

“I Think I Do”: Another Perspective on Consent and the Law

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The doctrine of informed consent, introduced by the courts in 1957,¹ is but one of many legally imposed duties to disclose to arise over the last several decades. In myriad areas of everyday life, including medical decision-making, the law has come to require that a person or entity with presumptively superior information as to risks, contents, or consequences take affirmative steps to disclose that information at the time another individual is faced with a decision for which it might prove pertinent.²

Such disclosure requirements underscore the values of individual liberty and self-determination that are at the core of our rights-based legal system. Rather than directly and more paternalistically regulating citizen behavior by, for example, simply prohibiting a given risk-creating activity, the State takes the less intrusive step of mandating that the individual be provided information that might affect her behavior. Further implicit in the various legally mandated disclosure requirements are several assumptions: that a more informed (if still imperfectly informed) decision is better than a less informed one; that the ordinary person cannot reasonably be expected to have or to be able in a timely manner to obtain the disclosed information otherwise; and that the potential benefits of requiring that the ordinary person be provided this information exceed its costs. In sum, notwithstanding the fact that acting without perfect information is intrinsic to the human condition, the law has taken steps in many contexts to increase the information upon which the ordinary individual might act.

Consistent with these values and assumptions, the rise of the legal doctrine of informed consent brought with it a shift from physician beneficence to patient autonomy as the guiding value of the doctor-patient relationship: the patient was to have an increasingly large, if

not the ultimate, say in most treatment decisions.³ But unless her doctor provided her pertinent medical information prior to her decision, the patient's explicitly “chosen” or “consented to” treatment forms could not automatically be assumed to be what she “really” wanted, could not be considered the result of a truly autonomous decision.

One of the most common contexts in which we thus far have not required disclosure of information to the ordinary individual by the party presumed to possess superior knowledge is the legal formalizing of a decision to marry. Why, as a matter of law, do we not impose similar requirements of disclosure and consent in the marital and medical decision-making contexts?

This *Festschrift* in honor of Jay Katz seems an especially appropriate occasion to pose this question, which makes a first attempt to unite two areas that have long independently interested him: informed consent and family law. And, heeding Jay's eloquent reminders that silent certainty is seldom as valuable as meaningful conversation and the acknowledgment of uncertainty,⁴ my intent in the next few pages is simply to present some tentative thoughts in what I hope will prove to be a larger dialogue.

Disclosure and Formalizing the Decision to Marry

Although there is little about the present legal procedures for getting married that would cause one to think that a contract is being entered into, the law has long explicitly characterized marriage as a legal “contract” among husband, wife, and the State.⁵ Most terms of the marriage contract, however, unlike, for example, the terms of a commercial contract, are not negotiated by the parties, nor are they set out in a single document.

Rather, they pre-exist as scattered state statutes and judicial decisions of general applicability. The great majority of these laws, such as those governing financial support and property rights both during marriage and upon its dissolution, delineate the legal obligations and duties of each spouse toward the other. A second, smaller group of laws, including those governing spousal testimonial privileges and certain crimes such as spousal rape, more directly affect the relationship between the State and one or both of the spouses.

When one marries, one agrees to be bound by the various laws that constitute the implied terms of the marriage contract. Although at the time one applies for a marriage license, the state necessarily possesses the most complete possible "knowledge" of the legal terms of the marriage contract, it generally does not take any affirmative action to disclose even a portion of that information to the parties requesting to be married.⁶ Nor does the State require the spouses-to-be to provide evidence that they know what the terms are of the contract into which they are about to enter.

Why is the law so willing to accept, without any disclosure of pertinent information by the more knowledgeable to the less knowledgeable party, the explicit preference of the couple applying for a marriage license when it has so much difficulty thus accepting the stated preference of the patient in the medical decision-making context? Several possibilities merit attention.

A Lawyer's Knowledge of the Law but a Layman's Knowledge of Medicine?

First, the law might impose a duty to disclose in the medical, but not the marital, decision-making context because of different assumptions as to what the average individual knows of medicine and the law. In the medical decision-making context, the disclosure requirement implies that the ordinary person is presumed to have an insufficient knowledge of the medical information pertinent to her condition and treatment alternatives. In the context of the decision to marry, however, the law may assume that the ordinary individual of normal mental capacity has, at the time she applies for a marriage license, an appropriate and adequate knowledge of the laws that comprise the terms of the marriage contract. If this latter assumption is empirically supported, there would appear to be little reason for the State to undertake the burden of systematically disclosing to spouses-to-be information that they likely already possess.

Although there are no published studies of the ordinary person's knowledge at the time of first marriage of the terms of the marriage contract, there seems little reason to believe that the public would demonstrate substantially greater understanding of this area of the law than of the other "everyday life" areas for which

published studies exist. Scarcely any state at present takes any affirmative action, beyond the usual publication of statutes and court decisions, to inform persons about to be married of the laws governing the economic and other consequences of their decision.⁷ Nor does any state require the parties to show that they understand the economic terms of the marriage contract before permitting them to enter into it.

The few published empirical studies indicate that the ordinary person knows little of the law that governs her personal interactions.⁸ To cite a typical set of findings: In a 1973 mail survey, 600 Michigan residents were asked 22 true-false questions, primarily about criminal and consumer law. The mean overall score was 15 of 22 correct (68 percent), with the mean number of correct answers in the consumer law section being only a fraction better than chance (53 percent).⁹

Taken as a whole, the sparse empirical data in this area suggest that the ordinary person does not have much knowledge of the law likely to be pertinent in everyday life. And the current absence of any special efforts by the State to convey information about the laws governing the economic and other consequences of marriage makes it improbable that a study of public knowledge of the terms of the marriage contract would yield substantially different results.

But perhaps the ordinary person considers marriage a sufficiently momentous life choice that she is more likely than in the case of other everyday-life legal transactions to consult an attorney for pertinent legal information. What empirical evidence do we have?

Notwithstanding the poor knowledge of the law that the ordinary American appears to possess, few ever consult an attorney on a personal, nonbusiness matter. The largest study in this area, a nationwide 1974 American Bar Association survey of more than 2,000 adults, found that 36 percent had never consulted an attorney on a personal matter, and another 28 percent had done so only once.¹⁰ The ABA survey further revealed that the most common uses of attorneys by the public for nonbusiness matters were for real estate transactions and the settling of estates.¹¹ Divorces and other matrimonial disputes were third, but attorneys were consulted on matrimonial matters only when divorce was imminent or had already occurred.¹² There is no evidence that any substantial number of persons consults an attorney shortly prior to marriage in order to obtain information as to the terms of the marriage contract.¹³ (Indeed, this pattern of usage is consistent with the anecdotal evidence that there are many "divorce lawyers," but one hears of rather fewer "marriage lawyers.")

The Quality of Consent

Given the likelihood that the ordinary individual marries with scarcely any knowledge of the terms of the

contract into which she is entering, we might safely assume that the law's failure to require disclosure in this context is not due to a belief that such a requirement would merely burden the State with providing the spouses-to-be information that they already have. Perhaps, unlike in the context of medical decision-making, the law simply does not care about the level of information that underlies the ordinary person's consent to the marriage contract. That is, the law may be relatively unconcerned with the *quality* of the consent to the marriage contract given by the spouses-to-be.

In fact, however, the marital statutes of virtually every state have long explicitly embodied the concern that a marriage be entered into intentionally and with an understanding of its seriousness and consequences. Thus, a marriage is usually considered legally voidable or void if either of the spouses at the time of marriage is below the "age of consent,"¹⁴ under duress,¹⁵ intoxicated,¹⁶ under the influence of drugs,¹⁷ insane,¹⁸ an "imbecile" or "idiot,"¹⁹ or otherwise mentally deficient.²⁰ In some states it is unlawful for the clerk even to issue a marriage license if either of the parties appears at the time to be "incapable" of consenting.²¹

The existing law, in short, attempts to ensure that the parties to the marriage contract have the *capacity* to understand the terms of that agreement. Yet it takes no steps whatsoever to ensure that the parties have a genuine *opportunity* to understand those terms at the time the agreement is entered into. Why has scarcely any state taken the next logical step and assumed the burden of disclosing information regarding the terms of the marriage contract to persons about to be married?

Fair Notice and the Rule of Law

Perhaps the reason for the law's different treatment of disclosure in the marital and medical decision-making contexts is the nature of the information to be transmitted. Somewhat paradoxically, the law may in general be far more eager to require the disclosure of non-legal information, such as the expected risks and benefits of various medical treatments, than to require the disclosure of information about the law itself. Indeed, at present, the *Miranda* warning²² stands nearly alone as an instance of legally mandated disclosure of information *about the law* to the ordinary person through a means other than the regular publication of statutes and judicial decisions. Why?

From disparate roots in Aristotle and Montesquieu,²³ our modern ideal of the rule of law has grown to embody a cluster of interrelated values attentive both to those who rule and to the governed: regularity, predictability, neutrality, accountability, and evenhandedness in the administration of justice—all of which are

intended and expected to enhance the freedom, security, autonomy, and dignity of the citizen. Friedrich Hayek has provided the classic statement of our 20th-century conception of the rule:

[S]tripped of all its technicalities[, the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.²⁴

Thus, it is fundamental to a rule of law that persons be able to know before acting what the legal character and consequences of their acts are and, therefore, that they be able to predict with reasonable certainty the outcome of any subsequent adjudication regarding their acts. Implicit in this entitlement is the notion that a major purpose of law is to guide and channel behavior and that the law therefore should consist of publicly accessible, comprehensible, and determinate rules for acting. The state, in sum, is to provide the citizen fair notice of the laws.

But what constitutes fair notice? Bentham believed that the only fair notice was *actual* notice. And he therefore proposed that the State should provide the citizenry a "universal code"²⁵ that would give some coherence to the "continually increasing and ever shapeless mass of law [that] is . . . shot down [like garbage] upon the heads of the people."²⁶ It was Bentham's further hope that this universal code would become "the chief book" and "one of the first objects of instruction in all schools."²⁷ His less ambitious proposals for ensuring public knowledge of the laws included making the reading of the code a regular part of all church services,²⁸ posting in certain public places (such as theaters, markets, and highways) the laws affecting those places,²⁹ and requiring that all contracts "be written upon stamped paper, which should bear upon its margin a notice of the laws concerning the transaction to which it referred."³⁰

Despite our professed ideal of a rule of law and our belief that fair notice is "the first essential of due process of law,"³¹ we have always considered Bentham something of an extremist and have long been satisfied with the State providing the public formal, rather than actual, notice of the law.³² For us, regular publication of statutes and judicial decisions has almost always constituted fair notice, no matter how inaccessible (in every sense) those government documents might in fact be to the average individual. Notwithstanding the fact that medical journals are as readily available to the public as statutes and judicial decisions—and perhaps as comprehensible—the law has never considered the mere publi-

cation of those journals to be an adequate substitute for actual physician disclosure to the individual patient. And we are left with the seeming paradox of the law having come to mandate higher standards of disclosure and consent in the typical medical decision-making context than in the context of most essentially legal decisions made by ordinary persons, such as the decision to marry.

One explanation of this paradox worth further consideration might, then, be the following. Were the State to assume the burden of providing information about the terms of the marriage contract to applicants for a marriage license, it would be acknowledging that formal notice of the law, without more, is not always fair notice. And, having started down this slippery slope, we might ultimately be forced to confront the fact either that Bentham had it right, or that our commitment to fair notice and the rule of law may be more rhetorical than real.

References

1. "The doctrine of informed consent surfaced, seemingly out of nowhere, in *Salgo v. Leland Stanford Jr. University Board of Trustees* [317 P.2d 170 (Cal. 1957)]." Jay Katz, *The Silent World of Doctor and Patient* (New York: Free Press, 1984), 60. See also Ruth R. Faden & Tom L. Beauchamp, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986), 86-91, 125-29.
2. To cite just a few examples: Pharmaceutical companies are required by law to tell the consumer of potential adverse effects of using their products, see 21 U.S.C. § 352 (1982); processed foods bear legally mandated labels stating their contents, see *id.* § 343 (1972); lending institutions must inform the borrower of the total dollar amount of interest to be repaid, see 15 U.S.C. § 1638 (a) (1982); and the police are legally obligated to tell the person about to be arrested of her Constitutional right to an attorney and to remain silent, see *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966).
3. For a discussion of the rise of—and partial retreat from—the legal doctrine of informed consent, see Jay Katz, *supra* note 1, 48-84. See also Faden & Beauchamp, *supra* note 1, 114-50; Alan Meisel & Lisa D. Kabnick, "Informed Consent to Medical Treatment: An Analysis of Recent Legislation," *University of Pittsburgh Law Review* 41 (1980): 407.
4. See generally Katz, *supra* note 1.
5. In a long-standing debate of essentially rhetorical interest, the courts have described marriage as, variously, a contract, a legal status, a legal institution, and some combination of these. While early and frequently characterizing marriage as a "civil contract," the courts have nonetheless made clear that it is in many respects unlike other contracts. The classic judicial description is contained in *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888):

It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

See also, e.g., *Clark v. Clark*, 10 N.H. 380, 382 (1839) ("A perfected negotiation, or treaty, of marriage, is undoubtedly a civil contract."); *Ryan v. Ryan*, 277 S.2d 266, 268-69 (Fla. 1973) (marriage "a 'contract' rather than a mere 'relationship'"); *Fearon v. Treanor*, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936) ("Marriage is more than a personal relation between a man and a woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society.")

6. Louisiana is at present the only exception. Louisiana legislation, originally enacted in 1975, states in current form:

... On receiving an application for a license to marry, the license issuing officer shall deliver to each prospective spouse, either in person or by registered mail, a printed summary of the then current matrimonial regime laws of this state.

... This summary shall be prepared by the attorney general of this state. It shall emphasize the possibility of contracting expressly a regime of one's choosing before marriage, that spouses who have not entered into a matrimonial agreement before marriage become subject to the local regime by operation of law, and the possibility of contracting after marriage to modify the matrimonial regime.

LA. REV. STAT. ANN. § 9:237 (West Supp. 1988).

In law, but not in fact, Kentucky is a second state that discloses information about the legal terms and consequences of the marriage contract to persons requesting to be married. Pursuant to legislation enacted in 1972, the "human resources coordinating commission of Kentucky" is required to prepare a "marriage manual for distribution to all applicants for a marriage license."

The manual shall include, but not be limited to, material on family planning, proper health and sanitation practices, nutrition, consumer economics, and the legal responsibilities of spouses to each other and as parents to their children.

KY. REV. STAT. ANN. § 402.270 (Michie/Bobbs-Merrill 1984) (emphasis added). The statute further states that "Each county clerk shall give a copy to each applicant for a marriage license."

This author's attempts to obtain a copy of the Kentucky manual, however, brought a "Memo" from Omar L. Greeman of the Office of Vital Statistics of the Kentucky "Cabinet for Human Resources," which stated: "The Human Resources

Coordinating Commission no longer exist[s]. So far as I know there was only one printing of this manual and only one or two copies were on file in our library." Memo from Omar L. Greeman to Lynn A. Baker (June 30, 1988). The manual is no longer (if it ever was) distributed to Kentucky marriage license applicants "because the current administration does not want to allocate any money to it." Telephone interview with Omar L. Greeman (June 17, 1988).

A xerox copy of the Kentucky manual, entitled "Because you are getting married . . .," that was obtained from Mr. Greeman contained no information related to "the legal responsibilities of spouses to each other and as parents to their children," as ostensibly required by section 402.270.

7. Louisiana is at present the only exception. See supra note 6.

8. See Daniel J. Givelber, William J. Bowers & Carolyn L. Blicht, "Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action," *Wisconsin Law Review*, 1984: 443; Note, "Legal Knowledge of Michigan Citizens," *Michigan Law Review*, 71 (June 1973): 1463; Martha Williams & Jay Hall, "Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences," *Law & Society Review*, 1972 (Fall 1972): 99.

By public knowledge of the law, I do not mean to include public knowledge of, for example, the sanctions that attach to various crimes. I am interested only in studies that measure the ordinary person's knowledge of whether a particular action is prohibited by the criminal law or subjects one to liability under the civil law. Thus, the vast majority of studies of public knowledge of the criminal law, which focus on the deterrent effects of various sanctions as well as public perceptions of sanctions, are not relevant. The above-listed three studies appear to be the only published surveys of public knowledge of the law, thus described.

9. See generally Note, supra note 8.

10. Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* (Chicago: American Bar Foundation, 1977), 186-94.

11. *Id.* at 196.

12. *Id.* at 196, 218-19 n.27.

13. This fact may well change as antenuptial contracts become more accepted. Unfortunately, there do not at present appear to be any statistics available on how many persons contact an attorney for assistance in drawing up such an agreement.

14. See, e.g., VA. CODE ANN. § 20-48, 49 (1983); WASH. REV. CODE ANN. § 26.04.010 (1986).

15. See, e.g., LA. CIV. CODE ANN. art. 93 (West Supp. 1988); DEL. CODE ANN. tit. 13, § 1506(a)(5) (1981).

16. See, e.g., MINN. STAT. ANN. § 518.02 (West Supp. 1988); PA. STAT. ANN. tit. 23, § 205 (Purdon Supp. 1988).

17. See supra note 16.

18. See, e.g., MISS. CODE ANN. § 93-7-3 (1972); W. VA. CODE § 48-2-2 (1986).

19. See, e.g., W. VA. CODE § 48-2-2 (1986); R.I. GEN. LAWS § 15-1-5 (1981).

20. See, e.g., MINN. STAT. ANN. § 518.02 (West Supp. 1988); S.C. CODE ANN. § 20-1-10 (Law. Co-op 1976).

21. See, e.g., MISS. CODE ANN. § 93-1-5(f) (Supp. 1987); PA. STAT. ANN. tit. 48, § 1-5(d) (Purdon Supp. 1988).

22. See *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966).

23. For a brief intellectual history of the notion of the rule of law, see Judith N. Shklar, "Political Theory and The Rule of Law," in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), 1.

24. Friedrich A. Hayek, *The Road to Serfdom* (Chicago: Univ. of Chicago Press, 1944), 72. It is Hayek's conception of the rule that is implicit in the familiar logo, "a government of laws, not men."

25. Jeremy Bentham, "Essay on the Promulgation of Laws, and the Reasons Thereof; with Specimen of a Penal Code," in J. Bowring ed., *The Works of Jeremy Bentham* (New York: Russell & Russell Inc., 1962), vol. 1, 158.

26. Jeremy Bentham, "Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constituted Authorities in the American United States," in J. Bowring ed., *The Works of Jeremy Bentham* (New York: Russell & Russell Inc., 1962), vol. 4, 481 n.*.

27. Jeremy Bentham, supra note 25, 158.

28. *Id.*

29. *Id.*

30. *Id.*: 159.

31. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

32. For an extended discussion of how our rhetoric of fair notice might be reconciled with the legal reality, see John Calvin Jeffries, Jr., "Legality, Vagueness, and the Construction of Penal Statutes," *Virginia Law Review*, 71 (March 1985): 189, 205-12.