances. In such cases, defendants must pay the full extent of the damage, not just that which was reasonably foreseeable, although reasonable foreseeability, to which this approach is an exception, is the general principle governing both the imposition and limits of legal liability. In assessing the effect of intrinsic coercive factors on voluntariness, particularly those factors which are not generated by an identified external cause (one could compare, in this regard, certain psychopathological states which fulfil the criteria for an intrinsic coercive factor, with similar states induced by drugs: the latter are much more likely than the former to be held to give rise to a lack of voluntariness), the maxim referred to above tends to adopt the form of "take yourself as you find yourself". That is, plaintiffs will have greater difficulty in establishing that "pure" intrinsic coercion should be regarded by the law as invalidating decision-making, than they will other forms of coercion.

Finally, it is worth noting that, in the case of both extrinsic and intrinsic factors influencing decision-making, it is a value judgement to decide when a factor reaches a degree of influence such that it becomes unacceptable in the sense of rendering a decision involuntary through coercion, duress or undue influence. This is true, in particular, in deciding, as the diagram indicates will be necessary, which "mixed" intrinsic factors amount to coercion and which do not.

### 2. What Is the Relationship between Voluntariness and Self-Determination, and between Voluntariness and Autonomy?

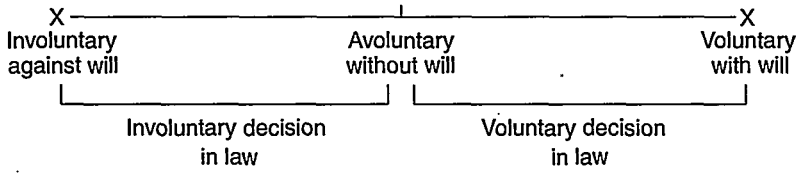
The presence of voluntariness indicates that a decision is indeed self-determined, not other-determined. The absence of voluntariness indicates the opposite. Consequently, voluntariness can be regarded as a marker of, or test for, self-determination in decision-making. Stated another way, an ability to be self-determining is related to an ability to make voluntary choices. On the other hand, it is the self who still decides even when a decision is involuntary, for

[17]M.A. Somerville, "Structuring the Issues in Informed Consent" (1981) 26 McGill L.J. 740 at 776ff.

[18]*Ibid.* at 753ff.

example, subject to coercion. Pursuant to such analysis, self-determination and voluntariness are not linked; rather, they are independent variables.

Voluntariness and autonomy, in the philosophical sense described, are directly related. The more autonomous a decision is, also the more voluntary it becomes. One can thus adopt a continuum of voluntariness from involuntary to avoluntary to voluntary, which parallels the continuums described previously both for autonomy and competence. In fact, such a continuum exists in relation to voluntariness, but again only one point on it is of relevance to the law: that below which a person's decision will be characterized as involuntary and above which it will be treated as voluntary, and in neither case need the decision be at an end-point to be so characterized. This can be represented diagrammatically as follows:




As this diagram indicates, some avoluntary decisions will be characterized in law as involuntary and others as voluntary. Again, a value judgement is involved in making such determinations.

3. What Is the Relationship between Voluntariness and Competence?

The relationship between voluntariness and competence is similar to one version of that between voluntariness and self-determination: the two are independent variables, that is, they are not linked. A competent person can make a voluntary or involuntary decision, although whether he or she could make an avoluntary one is an interesting question. Does the absence of exercise of will necessarily mean that the person is incompetent, that is, that competent persons cannot, by definition, act without will? The answer, at least in a technical legal sense, is probably that competent persons can act in an avoluntary manner. This is true because competence requires only the presence of the capacity to understand the information which must be provided in relation to any given decision. It does not require the exercise of that capacity. However, the cases in which competent persons do something with no act of will would need to be carefully identified. For instance, a person's refusal to make a decision is not such an example, because a refusal to make a decision is in itself an exercise of will. In fact, this is an option resorted to, in particular, by aged persons in relation to medical decision-making.[19] Moreover, the distinction between acts and omissions could be relevant here. A decision outcome which results from an omission to decide is more likely to be characterized as avoluntary than one where the person acts, whether verbally or otherwise, to render the decision.

[19]R.M. Ratzan, "Cautiousness, Risk, and Informed Consent in Clinical Geriatrics", *Clinical Research* 1982; 30:345-353, at 351.

Clearly, incompetent persons can make involuntary or avoluntary decisions, but can they make voluntary ones? The answer is clearly yes; it is their competence or understanding which is defective, not their ability to will or want the decision outcome which they express. These decisions can be voluntary, but they are not competent. It is important to recognize such factors, because recognizing that an incompetent person's decision is voluntary may make us more ready than otherwise to respect it in circumstances where this is appropriate — that is, where there is no adequate justification for overriding it. A requirement that we must take into account the wishes of incompetent persons with respect to their sexual sterilization would provide a good example in this regard. Too often the decisions of incompetent persons are regarded as being totally defective. We might develop a different attitude to such decisions if we recognize that some persons' decisions can be defective because of involuntariness, although these persons are competent, and other persons' decisions can be voluntary, but defective because of incompetence. Equally, in both cases there is a single defect present, although a different one. In a sense, the decision of a person in one of these categories is no more defective than that of a person in the other category. It could be important to recognize this in order to obtain a balanced perspective on defects in decision-making and to determine what consequences, whether legal or other, should be attributed to these defects.

## III. Conclusion

Exploring and comparing the decision-making concepts of autonomy, self-determination, competence and voluntariness in philosophy, psychiatry and law provides insights that can help us to decide both which decisions we should respect and which decisions we are justified in not respecting. However, just as we need to distinguish the sin from the sinner, we must distinguish the decision from the decision-maker. This is particularly important in ensuring respect for all persons. There may be a tendency only to respect those persons whose decisions we respect; that is, respect is generated from respect for a decision and flows to the person who made it. The converse should be true. We must respect all persons, whether or not we can respect their decisions in any given situation.

This leads to a final point. We need to identify the *prima facie* presumption from which we will work. It is proposed that it should be that the decisions of *all persons* should be respected, and that exceptions to this principle must be clearly justified. These exceptions can be a range of factors, *one of which* could be that the person is incompetent. But, if such a person's decisions were not harmful to him or her, or seriously harmful to others, incompetence by itself would be an insufficient justification for ignoring or overriding them. The alternative *prima facie* presumption, and the one that may be in use currently, is that the decisions of all competent (or self-determining, or autonomous) persons should be respected, and that exceptions to this principle must be clearly justified. This means that incompetent (or non-self-determining, or non-autonomous) persons are classified as separate from other persons, with the result that there is no *prima facie* presumption that their decisions or wishes need to be respected, and exceptions justified. Even more importantly, this approach means that the decisions or wishes of incompetent persons need not even be taken into

account. This distinction between "not respecting" and "not taking into account" is important. There is a difference between not respecting the decision or wishes of a person because these were simply ignored, and not respecting such a decision or wishes *after* these have been taken into account. The latter is more person-respecting. It is proposed that it should be decisions, not persons, which are classified, if we are not to run the risk of wrongfully discriminating against those whom we regard as less competent than ourselves and, therefore, as less worthy of respect for their rights of self-determination and more needy of protection. The first of the presumptions outlined above distinguishes between, if anything, decisions, not persons; the second distinguishes between persons. By focusing on differences between decisions and not on the persons who make them, we are more likely to retain our respect for all persons.