To the Graduate Council:

I am submitting herewith a dissertation written by Jeffrey W. Bulger entitled *Informed Consent And Rawls's "Political" Theory Of Justice*. I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Philosophy.

Glenn C. Graber, Chairperson

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INFORMED CONSENT AND RAWLS'S "POLITICAL" THEORY OF JUSTICE

A Dissertation Presented
in Partial Fulfillment for the
Doctor of Philosophy Degree at
The University of Tennessee, Knoxville

Jeffrey W. Bulger
August 1994

To my son
David Alexandre Bulger
who has given me a new
perspective on life.

ABSTRACT

The issue of informed consent has become a prominent issue in medical ethics. In spite of the numerous discussions on the criteria to be used for obtaining informed consent there has been little agreement. This is because most discussions approach the issue of informed consent from reasonable and rational yet incompatible comprehensive world views. *Informed Consent And Rawls's "Political" Theory Of Justice* overcomes this problem by using Rawls's political conception of justice.

Part One presents the historical elements of informed consent. Classical utilitarian and deontological arguments are used to show how these comprehensive views both support the concept of informed consent. However, because the bases of these arguments are fundamentally different, little room for agreement exists about the support for informed consent.

Part Two presents Rawls's *Political Liberalism* as a political common ground for agreement in which reasonable and rational comprehensive associational views, like utilitarianism and deontologism, can agree.

Part Three is a practical application of this conception of consent through the use of a computer program called DR. ETHICS™.

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Introduction

In *Informed Consent And Rawls's "Political" Theory Of Justice* I try to answer the question as to what standard of disclosure we should "politically" strive towards in a pluralistic society comprised of free and equal citizens who hold to differing comprehensive world views. This political approach is fundamentally liberal in that it does not judge whether reasonable and rational comprehensive world views are correct or incorrect regardless of whether they are liberal or conservative.

I start out in Part One by showing how historically the principles of beneficence and nonmaleficence have dominated the medical culture. Recently the medical culture has been undergoing both internal and external pressure to reevaluate itself especially in regards to informed consent. The fundamental basis typically used in this reevaluation, of what amount or type of information disclosure is necessary in order to obtain a proper informed consent, has been classical consequentialism or deontological reasoning.

However, consequentialism and deontologism are appeals to specific comprehensive world views; they are not broad and general political conceptions that all citizens could hold to. Since our pluralistic society is composed of many differing and maybe even incommensurable reasonable and rational comprehensive world views there is great resistance to any type of religious, philosophical or moral agreement that would put one group's reasoning, as "right" and others as "wrong".

To cross this impasse it is necessary to establish broad and general political conceptions that all or most reasonable and rational comprehensive world views would agree to. It is not necessary to present arguments for and against utilitarian or deontological reasoning as they are both reasonable and ra-

tional comprehensive world views consistent within themselves. Thus the task in Part Two is to construct a political system that various religious, philosophical and moral comprehensive world views would agree to based on a freestanding interrelated consensus. This is accomplished by presenting Rawls's political conception of justice as expressed in *A Theory of Justice* and *Political Liberalism*. From this political conception of justice I extrapolate an appropriate "ideal" standard of information disclosure for an informed consent.

Once this "ideal" political conception has been constructed, argument as to how this "ideal" conception needs to be modified in order to be justly applied to the "nonideal" world is presented. In Part Three I apply the developed "ideal" and "nonideal" conceptions of consent to our "nonideal" world through the use of a computer program I built called DR. ETHICS™. Here it is shown how we can practically apply the derived conception of informed consent.

In the course of research and writing, there have been several people who have assisted me most generously and graciously. In particular, I am indebted to Glenn C. Graber, George G. Brenkert, Richard E. Aquila and Charles H. Reynolds, who served as my chairperson and committee respectively. My spe-

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PART ONE

INFORMED CONSENT:

BASIC ELEMENTS

CHAPTER 1

Informed Consent and Autonomy

In this chapter I will first express the historical importance of informed consent. Secondly, using the two main classical traditions of utilitarianism and deontologism I will construct some defenses of the principle of informed consent. Then I shall be in a position to introduce the aim of this study: to address the subject of consent not by the traditional utilitarian or deontological perspectives but rather "politically" through the use of the Rawlsian concept of political democracy.

§ 1. Importance Of Informed Consent

1. Since the Nuremberg Trials the topic of informed consent has dominated bioethical literature. The world was shocked that in the German concentration camps horrible and sometimes brutal experiments were conducted on nonconsenting subjects.[1] The Nuremberg Code was articulated in a court opinion concerning the trial of twenty-three German physicians for "war crimes and crimes against humanity" during world War II.[2]

In terms of consent the Nuremberg Code says:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or

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1 Tom L. Beauchamp, James F. Childress, *Principles of Biomedical Ethics*, Second Edition (New York: Oxford University Press, 1983), p. 66.

2 George J. Annas, Leonard H. Glantz, Barbara F. Katz, *Informed Consent to Human Experimentation: The Subject's Dilemma* (Cambridge: Ballinger Publishing Company, 1977), p. 6.

> other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment. The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.[3]

As a response to these Nazi experiments, in which the consent of the human subjects were not even considered, the Nuremberg Code established four characteristics of consent. Consent was to be voluntary, competent, informed, and under-

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3 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. 2 (Washington, D.C.: U.S. Government Printing Office, 1949), pp. 181-82.

standing.[4] However, the Nazi actions were crimes not merely because they violated "consent" rather, they were crimes mainly because their actions were not beneficent and non-maleficent.

Historically[5], what was considered important was beneficence and nonmaleficence, not the consent of the patient. This is clearly expressed in the Hippocratic tradition of medicine[6]

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4 Annas, Glantz, Katz, *Informed Consent to Human Experimentation: The Subject's Dilemma*, p. 7.

5 For "A Brief Historical Overview" see T. M. Grunder, *Informed Consent: A Tutorial* (Owing Mills: National Health Publishing, 1986), pp. 1-9.

6 Assumed traditionally to have been written by Hippocrates, the Oath exemplifies only the Pythagorean school rather than Greek thought in general. The Oath of Hippocrates is one of the earliest and most important statements on medical ethics. Estimates of its actual date of origin vary from the sixth century B.C. to the first century A.D. Not only has the Oath provided the foundation for many succeeding medical oaths (e.g. the Declaration of Geneva), but it is still administered by many medical schools to graduating medical students either in its original form or in a slightly altered version. To see an example of a graduating oath that follows very closely the Hippocratic Oath see the *Solemn Oath of a Physician of Russia* which can be found in the *Kennedy*

where the paternalistic injunction was "I will keep them [patients] from harm and injustice".[7] In contrast, it might be argued that today the health-care maxim is "I will get the patient's informed consent".

Most of the recent medical codes have held that physicians must obtain the informed consent of patients before undertaking any health-care procedures.[8] However, it is still

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Institute of Ethics Journal Vol. 3, No. 4 (Baltimore: The Johns Hopkins University Press, 1993), p. 419. This Oath has been approved by the Minister of Health and the Minister of Higher Education of the Russian Federation and has been taken by the 1992 and 1993 graduating classes of Moscow Medical University.

7 See Ludwig Edelstein, "The Hippocratic Oath: Text, Translation, and Interpretation," *Supplements to the Bulletin of the History of Medicine* 30, Supplement 1 (Baltimore: The Johns Hopkins University Press, 1943); reprinted in Owsei Temkin and C. Lillian Temkin, eds., *Ancient Medicine: Selected Papers of Ludwig Edelstein* (Baltimore: The Johns Hopkins University Press, 1967).

8 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., pp. 67.

questionable whether "informed consent", in its true sense, has really arrived in clinical medicine.

> Katz's view [is] that informed consent in clinical medicine has more the quality of fairy tale, myth, or mirage than reality.[9] As he sees it, informed consent has done nothing to change historical medical practice because informed consent has never really arrived in medicine, never really taken hold. ... Katz seems right in his thesis that informed consent has not changed the fundamental character of the physician-patient relationship. ... The beneficence model is overwhelmingly predominant. Patients routinely acquiesce to medical interventions rather than autonomously authorizing them. From this perspective all the changes are surface displays, while below the surface there are no more real "informed consents" than in the past.[10]

What follows are the classical utilitarian and deontological arguments for believing that the patient who is competent and "acquiescent" or "submissive" and the health-care provider

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9 Jay Katz, *The Silent World of Doctor and Patient* (New York: Free Press, Macmillan Inc., 1984), pp. 83-85.

10 Ruth R. Faden, Tom L. Beauchamp, *A History and Theory of Informed Consent*, (New York: Oxford University Press, 1986), p. 100.

who is "beneficent" or "dominant" are both acting "immorally".[11] Even though, fundamentally, the utilitarian and deontological viewpoints are diametrically opposed to each other[12] it is inter-

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11 Immoral in the sense that to be either "acquiescent" or "dominant" would be inconsistent with the development of the person for the utilitarian and would be inconsistent with the dignity of persons for the deontologist. However, I am not saying that both are on the same "order" of immorality, e.g. it may be the case that in many or most situations that there is a greater degree of "immorality" on the part of the "dominant" person as they generally have greater control and responsibility. This might be especially true, for example in a doctor-patient relationship where the doctor takes the "dominant" position.

12 Diametrically opposed at least to the extent that classical utilitarian and deontological positions appeal *fundamentally* to extrinsic and intrinsic values respectively. This does not mean that one would necessarily be involved in a contradiction if one were to believe consent/autonomy was both intrinsically and extrinsically valuable. However, as we shall see in §2 and §3 Mill's classical utilitarianism and Kant's classical deontologism stresses extrinsic values and intrinsic worth respectively.

esting how "practically" they can arrive at the same resulting viewpoint on consent.[13]

However, even though the utilitarian and deontological positions can both come to the consensus that "consent" is the "moral position" both are still unable to come to an agreement on the fundamental basis or argument(s) for each other's position on consent.[14] This is where Rawls's social-political philosophy has an advantage. Rawls's social-political process or argu-

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13 The consensus on the value of consent for both utilitarian and deontological positions will also be shown in §2 and §3 respectively.

14 Classical utilitarians argue from a consequential basis and classical deontologists or intuitionists argue from an intrinsic worth basis. However, there are individuals who disagree with this. In *Bioethics in a Liberal Society,* p. 113, Max Charlesworth argues that "Mill pretends that autonomy, liberty and individuality are based upon 'the principle of utility', but in fact the values of autonomy and personal liberty are for him as absolute as they are for Kant. They are intrinsic goods regardless of any consequences they may have and there is, for Mill, no envisageable set of circumstances in which the general recognition of autonomy and liberty might have such untoward consequences that their restriction would be justified." I do not accept this analysis as will be made clear in §2.

ments are fundamentally agreeable to both the classical utilitarian and deontological positions. This, as we shall see in Part Two §4.3 and §7, is not only possible because of the broad, general and noncomprehensive nature of Rawls's social-political philosophy but also because of the fundamental "fairness" of Rawls's hypothetical approach. Rawls believes that this broad and general approach is a necessary and progressive step if we are going to live compatibly in a pluralistic democratic society composed of free and equal citizens.

We shall also see how Rawls's social-political philosophy is able not only to stay independent of both the classical utilitarian and deontological moral positions, but is also able to absorb both of them (even though they may be incompatible and/or opposing positions).[15] Using the Rawlsian social-political position, which is significantly different from either classical

15 The moral viewpoints are "absorbed" in the sense that both could successfully exist within the broad and general Rawlsian framework without being in "political" conflict with each other.

utilitarianism or deontologism,[16] we will also come up with the same conclusion: two competent individuals that are involved in a compromised consent situation, i.e. the "submissive" and "dominant" positions, would be violating, if not their own political liberties, the political liberties of others as citizens in a free and equal democratic society.[17] The ones who are "submissive" fail to have a proper regard for themselves and can "cause" the "dominant" party to have an improper view of the "submissive" party. The ones who are "dominant" fail to have a proper perspective on how they are to view others and can "cause" the "submissive" party to have an improper view of the "dominant" party.

Thus, on the one hand, if seeing oneself as submissive implies being less "free and equal" then that would be an improper

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16 As we shall see this is not only because of its general and noncomprehensive nature but also because Rawls's theory is argued from a hypothetical "contractarian" political position.

17 If these arguments about consent are in fact sound, then we will have come to the same basic conclusion by using not only the two most dominant and classical ethical viewpoints but also by using a modern social-political philosophy that claims to be independent or freestanding from these classical moral positions.

view of oneself in a "free and equal" society. Also, if seeing oneself as submissive "causes" others to see themselves as dominant—in the sense of perceiving others as less than "free and equal"—that also is an improper view of individuals in a "free and equal" society.

On the other hand, if seeing oneself as dominant implies seeing others as less "free and equal" than oneself then that would be an improper view of oneself and others in a "free and equal" society. Also, if seeing oneself as dominant "causes" others to see themselves as less than "free and equal", in comparison to oneself, that also is an improper view of individuals in a "free and equal" society.

§ 2. Utilitarian Support For Informed Consent

Both historically and contemporarily, utilitarianism and deontologism[18] have dominated the discussions about informed

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18 "Theories of normative ethics fall into two main groups: *consequentialist* (or *utilitarian*) theories and *deontological* theories (from Greek *deon* = duty)" Henrik R. Wulff, Stig A. Pedersen, Raben Rosenberg, *Philosophy Of Medicine*, (London: Blackwell Scientific Publications, 1990), p. 179.

consent.[19] In this section I will argue that "classical utilitarianism" supports informed consent insofar as the latter involves autonomy. In section §3. I will argue that "classical deontologism" supports informed consent because of our "duty", to ourselves and others, to treat and be treated as "persons" having intrinsic worth.

1. Utilitarians *could* argue that the purpose and justification for health care is to promote benefit and to protect persons from various risks of harm. The autonomous choice or informed consent of the patient is a secondary issue. This type of "paternalism"[20] *could* be supported by utilitarian or at least

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19 "This study of the theoretical aspects in medical ethics is highly developed with an abundance of primary and secondary texts. ... Almost universally these topics are treated from the viewpoint of either utilitarian or deontological ethics. An essential grasp of the principles and complexities of these theories is mandatory for the practicing of medical ethics" William J. Ellos, *Ethical Practice In Clinical Medicine* (New York: Routledge, 1990), p. 2.

20 For an excellent discussion on the nature of strong and weak paternalism see, Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., pp. 168-79.

some form of consequentalist justification.[21] Here the utilitarian *summum bonum* or the "ultimate good" does not include autonomous decision-making or informed consent but rather only the well-being of the patient. Those who would subscribe to this reasoning in regard to beneficence and/or nonmaleficence would be inclined to protect patients against "unwise" assumptions of risk(s) regardless of whether it is the patient's autonomous and/or informed choice.

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21 Max Charlesworth, *Bioethics in a Liberal Society,* (New York: Cambridge University Press, 1993), pp. 112-113, argues that "... for the utilitarian an efficient and effective health system is a good health system regardless of whether the health choices of individuals are diminished or not. (It might be argued that utilitarianism could accommodate itself to the goal of enlargement of choice in this area in that a good health strategy would be one which had the consequence or outcome of maximizing autonomy and choice ...But, ... it is not possible to quantify and measure and do sums about such a consequence or outcome [greater autonomy] in the way required by the theory of utilitariansim.)"

2. Other classical utilitarians (in particular Mill) argue that liberty or autonomy[22] ought not to be interfered with unless it is to prevent harm to others.

Mill in his book *On Liberty* says:

> The interference of society to overrule his [in this case the patient's] judgment and purposes in what only regards himself, must be grounded on general presumptions: which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases. ... [H]e himself is the final judge. All errors which he is likely to commit against advice and warning, are far outweighed by the evil of

22 The meaning of the term "autonomy", like many other words in our language, depends upon who is using the term and the context in which it is used. "Autonomy" or "self-rule" can be used to mean what Mill refers to as "liberty". "Liberty" for Mill implies the "internal" capacity to choose on one's behalf but primarily it means the lack of imposition from others when making a choice. This is important for Mill as this liberty or what I have called "autonomy" is the fundamental basis for the development of what Mill would call individuality, which is the "best thing" a human being can be. (John Stuart Mill, "On Liberty" in *Essential Works of John Stuart Mill,* ed. Max Lerner [New York: Bantam Books, 1961], p. 312.).

> allowing others to constrain him to what they deem his good.[23]
>
> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. ... In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[24]

However, Mill also realized that no action in society can ever be totally "individual" or isolated. Especially in the health-care professions it is difficult to come up with actions or decisions that "merely concern himself". Mill argues that when a person does anything "harmful" to himself it will usually not only affect those who are close to him but will also affect the community at large. An individual's action that results in an injury to one's property, body or mental faculties will usually af-

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23 *Ibid.*, p. 324.

24 *Ibid.*, p. 263.

fect others. And even if it does no direct harm to others it could result in harm by that person's example.

> If he injures his property, he does harm to those who directly or indirectly derive support from it, and usually diminishes, by a greater or less amount, the general resources of the community. If he deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself for rendering the services which he owes to his fellow creatures generally; perhaps becomes a burden on their affection or benevolence; and if such conduct were very frequent, hardly any offense that is committed would detract more from the general sum of good. Finally, if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead.
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> And even (it will be added) if the consequences of misconduct could be confined to the vicious or thoughtless individual, ought society to abandon to their own guidance those who are manifestly unfit for it? If protection against themselves is confessedly due to children and persons under age, is not society

> equally bound to afford it to persons of mature years who are equally incapable of self-government?[25]

Mill argues that although it may be the case that a person's actions towards himself may possibly be a "bad" example to society he believes that on the whole that person's hurtful actions towards himself will be a "good" example because of the painful or degrading consequences that will be a result of most of those "bad" actions.[26]

The strongest argument Mill gives against society having the power and ability to control other person's "personal" decisions is that more often than not the interference would be

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25 *Ibid.*, p. 327.

26 "With respect to what is said of the necessity of protecting society from the bad example set to others by the vicious or the self-indulgent ... [W]e are now speaking of conduct which, while it does no wrong to others, is supposed to do great harm to the agent himself; and I do not see how those who believe this, can think otherwise than that the example, on the whole, must be more salutary than hurtful, since, if it displays the misconduct, it displays also the painful or degrading consequences which, if the conduct is justly censured, must be supposed to be in all or most cases attendant on it." *Ibid.*, p. 330.

wrong. Whenever the public tries to determine categorically what is "good" or "bad" for other people the public will be wrong just as (or more) likely as they are right.[27] And often times this

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27 "But the strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place. On questions of social morality, of duty to others, the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still oftener right; because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practiced, would affect themselves. But the opinion of a similar majority, imposed as a law on the minority, on questions of self-regarding conduct, is quite as likely to be wrong as right; for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people; while very often it does not even mean that; the public, with the most perfect indifference, passing over the pleasure or convenience of those whose conduct they censure, and considering only their own preference. There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings; as a religious bigot, when charged with disregarding the religious feeling of others, has been known to retort that they disregard his feelings, by persisting in their abominable worship or creed. But there is no parity between the feeling of a person for his own opinion,

social imposition results in the majority oppressing the minority[28] with the majority's preferences.[29]

As a result, whenever a person's decision(s) affect others only contingently, not violating any specific duty to the public or causing any direct hurt to any assignable individual(s), society ought not to obstruct the person's liberty for making that

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and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse." *Ibid.*, p. 330-331.

28 "When we compare the strange respect of mankind for liberty, with their strange want of respect for it, we might imagine that a man had an indispensable right to do harm to others, and no right at all to please himself without giving pain to any one." *Ibid.*, p. 354.

29 "There is no reason that all human existences should be constructed on some one, or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is best, not because it is the best in itself, but because it is his mode." *Ibid.*, p. 315.

decision. The resulting personal and social benefits of this liberty far outweigh any resulting social inconvenience or burden.

> But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt on any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom. ... If society lets any considerable number of its members grow up mere children incapable of being acted on by rational consideration of distant motive, society has itself to blame for the consequences.[30]
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> The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social

30 *Ibid.*, p. 329.

> or to legal punishments, if society is of opinion that the one or the other is requisite for its protection.[31]

Thus the *summum bonum*—the ultimate good—in healthcare, for example, is not necessarily the "healthy" recovery of the patient; rather it is the broad and general classical utilitarian value of "happiness".[32] Mill argues that it is through the exercise of our liberty that we as individuals develop our character and increase "happiness".

> In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his

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31 *Ibid.*, p. 340.

32 [Utilitarianism] "views morality as concerned with the production of desirable or valuable states of affairs or experiences—commonly human happiness, welfare, or desire satisfaction; their production is the goal of morality. Human actions are morally evaluated in terms of their tendency to promote these goals, and right action is that action which, among the alternatives open to an agent, maximizes these valuable consequences for any and all persons affected. The consequences for any one person count for no more than for any other" (Dan W. Brock, *Life and Death: Philosophical Essays In Biomedical Ethics,* [New York: Cambridge University Press, 1993], p. 96).

> own existence, and when there is more life in units there is more in the mass which is composed of them.[33]

Mill believed that if the perfecting of man is of first importance and if the human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preferences are exercised only by the making of choices, then it is imperative that we concern ourselves in not only what man does but the manner in which man performs those actions, i.e. by making autonomous choices.[34] Thus, regardless of whether one's de-

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33 Mill, "On Liberty", p. 311.

34 "The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. The mental and moral, like the muscular powers, are improved only by being used. ... He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. ... It really is of importance, not only what men do, but also what manner of men they are that do it. Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself." *Ibid.*, p. 307.

cisions are in truth or error, the greatest freedom for the competition of ideas will be the most humane.[35] Since a well-developed human being can only be produced by the cultivation or development of individuality through decision-making, it follows that what Mill calls wrong is that which obstructs decision-making and that which is right is that which promotes the development of human beings, i.e. autonomous choices.[36]

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35 "[Mill's] conception of the good society was a humane and generous one: the society in which there was the greatest freedom for the competition of ideas, whether in truth or error, and for diversity of personality and styles of life." (Max Lerner, Preface to "On Liberty" in *Essential Works of John Stuart Mill*, p. 252.).

36 "Having said that Individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well-developed human being, I might here close the argument: for what more or better can be said of any condition of human affairs, than that it brings human beings themselves nearer to the best thing they can be? or what worse can be said of any obstruction to good, than that it prevents this?" Mill, "On Liberty", p. 312.

> Actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.[37]

Thus:

- if the principle of utility has as its *summum bonum* "happiness", and
- if autonomy is the surest route to this "happiness", and
- if autonomy involves informed consent, whenever two or more parties are involved

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then utilitarians must defend informed consent.

Thus in classical utilitarianism, or at least in the case of Mill, either autonomy is a supreme value, i.e. part of the "ultimate good", or autonomous choice is at least the best means to maximize what is of supreme value. In the latter case, utilitarians may argue that the authority to make decisions should rest with the patients or subjects because it will benefit patients and subjects by enabling them to make the decision that best promotes their welfare. Autonomous choice and its promotion in medical decision-making by patients could be jus-

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37 John Stuart Mill, *Utilitarianism* (Indianapolis: Hackett Publishing Company, 1979), p. 7.

tified by arguments from beneficence to the effect that decisional autonomy by patients enhances their ability to survive, heal, or otherwise improve their own health. These arguments could range from the simple contention that making one's own decisions promotes one's psychological well-being to the more controversial claim that patients generally know themselves well enough to be the best judges, ultimately, of what is and what is not beneficial for them. It can also be argued that rules of consent will curb social fears about being "used", promoting a climate of trust[38] between patients and the health-care profes-

38 Charles Fried describes the trust relationship in the following terms: "Although trust has to do with reliance on a disposition of another person, it is reliance on a disposition of a special sort: the disposition to act morally, to deal fairly with others, to live up to one's understandings, and so on. Thus to trust another is first of all to expect him to accept the principle of morality in his dealings with you, to respect your status as a person, your personality" ("Privacy", Hughes, ed. *Law, Reason and Justice*, 1969), p. 52.

sionals.[39] Thus the utility justification[40] for informed consent maintains that consent requirements will benefit all parties involved, i.e. the health-care professionals and the patients. However, it is also clear that, insofar as a recognition of the value of autonomy forms a part of such justification, this is perfectly compatible with the point that autonomy is not itself being regarded as an intrinsic good, rather it is being valued as an extrinsic good, i.e. for the sake of health or welfare.[41]

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39 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., pp. 68.

40 "Total" utilitarianism argues that "it is possible to conceive of a higher population with a lower quality of life that is compensated for by the increased numbers enjoying it. ... Average utilitarianism bids us take into account utilities to possible people only to the extent that they would affect the average utility per life lived" (R. M. Hare, *Essays On Bioethics* [Oxford: Clarendon Press, 1993], pp. 68-69). Classical utility justifications increases the 'average' utility of all involved when it comes to the issue of autonomy.

41 Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 14.

§ 3. Deontological Support For Informed Consent

1. The deontological position sees the requirement of informed consent as following from a direct duty[42] to respect the

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42 "A duty-based moral view posits a moral ideal for a person in the form of a set of moral commitments, constraints, or prohibitions of behavior that can be violated only at the cost of one's moral integrity ... This kind of moral position focuses directly on individual decision and action, and evaluates that decision and action not solely on the consequences it brings about. ... The moral categories of a duty-based view are all constraints on our action to which we must conform at the peril of our moral integrity. These constraints commonly derive from the general idea of relations between persons, and the moral requirement that what we do to others be justified by features of that specific other, and our relation to him. Duty-based views attempt to account for the intuition that a person has a special responsibility for what he deliberately and directly does to others, different from his responsibility for the actions of others. In this sense, duty-based views take the distinction between persons more seriously than do goal-based views, and focus on persons as agents whose own deliberate actions put them into morally significant relations with specific other persons." Dan W. Brock, *Life and Death: Philosophical Essays In Biomedical Ethics* (Cambridge University Press: New York, 1993), pp. 97-98.

patient's autonomy.[43] Instead of assessing the "moral worth" of an action solely on the consequences of that action, we must look to other moral features of an action.[44] Kant and others who

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43 For Kant, "autonomy is the ground of dignity of human nature and of every rational nature" (436). "The principle of autonomy is this: Always choose in such a way that in the same volition the maxims of the choice are at the same time present as universal law" (440). "What else, then, can freedom of the will be but autonomy, i.e. the property that the will has of being a law to itself? The proposition that the will is in every action a law to itself expresses, however, nothing but the principle of acting according to no other maxim than that which can at the same time have itself as a universal law for its object. ... Thus a free will and a will subject to moral laws are one and the same" (447). "the will of a rational being can be a will of its own only under the idea of freedom, and that such a will must therefore, from a practical point of view, be attributed to all rational beings" (448). Immanuel Kant, *Grounding for the Metaphysics of Morals,* 1785, translated by James W. Ellington (Indianapolis: Hackett Publishing Company, 1981); page references are to the German Akademie der Wissenschaften edition of Kant's Morals included in the margins of Ellington's translation.

44 Henrik R. Wulff, Stig A. Pedersen, Raben Rosenberg, *Philosophy Of Medicine* (London: Blackwell Scientific Publications, 1990), p. 181.

subscribe to the protection of patients' autonomy, because of such duty, usually base their arguments on synthetic *a priori* statements about the intrinsic worth of correspondingly required attitudes towards persons. Conceptually and logically, this concept of autonomy has been linked with the concept of rational beings—"persons"—having intrinsic value, i.e. "dignity", independent of special circumstances that confer value, i.e. utility justifications. Autonomous persons are ends in themselves—of intrinsic value—and thus we have a perfect duty[45] to others and to ourselves not to treat others or ourselves merely as means to an end. Following Kant, for example:

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45 H. J. Paton in *The Categorical Imperative* (London: Hutchinson & CO., 1965), pp. 147-148, says "Kant attaches great importance to the distinction between perfect and imperfect duties, but he seems nowhere to define the distinction clearly ... Perfect duties ... admit of no exception in favour of inclination, and this would suggest that imperfect duties do admit of such exceptions. ... In the case of perfect duties we are obliged to perform a definite *act*—for example, to pay precisely the ... [money] which we owe. In the case of imperfect duties we are bound to act only on a *maxim*: ... it is left to our discretion to decide whom we ought to help, and to what extent we ought to help."

> The practical imperative will therefore be the following: Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.[46]

Following the lead of Kant, deontologists are thus not usually inclined to protect patients against the consequences of their choices, on grounds that such constraints would violate both the health professional's own duty not to treat persons merely as a means to an end and the patient's own duty to act autonomously as a rational person.[47]

> Thus I define perfect and imperfect duties as follows: perfect duties—that is duties that are determinate both with respect to the particular content of the duty on any particular occasion, and the identity of the person to whom the duty is owed. Whereas imperfect duties are duties which are indeterminate with respect to both the particular content of the duty on any particular occasion and to whom the duty is owed.

46 Immanuel Kant, *Grounding for the Metaphysics of Morals,* p. 429.

47 "For the Kantian, as Nozick sees him, the proper treatment of persons is not itself a goal of action, but rather a 'side constraint' on action in pursuit of any goal. It cannot be sacri-

2. The justifications based on duty recognize consent as valid because the consenting party is an intrinsically autonomous person. Utilitarian arguments proceed differently, namely, by considering the extent to which respect for a person's autonomy would maximize the benefits of personal and social welfare and minimize harm.[48] When informed consent is

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ficed for a greater good, not even for a greater incidence of proper treatment. ... Kantians do not actually deny that men may be used as means. They object only when men are treated merely as means. But this distinction is not on its face illuminating. They cannot mean that men should be valued both as ends and means much as, say, tennis is desirable both in itself and as a means to health. For, if tennis were bad as a means to health, its intrinsic value might be outweighed; but the value of a person cannot be balanced off in this way." Arthur Flemming, "Using a Man as a Means," *Ethics: An International Journal Of Social Political And Legal Philosophy, vol.* 88 (1978), pp. 283-98.

48 "The utilitarian theory of distribution calls for realizing the greatest good for the greatest number. It involves a calculation of the consequences of an action, counting pleasures and benefits as positive factors and pains and losses as negative factors. These factors are summed up, and the state of affairs with the greatest total is the proper one" (Thomas M.

justified by the principle of duty, it is done so not primarily to facilitate social benefits, but rather as a check against social benefits as being the sole reasoning for health-care. The principle of duty focuses on the intrinsic dignity of the person rather than on social benefits. Thus, deontologically, persons have rights to receive information, necessary for informed consent, as to deny one the right to make a decision violates that person's dignity.

Thus an utilitarian might argue that autonomous decision-making is what will maximally promote the patient's and society's Greatest-happiness. By contrast, a deontologist might argue that we have a direct duty to honor autonomous decision-making that will respect the patient's intrinsic worth as a person.

3. Although the principle of the respect for autonomy is believed by some to be the grounding principle in the obligation or duty to obtain informed consent in research and clinical contexts, it is apparent that several issues will limit this obligation

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Garrett, Harold W. Gaillie, Rosellen M. Garrett, *Health Care Ethics: Principles And Problems,* 2nd ed. [Englewood Cliffs: Prentice Hall, 1993], p. 88.

or duty. It is controversial, to say the least, whether this principle of autonomy, whether supported by utilitarian or deontological reasoning, is the exclusive or even the primary justification of consent requirements. Further, and more importantly, what demands does the principle of autonomy make in regard to the amount and type of information that is to be disclosed so that the individual can make an "autonomous" decision? And to what extent does society have a duty or obligation to restrict "autonomous" decisions when they conflict with other societal values? Some considerations might be that of endangering the public health, the using up of scarce resources, whether or not a patient is able to pay, etc. If there are restrictions to one's autonomy, it must be because of some competing value(s)/duties.[49]

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49 The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research argues that "The ethical foundations of informed consent can be traced to the promotion of two values: personal well-being and self-determination. To ensure that these values are respected and enhanced, the Commission finds that patients who have the capacity to make decisions about their care must be permitted to do so voluntarily and must have all relevant information. ... Nevertheless, patient choice is not absolute. a. Patients are not entitled to insist that health care practitioner furnish them services when to do so

In turn, these competing value(s)/duties might themselves be linked to either utilitarian or deontological principles. It is difficult to know, on either approach, where such competition from competing values is likely to come to an end.

> As long as the debate between Kantians and utilitarians continues, and as long as the Western political and philosophical tradition embraces both the principles of respect for persons and beneficence, there cannot be a resolution of dilemmas traceable to those competing theoretical approaches.[50]

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would violate either the bounds of acceptable practice or a professional's own deeply held moral beliefs or would draw on a limited resource on which the patient has no binding claim." (b, c, d, and e expresses how the patient choice is not absolute when decisionmaking capacity is lacking.) President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: The Ethical And Legal Implications of Informed Consent in the Patient-Practitioner Relationship* (Washington, D.C.: U.S. Government Printing Office, 1982), pp. 2-6.

50 Barry Hoffmaster, Benjamin Freedman, Gwen Fraser, *Clinical Ethics: Theory and Practice* (Clifton N.J.: Humana Press, 1989), p. 118.

However, through a nontraditional approach to the issue of informed consent I believe we can make great progress by "absorbing" or "bypassing" those dilemmas.

§ 4. Addressing Informed Consent Through Justice

1. This nontraditional approach of addressing the subject of informed consent is through the broader concept of justice instead of principles of utility[51] or duty.

Because most literature that addresses the issue of informed consent by way of justice does not appeal to a distinctive principle of justice independent of other principles such as utility or duty, they end up presenting a confused picture. The term "just" is sometimes used in a broad and unspecified sense to refer to that which is "justified", or "morally right". Justice emerges more often than not when it is believed that someone's

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51 "Utilitarianism is not a theory of justice or of distribution, but a theory of the public good in which justice plays a subordinate role. A just distribution in utilitarianism would involve no more than maximizing the benefits of goods and services within the society": Thomas M. Garrett, Harold W. Gaillie, Rosellen M. Garrett, *Health Care Ethics: Principles And Problems,* p. 88.

legal or moral rights have been infringed or violated. Complaints of "injustice" rarely arise in connection with informed consent. Autonomy or beneficence principles are cited instead.[52]

> Beauchamp and Faden argue that:
>
> the major moral and conceptual problems about informed consent are not justice-based and do not directly confront issues of social justice.[53]

What they say is true of the discussion to date on informed consent. However, I wish to depart from this typical approach to the issue of informed consent. I will be addressing the question of what reasonable and rational agents would agree to under certain hypothetical conditions of justice, i.e. free and equal citizens living in a pluralistic constitutional democratic society.[54] Once this "just" system is constructed, we will then

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52 Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 14.

53 *Ibid.*, p. 16.

54 "Some ethicians [categorize social contract theories] as part of deontological ethics in that the contract spells out the duties which we have to each other as a result of that contract. It might also or better be conceived as part of a utilitarian

attempt to choose a standard of information disclosure deemed the most appropriate under this "just" system. If we can determine the most appropriate standard of information disclosure under such "ideal" circumstances, then perhaps we might be able to glean some insights into what type of information disclosure should be strived towards in less than perfect situations. But before we embark on this "political" task we will need to define and understand the three basic standards of information disclosures needed for making an informed-consent decision.

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approach to ethics in that a good social contract would insure as much as possible the greatest happiness of the greatest number with the contract providing the best climate for this outcome" (William J. Ellos, *Ethical Practice In Clinical Medicine*, p. 154). Rawls, as we shall see in Part Two, develops a theory of justice that is not based on any type of deontological or utilitarian ethics. Rawls's theory of justice is free standing and independent of any of these "associational views".

CHAPTER 2

Three Standards Of Disclosure

Historically there have been three standards of disclosure requirements supported in legal and medical ethics literature. These are the professional practice standard, the reasonable person standard and the subjective standard. A brief understanding of each of these standards is necessary if we are going to be able to understand our project. The ultimate goal is to develop a rational and reasonable political conception of justice and determine which of the following

standard(s) of disclosure would most closely meet the criteria developed on the basis of such a conception. The immediate task of this chapter is to present as objectively as possible the three standards of disclosure with their respective objections.

§ 2. The Professional Practice Standard[55]

1. The professional practice standard holds to the belief that the proper amount and kinds of information necessary to disclose and withhold is that which the professionals in that field and community do in fact commonly disclose or withhold.[56] This reasoning is usually based on the beneficent and non-maleficent tradition. The reasoning is that it is the health-care professionals who have the training, knowledge and experience necessary for the determination of just what amount and kinds of information are necessary to disclose and to withhold in order to benefit the patient. The professional practice standard

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55 The three standards of disclosure and their related problems are drawn in large part from the detailed description found in: Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., pp. 74-79.

56 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 74.

holds that the patient generally does not have the "professional expertise", i.e. knowledge and experience, necessary to be able to determine what information is "needed" for their own "good". Thus consent under this standard, is not determined or evaluated from the patient's "subjective" world view. Rather consent is that which the health-care professionals in that community, i.e. as a group, have determined to be appropriate from their own "subjective" world view.[57] As a result, the only people who are able to determine whether there has been an improper amount of information disclosure are the practitioners themselves not the patients. Historically, the professional practice standard has been the health-care standard for disclosure.[58]

> Historically, many physicians in the United States and other Western nations did not recognize an obli-

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57 Even though the standards of information disclosure necessary for a "proper" informed consent are determined "subjectively" by the health-care professionals within a community, the group will generally insist that its consent standard is not "subjective" but rather "objective", i.e. beneficent.

58 "[A]pproximately seventy-five percent of the legal jurisdictions in the United States cling to the more traditional professional practice standard". Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 75.

gation always to be truthful concerning either diagnosis or prognosis. Until recently, the paternalistic model held sway in the practice of medicine. ... [I]t was not unusual for physicians to withhold information from patients who were seriously or terminally ill on the grounds that the truth was not always in the best interest of the patient. Physicians maintained that patients did not always want to know the truth, could not always comprehend the truth, or might be harmed if they were presented with the harsh realities associated with a particularly hopeless diagnosis. Moreover, some physicians were skeptical that lay persons could make intelligent choices about the kind of care necessary for the treatment of a specific medical problem.[59]

In *Natanson v. Kline*, the court held:

The duty of the physician to disclose ... is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances.[60]

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59 Arthur L. Caplan, *If I were a rich man could I buy a pancreas? and other essays on the ethics of health care* (Bloomington: Indiana University Press, 1992), p. 244.

60 *Natanson v. Kline*, 186 Kan. 393, 409 (1960).

If there is to be any medical testimony in order to determine whether there has been a "breach of local medical standard" it must be from an "expert witness", i.e. a health-care professional within the local medical community.[61] In the *Yale Law Journal* a commentator notes,

> The view accepted by the majority of American jurisdictions bases the duty to disclose on a community standard; it requires only such disclosures of risks as is consistent with the practice of the local medical community. Expert medical testimony is required to show a breach of local medical standards.[62]

These rulings have made it very difficult for the plaintiff or patient to prove that a disclosure violation has occurred. For, in order to "prove" that a disclosure violation has occurred the patient would have to have one of the health-care professionals in the community to testify against one of her colleagues. This can be difficult when there is strong professional solidarity and when health-care professionals depend on each other for support and referrals.

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61 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 74-75.

62 "Informed Consent and the Dying Patient", *Yale Law Journal* 83 (1974), p. 1637.

The professional standard stated by the New Jersey Superior Court in *Kaplan v. Haines* is illustrative:[63]

> There is no definitive yardstick by which there can be an exact determination that a surgeon has surpassed the consent of the patient. The authorities, however, are generally in agreement that the nature and extent of the disclosure, essential to an informed consent, depends upon the medical problem as well as the patient. Plaintiff has the burden to prove what a reasonable medical practitioner of the same school and same or similar community, under the same or similar circumstances, would have disclosed to his patient and the issue is one for the jury where, as in the case *sub judice*, a fact issue is raised upon conflicting testimony as to whether the physician made an adequate disclosure.[64]

The courts thus constructed the professional practice standard under the long-standing principles of beneficence and nonmaleficence. Since "patients" normally are not in a position to "understand" all that is involved in treatment decisions and since it would be if not impossible, at least impractical, to

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63 Arnold J. Rosoff, *Informed Consent: A Guide for Health Care Providers* (Rockville: Aspen Publication, 1981), p. 37.

64 *Kaplan v. Haines*, 96 New Jersey Superior Court 242, 257 (App. Div. 1967).

"educate" every patient as to all treatment modalities and consequences there is thus a practical and "moral" need to appeal to customary practice. There is an underlying assumption that when patients present themselves for treatment they are doing so in an attempt to get "help". The health-care professionals are those people whose main intention and practice is to provide just that. The health-care professionals "alone" are the one's who have the greatest knowledge and experience in providing the "help" that the patients are trying to get. The courts also seem to have agreed that, depending on the community in which the practitioners are working, there is a "social climate" of attitudes and culture in which the health-care providers practice and since the health-care professionals are the ones who have the knowledge and experience, working within the particular community, they are the ones in the best position for determining how much information should be given or withheld in the patient's best interest. In the professional practice standard, consent is not the main or primary interest. Rather it is the best medical outcome.

2. Despite the professional practice standard's popularity, it has recently been criticized as a disclosure rule for informed consent law. This, of course, should be expected since the pro-

fessional practice standard evolved out the beneficent and non-maleficent tradition. As the social and political conception of the doctor patient relationship changes so does our view of "proper" medical disclosure. What used to be considered by society the "morally right thing to do", is now being questioned. Today there is a change of emphasis from the doctor's beneficent and non-maleficent attitude to the rights of patients to be in "control" of their medical treatment. Perhaps it is because patients are starting to see themselves as the employer and the health-care providers are seen as employees. As a result, "informed consent" on the part of the employer has become a heated debate. Naturally the employer wants to be in control of her employees. This is a big change in the "power", "respect" and "dignity" of the doctor patient relationship. Since the professional practice standard is based on the historical beneficent and nonmaleficence model it is natural that it will have to be "replaced" if there has been a fundamental shift in social attitudes.

Here are four criticisms that argue that the professional practice standard is not an adequate model for the health-care profession.

a) The professional practice standard can exist only if there are customary medical standards as to the amount and type of information to be disclosed. The argument is that standards of this type and nature do not exist.[65] Even if there were to be some consensus, as to a standard, how much consensus would be required for the establishment of such a standard in the first place?[66] We are now living in a pluralistic and mobile society. Homogeneity of social and political viewpoints within communities is rare.

b) There is also the complaint, even if it is only theoretical, that pervasively negligent care *could* be perpetuated with impunity[67] if relevant professionals generally offer the same inferior level of information, whether through ignorance, as a genuine conviction, or for reasons of professional solidarity.[68]

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65 *Ibid.*, p. 75.

66 Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 31.

67 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 75.

68 Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 31.

Society and patients no longer "trust" the health-care professionals unconditionally. Some might say that this lack of trust is because the health-care professions have overextended their social and economic privileges beyond the acceptable limits. But even if this were to be true that would still only be a small part of the reason. Perhaps the largest reason for this change in attitude is that society, in terms of health-care, is starting to conceive itself as composed of autonomous individuals who are able to exercise and develop their persons through decision-making.

c) Implicit in the professional practice standard is the assumption that the health-care professionals are in a better position than the patients, both because of education and experience, in determining what is in the patient's best interest. Even if this might have been true in a homogeneous community, (a position that would be very difficult to hold considering there is no empirical data supporting that conclusion[69]), it certainly is not true in a pluralistic society in which there are vast differences in individuals' subjective and objective values and world views.

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69 *Ibid.*, p. 31.

If the "best interest" is a normative notion and not an empirical one, what normative theory is the health-care professional to work from in a pluralistic society composed of a variety of religious, philosophical and moral perspectives? Should the doctor impose her judgment of "best interests" on the patient, that is, of course, if the doctor even knows her own values, or does the doctor attempt to determine the patient's values, values which at times the patient herself would not even know?[70]

d) The chief objection to the professional practice standard is that this standard undermines patient autonomy. Many people hold that the promotion of autonomy, not beneficence or nonmaleficence, is the primary function and justification of

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70 It may be argued that under certain "circumstances" it is not uncommon for others to know another person's values better than they would know themselves. Some special "circumstances" might be when a parent may know a child's values better than a child knows her own values. Another example might be a psychologist knowing her patient's values better than the patient knows herself. The "doctor-patient" relationship may also be such a "circumstance", even in a pluralistic society, as most patients who come to see a doctor have the "common" desire or "interrelated consensus" to get "well".

rules of informed consent.[71] The professional practice standard does not consider the patient's intersubjective, subjective and objective beliefs, fears, and hopes as having overriding authority.[72] As a result patient autonomy could be compromised for

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71 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 75.

72 Objective: belonging to the object of thought rather than the thinking subject.

Subjective: belonging to the thinking subject rather than the object of thought.

Intersubjectivity: The property of holding in reference to more than one subject, rather than purely subjectively. For example, the proposition 'hydrogen sulfide smells like rotten eggs', may be said to hold intersubjectively because there is common agreement upon its truth. Anthony Flew, *A Dictionary of Philosophy*, Revised Second Edition (New York: St. Martin's Press, 1979), p. 177.

In a paper, entitled *Clinical Medicine as a Science*, delivered at the "Conference on Changing Values in Medicine", Cornell University Medical College, Ernan McMullin said "Since knowledge is by nature bipolar, involving both subject and object, there is a sense in which all knowledge is subjective, that is, it pertains to a knowing subject. It is likewise objective in the same broad sense, since it necessarily has an object even if that object should happen to be the product of imagination only. When philosophers speak of the

the sake of what the health-care professionals would consider beneficence or nonmaleficence.

This raises the question of the ethical justifiability of the reduction of the patient's autonomy for the sake of the values of the medical community. A clear illustration of this problem might be on the question of euthanasia. When are the values of the medical community to be subservient to the values of the patient? Is the patient's autonomy to be reduced if the medical community feels or believes that a treatment should be given or continued when the patient or representative feels or believes that it should not, or vice versa? When is it justifiable or not to oppose a patient's values because they are different from the values of the medical community? Furthermore, some disputes are not about values but about predictions: "We believe Dad

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"intentionality" of the knowledge-act, it is this peculiar duality that they are principally addressing. ... There are some complications here in the context of those theories of knowledge (those of Kant ...) where knowledge either inevitably or appropriately reflects the cognitive structures of the knower." This paper can be found in the anthology by Eric J. Cassell, Mark Siegler, *Changing Values in Medicine* (New York: University Publications of America, 1979), p. 168.

will recover" or "God will heal him". When is it justifiable to go against a patient's predictions? These are difficult issues for which the professional standard, as typically understood, has very clear answers, i.e. do what is standardly done by the medical community.

§ 3. The Reasonable Person Standard

1. Although the professional practice standard has historically been the norm, recently the courts have started to recognize the reasonable person standard.[73] The reasonable person standard was introduced as a means of providing protection for a patient's autonomy or self-determination. It is an attempt to shift the right to decide what amount and type of information is relevant or necessary for an informed consent from the profes-

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73 "Because of several recent cases, the reasonable person standard has gradually emerged as a substantial legal criterion" Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 75.

sional to the patient or subject.[74] Instead of the health-care professionals deciding what information is pertinent, a hypothetical reasonable person becomes the standard of what would count as pertinent information in order to make an informed decision.[75]

Presumably, proponents of the reasonable person standard adhere to it because they believe either that the *prima facie* obligations or duties of "autonomy generally outweigh those of beneficence" [or else that] "the reasonable person standard better serves autonomy than does the professional practice standard." [76]

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74 Kenneth F. T. Cust, "Hypothetical Contractarianism and the Disclosure Requirement Problem in Informed Consent" *The Journal of Medical Humanities*, Vol. 12, No. 3, (1991), pp. 120-121.

75 "According to this newer standard, information to be disclosed is determined by reference to a hypothetical reasonable person, and there pertinence of a piece of information is measured by the significance a reasonable person would attach to a risk in deciding whether to submit to the procedure." Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 75.

76 *Ibid.*, pp. 75-76.

> The purest autonomy-based argument holds that risk, burden or benefit evaluations always belong to the individual affected, not to the professional(s) or medical community involved, regardless of the latter's expert knowledge and ability to protect the individual from harm.[77]

A set of considerations that explicate the concept of a reasonable person in terms of previous case law are the following:[78]

> 1. All material information necessary for a decision must be given, as judged by persons who would compose a jury rather than by expert testimony or by a medical body.[79]
>
> 2. Known risks of significant bodily harm and death must be disclosed.[80]

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77 *Ibid.*, p. 76.

78 The following is a quote from Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 76.

79 *Wilkinson v. Vesey*, 295 A. 2d 676, p. 688 (1972).

80 *Cobbs v. Grant*, 502 P. 2d 1 (1972).

3. The reasonable person is a composite or ideal of reasonable persons in society, and the individual subject is not in question.[81]

4. Standards of disclosure in medicine are not different from those of other professions where there is a similar fiduciary relationship.[82]

Some major differences between the professional practice standard and the reasonable person standard can be seen in the following case law.[83]

> In *Cooper v. Roberts*, the physician-defendant was held liable for failure to warn his patient of a 0.04 percent (i.e. 1 in 2,500 cases) risk of perforation of the stomach during a proposed gastroscopic examination using a semirigid fiberscope. The Pennsylvania appeals court held the trial judge had erred in charging the jury that the defendant's disclosure should be measured by that which would be

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81 *Canterbury v. Spence*, 464 F. 2d 772 (1972).

82 *Berkey v. Anderson*, 82 Cal. Reporter 67 (1969).

83 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p.76.

made by a reasonable practitioner in the medical community.[84] Said the court:

> A more equitable formulation would be: whether the physician disclosed all those facts, risks and alternatives that a reasonable man in the situation which the physician knew or should have known to be the plaintiff's would deem significant in making a decision to undergo the recommended treatment. This gives maximum effect to the patient's right to be the arbiter of the medical treatment he will undergo without either requiring the physician to be a mind reader into the patient's most subjective thoughts or requiring that he disclose every risk lest he be liable for battery.[85]

The patient sued the physician under the complaint that the physician did not disclose all the information that a "reasonable" person would need to have in order to make an informed consent. The physician argued that it was not standard for physicians to disclose this type of information when

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84 Arnold J. Rosoff, *Informed Consent: A Guide for Health Care Providers*, p. 39.

85 220 Pa. Super. at 267 A. 2d 647 (1971). In its opinion, the court noted the unequivocal rejection of the professional community standard in *Berkey v. Anderson*, 82 Cal. Reporter 67, 78, 1 Cal. App. 3d 790, 805 (1969).

there was such low incidence and that he should only be held to the accepted standards held by surgeons, i.e. the professional practice standard.[86] The court agreed with the reasonable person standard but not with the professional practice standard.

> The court concluded that "the patient's right of self-decision is the measure of the physician's duty to reveal." Under the reasonable person standard a physician is required to disclose "all information relevant to a meaningful decisional process" with respect both to the proposed therapy and its inherent risks.[87]
>
> Judge Robinson argued in *Canterbury v. Spence*, a precedent on which this court relied, that medical duties to disclose are themselves ultimately based on moral considerations of autonomy. The judge calls these considerations "the patient's right of self-decision" and the patient's "prerogative to decide."[88] His point is that duties of disclosure are at their root moral rather than legal or medical ones, and these moral duties inform both law and medicine as to the appropriate standards. Such case law, when com-

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86 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 76.

87 *Ibid.*, p. 76

88 *Canterbury v. Spence*, 464 F. 2d 772 (1972).

bined with the moral standards of autonomy, ... suggests the following standard of disclosure: the patient or subject should be provided with information that a reasonable person in the patient's or subject's circumstances would find relevant and could reasonably be expected to assimilate. In this way the moral requirement to respect autonomy is translated into a reasonable person standard.[89]

In the landmark case of *Canterbury v. Spence*:

The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body..." True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.[90]

[Thus] "there is a clear movement away from reliance on the self-regulation and self-restraint by professionals. The consumer movement symbolizes the growing distrust of long-respected institutions

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89 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 75.

90 464 F. 2d 772, 780 (D.C. Dir. 1972), quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914).

> and has brought about a public insistence on individuals being given the relevant information and allowed to make important decisions for themselves. In the health-care field, the label "patients' rights" is an outgrowth of this type of thinking. ... [T]he major practical change is that the rule relieves the patient-plaintiff of the burden of introducing expert testimony as to the professional community standard of disclosure. [91]

This was the major obstacle to the prosecution of informed consent claims under the professional standard.

2. However, the reasonable person standard is not immune to its conceptual, moral, and practical difficulties.[92]

a) Some conceptual problems are as follows. What is "a reasonable person". "Reasonable" in terms of whose subjective world view? What philosophical, religious or moral grounds are deemed "reasonable"? How broadly are we going to construe this notion of "reasonable"? Judge Robinson argued in *Canterbury v. Spence*, that

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91 Arnold J. Rosoff, *Informed Consent: A Guide for Health Care Providers*, p. 40.

92 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 77.

> the patient or subject should be provided with information that a reasonable person in the patient's or subject's circumstances would find relevant and could reasonably be expected to assimilate.[93]

What is this "relevant" information that a "reasonable" person could "assimilate"? If we are unable to define a "reasonable" person we certainly will not be able to define "relevant" information. And to what extent does this "assimilate" mean the understanding of medical procedures, complications and prognosis? If these terms are difficult to define then certainly these definitions will be difficult if not impossible to apply in practical applications. If living in a pluralistic society means living in a society that has a number of differing but "reasonable" beliefs and values it would seem that it would be exceedingly difficult if not impossible to disclose the "relevant" and "reasonable" information specific to each individual's subjective/objective beliefs and values in a pluralistic society.

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93 *Canterbury v. Spence*, 464 F. 2d 772 (1972).

b) Another problem is suggested by an empirical study by Ruth R. Faden[94] in which she found that, although 93% of the patients surveyed said that the disclosed information they received was helpful, only 12% used that information in their decision for consent.

> This study, involving family-planning patients, reaches conclusions similar to an earlier study by Fellner and Marshall of persons consenting to be kidney donors.[95] In both studies data indicate that patients make their decisions largely prior to and independent of the actual process of disclosing information. Other studies indicate that patients generally accept a physician's recommendation without

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94 Ruth R. Faden, "Disclosure and Informed Consent; Does It Matter How We Tell It?" *Health Education Monographs* 5 (1977): 198-215; Ruth R. Faden and Tom L. Beauchamp, "Decision-Making and Informed consent: A Study of the Impact of Disclosed Information," *Social Indicators Research* 7 (1980): 313-36; and, for an extension, Ruth R. Faden, et al., "Disclosure of Information to Patients in Medical Care," *Medical Care* 19 (July 1981): pp. 718-33.

95 C. H. Fellner and J. R. Marshall, "Kidney Donors—The Myth of Informed consent," *American Journal of Psychiatry* 126 (1970): 1245, and "Twelve Kidney Donors," *Journal of the American Medical Association* 206 (December 16, 1968): pp. 2703-7.

> weighing risks and benefits carefully[96] and that as many as 86% of patients would agree without any discussion of risks to a procedure (upper gastrointestinal endoscopy in one particular study).[97] These data do not in any way show that patient decisions were uninformed or that disclosed information was irrelevant, for the patients may have believed only that the additional information was not such as to shake their prior commitment to a particular course of action. For example, a kidney donor could reasonably decide that the eventual death of her brother far outweighs any information disclosed by a physician. Nonetheless, the above empirical findings do throw into question what should count as material facts, [for even reasonable persons may not use many of the facts disclosed.][98]

c) The main objection to the reasonable person standard is that it may not always be in the patient's best interest

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96 See Alan Meisel and Loren Roth, "What We do and Do Not Know About Informed consent," *Journal of the American Medical Association* 246 (November 27, 1981): p. 2475.

97 Gerald T. Roling, et al., "An Appraisal of Patients' Reactions to 'Informed Consent'," *Gastrointestinal Endoscopy* 24 (1977): pp. 69-70.

98 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., p. 77.

to provide that information. That is, the value of autonomy and "informed consent" may come into conflict with the value of beneficence. If a patient is given all "relevant" information to make an "informed consent" the patient may not make the "right decision" with respect to the treatment or procedure proposed by the medical community.[99] This may be true even though that patient's decision may be "reasonable" within their own world view. In order for the health-care professional to act in the "best interest" of the patient in terms of a healthy recovery it may be necessary not to comply with the reasonable person standard. But then the question arises that if there are a variety of "reasonable" decisions by what right can we say that some "reasonable" decisions are better than others. Perhaps we need different criteria for the determination of "reasonable" decision making.

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99 An example of the possible conflict between beneficence and "informed consent" is when the "proper" treatment involves the use of a placebo. A patient may think they need a pain killer when in fact the pain is psychogenic. Thus believing that it would be unreasonable to prescribe a pain killer the doctor prescribes a placebo instead. Obviously with a placebo you cannot disclose all information for "proper" medical treatment.

> Some have objected that the reasonable person standard does not go far enough with respect to protecting the patient's moral right to self-determination, for the objective standard only gives the patient that amount of information that a "reasonable person" would require to assess the risks and benefits of some proposed treatment or procedure. The problem, these objectors maintain, is that the amount and type of information a "reasonable person" might require might not be the same amount and type of information that is "material" or relevant for a particular person under a particular set of circumstances. Therefore, they argued, given that the objective or reasonable person standard might not accomplish its purpose—that is, providing sufficient protection for the patient's moral right of self-determination—a stronger standard of disclosure was required, the subjective standard.[100]

§ 4. The Subjective Standard

1. The subjective standard is the most patient-specific of the disclosure standards. Both the professional practice standard and the reasonable practice standard tried to be broad and general to an "objective" acceptable practice or an "objective"

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100 Cust, "Hypothetical Contractarianism and the Disclosure Requirement Problem in Informed Consent", p. 121.

reasonable person. In contrast the subjective standard is a standard that is specific to each individual patient and thus treats patients on a case-by-case basis. However, underlying the specific nature of the subjective standard is a "general" conception of competent persons as being autonomous agents, whatever their religious, philosophical or moral beliefs and values. This standard does not judge individual belief and values; rather it accepts them as a given and tries to individualize the information disclosure criteria for each individual and their situation.[101] Thus the subjective standard *prima facie* avoids the

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101 Mill argues forcefully in his book *On Liberty*, "The traditions and customs of other people are, to a certain extent, evidence of what their experience has taught *them*; presumptive evidence, and as such, have a claim to his deference: but, in the first place, their experience may be too narrow; or they may not have interpreted it rightly. Secondly, their interpretation of experience may be correct, but unsuitable to him. Customs are made for customary circumstances, and customary characters: and his circumstances or his character may be uncustomary. Thirdly, though the customs be both good as customs, and suitable to him, yet to conform to custom, merely *as* custom, does not educate or develop in him any of the qualities which are the distinctive endowment of a human being. ... The mental and moral, like the muscular powers, are improved only by being used. ... He who lets the world, or

major problems of lack of specificness of the professional practice standard and the reasonable person standard.

> In the reasonable person model, sufficiency of information is judged by reference to the informational needs of the "objective" reasonable person, and *not* by reference to the specific informational needs of the individual subject—as proposed by the subjective standard. Individual informational needs can differ, because some persons may have highly personal or unorthodox beliefs, unusual health problems, or unique family histories requiring a different informational base than most other persons. ... If a physician knows or has reason to believe that a person needs and wants such information, then withholding it may deprive the patient of the opportunity to make an informed choice, and thus may undermine autonomy. ...
>
> The physician is obligated to disclose information a particular patient wants or needs to know, so long as there is a reasonable connection between these informational needs and what the physician should know about the patient's position. This construal suggests that the *moral* question is not whether the informa-

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his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation." Mill, "On Liberty", p. 307.

> tion necessarily, probably, or possibly would have led the patient to forego therapy, but rather whether the information was necessary for a "reasonably" informed decision regardless of the outcome.[102]

The subjective standard thus holds that the professional who is "suggesting" an option to provide a particular treatment or procedure is to provide the amount and type of information that each specific patient "needs" in accordance with the patient's subjective beliefs and values in order that the patient may be able to make an autonomous informed decision.

2. The subjective standard also has its share of conceptual, moral, and practical difficulties.

a) The main objection to the subjective standard is that it unrealistically demands too much from the physician.

> Opponents of this standard argue that it places an unfair legal burden on physicians to intuit the idiosyncratic values and interests of their patients, and then leaves the physicians at the mercy of their patients' self-serving hindsight in court.[103]

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102 Beauchamp and Childress, *Principles of Biomedical Ethics*, 2nd ed., pp. 77-78.

103 Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 33.

The amount and type of information the physician is to disclose to the patient is dependent on the particular person and the particular circumstances. How is the physician supposed to know what the patient's beliefs, fears, hopes, needs, wants and desires are? The "material information" and the central concept of "the subjective person" are not only unclear but also very difficult to define. All one knows is the broad and general social conception of persons as being autonomous agents. However, even if we are able to give the specific subjective information to these autonomous agents it still can be argued that these agents, because of their lack of knowledge and experience are only "trusting" the professional skill of an healthcare provider.

> [U]nless the patient is himself a doctor, he is unlikely to be able to understand all the details of the prognosis. So what he is consenting to is not a treatment whose precise consequences he can accurately and reliably foresee (even the doctor cannot often do that); rather, the patient, in giving consent, is backing his own judgment as to the professional skill of the doctor, a judgment based on past experience and

> on what the patient can understand about his present case.[104]

b) From a beneficent position it can be argued that it may not be in the patient's "best interest" always to be given the amount and type of information required by the subjective standard. The patient may not be able make the "right decision" or the patient might unintentionally make the "wrong decision". So if the health-care provider "knows" that the disclosure of information will result in a "wrong" decision shouldn't the physician withhold that information?

c) Practically, how can the subjective standard be employed in practice? Empirical studies, as mentioned in § 3.2; b), have shown that patients make their decisions largely prior to and independent of the actual process of disclosing information. Other studies indicate that patients generally accept a physician's recommendation without weighing risks and benefits carefully. Thus what should count as material facts for the individual patient?

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104 R. M. Hare, *Essays On Bioethics* (Oxford: Clarendon Press, 1993), p. 56.

§ 5. Considerations Of Justice As An Alternative Means To Find The Preferred Standard

1. Utilitarian or deontological normative arguments have been the standard avenue to show why one standard of disclosure is the preferred standard.[105] But this approach has not been very satisfactory in resolving the debate. I believe that by applying the alternative "political" approach in terms of the concept of justice we will be able to shed some light on what up till now has proven to be an intractable problem. However, as we saw earlier, Faden & Beauchamp argue that:

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105 In our study it is clear, after Chapter One, that both the *classical* utilitarian and deontological positions value personal autonomy. Utilitarian arguments consider the extent to which respect for a person's autonomy would maximize the benefits of personal and social welfare and minimize harm. Deontological arguments consider the duty to recognize the consenting party as an intrinsically autonomous person. It is my belief that the subjective standard gives greater consideration and respect towards personal autonomy by tailoring the information disclosure to each individual's beliefs and values.

> The major moral and conceptual problems about informed consent are not justice-based and do not directly confront issues of social justice.[106]

The problem, they say, is that:

> Many appeals to "justice" present a confused picture because they are not appeals to a distinctive principle of justice that is independent of other principles such as beneficence or respect for autonomy. These appeals to "what is just" use the term "just" in a broad and nonspecific sense to refer to that which is generally justified, or in the circumstances morally right. ... It often turns out that the controlling moral principle in such a judgment is less one of justice *per se* than respect for autonomy. ... Many complaints of "injustice" in the informed consent literature can be linked to alleged violations of the principle of respect for autonomy or of the principle of beneficence.[107]

In contrast, I hope to show that "moral principles", such as autonomy and beneficence can be part of an "ideal" theory of justice and that "informed consent" may be regarded as a problem of justice without reducing the problem to the standard

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106 Faden and Beauchamp, *A History and Theory of Informed Consent*, p. 16.

107 *Ibid.*, pp. 14-15.

terms of utilitarian or deontological debate.[108] Rather, as we might put it, the problem can be regarded as *political* rather than in the standard moral terms.[109] Instead of appealing to comprehensive "associational" points of view, like utilitarianism or deontologism, we are trying to appeal to the broad and general political conception of justice that all or most reasonable and rational "associational" views can agree on.[110]

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108 For an overview of these competing theories of justice see Allen Buchanan, "Justice: A Philosophic Review," in *Justice and Health Care*, ed. Earl E. Shelp (Dordrecht: D. Reidel Publishing Co., 1981). For an overview of these theories as applied to the problem of microallocations—that is, the distribution of medical resources under conditions of dire scarcity—see Gerald R. Winslow's *Triage and Justice* (Berkely: University of California Press, 1982).

109 "In *Theory* a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice. Nothing is made of the contrast between comprehensive philosophical and moral doctrines and conceptions limited to the domain of the political. In [*Political Liberalism*] ..., however, these distinctions and related ideas are fundamental." John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. xv.

110 This conception of justice will be political to the extent of relying on the broad and general social conceptions of what it

2. In what follows I will explicate the essential features of Rawls's theory of justice, in so far as those features might be successfully applied to the problem of disclosure requirements necessary for informed consent[111].

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is to be a reasonable and rational person with basic rights and liberties in a free and equal democratic constitutional society.

111 As far as I know no one other than Kenneth F. T. Cust has attempted to apply Rawls's theory of justice to the problem of informed consent, although some have applied the theory to other problems in medical ethics. For an account of a pluralist approach—that is combining the utilitarian, egalitarian, libertarian and Rawlsian contractarianism—not to the problem of disclosure requirements in informed consent but rather to the problem of rights to health care see Charles J. Dougherty, *American Health Care*, (Oxford: Oxford University Press, 1988). Two applications of Rawls's theory to other medical ethics issues are by Norman Daniels in *Just Health Care* (Cambridge: Cambridge University Press, 1985) and *Am I My Parents' Keeper? An Essay on Justice Between the Young and Old* (Oxford: Oxford University Press, 1988).

PART TWO

INFORMED CONSENT: RAWLS'S POLITICAL DEMOCRACY

CHAPTER 3

Social Justice

Informed consent and other issues of "ethics" have usually been investigated through the use of various ethical theories, e.g. consequentialism and deontologism. I will differ from this approach by appealing to a broader political spectrum of hypothetical contractarianism. Because of the multicultural society we now live in, it is next to impossible for our society to agree on any type of associational or personal philosophical position like consequentualism or deontologism. Yet we still must get along socially and make policy

decisions in spite of our religious, philosophical and moral plurality. As a result, I believe that we need to deviate from the traditional methods of ethical inquiry. We should concentrate instead on the broad and general constitutional rights and liberties that all or most people could agree on no matter what their personal, or social, comprehensive doctrines might be. Rawls's hypothetical contractarian theory is such an approach.

Although the subject of informed consent could be presented using a variety of approaches, I will be basing the following discussions on the construction and application of Rawls's theory of justice. Through this process we will be able to determine what type(s) of information disclosure would be politically *ideal* under a Rawlsian framework. It may be the case that we will not find the perfect solution(s) on the subject of information disclosure but perhaps we will have made one step in the right direction, at least for those who fit the criteria for a Rawlsian reasonable and rational competent citizen.

§ 1. Social Contract Doctrine As A Conception of Justice

1. Rawls's guiding aim in both his books, *A Theory Of Justice* and *Political Liberalism,* is to work out a theory of justice that is a viable alternative to *classical* utilitarianism and

deontological conceptions of justice which have long dominated our philosophical tradition.[112]

> [T]he features of a political conception of justice are, first, that it is a moral conception worked out for a specific subject, namely, the basic structure of a constitutional democratic regime; second, that accepting the political conception does not presuppose accepting any particular comprehensive religious, philosophical, or moral doctrine; rather, the political conception presents itself as a reasonable conception for the basic structure alone; and third, that it is not formulated in terms of any comprehensive doctrine but in terms of certain fundamental ideas viewed as latent in the public political culture of a democratic society.[113]

Since we will be deriving a standard of informed consent through the application of Rawls's constitutional democratic regime, it follows that our political standard of informed consent will also be independent of classical utilitarian and deontological conceptions.

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112 John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971), p. 3.

113 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 174-5.

In light of Rawls's pluralistic approach to justice I believe that the title of his book *Political Liberalism* is an unfortunate choice. This title unnecessarily alienates those who consider themselves conservative even though Rawls's political system is quite compatible with either conservatism or liberalism as we know them in our political arena. Rawls would have been more consistent if he would have given his book a title more like *Political Democracy: A Foundation of Social Justice*.

Rawls's political conception of justice generalizes and carries to a higher order of abstraction the traditional social contract doctrines of Locke, Rousseau, and of course Kant.[114,115,116] But *Political Liberalism* accomplishes this task in a much different way. Rawls's new conception is that in a democratic society in which all may exercise their human reason freely and without coercion (within the constraints of social deterministic

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114 *Ibid.*, p. xv.

115 Rawls, *A Theory of Justice*, p. 11.

116 John Locke's *Second Treatise of Government,* Jean-Jacques Rousseau's *The Social Contract*, and Immanuel Kant's ethical works beginning with *The Foundations of the Metaphysics of Morals* as definitive of the contract tradition.

aspects) you will naturally end up with a plurality of reasonable and rational comprehensive[117] views or what I call "comprehensive world views".[118]

> Comprehensive doctrines of all kinds—religious, philosophical, and moral—belong to what we may call the "background culture" of civil society. This is the culture of the social, not of the political. It is the culture of daily life, of its many associations: churches and universities, learned and scientific societies, and clubs and teams to mention a few.[119]

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117 "A conception is said to be general when it applies to a wide range of subjects ...; it is comprehensive when it includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct ... ." Rawls, *Political Liberalism*, p. 175.

118 "Comprehensive world view" is a better descriptive term than what Rawls calls a "comprehensive doctrine". A world view is the perspective of an agent and how she perceives and interprets the world around her including her concept of the good. Even though this is the same as what Rawls calls a comprehensive doctrine, the term "doctrine" usually is not used in this personal, broad and universal sense.

119 Rawls, *Political Liberalism*, p. 14.

> Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.[120]

Not only will there be a plurality of comprehensive world views[121] but some of them will also be incompatible even in a well-ordered society[122] where citizens act fairly.

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120 *Ibid.*, p. xvi.

121 Mill in *On Liberty* says: "Individuals, classes, nations, have been extremely unlike one another: they have struck out a great variety of paths, each leading to something valuable; and although at every period those who traveled in different paths have been intolerant of one another, and each would have thought it an excellent thing if all the rest could have been compelled to travel his road, their attempts to thwart each other's development have rarely had any permanent success, and each has in time endured to receive the good which the others have offered." Mill, "On Liberty", p. 321.

122 To say that a society is well-ordered conveys three things:

1. It is a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice.
2. Its basic structure is publicly known, or with good reason believed, to satisfy these principles.

> A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.[123]

2. This notion of plurality relates to informed consent in that many of the problems that we face with the issue of information disclosure are the result of people having reasonable and rational world views that differ or are incompatible with each other. Although it would be expected that most physicians and patients would be focusing more on the concrete situation(s), rather than theoretical "world views", it is still the "world views" that give interpretation and meaning to the concrete situation(s). For example, one party might view the "situation" as a test of their faithfulness to God whereas another might view the "situation" as an unfortunate fact of life that needs to be dealt with. The former party may as a result

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> 3. Its citizens have a normally effective sense of justice and so they generally comply with society's basic institutions, which they regard as just.
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> Rawls, *Political Liberalism*, p. 35.

123 *Ibid.*, p. xvi.

have a submissive or an acceptance type of attitude towards "God's test" whereas the latter party may have an aggressive or a "take charge" type of attitude. I believe that Rawls's hypothetical political system will help shed some light on what up to now has proven to be an intractable problem.

3. The important question for Rawls is: can we develop a system which will make it possible for people with differing "reasonable and rational" comprehensive world views to function socially, i.e. exercise fair cooperation, within a free and equal democratic society?[124] The political system Rawls develops is what he calls political liberalism. Why liberalism? Because liberalism, in contrast with conservatism, is that which is tolerant and accepting of other reasonable and rational comprehensive world views.[125] But if this is the reason why Rawls calls it liberalism then he has confused his own political conception of democracy with that of various incompatible com-

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124 It is true that we are assuming that the society is composed of free and equal citizens in a democratic society. This assumption I believe is valid in working out a political system applicable, for example, to the United States. Whether this is itself a world view will be discussed later.

125 Rawls, *Political Liberalism*, p. 3.

prehensive world views. Political democracy builds itself on what Rawls calls an overlapping consensus (or what I believe should be called, and will call, an interrelated consensus[126]) not just on a liberal comprehensive world view. It may be true that this political liberalism has *prima facie* more in common with the liberal than the conservative point of view. However, the purpose of this endeavor is to show how vastly differing comprehensive world views, i.e. conservative or liberal, can agree independently to this democratic political system designed for a pluralistic society without compromising their *basic* social val-

126 The term "overlapping consensus" gives the false impression that what is being agreed to is something shared, like the union of several circles (overlapping each other). Rawls makes it clear that this is not what is meant. What is being agreed upon are principles that are/can be free-standing of various comprehensive world views. However, the principles are interrelated with the various comprehensive world views in that they *can* be viewed from the perspective of one's world view as either derived from, congruent with, or at least not in conflict with their other values. They are also interrelated in that the principles do have the added effect of constraining, guiding and maybe even determining to some extent, through the political structure, what world views are acceptable to have or pursue.

ues.[127] Why is this political? Because, for Rawls, the realm of the political deals with those social values that are interrelated, primary and basic.

Rather than looking for and finding capital "T" Truth in what could be called The Political System, we are looking to develop *a* political system which will make it possible for people with differing comprehensive world views (a given if people are free and equal in a democratic society) to function socially within a society.

Political persons, i.e. citizens, are regarded as free and equal in virtue of their possession of the two moral powers, the rational and reasonable.[128]

> Justice as fairness works from the fundamental ideas of society as a fair system of cooperation together with the conception of the person as free and equal. These ideas are taken as central to the democratic ideal.[129]

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127 How this is possible shall be made clearer.

128 Rawls, *Political Liberalism*, p. 34.

129 *Ibid.*, p. 167.

> ... the conception of citizens as free and equal persons ... is a political conception affirmed for the sake of establishing an effective public conception of justice.[130]
>
> ... since persons can be full participants in a fair system of social cooperation, we ascribe to them the two moral powers ... namely, a capacity for a sense of justice [reasonable] and a capacity for a conception of the good [rational].[131,132]

This system of political democracy is unique in that it is not a comprehensive world view itself, imposing itself on others, rather it is something that most all reasonable and rational comprehensive views would agree to—an interrelated consensus. Thus we are not looking for The Political System but *a* political system that does a better job promoting and maintaining this "stable society" of free and equal citizens than the *classical* views of utilitarianism or deontologism. All we are looking for is

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130 *Ibid.*, p. 367.

131 *Ibid.*, p. 19.

132 "These two powers are the capacity for a sense of right and justice (the capacity to honor fair terms of cooperation and thus to be reasonable), and the capacity for a conception of the good (and thus to be rational)."*Ibid.*, p. 302.

perhaps a better alternative than what most other political philosophers have held on to or combined up to this point in time. If Rawls is successful, and if we can apply Rawls's political system, through extension[133], to the concept of informed consent then we should be able to determine which standard of information disclosure would be most appropriate for Rawls's "political persons".

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133 As we shall see in § 8 & 9 we will not be extrapolating the "Rawlsian" informed consent principle by philosophical argument tracing back to the basic liberties under the first principle, as it would be unlikely that those with differing philosophical arguments would ever be able to convince others that they are correct. Rather the basis of agreement will be in the public culture of a democratic society and its underlying conception of the person and that of social cooperation. Our appeal will be to the constitutional bases which account for our fundamental constitutional rights and liberties establishing the social conception of the person. Thus legislation of a type of informed consent will be constrained by the two principles of justice and constitutional law in hierarchical order.

§ 2. Political Persons And Their Two Moral Powers

In developing this system the logical place to start, other than our assumption of a free and equal democratic society, is the subjects involved—political persons. A political person is comprised of two indispensable parts Rawls calls the two moral powers the reasonable and the rational. Of course the political person *qua* person will be actually comprised of more than just the reasonable and rational, but the reasonable and rational are essential for the political person. Rawls uses the terms "reasonable" and "rational" in a very broad and general sense which is absolutely necessary to understand if one is even to begin to understand his position. Likewise it may be the case that the terms "reasonable" and "rational" may have a fuller meaning but the broad and general meaning of the terms is as follows.[134]

Being *reasonable* is the ability to deal fairly with others in society with mutual respect for all. It is the capacity for a sense of right and justice. Being *rational* is the capacity to freely

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134 The political person needs to be defined as broadly and generally as possible in order not to be a metaphysical conception. A fuller discussion of this issue follows shortly.

form, revise, and pursue one's good, whatever that might be. Both are absolutely necessary for a stable society. Why? Because "citizens" getting along in this well-ordered free and equal democratic society politically and practically means, getting along with each other by the use of fair terms and being able to pursue their rational good. Likewise informed consent as a social issue involves being reasonable—the capacity for doctors and patients to get along with each other by the use of fair terms, i.e. a sense of justice—and as an autonomy issue informed consent involves being rational—the capacity for doctors and patients to pursue their rational good, i.e. to freely form, revise, and pursue one's own good. But caution as to what it practically means to be rational and reasonable needs to be addressed. As we shall see in Rawls's political democracy, a just political construction or process needs to be followed in all interpersonal transactions. In other words, we cannot entirely derive what informed consent would entail from knowing that we are reasonable and rational. A political process must be followed that in effect assumes a rational and reasonable political system that all must follow in order for us to function and flourish as a pluralistic society.

§ 3. Original Position; Hypothetical And Nonhistorical

1. Using as a model this full conception of the political person as reasonable and rational, Rawls argues that it is reasonable and rational to construct a hypothetical nonhistorical "original position" in which the representatives in the original position are purely rational representatives of citizens of a free and equal democratic well-ordered society, constrained by the reasonable or fair (i.e. thick) veil of ignorance.

> ...in the fundamental case of social cooperation within the basic structure of society, the representatives of citizens as reasonable and rational agents must be situated reasonably, that is, fairly or symmetrically, with no one having superior bargaining advantages over the rest. This last is done by the veil of ignorance. [135]

The result is a reasonable (i.e. just) and rational (i.e. able to freely form, revise, and pursue one's good) political system compatible with a plurality of reasonable and rational world views that may have irreconcilable, incompatible, and incommensurable conceptions of the good (i.e. a pluralistic society which is a natural result of being free and equal).

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135 Rawls, *Political Liberalism*, p. 52.

2. If the purpose of the original position is to represent political persons the question arises as to what are the essentials for the development of the two moral powers that is the development of the political person as reasonable and rational? Rawls's argues that what is essential for the development of the political person is a reasonable and rational political structure and process, of which this political democracy is but one workable system. As relating to our task of choosing a standard of disclosure we shall see that our basis of agreement for "informed consent" will be in the public culture of this democratic society, i.e. in its underlying conception of the political person and that of social cooperation.

The standard of disclosure to be chosen as necessary for informed consent can, at least to some extent, be considered rational and reasonable. Rational, but not that the standard of disclosure can form, revise or pursue its own good as a standard of disclosure cannot have a good of its own. Reasonable, but not that the standard of disclosure can, "personally", deal fairly with others. The standard of disclosure necessary for an informed consent will be rational and reasonable to the extent that the public culture, in its underlying conception of the political person—as rational and reasonable—and that of social co-

operation, from which the standard is derived, is a result of Rawls's constructive political process.

3. The reasonable terms of this structure and process start out as the veil of ignorance ranging from being thick at the point of agreeing on the principles of justice and getting thinner as you continue to the constitutional, legislative and judicial stages respectively. The purely rationally autonomous representatives, subject to the restrictions of the original position, are to agree on principles of fundamental justice. The representatives are symmetrically situated with respect to one another, because of the veil of ignorance, and are in that sense equal. It is their task to agree on certain principles of justice from a list of alternatives given by the traditions of moral and political philosophy. The agreement of the parties on certain definite principles establishes a tautological connection between the conception of the person represented and the principles. However, it is not necessary to show that the principles of justice that are agreed upon would be adopted from *any* enumeration of alternatives. The aim of justice as fairness is only to show that the principles of justice would be adopted over the other *traditional* alternatives. Once this is done further refinements may be made.

> While it should be granted that any list of alternatives may be to some extent arbitrary, the objection is mistaken if it is read as holding that all lists are equally so. A list that includes the leading traditional theories is less arbitrary than one which leaves out the more obvious candidates. Certainly the argument for the principles of justice would be strengthened by showing that they are still the best choice from a more comprehensive list more systematically evaluated. I do not know how far this can be done. I doubt, however, that the principles of justice (as I have defined them) will be the preferred conception on anything resembling a complete list.... Justifying grounds do not lie ready to hand: they need to be discovered and suitably expressed, sometimes by lucky guesses, sometimes by noting the requirements of theory. It is with this aim in mind that the various conditions on the choice of first principles are brought together in the notion of the original position. The idea is that by putting together enough reasonable constraints into a single conception, it will become obvious that one among the alternatives presented is to be preferred.[136]

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136 Rawls, *A Theory of Justice*, pp. 581-82.

§ 4. First Principle Of Justice

1. The following are two principles of justice that meet the above criteria—the first principle representing the rational and the second principle the reasonable:[137]

a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

b. Social and economic inequalities are to satisfy two conditions:

   i) they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and

   ii) they are to be to the greatest benefit of the least advantaged members of society.

2. The first principle that the representatives in the original position would agree to is the fully adequate set of the equal basic liberties that are necessary for the individuals they represent to develop as political persons or citizens. A political person, Rawls argues, requires:

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137 Rawls, *Political Liberalism*, pp. 5, 291.

a. The development and use of their rational moral powers, (i.e. their determinate conception of good). Even though the representatives in the original position still do not know the content of this good, they do know the general structure of the facts of psychology and social institutions. That is they know that those whom they represent do in fact form, revise and pursue a comprehensive world view and that the principles of justice also influence the content of that comprehensive world view.

b. The development and use of their reasonable moral powers, (i.e. sense of justice or fairness).

The principles of justice will determine what we deem as a worthy good or end to pursue to the extent that our political culture, rules and regulations influence our choice of values. However, this does not mean that the "political" culture, rules and regulations are made supreme and that all other "associational" values are subordinated to them. This is true at least to the extent that the "political" culture, rules and regulations are so broad and general that they do not dictate any particular religious, philosophical or moral "associational" value(s). If you argue that the "associational" values are subordinated to the "political" culture, rules and regulations it would only be to

the extent that the "associational" values are to be constrained within the broad and general "political" values deemed necessary for individuals to develop their moral powers as rational and reasonable agents. As Rawls says:

> [This] does not imply that the exercise of the moral powers on the part of the citizens in society is either the supreme or the sole form of good. Rather, the role and exercise of these powers (in the appropriate instances) is a condition of good.[138]

As a result the representatives in the original position would agree that it would be "just" that the citizens they represent would have a fully adequate scheme of equal basic rights and liberties necessary for the development of the political person, so long as they do not interfere with the liberties of others.

The support for the agreement on these equal basic rights and liberties could be derived from either utilitarian or deontological arguments. A utilitarian could argue from the position of the promotion of the greatest degree of the good through consequences and a deontologist could argue from the position of logical consistency with the definition of a political person and the categorical imperative. The point of this is that various com-

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138 *Ibid.*, p. 334.

prehensive world views, which may even be incompatible and incommensurable, can agree on political principles by being interrelated with the primary principles. However, this agreement is not because of an overlap or similarity between various comprehensive world views but because the two principles and the ensuing primary goods are freestanding. Freestanding in that instead of deriving agreement from comprehensive world views, like utilitarianism and deontologism, the agreement is derived from the broad and general notions of what would be necessary for free and equal persons to function in a pluralistic society. That is, what would be necessary for persons to pursue freely and equally a) a determinate conception of a good and b) social cooperation, i.e. a rational conception of a determinate good and a reasonable conception of social cooperation. The two principles of justice is one such solution which is independent of any comprehensive moral doctrine because the principles have not been derived from any comprehensive world view(s). Rather, the two principles have been derived from the "limited" point of view of what a free and equal political person in a well-ordered democratic society would need in order to develop as reasonable and rational. Thus the two principles are freestand-

ing and as a result may or may not be part of various comprehensive world views.[139]

3. It could be argued that Rawls is depending on a metaphysical conception of a "political person" such that his political conception is metaphysical instead of political and thus part of a, or a number of, comprehensive world views.[140] But Rawls's position is that political democracy is to be a freestanding view, independent of any particular metaphysical or comprehensive world view. He argues that what is implied in a political conception is that there be no specific metaphysical or epistemological doctrine. But doesn't the construction of this political system presuppose in the original position a particular metaphysical conception of the political person as reasonable and rational?

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139 This is not like saying, for example, that although two languages are not intertranslatable they both can be translated into a third language. That would be too comprehensive of a notion. Rather, it is more like saying that the two non-intertranslatable languages have the broad and general notion of communication for whatever reason(s).

140 Rawls, *Political Liberalism*, p. 10.

Rawls does not think he is using any type of particular metaphysical conception because the original position is only a device of representation. The veil of ignorance, Rawls argues, does not have any metaphysical implications concerning the nature of the self.

> When we simulate being in the original position, our reasoning no more commits us to a particular metaphysical doctrine about the nature of the self than our acting a part in a play, say of Macbeth or Lady Macbeth, commits us to thinking that we are really a king or a queen engaged in a desperate struggle for political power. We must keep in mind that we are trying to show how the idea of society as a fair system of social cooperation can be unfolded so as to find principles specifying the basic rights and liberties and the forms of equality most appropriate to those cooperating, once they are regarded as citizens, as free and equal persons.[141]

Rawls in a footnote continues to argue that:

> Part of the difficulty is that there is no accepted understanding of what a metaphysical doctrine is. ... [T]o develop a political conception of justice without presupposing, or explicitly using, a particular metaphysical doctrine, for example, some particular

141 *Ibid.*, p. 27.

> metaphysical conception of the person, is already to presuppose a metaphysical thesis: namely, that no metaphysical doctrine is required for this purpose. One might also say that our ordinary conception of persons as the basic unit of deliberation and responsibility presupposes, or in some way involves, certain metaphysical theses about the nature of persons as moral or political agents. ... If we look at the presentation of justice as fairness and note how it is set up, and note the ideas and conceptions it uses, no particular metaphysical doctrine about the nature of persons, distinctive and opposed to other metaphysical doctrines, appears among its premises, or seems required by its argument. If metaphysical presuppositions are involved, perhaps they are so general that they would not distinguish between the metaphysical views—Cartesian, Leibnizian, or Kantian; realist, idealist, or materialist—with which philosophy has traditionally been concerned. In this case they would not appear to be relevant for the structure and content of a political conception of justice one way or the other.[142]

The original position is a nonmetaphysical foundational conception of the basis of political morality to which we appeal. Now it is true that comprehensive world views are adequate

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142 *Ibid.*, p. 29.

within themselves to provide a metaphysical foundation for the basis of laws and regulations, including informed consent. But we need a nonmetaphysical foundation because we are living within a pluralistic society which may be comprised of incompatible world views in which it is necessary that we all get along socially.[143]

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143 It is important to note here that Rawls's concept of "reasonable" and that of the reasonable person standard are quite different since for Rawls "reasonable" means dealing fairly with others whereas the reasonable person standard has more of the idea of establishing a rational end or purpose. Rawls's concept of "rational" on the other hand, is the forming, pursuing and/or revising of one's end or purpose in life, *whatever* that might be. The reasonable person standard is therefore different than Rawls's "rational" in that for Rawls there is no preference given to any particular end or purpose whereas the reasonable person standard does have a preference or at least a consensus on what range qualifies as a "reasonable standard". Thus Rawlsian rational persons may pursue any end they wish within the societal constraints of, for example, the constitution. With these differences in mind it would appear that the reasonable person standard would be closer to Rawls's concept of "rational" than his concept of "reasonable".

4. The original position, as rational and reasonable, is this nonmetaphysical foundation that needs to be substituted for at least that part of our world view that deals with the political realm. Rawls, in a sense, splits up our world view into two pieces; the political and the associational. This is not so different from what Descartes did with his Cartesian or psychological dualism, giving the "soul" to the Church and the body to science. Here Rawls creates a dualism giving one half—the comprehensive world views—to the associations, like churches and so forth, and giving the other half—the general interrelated consensus—to politics. However, Descartes thought that the soul could exist independently of the body whereas Rawls is not so naive as to think that politics could exist independent of world views or vice versa.

The political part of our world view demands a type of political democracy if we are going to live in a society comprised of people holding to differing comprehensive world views without violence. The principles of this political democracy thus must be comprised of a reasonable and rational nonmetaphysical free-standing conception that most reasonable and rational world views are able to accept, i.e. interrelated. The other part of our world view, the nonpolitical aspects, are "freely determined" by

our own comprehensive world view and may be incompatible with others in society. But as long as these differences are not politically incompatible mandates of law, i.e. force, we should be able to cooperate and function as a stable and well-ordered democratic society where citizens are free and equal.[144] It is the interrelated political principles that all or most reasonable and rational world views can agree on that will form the basis of our concept of precisely how much information disclosure would be necessary for an informed consent.

5. People function within this realm of political democracy much like people do when they play harmoniously in a symphony.

Rawls mentions that an orchestra illustrates the idea of social union in that each member is dependent on the other for

144 "[T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself." Mill, *On Liberty*, p. 265.

the final outcome.[145] I believe that an orchestra can also illustrate the original position and the basic institutions. The original position, with its primary principles and primary goods, is the theory or foundation behind the staff, keys and notes placed on sheet-music. The basic institutions, with its constitution, legislative and judicial stages, are the sheet-music of the orchestra. Freedom is represented in the fact that the orchestra is composed of musicians who freely choose to master their particular instruments. Equality is represented in the fact that all the instruments are equally needed to create the music. The orchestra proceeds through the composition being guided by broad key changes like the constitution guides the broad social structure. The musicians try to play the sheet-music as written, like legislation, and play in harmony with each other through the guidance and flexibility of a conductor, representing the judicial stage. Each musician uses their own instruments, or different world views, some the same, like two trombones, having the same world view, but playing different parts of first and second chair—different talents. Various musical instruments may be quite different from each other, like the wood-

145 Rawls, *Political Liberalism*, p. 321.

winds, brass, percussion and strings—different world views—some may even sound terrible together—incompatible world views—yet with the basic structure of key changes—constitution—and of the notes on the sheet-music—legislation—and the conductor—judicial stage—they can play together harmoniously as a symphony, like a stable and just society.

6. However, in order to construct this stable and just pluralistic society, we must start with an independent nonmetaphysical foundation—the original position. Rawls's rational representatives under the constraints of reason agree to a basic primary goods list, i.e. "things that every rational man is presumed to want"[146] These primary goods are comprised of five categories, each of which is believed to be necessary for all rational and reasonable persons in a pluralistic democratic society to have in order for them to form, revise or pursue their good no matter what their world view is. This list is not comprehensive and thus may be made either longer or shorter. However, the larger the list, the more weak will be the protection of the essential goods as there will be more competition or exceptions to deal with. Each category may clash with other

146 Rawls, *A Theory of Justice*, p. 62.

categories and thus have to be limited. This limitation is the central range of application of each liberty. This list is developed by trial and error through the process of reflective equilibrium[147] and could be continued indefinitely. We are not trying to develop The Political System, but only *a* political system that works better than what we presently have in terms of a social contract theory with a group of people who are free and equal citizens of a democratic well-ordered society.

Rawls lists the five categories of primary goods as follows:[148]

> a. The basic liberties ... these liberties are the background institutional conditions necessary for the development and the full and informed exercise of the two moral powers ...; these lib-

147 "There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life. We may, and must, assume our opinion to be true for the guidance of our own conduct. ... [T]he source of everything respectable in man either as an intellectual or as a moral being, namely, that his errors are corrigible. He is capable of rectifying his mistakes, by discussion and experience." Mill, *On Liberty*, p. 271-272.

148 Rawls, *Political Liberalism*, pp. 181, 291, 308, 332-335.

erties are also indispensable for the protection of a wide range of determinate conceptions of the good (within the limits of justice).

1. Freedom of thought
2. Liberty of conscience
3. Political liberty
4. Freedom of association
5. Freedoms specified by the liberty and integrity of the person
6. Rights and liberties covered by rule of law

b. Freedom of movement and free choice of occupation against a background of diverse opportunities: these opportunities allow the pursuit of diverse final ends and give effect to a decision to revise and change them, if we so desire.

c. Powers and prerogatives of offices and positions of responsibility: these give scope to various self-governing and social capacities of the self.

d. Income and wealth, understood broadly as all-purpose means (having an exchange value): income and wealth are needed to achieve directly or indirectly a wide range of ends, whatever they happen to be.

e. The social bases of self-respect: these bases are those aspects of basic institutions normally essential if citizens are to have a lively sense of their own worth as persons and to be able to develop and exercise their moral powers and to advance their aims and ends with self-confidence.

This is not a comprehensive list by any means, but a list that seems to be an adequate starting place that most reasonable and rational comprehensive views could agree to in a hypothetical, nonhistorical, well-ordered democratic society in which the citizens' possession of these primary goods specifies the guaranteed status of free and equal citizens.[149,150]

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149 See §3.3 for a discussion of how the principles of justice are agreed upon in relation to other *traditional* alternatives. These principles include the primary goods. Because this list is to some extent arbitrary and the justifying grounds do not lie ready to hand, i.e. they are discovered by lucky guesses and reflective equilibrium, it is of little interest, at least at this point, to analyze or evaluate Rawls's list.

150 "This, then, is the appropriate region of human liberty. It 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 and sentiment on all subject, practical or speculative,

7. Rawls gives three main grounds, each related to the capacity for a sense of justice, for the representatives in the origi-

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scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. 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: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected; is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it." Mill, *On Liberty*, pp. 265-266.

nal position to adopt the two principles of justice which guarantee the equal basic liberties and assign them priority. These grounds are important for our study in that the basic liberties will be the foundation for determining what our constitution will be comprised of and thus the basis for our construction of our principles of consent. A quick sketch of these three justifying grounds[151] is as follows:

a. the two principles of justice give priority to the equal basic liberties;[152]

   i. advantage to everyone's conception of good of a just and stable scheme of cooperation—public knowledge rather than penal sanctions and

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151 "... [How is] justice as fairness, and indeed any other political conception, ... to be assessed. Here the test is that of reflective equilibrium: how well the view as a whole articulates our more firm considered convictions of political justice, at all levels of generality, after due examination, once all adjustments and revisions that seem compelling have been made. A conception of justice that meets this criterion is the conception that, so far as we can now ascertain, is the one most reasonable for us. Rawls, *Political Liberalism*, p. 28.

152 Rawls, *Political Liberalism*, p. 316.

ii. most stable conception of justice is the two principles of justice—perspicuous and concerned with the good of those with whom they represent.

b. fundamental importance of self-respect presupposes;[153]

i. the development and exercise of the two moral powers and

ii. the accepting of various plans of life or comprehensive world views as worthwhile.

c. a democratic society well-ordered by the two-principles of justice can be for each citizen a more comprehensive good than the determinate good of individuals[154]—a social union of social unions.[155]

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153 *Ibid.*, p. 318.

154 "[T]his more comprehensive good cannot be specified by a conception of the good alone but also needs a particular conception of justice, namely, justice as fairness. Thus this more comprehensive good presupposes this conception of justice and it can be attained provided the already given determinate conceptions of the good satisfy the general conditions. *Ibid.*, p. 323.

155 *Ibid.*, p. 320.

i. Society depends on various talents.

ii. Society depends on cooperative endeavors.

iii. Societies' notions of reciprocity in the principles of justice.[156]

8. There are three reasons for the principle which guarantees that these equal basic liberties have priority over the second principle of just distribution are derived from:

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156 "[P]ublic culture is always in large part the work of others; and therefore to support these attitudes of regard and appreciation citizens must affirm a notion of reciprocity appropriate to their conception of themselves and be able to recognize their shared public purpose and common allegiance. These attitudes are best secured by the two principles of justice precisely because of the recognized public purpose of giving justice to each citizen as a free and equal person on a basis of mutual respect. This purpose is manifest in the public affirmation of the equal basic liberties in the setting of the two principles of justice. The ties of reciprocity are extended over the whole of society and individual and group accomplishments are no longer seen as so many separate personal or associational goods." *Ibid.*, pp. 322-333.

a. the "explanation of why a liberty is basic"[157], i.e. built on the concept of the political person and what it takes to develop as rational and reasonable citizens in a democratic well-ordered society,

b. "the procedural role of certain liberties and their fundamental place in regulating the basic structure as a whole, as in the case of the equal political liberties"[158], and

c. the fact that "certain liberties are indispensable institutional conditions once other basic liberties are guaranteed; thus freedom of thought and freedom of association are necessary to give effect to liberty of conscience and the political liberties."[159]

9. Since the primary goods are necessary for the development of the political person, it is tempting to think that the representatives in the original position would try to maximize

157 *Ibid.*, p. 309.

158 *Ibid.*, p. 309.

159 *Ibid.*, p. 309.

them, giving first priority to the scheme of basic liberties.[160] But the basic liberties are not maximized and the basic liberties do not maximize anything, including the two moral powers. Rather the basic liberties function only to guarantee the social conditions needed for the development of the full and informed exercise of the two moral powers.

> But in fact, ...the scheme of basic liberties is not drawn up so as to maximize anything, and, in particular, not the development and exercise of the moral powers. Rather, these liberties and their priority are to guarantee equally for all citizens the so-

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160 The first principle of justice in *Political Liberalism* is different than the one stated in *Theory*. The former states: "Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all. ... [T]he words "a fully adequate scheme" replace the words "the most extensive total system" which were used in *Theory*. *Ibid.*, p. 291. "Now, in *Theory* one criterion suggested seems to be that the basic liberties are to be specified and adjusted so as to achieve the most extensive scheme of these liberties. This criterion is purely quantitative and does not distinguish some cases as more significant than others; moreover, it does not generally apply and is not consistently followed. As Hart noted, it is only in the simplest and least significant cases that the criterion of greatest extent is both applicable and satisfactory." *Ibid.*, p. 331.

> cial conditions essential for the adequate development and the full and informed exercise of these powers ...."[161]

The idea of maximizing the basic liberties is incoherent for at least two reasons. The first being that there is no coherent notion of what would be maximized. The second being that the two moral powers is only a part of what it is to be a person.

> Now there are two reasons why the idea of a maximum does not apply to specifying and adjusting the scheme of basic liberties. First, a coherent notion of what is to be maximized is lacking. We cannot maximize the development and exercise of two moral powers at once. And how could we maximize the development and exercise of either power by itself? Do we maximize, other things equal, the number of deliberate affirmations of a conception of the good? That would be absurd. Moreover, we have no notion of a maximum development of these powers. What we do have is a conception of a well-ordered society with certain general features and certain basic institutions. Given this conception, we form the notion of the development and exercise of these powers which is adequate and fully relative to the two fundamental cases.

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161 *Ibid.*, p. 332.

The other reason why the idea of a maximum does not apply is that the two moral powers do not exhaust the person, for persons also have a determinate conception of the good. Recall that such a conception includes an ordering of certain final ends and interests, attachments and loyalties to persons and associations, as well as a view of the world in the light of which these ends and attachments are understood. If citizens had no determinate conceptions of the good which they sought to realize, the just social institutions of a well-ordered society would have no point. Of course, grounds for developing and exercising the moral powers strongly incline the parties in the original position to adopt the basic liberties and their priority. But the great weight of these grounds from the standpoint of the parties does not imply that the exercise of the moral powers on the part of the citizens in society is either the supreme or the sole form of good. Rather, the role and exercise of these powers (in the appropriate instances) is a condition of good. That is, citizens are to act justly and rationally, as circumstances require. In particular, their just and honorable (and fully autonomous) conduct renders them, as Kant would say, worthy of happiness; it makes their accomplishments wholly admirable and their pleasures completely good. But it would be madness to

maximize just and rational actions by maximizing the occasions which require them.[162]

§ 5. Second Principle Of Justice

1. The second principle of justice, sometimes referred to as the difference principle, states that:

> Social and economic inequalities are to satisfy two conditions:
>
> i) they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and
>
> ii) they are to be to the greatest benefit of the least advantaged members of society.[163]

2. The two primary principles of justice—like the political person, the original position,[164] and comprehensive world

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162 *Ibid.*, pp. 333-4.

163 *Ibid.*, pp. 5, 291.

164 "Two different parts of the original position must be carefully distinguished. These parts correspond to the two powers of moral personality, or to what I have called "the capacity to be reasonable" and "the capacity to be rational." While the original position as a whole represents both moral powers, and

views—reflect the rational and the reasonable. The first principle of justice reflects the rational. The second principle reflects the reasonable. Together the two principles of justice correspond to the two powers of moral personality, i.e. the reasonable and rational, reflecting that which is necessary to be a political person in a hypothetical, nonhistorical, democratic well-ordered society of free and equal citizens.

3. However, it *might*[165] be argued that the primary principles of justice should not include the reasonable. Remember that the representatives in the original position are purely rational autonomous representatives who are reasonably constrained externally by a thick veil of ignorance. As we develop the basic social structure, going from issues that are very general, i.e. the principles of justice, to those that are more specific,

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therefore represents the full conception of the person" *Ibid.*, pp. 305.

165 Although the following argument is not Rawls's position, (and will be refuted in the following section §5.4), I believe that it helps us come to an understanding of why Rawls's rational and reasonable concepts are not derivative ideas but rather complementary ideas.

i.e. constitutional, legislative and judicial stages, the veil of ignorance is gradually lifted as more information is needed in order to allow this construction. As this veil is gradually lifted there should be a transference of the just or reasonable from being externally imposed to becoming internally part of the basic structure. Thus when the outward constraints of the veil are thick the inward principles of the reasonable are thin. As the outward constraints of the veil become thinner the inward basic structure of the reasonable, just laws and regulations, becomes thicker.

Thus it *could* be argued that Rawls is being redundant since his second principle is reasonable and the original position is already under the constraints of the reasonable—the veil of ignorance—the original position is not the place to introduce the second principle of distributive justice. Distributive justice thus should be introduced at the legislative stage which still has a veil of ignorance but is much thinner or partial. The original position should be internally purely rational with external constraints of the reasonable, i.e. veil of ignorance. Thus the content of the original position and the agreed-on principles should be that of the rational only. It is not yet necessary to agree on the principles of reasonableness until the thick veil of

ignorance, the external constraint of the reasonable, becomes thinner. The reason why the reasonable is not introduced at the constitutional stage is because Rawls argues that the constitution is to incorporate only the first principle of justice, i.e. the rational.

> The first principle of justice is to be applied at the stage of the constitutional convention. ... Although delegates have a notion of just and effective legislation, the second principle of justice, which is part of the content of this notion, is not incorporated into the constitution itself. Indeed, the history of successful constitutions suggests that principles to regulate economic and social inequalities, and other distributive principles, are generally not suitable as constitutional restrictions. Rather, just legislation seems to be best achieved by assuring fairness in representation and by other constitutional devices.[166]

So why is the difference principle necessary or even allowable as a primary principle especially if it is not even incorporated into the constitution? Why not have, in the original position, just the rational principle, with its rational list of basic primary goods, agreed upon by the representatives under the (reasonable) thick veil of ignorance? You would still be model-

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166 *Ibid.*, pp. 336-7.

ing the political rational person on the rational and reasonable as the rational and reasonable are both being utilized in the original position. Then when you get to the legislative stage you could "derive" the reasonable difference principle from the rational constitution. Thus you would start out with the pure rational principle, agreed upon through a pure reasonable veil of ignorance. The Constitution would then likewise be made up of the purely rational principles, and its basic liberties, under a thinning reasonable veil of ignorance. Then as the reasonable veil is thinned even more, the reasonable would be translated into legislation. As the basic institutions are developed through legislation and the judicial process, the reasonable veil of ignorance would gradually be lifted transferring progressively the external reasonable into the internal structure, i.e. rules of law and legislation. This would also, as a result, give the lexical order effect of giving priority of the rational over the reasonable.[167]

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167 Allen Buchanan explains Rawls's concept of lexical ordering as follows; "A principle 'P' is lexically prior to a principle 'Q' if and only if we are first to satisfy all the requirements of 'P' before going on to satisfy the requirements of 'Q'. Lexical priority allows no trade-offs between the demands of conflicting

But if we do this "transfer" of the external reasonable into the internal reasonable on what bases are we going to start to determine what the internal reasonable is comprised of or built on? Certainly the external reasonable, i.e. the veil of ignorance, is not appropriate as a building block or foundation for the internal reasonable as it gives us no guidance except for a lack of knowledge even though this lack of knowledge is for the purpose of impartiality.[168] Thus the reasonable would have to be derived from the only other aspect left, the rational. That which is internally reasonable would have to be derived from that which is rational and thus the reasonable would be dependent on the rational.

4. But this is not what Rawls wants or has in mind. The rational and the reasonable are two distinct but complementary basic ideas. In particular, the reasonable is not derivable from the rational. David Gauthier, in his book *Morals by Agreement,*

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principles: the lexically prior principle takes absolute priority." Buchanan, *Justice: A Philosophical Review,* p. 6.

168 However, the veil of ignorance is defended on the basis of a concept of impartiality which may be related to Rawls's category of the reasonable as a mechanism of representation.

tries to derive the reasonable from the rational, thinking that since the rational is more basic and sure, deriving the reasonable from the rational would at last give the reasonable, or just, a firm foundation.

Rawls rejects this idea of deriving the reasonable from the rational, arguing that they are complementary ideas. And as complementary ideas the reasonable and the rational are unable to exist without the other. This becomes clear when we realize what would happen if we try to split up our political person. On the one hand, a political person that was solely a reasonable agent would have nothing to be reasonable about as there would be no rational good or end to pursue. On the other hand, a political person that was solely rational would lack the sense of justice that comes from being reasonable and thus would not be able to recognize the independent validity of the claims of others in a pluralistic democratic society.

> To see justice as fairness as trying to derive the reasonable from the rational misinterprets the original position.[169]

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169 Rawls, *Political Liberalism*, p. 52.

The constitution is the first of the basic institutions and it is developed using only the rational principle of justice behind the veil of ignorance. Thus, even in the development of the rational constitution, the reasonableand the rational are complementing each other. But at the legislative stage we are behind a thinner veil of ignorance with a need for incorporating or transferring the external reasonable into internal reasonable. This is where the reasonable second principle is a necessary component in the original position. It gives us a foundation on which to build our reasonable rules and laws. Just as the constitutional stage is built on or derived from the rational principle in the original position so now the reasonable part of the legislative stage is derived from the reasonable principle in the original position keeping intact the lexical ordering of the rational preceding the reasonable. The reasonable second principle of justice is thus a necessary component to Rawls's original position if the reasonable is in fact not to be derived from the rational.

It is, of course, impossible to prove that the reasonable cannot be derived from the rational as it is impossible to know and evaluate all past, present and future arguments for that conclusion. Thus negative statements like this are at best just conjectures. The most we can do is look at those arguments that

seriously attempt to derive the reasonable from the rational and show how they fail in their attempt.[170] To the extent that the arguments are successful in deriving the reasonable from the rational we must show that they rely at some point on conditions expressing the reasonable itself.[171]

> The way to resolve the matter is to consider after due reflection which view, when fully worked out, offers the most coherent and convincing account. About this, of course, judgments may differ.[172]

The important point to hang on to here is that for Rawls the rational and the reasonable are complementary and that they are the necessary political components for free and equal political citizens in this just and stable nonhistorical, hypothetical democratic well-ordered society.

5. But how then are we to justify the reasonable principle of justice in the original position when those representatives

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170 Gauthier is an example of someone who attempts to derive the reasonable from the rational. See David Gauthier, *Morals By Agreement* (New York: Oxford University Press, 1986).

171 Rawls, *Political Liberalism*, p. 53.

172 *Ibid.*, p. 53.

are acting as purely rational autonomous agents? It is important to see that the representatives are rationally autonomous in two respects.

> First, in their deliberations they are not required to apply, or to be guided by, any prior or antecedent principles of right and justice. Second, in arriving at an agreement on which principles of justice to adopt from the alternatives available, the parties are to be guided solely by what they think is for the determinate good of the persons they represent, so far as the limits on information allow them to determine this.[173]

These rationally autonomous representatives, although under the constraints of the veil of ignorance, know at least two things about the political persons they represent:

1. the persons are rational in that they have the capacity to form, revise and pursue a good and
2. the persons need to be able to deal fairly with others, i.e. to be reasonable, so as to be able to promote their good.

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173 *Ibid.*, p. 307.

Even from a purely rational perspective, with this knowledge in hand, it would be clear that there would be a need for at least two primary principles[174] if the rational and the reasonable are to be seen as complementary and not derivable from each other, that is:

1. a primary principle that would provide the foundation for freedom and equality to pursue, develop or exercise their good—the rational, and
2. a primary principle that would provide the freedom and equality to deal fairly with others—the reasonable.

Thus, the reasonable is not being derived from the rational rather the rational just sees the reasonable as a complementary part of our two-faceted political person—the reasonable and rational—both being necessary for the promotion of the good. Thus the reasonable is not derived from the rational

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174 A single principle could also represent the reasonable and the rational if it were comprised of both aspects. However, as we saw above, Rawls holds that the two principles are to be in lexical order. If we were to have only one principle the lexical ordering would not be as straight forward.

nor is the rational derived from the reasonable. Rather the reasonable and rational are complementary to each other.

6. As mentioned at the outset of this section the second principle of justice is often times referred to as the difference principle and states that:

Social and economic inequalities are to satisfy two conditions:

i) they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and

ii) they are to be to the greatest benefit of the least advantaged members of society.[175]

The second principle of justice—the difference principle—is justified using maximin reasoning.

> The term "maximin" means the maximum minimorum; and the rule directs our attention to the worst that can happen under any proposed course of action, and to decide in the light of that.[176]

Like the maximum principle the maximin principle has the limited role of being used only as a criterion of background justice. Rawls is constructing a general political world view, not

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175 *Ibid.*, pp. 5, 291.

176 Rawls, *A Theory of Justice*, p. 154.

a specific comprehensive world view. The maximum and maximin principle and the two principles of justice are all to be confined to the basic structure and not used as a basis for specific morality. To do otherwise would be to shortcut the political construction process and the basic institutions, which are inevitable in a pluralistic democratic society, whose structures were systematically designed to insure that all citizens, with their same or different comprehensive world views, are dealt with, politically speaking, reasonably and rationally.

The political maximin principle maximizes the minimum position with the hope of guaranteeing the best social conditions for the least advantaged. This Rawls feels is what the rational representatives would agree to as the conditions necessary for ensuring that those whom they represent would be guaranteed the best social conditions possible for their development as political persons.

10. Even though the maximin theory and the two principles of justice, in our political construction, are to be confined to the basic structure and not used as a basis for specific morality, people still have built elaborate "Rawlsian" informed consent

arguments failing to understand this fundamental point. The following argument is an example of such a mistake.[177]

Cust expresses correctly that Rawls, in his book *A Theory Of Justice,* presents what has been described as hypothetical contractarianism. In this hypothetical situation, there are people in the original position (Pops)[178], behind a veil of ignorance, who decide what principles of justice would be fair.[179] The veil of ignorance is characterized by Rawls as follows:

> Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even as-

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177 Cust, "Hypothetical Contractarianism and the Disclosure Requirement Problem in Informed Consent", pp. 125-128.

178 This is an acronym Cust uses. Cust, "Hypothetical Contractarianism and the Disclosure Requirement Problem in Informed Consent", p. 125.

179 This, of course, is different from the description in *Political Liberalism*. In *Theory* Rawls has people in the original position choosing for themselves the principles of justice. In *Political Liberalism* Rawls has rational representatives choosing the principles for those whom they represent.

> sume that the parties do not know their conceptions of the good or their special psychological propensities.[180]

Under the constraints of the veil of ignorance, Pops would still be rational, free, equal and disinterested agents. The principles of justice chosen under these condition would establish not only what would be considered as primary social goods (PSG's)[181] but also how those PSG's should be distributed.

Rawls states in *Theory* that the two principles of justice[182] could be justified in a number of ways.[183] One way of justification is to show, for example, how consequentialists could come to the same agreement of principles of justice through the use

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180 Rawls, *A Theory of Justice*, p. 12. also see pp. 136-150.

181 This is an acronym Cust uses. Cust, "Hypothetical Contractarianism and the Disclosure Requirement Problem in Informed Consent", p. 126. Primary social goods, or PSG's for short, are defined as those "things which it is supposed a rational man wants whatever else he wants." Rawls, *A Theory of Justice*, p. 92. also see pp. 90-95.

182 For a formulation of the two principles of justice see *Ibid.*, pp. 302-303.

183 *Ibid.*, p. 152.

of actual and predictive consequences. But another way of defending the choice of the principles of justice is by showing how the principles are compatible with the risk aversiveness of Pops, i.e. the maximin solution.[184]

> [I]t is useful as a heuristic device to think of the two principles as the maximin solution to the problem of social justice. There is an analogy between the two principles and the maximin rule for choice under uncertainty. This is evident from the fact that the two principles are those a person would choose for the design of a society in which his enemy is to assign him his place. The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of others. The persons in the original position do not, of course, assume that their initial place in society is decided by a malevolent opponent.[185]

In employing the "maximin rule", in the determination of the "principles of justice", Pops would be trying to choose the best "worst outcome".

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184 *Ibid.*, p. 152.

185 *Ibid.*, p. 152-153.

Cust strikes off on his own by thinking that it would be consistent with Rawls's theory to use this maximin principle in the determination of what would be a just standard of disclosure principle. Cust argues that if Pops were to choose a standard of disclosure instead of the two principles of justice, Pops would choose the professional practice standard.[186] Cust believes this decision would be governed by these three considerations.[187]

> First, they [Pops] do not know, at least until the veil is lifted, whether they are the doctor or the patient, that is they have to make a choice on the assumption that they stand an equal chance of being either the doctor or the patient.

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186 See §8. Deciding On A Standard Of Disclosure.

187 Cust, "Hypothetical Contractarianism and the Disclosure Requirement Problem in Informed Consent", p. 127.

Second, the choice they make has to be based on the minimax[188] rule, which, it will be recalled, tells them to maximize their minimum expected utility.

Third, they are mutually disinterested, which is to say that once they are behind the veil of ignorance they are completely unconcerned with each other's interest.[189]

Cust argues that Pops would reason as follows:

[T]he maximin rule tells them [Pops] to minimize the worst possible outcome and assuming that the worst possible outcome is one's death,[190] one would

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188 Cust refers here to the maximin rule as the minimax rule. Cust gives the minimax rule the same definition as the maximin rule: "the minimax rule, which, it will be recalled, tells them to maximize their minimum expected utility". *Ibid.*, p. 127.

189 *Ibid.*, p. 127.

190 Cust in a footnote says "Death may not be the worst possible outcome for, as some would surely argue, there are cases where being alive and in extreme pain is far worse than being dead. Nevertheless, even if death is not the worst possible outcome the argument goes through for whatever is the worse possible outcome is the outcome that the hypothetical contractors would want to minimize the likelihood of." Ibid., p. 128.

> want to minimize the likelihood of that outcome. The best possible way to minimize that outcome, *ceteris paribus*, would be to allow the doctor to choose on behalf of the patient the nature and amount of information to disclose such that the likelihood of the worst possible outcome was minimized. Why the doctor? Because she is better informed both with respect to knowledge and expertise. Hence, insofar as disclosure requirements are concerned in decision making this is an argument in favor of the professional standard of disclosure.[191]

However, if Cust were to "truly" follow his own "maximin" reasoning it might lead him to dispense with the requirement for patient consent altogether. If the doctor is always or usually in the best position to make medical decisions, and if in doctor/patient relationships the sole concern is the maximization of the patient's worst off condition, then the patient's consent may have little relevance in securing the "maximin".

11. Cust has misunderstood Rawls's intention for the use of the maximin theory. In *Political Liberalism* Rawls clearly states that:

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191 *Ibid.*, p. 128.

> The maximin principle was never [i.e. not in *Theory* either] proposed as a basis for morality; in the form of the difference principle it is one principle constrained by others that applies to the basic structure; and when this principle is seen in this limited role as a criterion of background justice, its implications in normal cases are not, I believe, implausible. Finally, confining the application of the principles of justice to the basic structure does not imply that only the number of persons involved determines which principles hold for a given case.[192]

The important point to hold on to here is that the political maximin principle maximizes the minimum amount of primary goods and nothing else and the primary goods do not necessarily maximize anything. Rather the primary goods function only to guarantee the social conditions necessary for the development of the full and informed exercise of the two moral powers. The maximin theory was not meant to be used for deriving what type of information disclosure would be necessary for a reasonable and rational informed consent.

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192 Rawls, *Political Liberalism*, p. 261.

§ 6. The Foundation Of The Basic Institutions

1. The foundation of the constitution, legislative stage and judicial stage is the conception of the political person as reasonable and rational. In this process, the reasonable always constrains the rational. As you proceed from stage to stage, from the conception of a person to the two principles and then to the establishment of a constitution and next to legislation and finally to the judicial stage, what varies is the task of the rational agents of deliberation, i.e. going from general to specific and thus requiring a progressively "thinner" veil, and the constraints, that is the reasonable, to which they are subject, i.e. going from weak to strong as a result of accumulated restrictions of justice.[193]

The autonomous representatives in the original position are under the constraints of the thick veil of ignorance and have the general task of determining the primary principles of justice necessary for the development of the political person. In the constitution stage although those selecting a constitution are

193 *Ibid.*, p. 340.

under a "thinning" veil of ignorance[194] they are also under the constraints of the primary principles adopted in the original position. Legislators are constrained even more, despite the fact that they are under a "thinner" veil of ignorance, as any laws they enact must be in accord with all of the previous constraints, i.e. laws chosen must be in accord with not only the two primary principles but now also with the constitution. Thus the exercise of both the rational and the reasonable changes as the representatives proceed from stage to stage.[195]

1. Changes in the tasks of the rational;
    a. their tasks become less general and
    b. their tasks become more specific.
2. Changes in the constraints of the reasonable;

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194 The veil must thin as decisions become more specific. As decisions become more particular and situational there is a proportional need for particular and situational information. Conversely, in proportion to the extent that the decisions being made in the original position are broad and general so it was deemed just to restrict specific information, i.e. "thick" veil of ignorance.

195 Rawls, *Political Liberalism*, p. 340.

a. the constraints of the reasonable becomes stronger or more complex because of previous agreements and

b. the veil of ignorance becomes thinner, a necessary feature if the rational tasks are to be more specific.

Thus the constraints on the rational from the reasonable changes at each stage as the task of the rational changes.

> While the constraints of the reasonable are weakest and the veil of ignorance thickest in the original position, at the judicial stage these constraints are strongest and the veil of ignorance thinnest. The whole sequence is a schema for working out a conception of justice and guiding the application of its principles to the right subject in the right order. This schema is not, of course, a description of any actual political process, and much less of how any constitutional regime may be expected to work. It belongs to a conception of justice, and although it is related to an account of how democracy works, it is not such an account.[196]

196 *Ibid.*, p. 340.

2. After the reasonable and rational principles have been chosen by the rationally autonomous representatives in the original position they then must be applied to the "basic structure" which Rawls takes to be a modern constitutional democratic regime. The basic structures of society are:

> the main political, social, and economic institutions, and how they fit together into one unified system of social cooperation, from one generation to the next.[197]

The framework of the basic institutions consists of the constitutional branch, the legislative branch and the judicial branch. The constitution is composed of two primary essentials:

> a. fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and
>
> b. equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.[198]

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197 *Ibid.*, p. 11.

198 *Ibid.*, p. 227.

The constitutional essentials of the first kind could be illustrated by the difference between presidential and cabinet government. But once the structure of government is agreed on it should be changed only as a result of political justice or the general good and not because of some political advantage of some group or party.[199]

By contrast, the second essential of the constitution, which deals with equal basic rights and liberties, can only be specified within small variations.[200]

> The distinction between the principles covering the basic freedoms and those covering social and economic inequalities is not that the first expresses political values while the second does not. Both express political values. ... In the first role that structure specifies and secures citizens' equal basic rights and liberties and institutes just political procedures. In the second it sets up the background institutions of social and economic justice appropriate to citizens as free and equal. The first role concerns how political power is acquired and the limits of its exercise.[201]

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199 *Ibid.*, p. 228.

200 *Ibid.*, p. 228.

201 *Ibid.*, p. 229.

Unlike the essentials covering social and economic inequalities, it is fairly clear to see whether the constitutional essentials covering basic freedoms are satisfied. Social and economic inequalities are always subjected to wide differences of reasonable and rational opinions, inferences and intuitive judgments. This is because the subject, of social and economic inequalities, is complex, not very predictable and poorly understood.[202]

> Thus, ... we can expect more agreement about whether the principles for the basic rights and liberties are realized than about whether the principles for social and economic justice are realized.[203]

Because a democratic constitution, as an expression of higher law, is to be widely supported "it is best not to burden it with many details and qualifications". It is also because of this fact that the basic institutions should be able to reflect and make visible the essential constitutional principles.[204]

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202 *Ibid.*, p. 229.

203 *Ibid.*, p. 229.

204 *Ibid.*, p. 232.

> To conclude: there are four grounds for distinguishing the constitutional essentials specified by the basic freedoms from the principles governing social and economic inequalities.
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> a. The two kinds of principles specify different roles for the basic structure.
>
> b. It is more urgent to settle the essentials dealing with the basic freedoms.
>
> c. It is far easier to tell whether those essentials are realized.
>
> d. It is much easier to gain agreement about what the basic rights and liberties should be, not in every detail of course, but about the main outlines.[205]

These considerations explain why basic liberties "count as constitutional essentials while the principles of fair opportunity and the difference principle do not".[206] This is an important point for our enterprise as it is the constitution that will establish the foundation for the principles of consent requirements.

> [I]f a political conception of justice covers the constitutional essentials and matters of basic justice—for

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205 *Ibid.*, p. 230.

206 *Ibid.*, p. 230.

> the present this is all we aim for—it is already of enormous importance even if it has little to say about many economic and social issues that legislative bodies must regularly consider. To resolve these more particular and detailed issues it is often more reasonable to go beyond the political conception and the values its principles express, and to invoke non-political values that such a view does not include. But so long as there is firm agreement on the constitutional essentials and established political procedures are reasonably regarded as fair, willing political and social cooperation between free and equal citizens can normally be maintained.[207]

3. The basic generality of this constitution to guarantee basic rights explains why political "power cannot be left to the legislature or even the supreme court, which is only the highest judicial interpreter of the constitution". The legislature is to be constrained by the constitution. The supreme court may be the "highest judicial interpreter of the constitution" but it also is constrained by the constitution. Political power is held co-dependently by the three branches, i.e. the constitution branch, the legislative branch, and the judicial branch, "in a duly specified relation with one another with each responsible to the peo-

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207 *Ibid.*, p. 230.

ple". It is true that in a democratic society "a strong majority of the electorate can eventually make the constitution conform to its political will".[208] This comes about because:

> The constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is. A particular understanding of the constitution may be mandated to the Court by amendments, or by a wide and continuing political majority ....[209]
>
> No institutional procedure exists that cannot be abused or distorted to enact statutes violating basic constitutional democratic principles.[210]

4. Since the constitution protects mainly the equal basic rights and liberties of citizenship the legislative stage is needed to protect all the other legal rights and liberties specified by the two principles of justice.

> This implies, for example, that the question of private property in the means of production or their social ownership and similar questions are not set-

208 *Ibid.*, pp. 232-233.

209 *Ibid.*, pp. 237-238.

210 *Ibid.*, p. 233.

> tled at the level of the first principles of justice, but depend upon the traditions and social institutions of a country and its particular problems and historical circumstances.[211]

Even if it were possible to construct a philosophical argument tracing legislation back to the first principle of justice, i.e. basic rights and liberties, there is good reason for working out a conception of justice which does not do this. For one thing, in a pluralistic society you probably will not find philosophical agreement. Secondly, the legislative stage is to be defined and arranged by both the conception of the person and social cooperation. Since the principles of justice account for our fundamental constitutional rights and liberties, the remaining questions of justice are to be settled at the legislative stage with the two principles of justice functioning as a possible common court of appeal.[212]

> In sum, then, the constitution specifies a just political procedure and incorporates restrictions which both protect the basic liberties and secure their priority. The rest is left to the legislative stage. Such a

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211 *Ibid.*, p. 338.

212 *Ibid.*, p. 338-339.

constitution conforms to the traditional idea of democratic government while at the same time it allows a place for the institution of judicial review.[213] This conception of the constitution does not found it, in the first instance, on principles of justice, or on basic (or natural) rights. Rather, its foundation is in the conceptions of the person and of social cooperation most likely to be congenial to the public culture of a modern democratic society.[214]

Once a constitutional consensus is in place, political groups must enter the public forum of political discussion and appeal to other groups who do not share their comprehensive doctrine. ... Political conceptions of justice provide the common currency of discussion and a deeper basis for explaining the meaning and implications of the principles and policies each group endorses.[215]

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213 For a valuable discussion of judicial review in the context of the conception of justice as fairness, see Frank I. Michelman, "In Pursuit of Constitutional Welfare Rights: one View of Rawls' *Theory Of Justice," University of Pennsylvania Law Review* 121(5) (May 1973), pp. 991-1019.

214 Rawls, *Political Liberalism*, p. 339.

215 *Ibid.*, p. 165.

5. The point here is that citizens are to conduct their fundamental political discussions within the "Rawlsian" political framework of justice. Each of us must be able to explain our political position not by appealing to our associational point of view but rather by principles and guidelines we think other citizens may reasonably be expected to endorse as free and equal citizens in a pluralistic society.[216] Although it may be the case that others may fail to endorse our political position the fact that our public discussions are based on the common public conception of the political person and social cooperation imposes considerable discipline.[217]

> It is inevitable and often desirable that citizens have different views as to the most appropriate political conception; for the public political culture is bound to contain different fundamental ideas that can be developed in different ways. An orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.[218]

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216 *Ibid.*, p. 226.

217 *Ibid.*, p. 227.

218 *Ibid.*, p. 227.

> In a constitutional system with judicial review, or review conducted by some other body, it will be necessary for judges, or the officers in question, to develop a political conception of justice in the light of which the constitution, in their view, is to be interpreted and important cases decided. Only so can the enactments of the legislature be declared constitutional or unconstitutional; and only so have they a reasonable basis for their interpretation of the values and standards the constitution ostensibly incorporates. Plainly these conceptions will have an important role in the politics of constitutional debates.[219]

§ 7. Public Political Culture vs Social Background Culture

If we have a civil and just democratic pluralistic well-ordered society that is comprised of citizens who hold to vastly differing world views, a natural result of being free and equal persons, these world views, if we use Rawls's political construction, could be characterized as comprised of two parts: the public political part and the background or social culture part. The political part is the interrelated conception of justice that is reflected in terms of the fundamental ideas seen as implicit in the

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219 *Ibid.*, p. 165.

public political culture of a democratic society. It is the public culture that is comprised of the interrelated public political institutions.[220] The social part or background culture of a civil society is not necessarily composed of anything that is interrelated with other comprehensive world views *per se* but rather of various comprehensive doctrines, i.e. religious, philosophical and moral doctrines that manifest themselves in many associations: churches, universities, learned and scientific societies, and clubs and teams to mention a few. The background culture is the culture of the social or associational, not of the political.

> A conception of justice fulfills its social role provided that persons equally conscientious and sharing roughly the same beliefs find that, by affirming the framework of deliberation set up by it, they are normally led to a sufficient convergence of judgment necessary to achieve effective and fair social cooperation. My discussion of the basic liberties and their

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220 "In justice as fairness the priority of right means that the principles of political justice impose limits on permissible ways of life; and hence the claims citizens make to pursue ends that transgress those limits have no weight." *Ibid.*, p. 174. "The priority of right gives the principles of justice a strict precedence in citizens' deliberations and limits their freedom to advance certain ways of life." *Ibid.*, p. 209.

priority should be seen in this light.... Thus justice as fairness is addressed not so much to constitutional jurists as to citizens in a constitutional regime. It presents a way for them to conceive of their common and guaranteed status as equal citizens and attempts to connect a particular understanding of freedom and equality with a particular conception of the person thought to be congenial to the shared notions and essential convictions implicit in the public culture of a democratic society. Perhaps in this way the impasse concerning the understanding of freedom and equality can at least be intellectually clarified if not resolved. It is particularly important to keep in mind that the conception of the person is part of a conception of political and social justice. That is, it characterizes how citizens are to think of themselves and of one another in their political and social relationships, and, therefore, as having the basic liberties appropriate to free and equal persons capable of being fully cooperating members of society over a complete life. The role of a conception of the person in a conception of political justice is distinct from its role in a personal or associational ideal, or in a religious or moral way of life. The basis of toleration and of social cooperation on a footing of mutual respect in a democratic regime is put in jeopardy when these distinctions are not recognized; for when this happens and such ideals and ways of life take a political form, the fair terms of cooperation are narrowly drawn, and free and willing coop-

> eration between persons with different conceptions of the good may become impossible.[221]

Thus we have seen how Rawls's reasonable and rational conception of justice, with its primary principles and basic institutions and stages, i.e. political person, two principles, constitution, legislative stage and judicial stage, can in fact be interrelated with other reasonable and rational comprehensive world views that may even be incompatible with each other. Because of the broad and general abstractness of this political construction most rational and reasonable world views will see this political conception of justice as fairness as either derived from, congruent with or at least not in conflict with their *fundamental* values in their world view. Rawls has tried to show how this political conception or structure is a just and stable structure that is exercisable in a well-ordered fair and equal pluralistic democratic society giving, as a result, a sense of fair representation and stability to all. Rawls believes that this political system theoretically makes it possible for people with different comprehensive world views to function politically and socially within a pluralistic society.

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221 *Ibid.*, pp. 368-69.

§ 8. Deciding On A Standard Of Disclosure

Using Rawls's just political system to derive a public policy of information disclosure for informed consent I believe will result in the subjective standard. However, it must be kept in mind that Rawls is dealing with a well-ordered society in which citizens would be ideally competent. In the "real" world there are people who are less than competent and thus the subjective standard might not be appropriate for them. I will be arguing later that as the pendulum of competency swings towards "ideal" competency the subjective standard becomes more and more appropriate. As the pendulum of competency swings towards "non-ideal" competency you will likewise swing through the reasonable person standard towards the professional practice standard.

The way one would extrapolate the "Rawlsian" informed consent principle, i.e. subjective standard for the ideally competent, is not by philosophical argument tracing back to the basic liberties under the first principle , because it would be unlikely that those with differing philosophical arguments would ever be able to convince others that they are correct. Rather the basis of agreement is in the public culture of a democratic society

in its underlying conception of the person, as rational and reasonable, and that of social cooperation.[222]

§9. Constitutional Basis

1. We must appeal to our solid constitutional bases, which account for our fundamental constitutional rights and liberties establishing the social conception of the person. Of course the constitution reflects and protects our basic liberties under the first principle, i.e. freedom and equality, freedom of thought, liberty of conscience, and personal liberty to mention a few. Thus the legislation of a type of informed consent that would be regarded as just would, of course, have to be constrained by constitutional law[223] and the two principles of justice.

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222 The notions of the basic structure, of the veil of ignorance, of a lexical order, ... as well as of pure procedural justice ... [can not be expected] to work by themselves, but properly put together they may serve well enough. It is too much to suppose that there exists for all or even most moral problems a reasonable solution. Rawls, *Political Liberalism*, p. 89.

223 Edmund Pellegrino says that constitutional liberties do apply to doctor patient relationships. "In a democratic society, people expect the widest protection of their rights of self-determination. Hence, the contemporary patient has a right to

2. In a well-ordered society of competent individuals the professional standard and the reasonable person standard fail to conform to the constitution because of the violations that would occur against some of the basic liberties the constitution would uphold. The professional practice standard, as held historically, violates at least freedom and equality, freedom of thought, liberty of conscience and personal liberty. This is a result of the conviction that the proper and moral role of the doctor is to act in the patient's best medical interest as determined by the medical community rather than as determined by the patient.

However, in a Rawlsian system, citizens are free and equal with basic rights and liberties—this includes, of course, physicians and patients. Competent patients and physicians are empowered to be free and equal with their constitutionally protected rights. Patients have the choice and the responsibility to take part in their determination of their health-care good.

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know the decisions involved in managing his case." Edmund D. Pellegrino, "The Hippocratic Ethic Revisited," in *Humanism And The Physician* (Knoxville: University of Tennessee Press, 1979), p. 98.

Citizens are in control of their destiny to the extent that the constitution as a rational and reasonable social and democratic position empowers them with basic rights and liberties. Thus treatment choices would fall under the umbrella of being free and equal along with freedom of thought and conscience.

3. The reasonable person standard not only violates the constitutional rights and liberties such as freedom and equality, freedom of thought, liberty of conscience and personal liberty but it also does not take into consideration pluralistic standards of "reasonable". It works on the presupposition that it is possible to come up with a "reasonable" protocol or standard that would be applied to all or most patients because that protocol or standard is believed to be universally "reasonable". In a Rawlsian well-ordered society in which all are fully competent, the objection is not so much that the patients would not agree with the procedures, rather, it is the idea of taking away the decision making process from the autonomous patient who, incidentally, may have quite different values and beliefs than that of the "standard" patient, especially in a pluralistic society. We can, certainly, argue that unreasonable choices are not autonomous or competent—as they would not promote the Rawlsian *reasonable* and *rational* person, however, the issue

here is not that of unreasonable choices, rather, it is the fact that what is unreasonable for one group of individuals might be quite reasonable for another group who as autonomous persons share different values and beliefs. A clear example of this is the Jewish person who refuses to have a pork heart valve put in because of the Jewish associational belief that pork is "unclean".

4. The subjective standard of information disclosure appears to be the only reasonable and rational position under the constraints of a constitution which upholds the basic liberties as derived under the first principle of justice in a well-ordered competent society. Now it may be the case that people may in fact relieve or relinquish those rights because of some associational beliefs or world view. That is fine as long as people know that they do in fact have those political social rights. People must know that they have the constitutional right to relinquish not only their constitutional rights but even more importantly to relinquish their associational constraints and to claim their constitutional rights and liberties as free and equal citizens.

§ 10. Subjective Standard

1. Although it may be argued that none of the three standards of information disclosures is perfect, it seems clear that

the subjective standard would be more in line with free and equal competent citizens' constitutional rights and liberties. Certainly, since the subjective standard is inherently individual and private, people should have the freedom to receive less information but it would seem that from the options presented the subjective standard should be the social common standard for competent individuals, unless otherwise specified, as only this standard affirms competent persons as rational and reasonable.

The conceptual, moral, and practical difficulties that were presented in §4.2 in response to the subjective standard dissapear in a Rawlsian well-ordered society in which all citizens are also ideally competent.

The main objection to the subjective standard was that it unrealistically demanded too much from the physician. But in this Rawlsian society both the doctor and the patient will not only have the "proper" conception of what it is to be a rational and reasonable person, both with respect towards themselves and towards others, but they will also have the capacity to be reasonable and rational. Thus, even though there is a demand on the doctor to disclose relevant information there is also a

joint responsibility on the part of the patient to participate in the determination of what informational needs are important.

The second and third objections dealt with not being able to make the "right" decisions and how decisions are in large part made prior to information disclosure. But once again these objections fall mute in a Rawlsian framework as this well-ordered society is comprised of individuals who are rational and reasonable and who do in fact act and make decisions accordingly.

2. If this is indeed true, then it may be the case that we have not found the perfect solution on the subject of information disclosure but at least we have perhaps made one step forward in the right direction, at least for those who fit the criteria for a Rawlsian reasonable and rational competent citizen.

PART THREE

INFORMED CONSENT:

AN EXPERT-SYSTEM APPLICATION

CHAPTER 4

DR. ETHICS™: A CRITICAL EVALUATION

In part three we will be evaluating the informed consent protocol of DR. ETHICS™ an expert system I have developed for determining whether a valid informed consent has been given or not. However, the informed consent protocol in DR. ETHICS™, (henceforth referred to simply as DR. ETHICS™) is a computer expert-system that is not easily put on paper in any type of coherent

fashion. Ultimately I shall follow the "decision tree" that would result in a judgment that would be deemed "Ethical to Treat". However, we shall also evaluate the responses that clearly would go outside of those constraints.

In the beginning of each major section I shall present a flow chart representing, as accurately as possible, the decision tree process used in DR. ETHICS™. The flow charts consist of boxes abbreviated for the full questions that will be shown in the text or on your computer. The arrows tell where DR. ETHICS™ is or could go depending on how the questions are answered.

Obviously, I hope, I am not so naive as to think that DR. ETHICS™ should, or even could be used to determine "real life" situations on an individual case-by-case basis. DR. ETHICS™ is designed as a teaching tool to help explicate a rational and reasonable thinking process and criteria that are usually essential in making these types of considerations. However, it must be kept in mind that even though DR. ETHICS™ is compatible with Rawlsian political justice, DR. ETHICS™ still is only one of many ways in which these issues could be organized and/or addressed. Practically, if DR. ETHICS™ helps to formulate, clarify or reinforce a "protocol" already formulated for doing this type

of work then DR. ETHICS™ will have achieved its aim. DR. ETHICS™ is and never was designed to take the "person" out of medical ethics. I am a firm believer that each individual patient needs to be considered on a case-by-case basis. Justice cannot be found neatly in a rule-book, legislation, or in an algorithm, rather, it is often times, if not most of the time, a practice of exceptions, i.e. a practice of judicial review[224].

This is a position I believe Rawls would agree on especially since our society is becoming more and more pluralistic with fundamentally different world views as well as the fact that we are moving out of Rawls's well-ordered society into one that is not well-ordered and also one in which various levels of competency exist.

§ 1. DR. ETHICS™: But From What Ethical Perspective?

1. DR. ETHICS™ is a computer program that can analyze the ethical implications of case studies in clinical medicine. The Informed Consent Protocol interactively works through any

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224 "Judicial review" is being used here in a broad and general sense meaning not only a mechanism like a court but also as something one could do in the process of decision making.

case study brought to DR. ETHICS™ by the professional and/or student. DR. ETHICS™ will help to expose the ethical dimensions, ask for responses and/or decisions and present its recommended resolution. This resolution can then be accepted or challenged and used as an advanced starting point and catalyst in ethical dialogue. But from what ethical perspective or expertise does DR. ETHICS™ approach these cases? Is DR. ETHICS™ built on experiential wisdom, consequentialism, deontologism, natural law, casuistry, ethics of care or what?

2. Following the theme of the previous chapters, DR. ETHICS™ consists of a systematic approach not in a particular type of applied ethics or associational view, but rather an approach that is structured on primary principles of justice that a pluralistic society could agree on in order to establish and/or affirm our social conception of a "rational" and "reasonable" person. In trying to accomplish this task it is not necessary to take an eclectic approach in which one tries to combine all types of ethical approaches, as you would only end up with intractable reasonable and rational conflicts and contradictions. DR. ETHICS™ is an approach which is compatible with the Rawlsian social contract, i.e. upholding the primary basic liberties that a pluralistic society would hold of value. DR. ETHICS™

is not meant to be an approach establishing what your individual values and goals should be rather it is an approach establishing what a pluralistic society as a whole should strive towards so that all individuals within that society can establish and or live according to their own personal "world view". In other words, it is an approach that tries to support those values and or rights that would provide free and equal individuals within a democratic pluralistic society the opportunity or environment to develop as "rational" and "reasonable" persons. As I quoted earlier:

> A conception of justice fulfills its social role provided that persons equally conscientious and sharing roughly the same beliefs find that, by affirming the framework of deliberation set up by it, they are normally led to a sufficient convergence of judgment necessary to achieve effective and fair social cooperation. My discussion of the basic liberties and their priority should be seen in this light.... Thus justice as fairness is addressed not so much to constitutional jurists as to citizens in a constitutional regime. It presents a way for them to conceive of their common and guaranteed status as equal citizens and attempts to connect a particular understanding of freedom and equality with a particular conception of the person thought to be congenial to the shared notions and essential convictions implicit

> in the public culture of a democratic society. Perhaps in this way the impasse concerning the understanding of freedom and equality can at least be intellectually clarified if not resolved. It is particularly important to keep in mind that the conception of the person is part of a conception of political and social justice. That is, it characterizes how citizens are to think of themselves and of one another in their political and social relationships, and, therefore, as having the basic liberties appropriate to free and equal persons capable of being fully cooperating members of society over a complete life. The role of a conception of the person in a conception of political justice is distinct from its role in a personal or associational ideal, or in a religious or moral way of life. The basis of toleration and of social cooperation on a footing of mutual respect in a democratic regime is put in jeopardy when these distinctions are not recognized; for when this happens and such ideals and ways of life take a political form, the fair terms of cooperation are narrowly drawn, and free and willing cooperation between persons with different conceptions of the good may become impossible.[225]

It is with this in mind that DR. ETHICS™ approaches the issue of informed consent.

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225 Rawls, *Political Liberalism*, pp. 368-69.

3. DR. ETHICS™ and its informed consent protocol is really meant only to be a teaching tool and an example of what issues need to be addressed in dealing with informed consent. It is not an algorithmic program that is capable of replacing the judicial judgment of health-care providers and patients. DR. ETHICS™ is only a starting point or a beginning, if you wish, at establishing a minimum standard which a democratic pluralistic society could all agree upon even though some would be satisfied with less stringent requirements and others *could* prefer more stringent requirements.

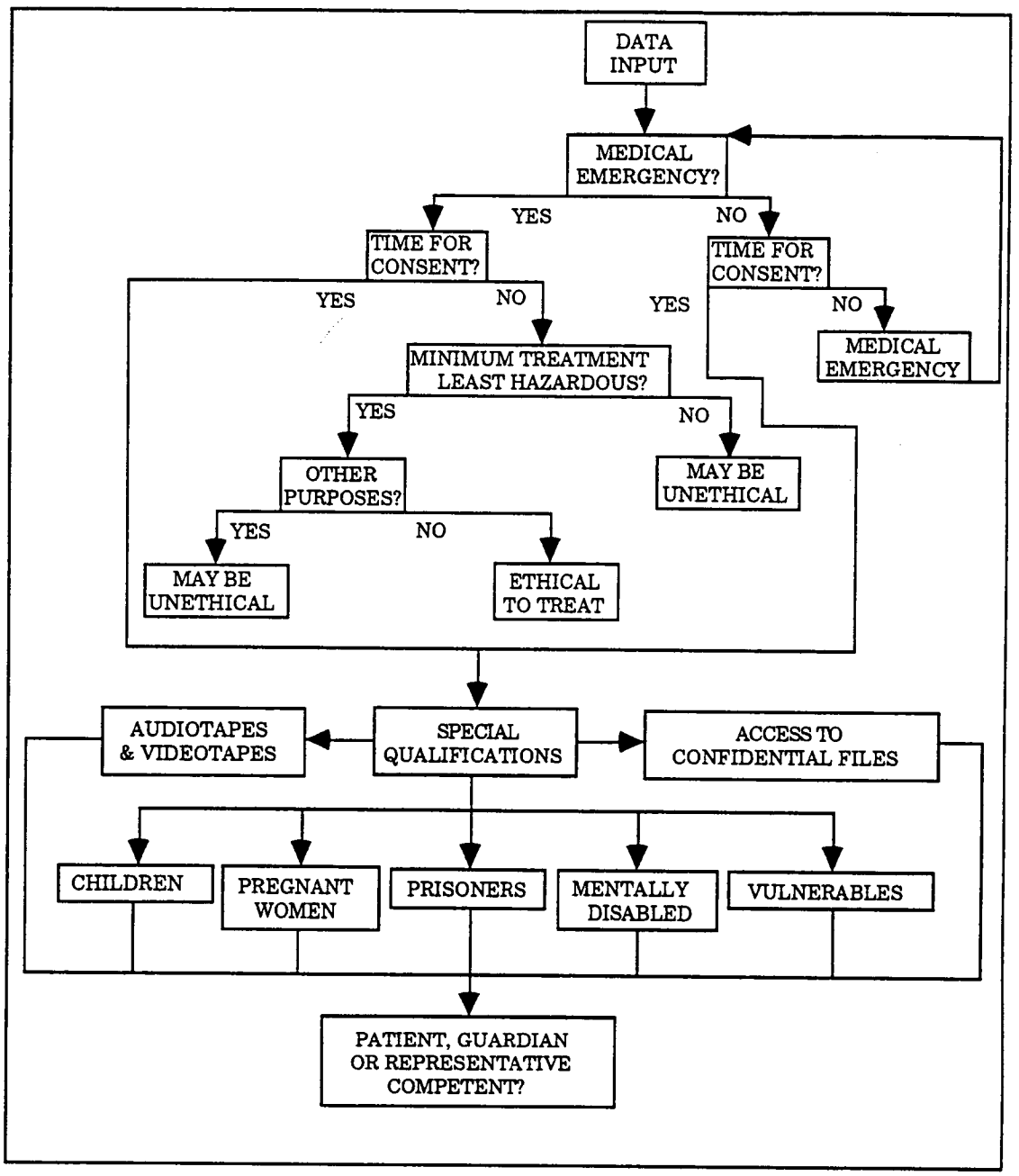
Where there is great dissent, e.g. abortion, euthanasia etc., public legislation should be minimized. Public debate and judicial review will be the means to change the broad social/personal beliefs and conceptions until general agreement can be reached benefiting all or, at the very least, benefiting the least well-off, i.e. maximin. However, this maximin principle also falls under certain exceptions as justice is often times, as mentioned above, a practice of exceptions. An example of this might be when those other than the least well-off benefit immensely with very little imposition on the least well-off. As utilitarian as this may sound I believe that most rational and reasonable points of view, e.g. deontologism, caring positions etc.,

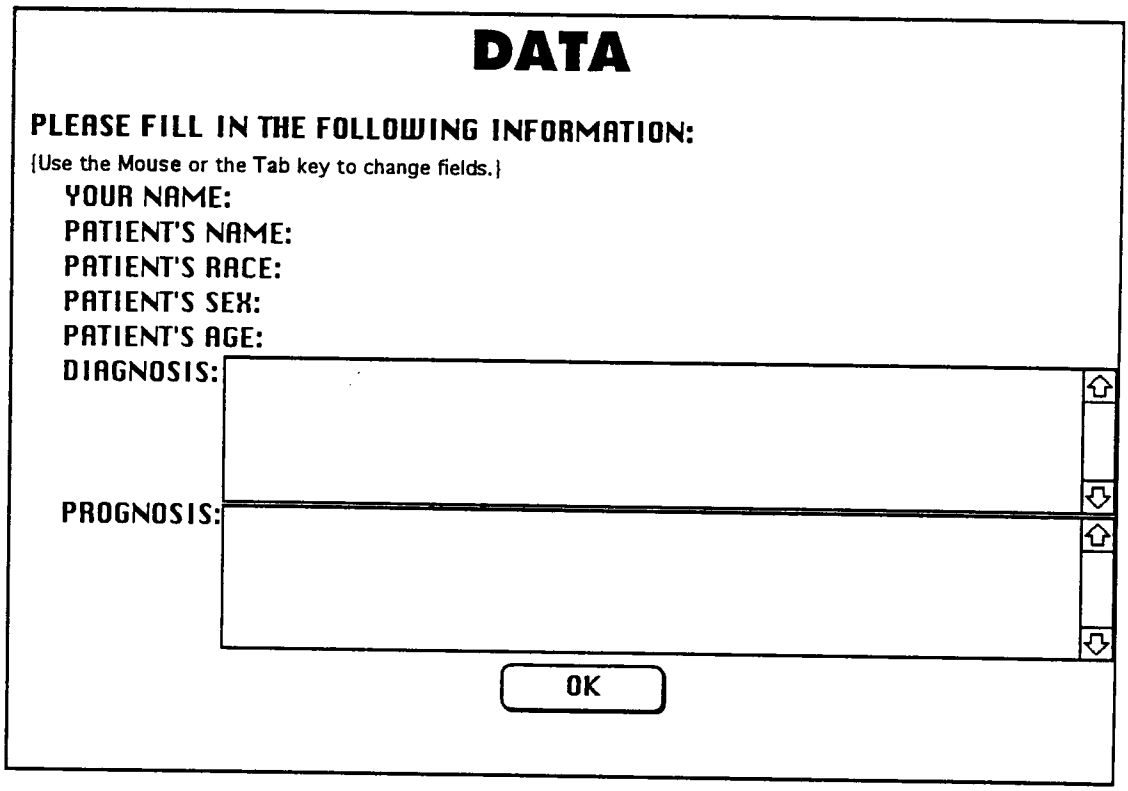
would agree with this position. Regardless of whether this is true or not the main point is that on issues of great disagreement legislation is to be limited based on the idea that this lack of legislation would stimulate public debate benefiting the growth and development of the reasonable and rational political person, i.e. the ability to deal fairly with others in society with mutual respect for all and the capacity to freely form, revise, and pursue one's good, whatever that might be.

To help orient ourselves with DR. ETHICS™ and how it works through this informed consent protocol I will provide a visual guide of its decision making processes. This will be done through the use of "flow charts".

§ 2. Flow Chart One

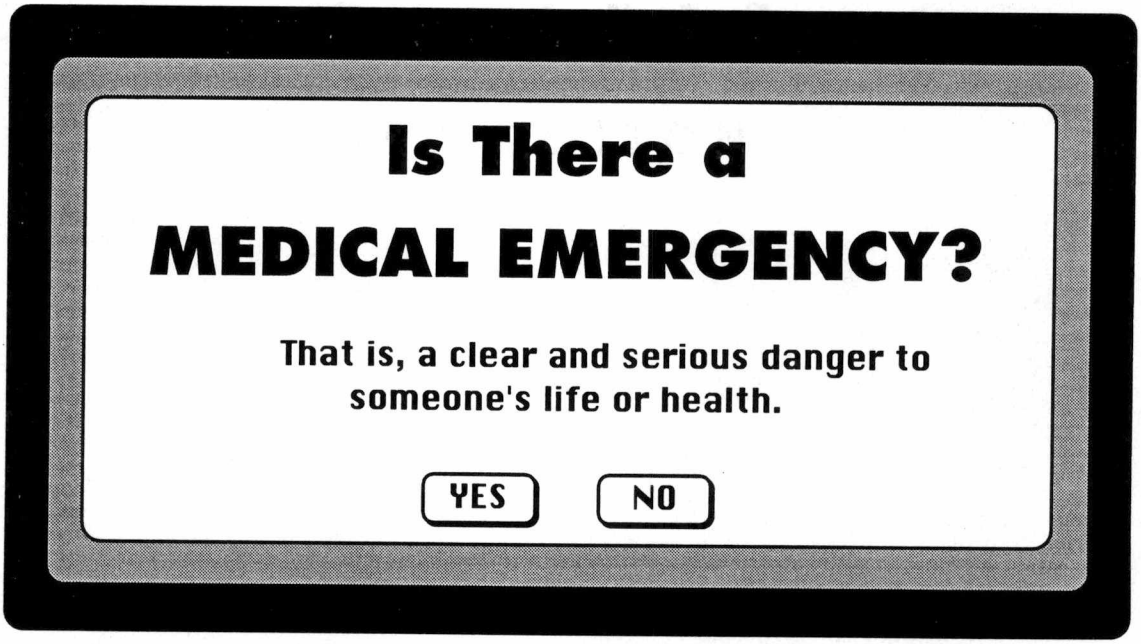
1. Here is the first of the four "flow charts" we will be considering. Look at it carefully and familiarize yourself with the decision making process and how it "flows" depending on how you answer the questions presented.


DATA INPUT
MEDICAL EMERGENCY?
YES
NO
TIME FOR CONSENT?
TIME FOR CONSENT?
YES
NO
YES
NO
MEDICAL EMERGENCY
MINIMUM TREATMENT LEAST HAZARDOUS?
YES
NO
OTHER PURPOSES?
MAY BE UNETHICAL
YES
NO
MAY BE UNETHICAL
ETHICAL TO TREAT
AUDIOTAPES & VIDEOTAPES
SPECIAL QUALIFICATIONS
ACCESS TO CONFIDENTIAL FILES
CHILDREN
PREGNANT WOMEN
PRISONERS
MENTALLY DISABLED
VULNERABLES
PATIENT, GUARDIAN OR REPRESENTATIVE COMPETENT?



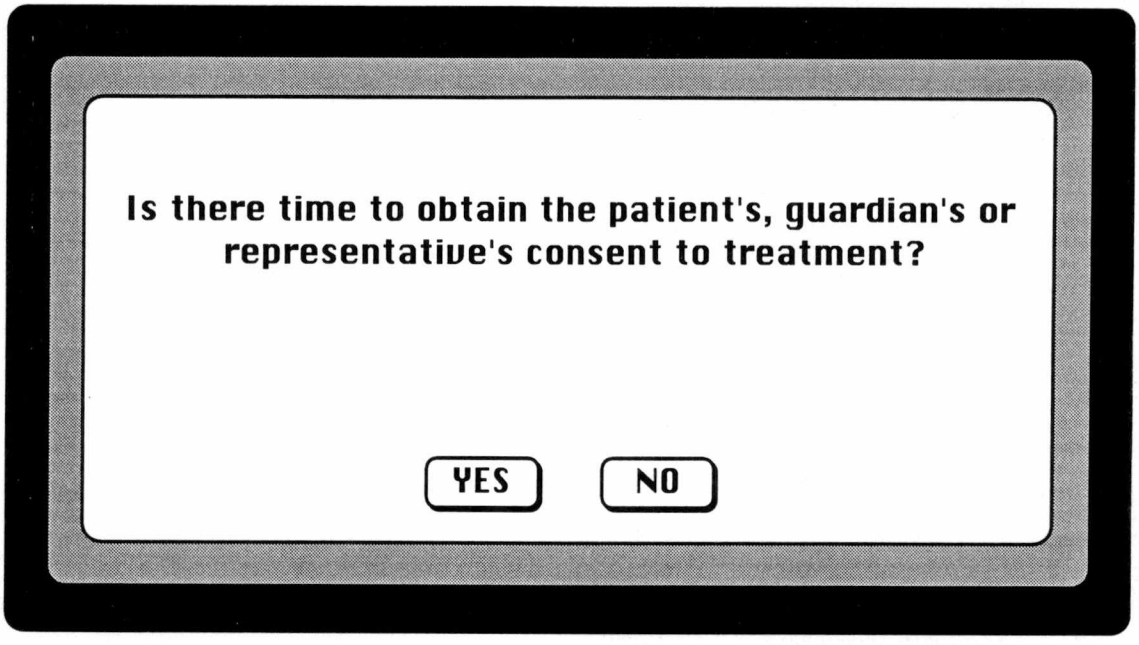
2. The first couple of questions DR. ETHICS™ asks are for the purpose of acquiring preliminary data. These questions identify the background information about the patient and their prognosis and diagnosis. Although DR. ETHICS™ does not request a patient history, that information might later be important especially when trying to determine the prevalence rate with regards to the disease or state in question. More will be said on this later.

Other questions that might be of importance in decision-making, are questions in regards to the patient's and heath-care provider's associational or personal "world views"—including religous views. These questions are not asked because DR. ETHICS™ is concerned with the pluralistic social-political spectrum and not the more specific associational values. However, these associational or personal values and beliefs will be brought into the decision making process by the patient. DR. ETHICS™ wants to establish the most extensive liberty for a pluralistic democratic society. If certain individuals would be content with a less stringent informed consent protocol at least they will not be able to object that their liberties have been violated.



3. Whether this question is answered "YES" or "NO" does not conclusively determine whether or not there is time to obtain the patient's, guardian's or representative's consent. Thus no matter how you answer this question you will next be asked "Is there time to obtain the patient's, guardian's or representative's consent to treatment?". However, if one were to say "NO", that this is not a medical emergency, and then answer the following question in regards to there not being time to obtain the patient's, guardian's or representative's consent to treatment the program would kick you back to the previous question of being a medical emergency.

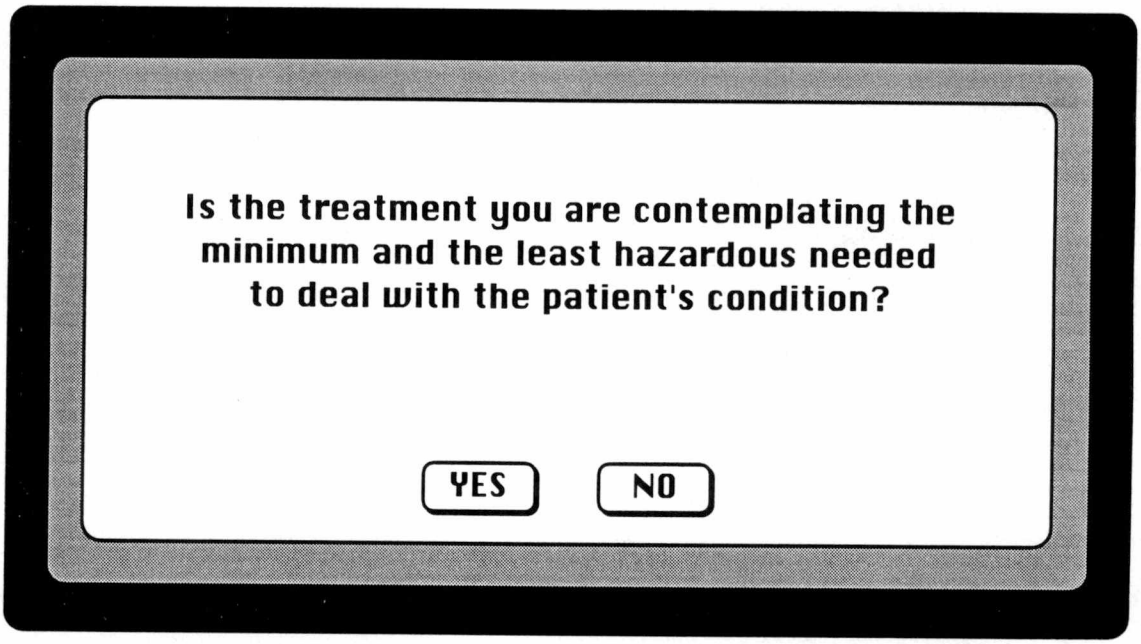
The rationale behind this is that if there is insufficient time to obtain consent before serious danger to the patient's life or health then perhaps the situation that you thought was not a medical emergency is in our terms a medical emergency. In this context it is not possible to have a non-emergency situation in which there is no time to get any type of consent, e.g. informed, proxy etc.. In other words, if there is no time for any type of consent and there is a clear and serious danger to the patient, then by definition it is a medical emergency. We are not justifying the ignoring of consent, rather, it is a situation in which getting consent just is not possible because of time constraints. We must bypass consent if necessary to avoid serious harm.



4. Whether or not the case is a "medical emergency" if you answer "YES" to this question then DR. ETHICS™ will go to a section called Special Qualifications for Treatment/Research. The Special Qualifications section gives some additional precautions and guidelines that are necessary in obtaining consent from special individuals.

If the situation is such that it is a medical emergency in which there is no time for consent, i.e. you answer "NO" to this question, then DR. ETHICS™ will ask you some additional questions. Two questions that follow from the fact that it is not pos-

sible to obtain consent in a medical emergency are the following:



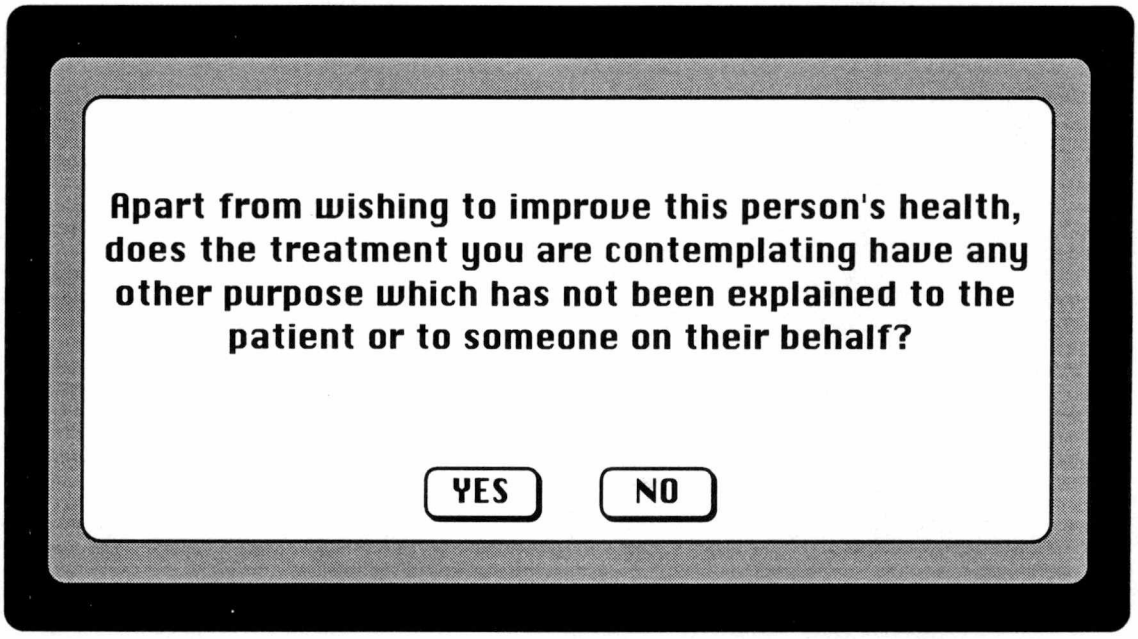
5. If you answer "NO" to this question then DR. ETHICS™ will conclude that the Treatment May Not Be Ethical. In this type of situation it is imperative that the minimum and least hazardous standard treatment be given. This is not a situation in which experimental or questionable practices should be used. The reasoning behind this is that since the patient is not at this time a "reasonable" and "rational" person, i.e. competent, and

decisions concerning the patient's welfare must be made for her, it would be best to err on the side of caution and towards those procedures that have been proven to be the minimum and the least hazardous. Thus in this particular situation, in which a consent is not possible, the minimum and least hazardous treatment, should be applied.

This criterion does not violate the essential nature of the primary basic good of personal liberty that is necessary for anyone to develop as rational and reasonable political persons as defined in chapter 3. We are now in a nonideal situation in which the patient is not able to function rationally and reasonably.

On the one hand, as competency for consent decreases the "pendulum of informed consent" swings towards the professional practice standard of consent. On the other hand, we shall see that as competency for consent increases the "pendulum of informed consent" swings towards the subjective standard. The more a treatment deviates from the standard practice the more stringent the consent requirements become. More shall be said about this further on.

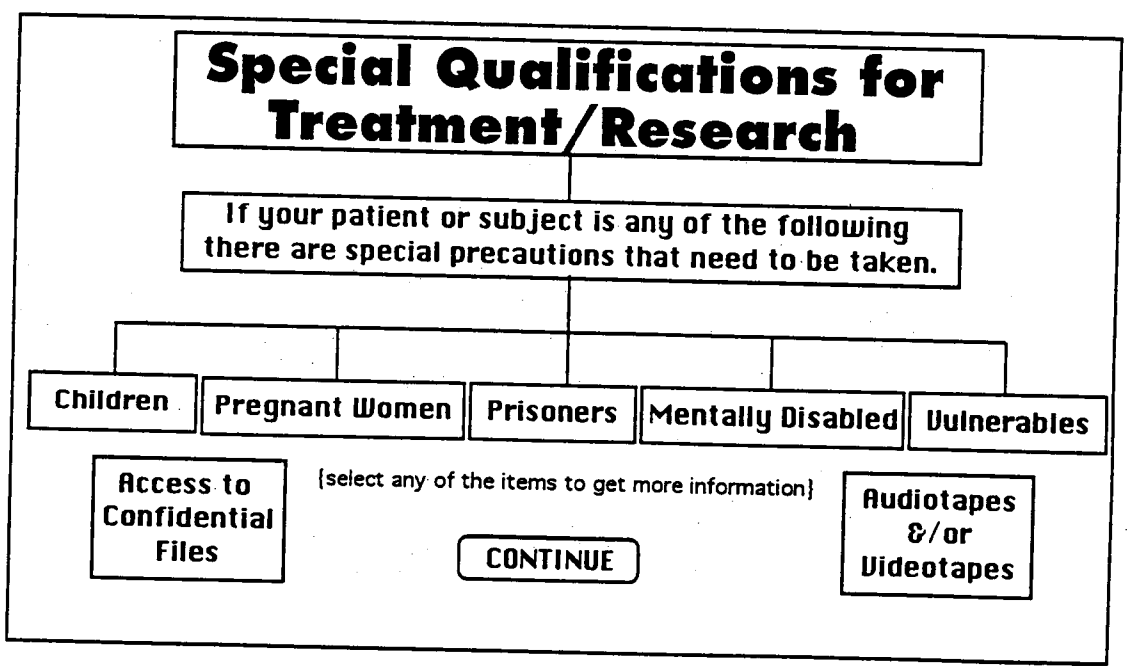
Answering "YES" to the question of the treatment being the minimum and least hazardous necessary for treating this patient will deliver you to the following question.



6. In dealing with a patient from whom you are unable to get any type of consent, it is imperative that the only or main purpose for the treatment you are giving is for the patient's benefit. To do otherwise could be seen as taking advantage of the non-consent situation. Certainly if it happens that the minimum and least hazardous treatment could be used for other purposes, e.g. research, then it is important to indicate

that the "other purposes" were not the *main* reason(s) for choosing the particular treatment. Again, because of this non-consent situation there is the emphasis towards the professional practice standard of treatment when the treatment is the minimum and least hazardous for a non-consenting patient.

7. Going back to the case in which there is time to obtain the patient's, guardian's or representative's consent to treatment, the following special qualifications and precautions section comes up. (look at "flow chart one" to see what we have just covered and to see were we are going.)



8. As important as this material is I have chosen to bypass it at this point in order to provide some continuity with the subject matter at hand. That is, we are trying to devise a standard of practice that would be considered just in a pluralistic democratic society of free and equal persons. It has also been in line with our approach to concentrate not on the exceptions or special cases but to concentrate on standard or normal circumstances first. Then once we have made some progress in that direction then perhaps those "normal" procedures can be applied or modified in order to accommodate those "special" cases.[226] Thus my focus is to first try to delineate a basic standard of consent practice.

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226 A sketch of the basic issues are:

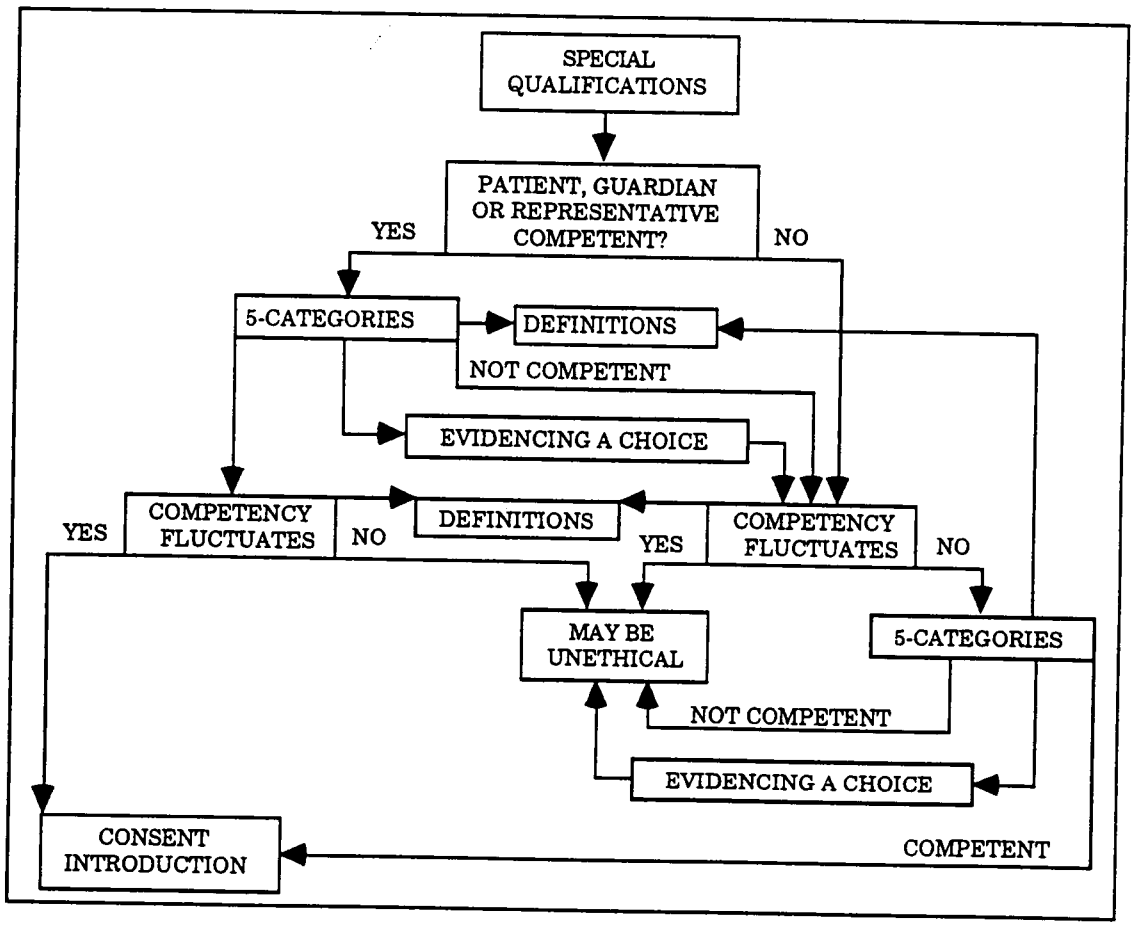
1) There are groups that present special problems for consent.

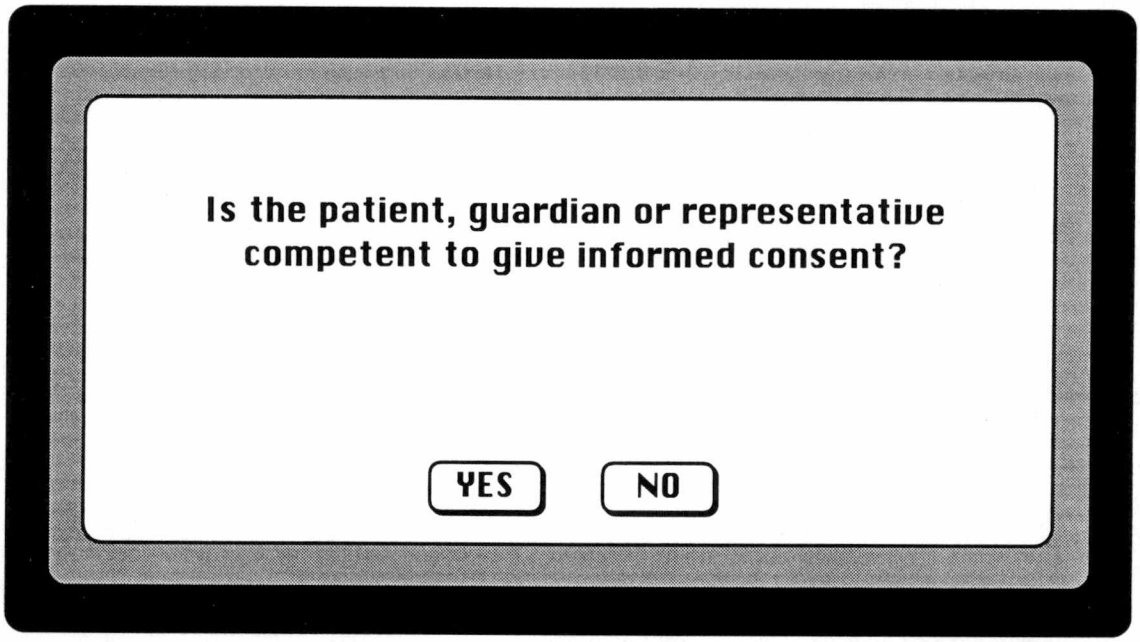
2) Their special status has been recognized by commissions drawing up research guidelines.

3) Similar issues arise for consent for treatment.

§ 3. Flow Chart Two

1. Here is the second major "flow chart" to be considered. Once again look at it carefully and familiarize yourself with the decision making process.





2. Before we go on to explain what happens depending on whether you answer this question "YES" or "NO" we need to address the implications of allowing the practitioner to make this judgment. The question here is whether this isn't smuggling back in some of the professional practice standard even for those who would be "fully" competent. It could be forcibly argued that the determination of competency is a subjective evaluation in which the patient herself often is unable to give an accurate evaluation of her own competency. Certainly there are many situations in which the "objective" evaluator may evalu-

ate the patient as competent/incompetent while another "objective" evaluator may evaluate the patient differently arguing adamantly that she is incompetent/competent.

For a Rawlsian well-ordered society this issue never arises as it is assumed that all its citizens are "rational" and "reasonable" persons who would be ideally competent. But in the "real" world we are working with citizens who are less than ideally "reasonable" and "rational" persons. The extent that our society is less than "ideal" in this regard is the extent that we must swing towards or introduce the professional practice standard into our practical approach. Even though this is a less than "ideal" approach it is nonetheless a necessary practical approach.

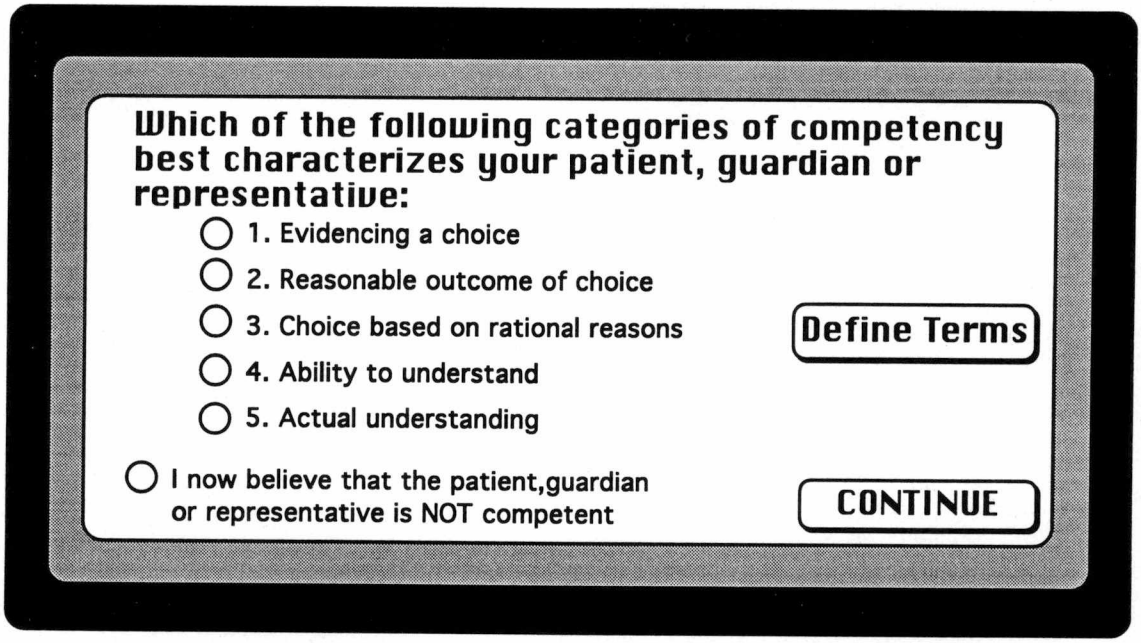
Rawls's well-ordered society is intentionally "artificially" simplistic. It is this simplicity which allows us to ethically evaluate what standards and/or procedures we should ideally strive towards even though those standards and procedures may not be able to be practically applied to the "real" world. Rawls's justice is successful to the extent that it brings us closer to helping us determine what we should ideally strive towards regardless of whether citizens hold to consequentialism, deontologism, or some other associational or pluralistic point of view.

In light of our less than "ideal" pluralistic society and what has been said above we can now move on to discuss the question of whether the patient, guardian or representative is competent to give informed consent. If you answer "YES" to this question then you will go to:

a. the question of defining the type of competency then to

b. the section explaining how competency may fluctuate.

If you answer "NO", then you go to the section explaining how competency may fluctuate and are given the opportunity to change your mind. If you still feel that the patient, guardian or representative is still incompetent and there is still time to get consent, then it Might be Unethical to Treat the Patient. If you change your mind and thus think the patient, guardian, or representative is competent then you move on to select one of the five types of competencies.



3. Five types of competency:

(1) **Evidencing a choice:** Does not focus on the quality of the patient's decision but instead only on the presence or absence of a decision. (This is not enough to establish competency. Just because an individual shows evidence of choice is not good enough to be competent. An infant or an impaired adult may choose to play with something dangerous like a razor blade. But certainly we do not consider them competent and let them do as they wish just because they show evidence of choice.)

(2) **Reasonable outcome of choice:** emphasizes the outcome of the decision—consequentialism—rather than on the mere fact of a decision or how it was reached.

The way the term "reasonable" is being used here is somewhat different from the way Rawls uses the term "reasonable". For Rawls being "reasonable" is having the ability to deal fairly with others in society with mutual respect for all. This would, of course, be a strong consideration in the determining the outcome of the decision being made. But the way the term "reasonable" is being used here also involves aspects of Rawls's term "rational". For Rawls being "rational" is having the capacity to freely form, revise, and pursue one's good, whatever that might be. The pursuit of one's good has here been defined, consequentially, as some particular or range of outcomes. Rawls, of course, would not agree with this approach for his well-ordered "rational" and "reasonable" citizens as competency would be presupposed and the patient would also have a clear "rational good" in mind. However, here we are not working within a well-ordered society of competent individuals. Thus the practical approach of emphasizing the outcome of the decision is used quite often by physicians and courts premised on the following syllogism: the patient needs treatment; the pa-

tient has not obtained treatment on his or her own initiative; therefore, the patient's decision is incorrect, which means that he or she is not competent in regard to this decision, thus justifying the involuntary imposition of treatment. Implicit in this reasoning is the belief that as the competency for a particular decision diminishes so increases the power or need of others, who are competent, to make the decision for the patient.

(3) **Choice based on rational reasons:** emphasizes the quality of the patient's thinking, not the resultant outcome. This would be more of a deontological approach accentuating the perfect duty to oneself to act as autonomous agents and the imperfect duty to others to respect the dignity of competent persons as autonomous agents.

The way in which "rational" is being used here, like the reasonable outcome of choice, also has components of both of Rawls's terms "rational" and "reasonable". Like Rawls's use of the word "rational", there is an emphasis on the cognitive ability of the patient being able to freely form, revise, and pursue one's good, whatever that might be. Like Rawls's use of the word "reasonable", there is also an emphasis on the ability to deal fairly with others in society with mutual respect for all.

Choice based on rational reasons argues that as long as the reasoning is rational the patient is competent. The problem here is distinguishing rational from irrational. In Rawls's well-ordered society this would not be a problem as all his citizens are by definition rational. In our case this becomes problematic as there is no clear way to absolutely determine the rationality of another person as it is to some extent subjective. This becomes even more difficult as our society becomes more pluralistic and other people's "good" are significantly different than the health-care provider(s). Once again, implicit in this reasoning is the belief that as the competency for a particular decision diminishes so increases the power or need of others, who are competent, to make that decision for the patient.

(4) **Ability to understand:** It is the ability of the patient to comprehend or understand the risks, benefits, and alternatives to treatment, including no treatment, that is important, not how the patient weighs these elements, values them, or puts them together to reach a decision.

(5) **Actual understanding:** Depending on how sophisticated a level of understanding is to be required, this test delineates a potentially high level of competency, one that may be difficult to achieve.

4. If you choose either 2, 3, 4, or 5, you will proceed to the following screen.

Competency Fluctuates Depending on Context

Patient's Decision	Risk/Benefit Ratio of Treatment	
	Favorable	Unfavorable or Questionable
Consent	Low Test of Competency	High Test of Competency
Refusal	High Test of Competency	Low test of Competency

Explain Table

The diagram above illustrates how the determination of a patient's competency tends to vary from one context to another depending on whether the patient refuses or consents to treatment in relation to the Risk/Benefit ratio determined by the health care providers.

It is impossible to evaluate another person's competency totally devoid from your own presuppositions or subjective world view. Although being aware of this influence can help to minimize the influence as much as possible.

The goal of the health care provider should be to evaluate the patient's competency from the patient's world view and not your own.

After scrolling through the "**Explain Table**" and reading the above explanation do you still think the patient, guardian or representative is competent?

YES NO

EXPLANATION OF COMPETENCY TABLE

Patient's Decision	Risk/Benefit Ratio of Treatment	
	Favorable	Unfavorable or Questionable
Consent	Low Test of Competency (Cell A)	High Test of Competency (Cell C)
Refusal	High Test of Competency (Cell B)	Low test of Competency (Cell D)

5. If the risk/benefit ratio of treatment is favorable and consent is given, Cell A, then a low test of competency follows. If there is a refusal of consent, Cell B, then a high test of competency will be followed.

If the risk/benefit ratio of treatment is unfavorable or questionable and consent is given, Cell C, then a high test of competency will follow. If a refusal of consent is given, Cell D, then a low test of competency is followed.

In Cell A we have a patient who consents to have what the health professional(s) feels to be a favorable risk/benefit ratio. Under these circumstances a test employing a low threshold of competency may be applied to find even a marginal patient competent so that the patient's decision may be honored and the doctor can do what she feels is best for the patient. This is what happens daily when uncomprehending patients are permitted to sign themselves into the hospital. For example, a patient may come in with a broken arm and be delusional because of the pain. But since it is an acceptable practice to reset broken arms the patient is considered competent to assent to the proce-

dure even though she may be uncomprehending of the procedure.

In Cell B we have a patient who refuses to have what the health professional(s) feels to be a favorable risk/benefit ratio. Under these circumstances a test employing a higher threshold of competency may be applied. Under such a test even a somewhat knowledgeable patient may be found incompetent so that consent may be sought from a substitute decision maker and treatment administered despite the patient's refusal.

In both of these cases, Cell A & B, in which the risk/benefit ratio is favorable, health professionals and judges usually argue for providing treatment. Therefore, a test of competency is applied that will permit the treatment to be administered irrespective of the patient's actual or potential understanding.

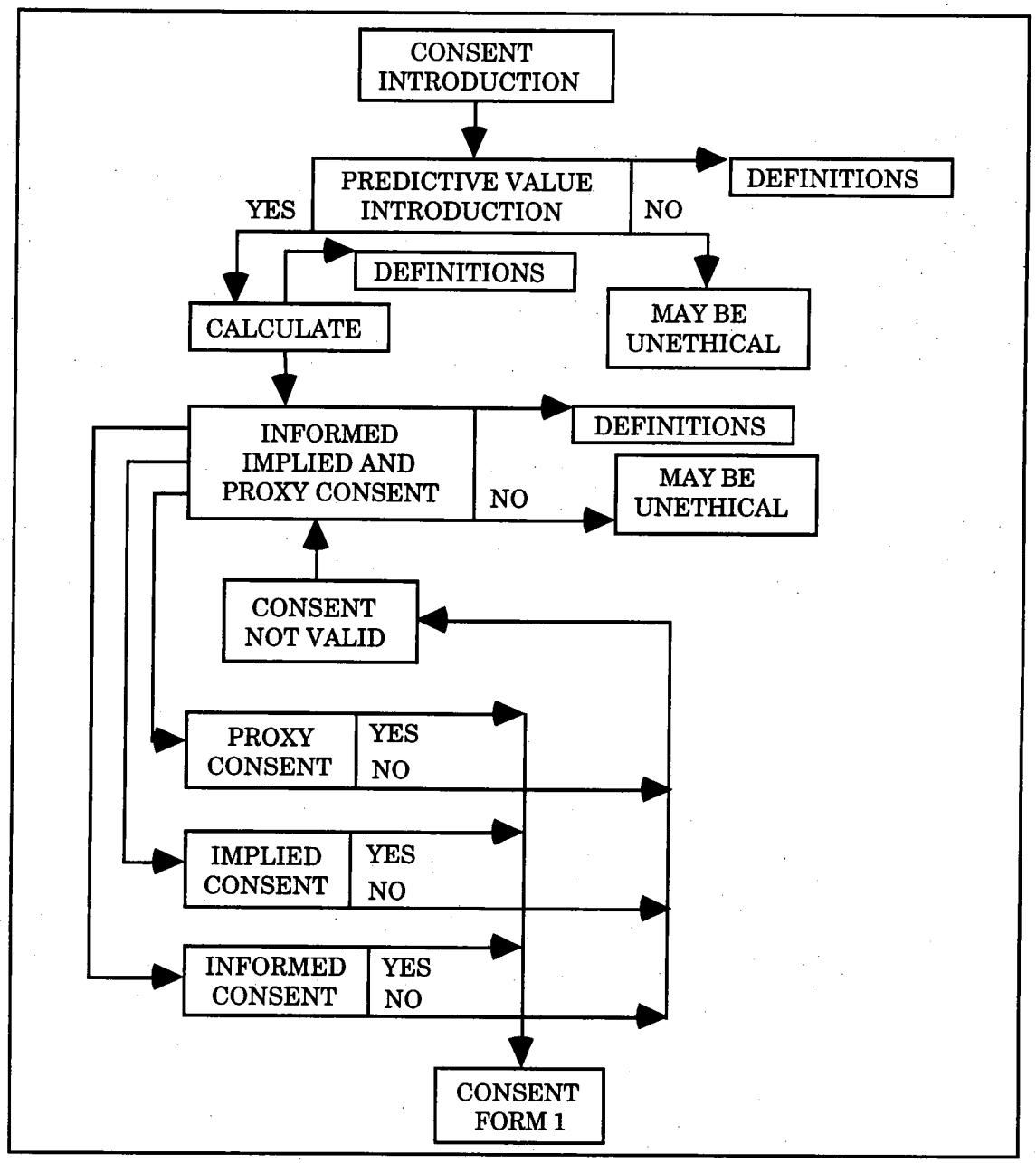
In Cell C we have a patient who consents to have what the health professional(s) feels to be an unfavorable risk/benefit ratio. Under these circumstances a test employing a high threshold of competency may be applied preventing even some fairly knowledgeable patients from undergoing treatment.

In Cell D we have a patient who refuses to have what the health professional(s) feels to be an unfavorable risk/benefit ratio. Under these circumstances a low threshold of competency may be selected so that the patient will be found competent and her refusal honored.

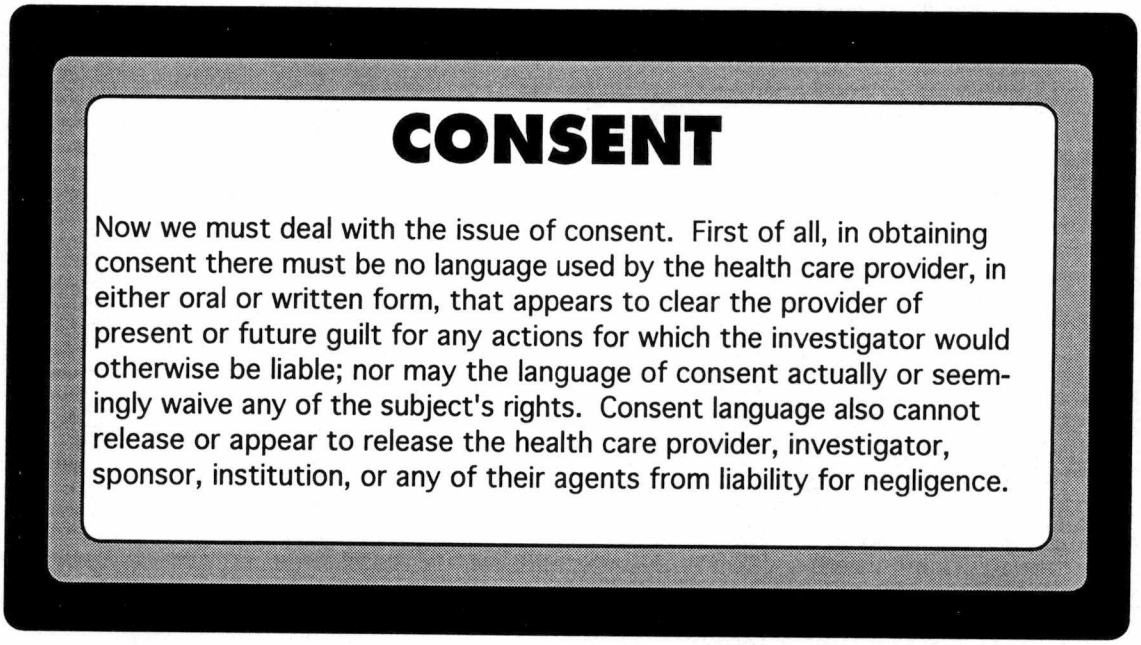
In both of these cases, Cells C & D, in which the risk/benefit ratio is unfavorable, health professionals and judges usually argue towards not providing the treatment.

§ 4. Flow Chart Three

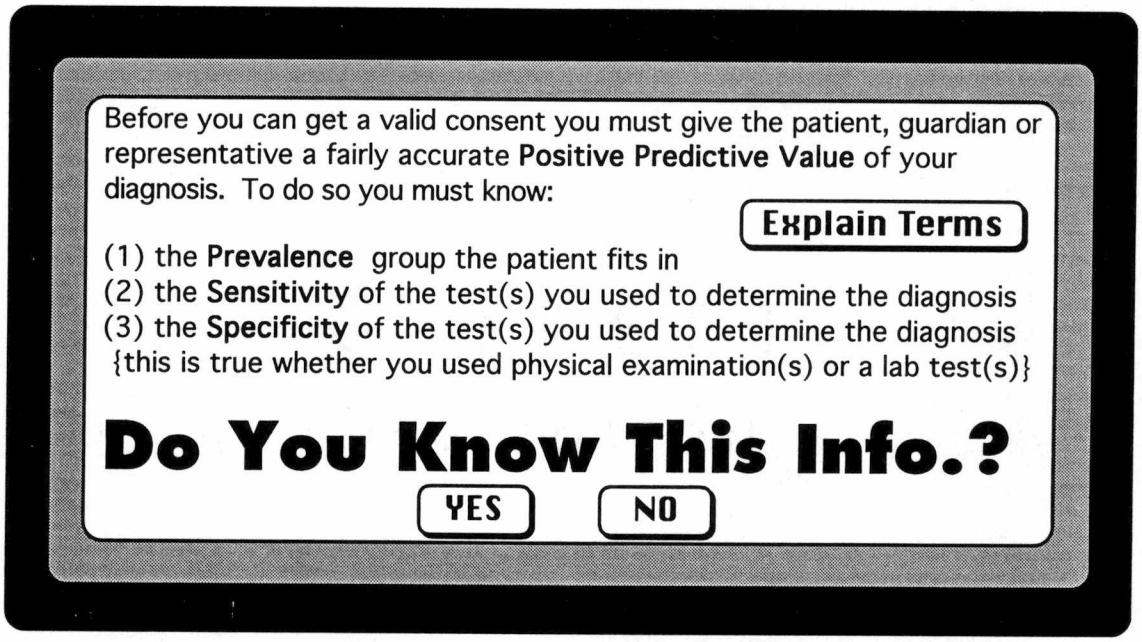
Once competency is determined (including the shifting standard) we then need to determine consent.


CONSENT INTRODUCTION
PREDICTIVE VALUE INTRODUCTION
YES
NO
DEFINITIONS
DEFINITIONS
CALCULATE
MAY BE UNETHICAL
INFORMED IMPLIED AND PROXY CONSENT
NO
DEFINITIONS
MAY BE UNETHICAL
CONSENT NOT VALID
PROXY CONSENT
YES
NO
IMPLIED CONSENT
YES
NO
INFORMED CONSENT
YES
NO
CONSENT FORM 1

1.


CONSENT
Now we must deal with the issue of consent. First of all, in obtaining consent there must be no language used by the health care provider, in either oral or written form, that appears to clear the provider of present or future guilt for any actions for which the investigator would otherwise be liable; nor may the language of consent actually or seemingly waive any of the subject's rights. Consent language also cannot release or appear to release the health care provider, investigator, sponsor, institution, or any of their agents from liability for negligence.

2.

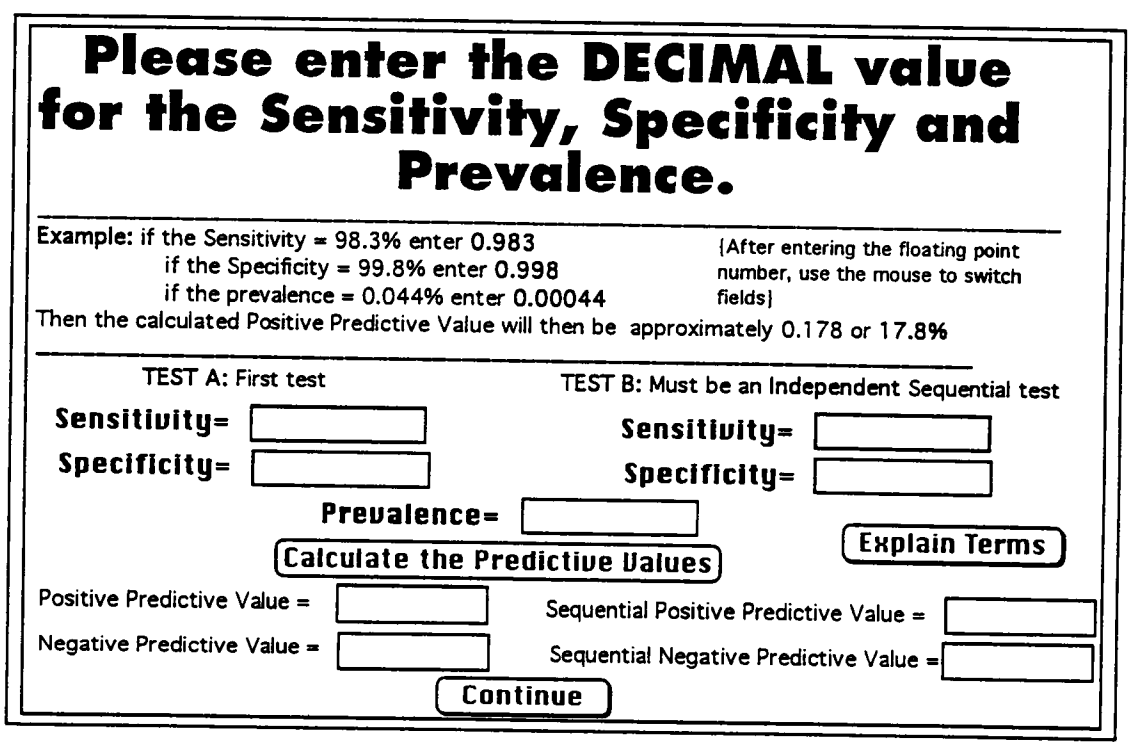


3. If you select the button "Explain Terms", in the previous screen display, it will explain the terms Sensitivity, Specificity, Prevalence, Positive and Negative Predictive Values, Series and Parallel Sequential Testing and some of the ethical issues involved with diagnostic testing.

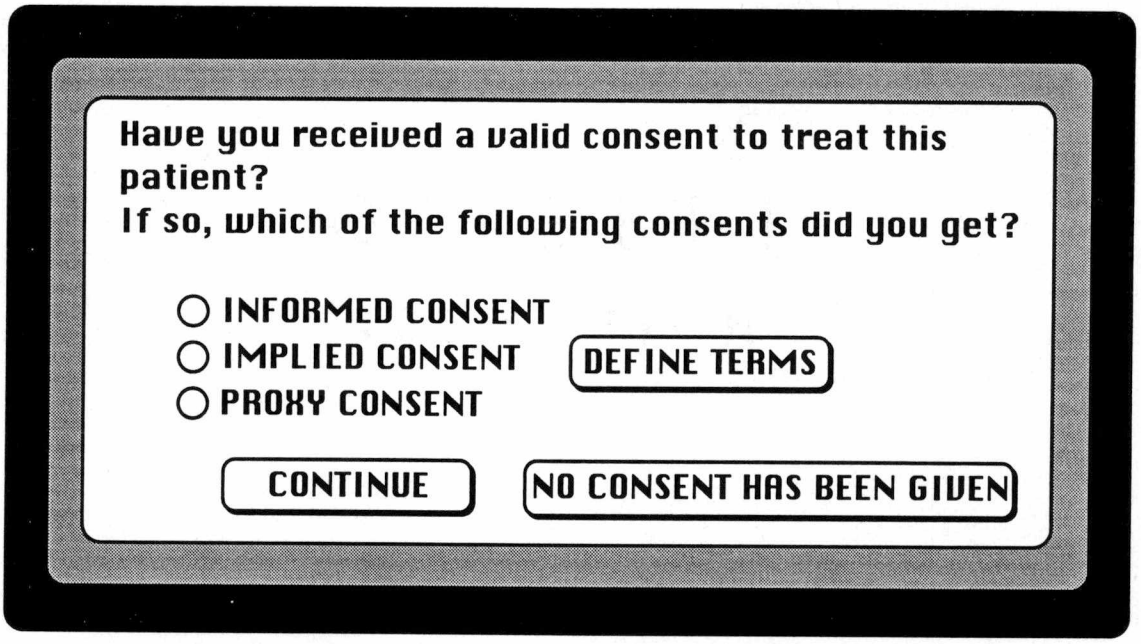
This information is necessary in order for the patient to know to what extent the diagnostic test or evaluation of her condition is accurate. Many times a patient's diagnostic test is no more accurate than chance, i.e. no better than the patient's prevalence group. Thus in order to make a truly informed deci-

sion the positive and negative predictive values are imperative. However, it may be the case that since we are moving away from "ideal" theory, we should recognize that an acceptable consent may lack this if it is not possible to acquire the positive and negative predictive values. Therefore, an option is given to bypass this requirement.

4.



5.



6. Once the positive and negative predictive values have been disclosed DR. ETHICS™ will ask if a consent has been attained and what type of consent was given.

I. Informed Consent: Is when the patient, guardian or representative:

1. Is considered "fully" competent to consent to treatment
2. Has received all the relevant information necessary to make an autonomous decision such as being informed of the risks, benefits, and alternatives to treatment

(including no treatment) and given the chance to ask questions and have them answered

3. Is able to act voluntarily, i.e. is sufficiently free from influences that would render the patient's decision involuntary

4. Adequately understands the treatment

5. Is willing to agree to the procedure

II. Implied Consent: Is when the:

1. Patient is in an emergency situation where it is not possible to get voluntary informed or proxy consent and life or health is threatened, or

2. Patient, guardian or representative initiated the contact for standard routine care

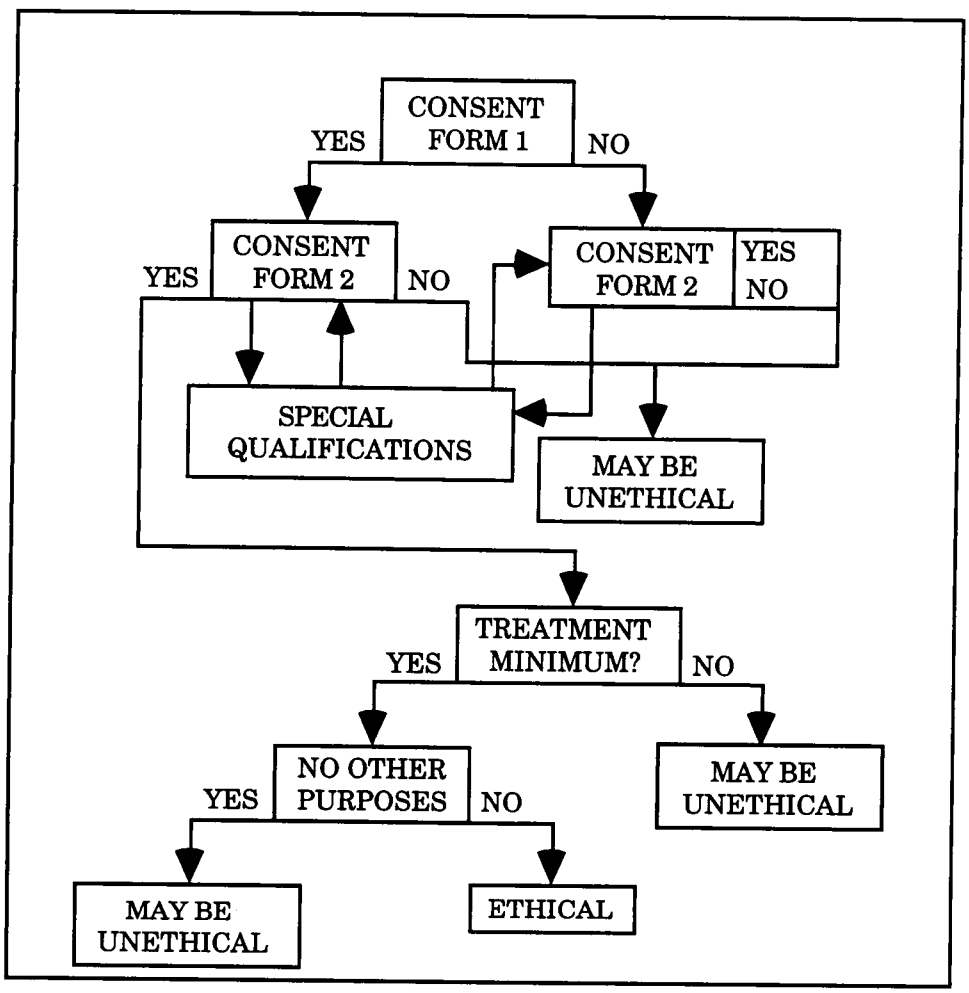
III. Proxy Consent: Is when another person, the guardian, makes a decision for another. Proxy consent usually takes place when the patient is not competent to consent to treatment or the patient is too young to make a competent decision.

The requirements are:

1. Guardian has the authority to make decisions for the patient
2. Guardian is considered "fully" competent
3. Guardian is able to act voluntarily, i.e. is sufficiently free from influences that would render the patient's decision involuntary
4. Guardian has received all the relevant information necessary to make an autonomous decision such as being informed of the risks, benefits, and alternatives to treatment (including no treatment) and given the chance to ask questions and have them answered
5. Guardian adequately understands the treatment
6. Guardian represents the patient's point of view, if possible
7. Guardian has made a decision regarding medical treatment

§ 5. Flow Chart Four

Here is the fourth major "flow chart" to be considered.



CONSENT FORM

1. Does the consent form include each of the following basic elements?

YES	NO		
☐	☐	a.	An explanation of the purposes of the procedure, and the expected duration of the patient's treatment?
☐	☐	b.	A description of the procedures to be followed and identification of any procedures that are experimental?
☐	☐	c.	A description of benefits to the patient or to others?
☐	☐	d.	A description of any foreseeable risks or discomforts to the subject, or—if applicable—a statement that risks are minimal?
☐	☐	e.	A disclosure of alternative procedures that may be advantageous to the subject (where research is combined with treatment or service)?
☐	☐	f.	A statement describing the extent to which confidentiality of records identifying the subject will be maintained, along with the precise means of maintaining confidentiality?
☐	☐	g.	For research involving more than minimal risk, the appropriate compensation and treatment availability statement?
☐	☐	h.	An explanation of whom to contact for answers to pertinent questions about the research, including names, addresses, and phone numbers?
☐	☐	i.	A statement that treatment is voluntary, refusal to participate will involve no penalty or loss of benefits, and the subject may withdraw or discontinue treatment at any time without penalty or loss of benefits?

Any "NO" answer call for revision of the consent form or justification for the variance from normal form. A copy of the consent form must be left with the patient, guardian or representative.

Continue

CONSENT FORM

Does the consent form include each of the following basic elements?

YES NO

☐ ☐ 2. Is the consent form written in ordinary language, free of excess technicality, and styled to the nature of the subject (e.g., child, adult)?

☐ ☐ 3. Is the consent form free of exculpatory language through which the subject is made to waive or appear to waive any legal rights, including release of the investigator, sponsor institution, or agents from liability for negligence?

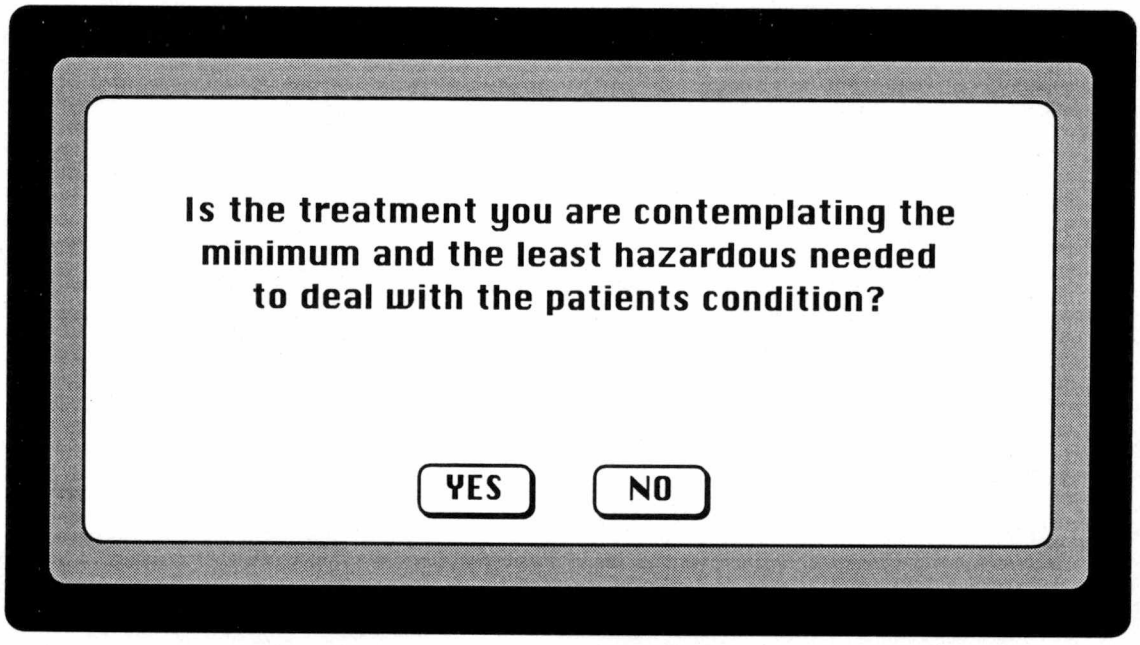
☐ ☐ 4. If young children are included as subjects, is provision made for securing the assent of the child as well as the consent of the parent or guardian?

☐ ☐ 5. If special subjects are used, such as pregnant women, prisoners, the mentally disabled, children, "vulnerables" or video/audio tapes or confidential data, are the required safeguards included?

Explain

Any "NO" answer call for revision of the consent form or justification for the variance from normal form. A copy of the consent form must be left with the patient, guardian or representative. **Continue**

The next three screen displays were presented earlier when it was determined that there was no time for consent. Now it has been determined that there has been a valid consent.



3. If you answer "NO" to this question then DR. ETHICS™ will conclude that the Treatment May Not Be Ethical. The reasoning for this judgment is that even if all of the consent requirements have been given, if the health-care professional deviates from the minimum and least hazardous standard treatment then it increases the risk for being not ethical. However this judgment does not mean that it is in fact not ethical only that there is a greater probability that it could be.

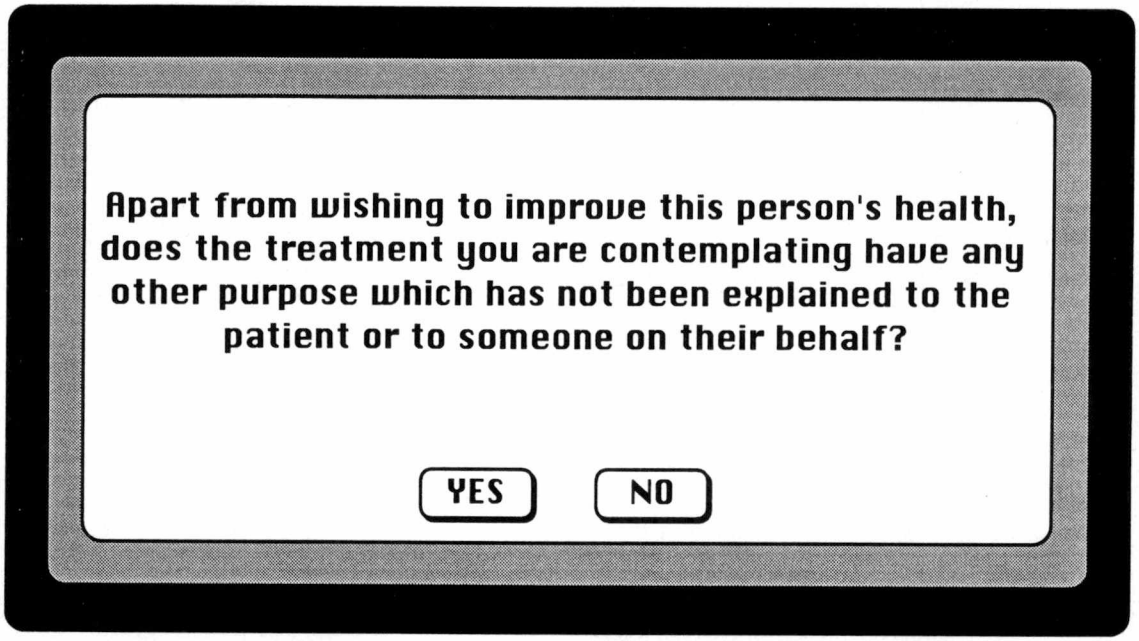
As mentioned before, as competency for consent decreases the more the pendulum swings towards the professional practice standard. On the other hand, we shall see that as competency for consent increases the more the pendulum swings to-

wards the subjective standard. The more a treatment deviates from the standard practice the more stringent the consent requirements become. The more stringent the consent requirements become the greater chance there is that the consent requirements could be violated.[227]

Answering "YES" to the question of the treatment being the minimum and least hazardous necessary for treating this patient will promptly delivery you to the following question.

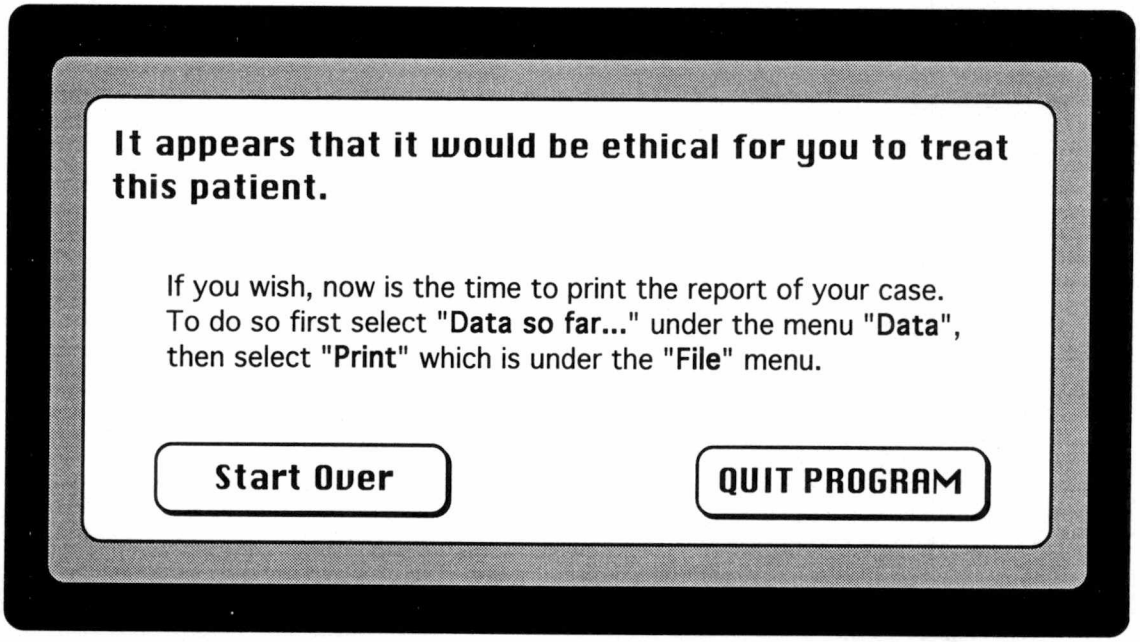
---

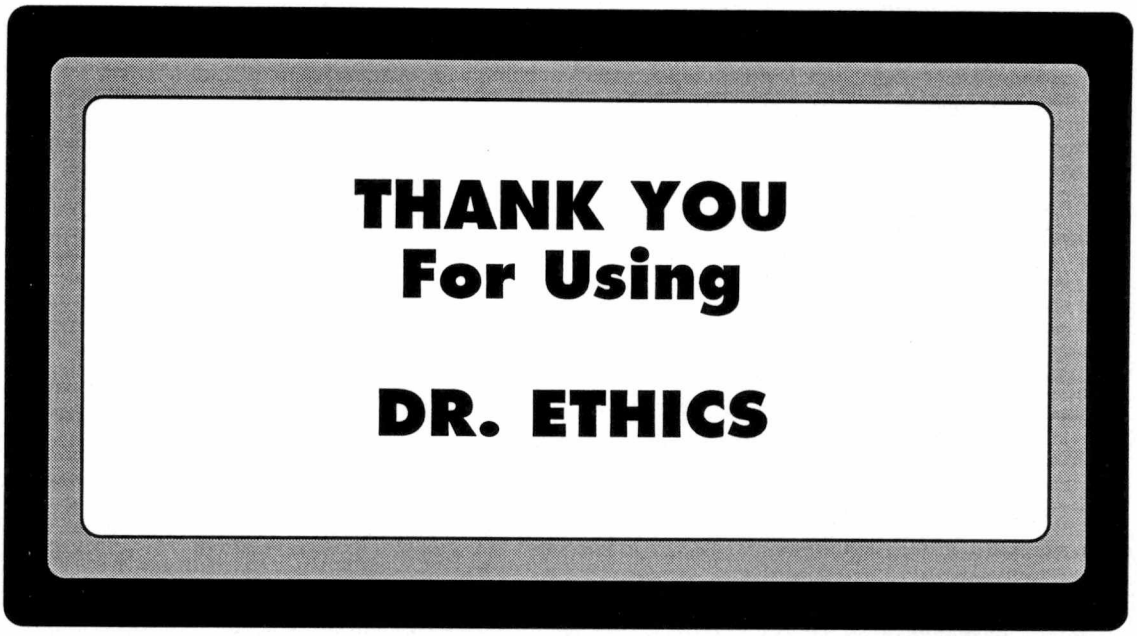
227 At this point it should be clear that I am not defending the subjective standard over the professional practice or reasonable person standards. Rather, I am arguing that there is no one particular standard to appeal to in a nonideal society in which competency varies. In other words, information disclosure varies along a spectrum—it is dependent on the level of competency.



4. Even though it is true that in order to get this far you would have had to have met this requirement already it is here to emphasize that the main purpose for the treatment you are giving is for the patient's benefit. To do otherwise could be seen as taking advantage of the patient.

5. If you meet all of the above requirements then DR. ETHICS™ gives the following ethical analysis:


It appears that it would be ethical for you to treat this patient.
If you wish, now is the time to print the report of your case.
To do so first select "Data so far..." under the menu "Data",
then select "Print" which is under the "File" menu.
Start Over
QUIT PROGRAM


THANK YOU
For Using
DR. ETHICS

§ 6. Conclusion

In conclusion DR. ETHICS™ successfully works within the constraints presented in Rawls's *Political Liberalism.*

What standard of practice we should strive towards—professional, reasonable person or subjective—appears to be situational and dependent on the level of competence the patient, guardian or representative has. The less competence available the more the professional practice standard seems to be appropriate. The more competence available the more the subjective standard seems to be appropriate.

For a Rawlsian "reasonable" and "rational" well-ordered society competency would be at an "ideal" level and thus the subjective standard would be the "just" standard of medical practice. However, in our "nonideal" pluralistic society competency varies from incompetence to full competency and thus our standards of disclosure will vary from the professional practice standard, the reasonable person standard and, as a goal to be strived towards, the subjective standard respectively.

It may be the case that DR. ETHICS™ may have many rough spots and probably could, or should, deal with many more issues that could come up. But if DR. ETHICS™ and

Rawls's *Political Liberalism* has been successful in presenting a rational and reasonable pluralistic attitude towards medical ethics, then I have accomplished all that I have set out to accomplish.

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VITA

VITA

Jeffrey W. Bulger has currently accepted a position as assistant professor of philosophy at Stetson University in DeLand, Florida. A native of Grand Forks, North Dakota he received a B.S. degree in geology with a concentration in petroleum engineering at The University Of North Dakota in Grand Forks, North Dakota. After spending some time logging oil wells in Wyoming and doing research and development in the field of drilling fluids in Texas he went back to school to get his M.A. in exegetical theology at Western

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