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# Lawyers and Clients Symposium: Clinical Education

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## LAWYERS AND CLIENTS

Stephen Ellmann\*

We sometimes assert that clients are entitled to be the masters of their lawyers. Men and women in our society, we hold, have the right to choose their own fates within the limits of the law and the circumstances of their lives. They are, in other words, competent to run their own lives—competent in the sense that they are legally entitled to exercise this authority and responsibility.

They remain competent, moreover, even in those circumstances where they need to hire a lawyer. The Code of Professional Responsibility tells us that when choices will affect the merits of a case or substantially prejudice a client's rights, "the authority to make decisions is exclusively that of the client and . . . such decisions are binding on his lawyer."<sup>1</sup> Lawyers exist, the Code suggests, to vindicate the right of "each member of our society . . . to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense."<sup>2</sup>

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (as amended 1981) [hereinafter MODEL CODE].

2. *Id.* EC 7-1 (footnotes omitted).

The Model Rules of Professional Conduct, adopted by the American Bar Association in 1983, contain similar, though somewhat narrower, endorsements of client competency and control. Rule 1.2(a) declares that "[a] lawyer shall abide by

For some clients, these statements of principle are probably also accurate depictions of reality. Clients who enjoy economic leverage over their attorneys, clients whose own expertise rivals their lawyers' knowledge, and even, perhaps, clients who are simply so unusually aggressive as to command their lawyers' close attention, may well enjoy legal services that are finely tuned to the clients' own definition of their objectives. Indeed, the lawyers for such clients may be criticized for their *failure* to influence their clients to act in socially desired ways.<sup>3</sup>

For many clients, however, the reality is likely to be very different. Attorneys, after all, wield technical expertise, enjoy exclusive or privileged access both to other lawyers and to officials of the state, and bring familiarity and detachment to situations in which clients are often frightened, angry, and uninitiated. Often social status and economic class will also give lawyers a standing to which both lawyer and client may feel deference is due. Even lawyers not eager to embrace class privilege may accept traditions and habits of professional autonomy which restrict the spheres of client decisionmaking and active involvement. All of these factors encourage lawyers to assume, and clients to cede, a major role not only in the implementation of client choices but in the making of the choices themselves. It is with attorney-

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a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) [hereinafter MODEL RULES]. The Rules do, however, allow the lawyer to "limit the objectives of the representation if the client consents after consultation." *Id.* Rule 1.2(c). In addition, the comment to Rule 1.2 observes that "[a] clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking."

The Model Rules thus seem to acknowledge that lawyers make decisions on a range of issues, such as procedural questions, that will affect the merits and may substantially prejudice a client's rights—decisions that EC 7-7 of the Code of Professional Responsibility could be read to place exclusively in the hands of clients. Even if this change is more than rhetorical, however, the Model Rules plainly adhere to the principle that clients are able to choose the fundamental objectives of their cases. As the comment to Rule 1.14 declares, "[t]he normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."

3. Such criticism of the corporate bar dates back at least to Brandeis. See generally Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 503-08 (1985).

client relationships such as these that this Article is concerned.<sup>4</sup>

As the role of the lawyer expands, it becomes increasingly appropriate to describe lawyers as exercising "power" over their clients. Certainly lawyers commonly possess at least a modicum of power, if power is broadly defined—that is, they have the ability, if only through the persuasive impact of their arguments, to make their clients more disposed to act (or not act) in particular ways than they otherwise would have been.<sup>5</sup> A lawyer wields this form of "power" when she informs a client that the statute of limitations will bar his lawsuit if it is not filed promptly, and thereby causes the client to act more rapidly than he otherwise would have.<sup>6</sup> This example of power hardly seems troublesome, but the extent and the nature of attorneys' power over clients become more problematic as lawyers' advantages over their clients in knowledge, assurance, and social standing sharpen.

Moreover, lawyers who take on such an authoritative role in their relationships with their clients may not even be doing a good job of helping the clients.<sup>7</sup> Armed with great influence over their clients, yet constrained by significant systemic and economic pressures—despite the image of professional autonomy—lawyers may never listen to their cli-

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4. Thus, this Article is particularly concerned with individual clients, relatively unskilled in legal matters, and relatively disadvantaged in their dealings with lawyers. While corporate clients, for example, may ordinarily be much more able to guide their attorneys and so need less concern on this score, I suspect that even rich and well-informed clients sometimes find themselves at least subtly steered by their attorneys. To whatever extent that is the case, these clients as well are part of the focus of this Article.

5. I take this definition of power from Michael D. Bayles, who writes that "X has power over Y with respect to actions of type A if X has the power to do actions of type B, and if he does so act Y is more disposed to do an action of type A." Bayles, *A Concept of Coercion*, in NOMOS XIV: COERCION 16, 27 (J. Pennock & J. Chapman eds. 1972). This formulation does not specify the means by which lawyers produce these changes in their clients, nor does it straightforwardly indicate the justifiability of any of these methods. The nature and propriety of the elements of attorneys' power are the focus of the remainder of this Article.

6. In this Article, feminine pronouns typically refer to lawyers, while masculine pronouns typically refer to clients. Needless to say, each set of pronouns includes people of both sexes.

7. For critical assessments of the exercise of such dominance by lawyers over their clients, see, e.g., Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. (No. 2) 15 (1967).

ents well enough to understand their actual needs and concerns. Grasping neither the true nature of their clients' problems, nor the contours of the solutions that would best meet their clients' wishes, lawyers may wield a power that benefits no one so much as themselves.

This dreary picture has prompted a variety of proposals meant to enhance the standing of clients in the attorney-client relationship.<sup>8</sup> Perhaps the most thoroughgoing attempt to reduce the power of lawyers, however, has been the elaboration of the elements of a "client-centered practice" by David Binder and Susan Price.<sup>9</sup> Broadly we can say that client-centered practice takes the principle of client decision-making seriously, and derives from this premise the prescription that a central responsibility of the lawyer is to enable the client to exercise his right to choose. To this end, the lawyer must learn to ask questions and listen to their answers with great sensitivity, for only by doing so can the lawyer learn the relevant facts and help the client articulate his own values, and thus set the stage for the client's ultimate choices. The lawyer must learn to say, or rather to guide, less—for the crucial decisions must be as far as possible the product of the client's own will, rather than the result of the overt instructions or veiled guidance of the attorney.

There is much to admire, and to learn from, in these principles and in the methods of practice which they counsel. But these prescriptions by no means eliminate lawyers' power over their clients. To explain this judgment, Part I of this Article defines two of the most troubling forms of law-

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8. Mark Spiegel, for example, has urged that client decisionmaking in legal situations be protected by requiring lawyers to obtain the clients' "informed consent" to a wide range of decisions, many of them dealing with procedural rather than solely substantive choices. Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979). Douglas Rosenthal also endorsed the principle of informed consent in proposing his "participatory model," in which clients do not have "predominant . . . control" in the lawyer-client relationship, but do "participate actively in dealing with their problems and share control and decision responsibility with the professional." D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 2, 154 (1974). Other scholars, while maintaining that lawyers cannot avoid influencing their clients' decisions, have sought to sensitize lawyers to their potential effects on clients and to offer attorneys ways to "provide guidance and direction without implicitly giving orders." See G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 1040 (1978).

9. D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

yers' power—coercion and manipulation—and argues that lawyers' use of these forms of power over their clients requires justification, since such conduct breaches the principle of client competence. Then Part II looks closely at methods of interviewing and counseling that are characteristic of client-centered lawyering, and finds that these techniques appear calculated to develop a seemingly intimate relationship between attorney and client, in which the attorney affects the client by methods that are both psychologically potent and manipulative.

To say that such methods are used, however, is not to say that their use is necessarily improper. Part III of this Article examines the range of potential defenses for the exercise of such power, and argues that manipulation of clients is in fact frequently justified by the very standard of client decisionmaking that it appears to flout. Nonetheless Part III also concludes that in important respects the particular guidelines developed by Binder and Price undercut clients' ability to make their own decisions, and so it suggests, ultimately, the contours of a practice that could be more fully faithful to the principle of client decisionmaking.

#### I. COERCION AND MANIPULATION IN LAWYER-CLIENT RELATIONS

Before we look at the nature of client-centered practice, we should clarify what we are looking for. We should distinguish, in particular, between forms of attorney behavior that sharply undercut clients' authority and other forms of lawyerly influence that are innocuous or even benign. In almost any conversation, after all, each participant seeks to have various effects on the others. We may seek to change our listeners' perceptions, beliefs, or actions, or to strengthen their commitment to the attitudes or plans which they already have. Unless we wish to condemn the most ordinary of interactions as morally tainted, therefore, we cannot take the fact that the client's understanding or intentions evolve in the course of dealing with the lawyer as a cause for concern. Indeed, we might take such results as reason for celebration—for they might reflect that the lawyer admirably performed her task of providing the client with information about the legal world, and thus promoted the client's autonomy by enabling him to make decisions without the burden

of ignorance. But certain methods of affecting the client are plainly not so benign.

A. *Coercion*

One interaction of obvious concern is coercion. Suppose, for example, that the lawyer announces that she will withdraw from the representation if the client does not act as she (the lawyer) wishes. Perhaps she makes this statement in an effort to prevent the client from committing perjury; perhaps she issues it to dissuade the client from insisting that the lawyer take action which she believes would be tactically disastrous; perhaps she seeks to force the client to pay her fee. In other words, the lawyer may be acting in order to serve the public interest, or her client's own self-interest as she understands it, or her self-interest. In each example, the lawyer believes that the prospect of her withdrawing from the case may induce the client to change his plans—and surely this belief is often a reasonable one, for even a client who could find and retain alternative counsel may find the risk of losing his present lawyer intimidating.

Under certain circumstances, withdrawal for each of these reasons is ethically permissible or even required.<sup>10</sup> But is the lawyer's use of the prospect of her withdrawal

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10. The client's intention to commit perjury might be grounds for either mandatory or permissive withdrawal under the Code of Professional Responsibility. See MODEL CODE, *supra* note 1, DR 2-110(B)(2) (mandatory withdrawal when lawyer "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule"); *id.* DR 2-110(C)(1)(b) ([p]ermissive withdrawal when client "[p]ersonally seeks to pursue an illegal course of conduct"); *id.* DR 2-110(C)(1)(c) (permissive withdrawal when client "[i]nsists that the lawyer pursue a course of conduct that is illegal or . . . prohibited by the Disciplinary Rules"); *id.* DR 2-110(C)(2) (permissive withdrawal when "continued employment is likely to result in a violation of a Disciplinary Rule").

The client's insistence that the lawyer adopt a course of action which, although not contrary to the provisions of the Code of Professional Responsibility, is contrary to the lawyer's judgment and advice, can be a basis for permissive withdrawal under DR 2-110(C)(1)(e) (permissive withdrawal when client "[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in" such conduct), and possibly also under DR 2-110(C)(1)(d) (permissive withdrawal when client "[b]y other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively").

The client's deliberate disregard of an agreement or obligation to the lawyer as to expenses or fees is made a basis for permissive withdrawal in DR 2-110(C)(1)(f).

The Model Rules of Professional Conduct contain similar provisions. See MODEL RULES, *supra* note 2, Rule 1.16.

nonetheless an attempt to "coerce" her client? Her conduct might be described as an attempt to persuade or pressure or intimidate her client; deciding whether it is also coercion requires, first, a definition of this morally loaded but elusive term.

For our purposes, we may say that one person successfully coerces another when, in order to alter the other's behavior, he threatens to bring about undesirable consequences for the other person, and the other person alters his behavior accordingly, at least in part as a result of the threat.<sup>11</sup> Under this definition, the fact that the undesirable consequences are deserved is irrelevant to the coercive status of the threat; thus it is coercive to threaten to imprison a man in order to rob him and also coercive to threaten to imprison him if he commits robbery.<sup>12</sup> By the same token, the fact that a lawyer may be authorized or even required to withdraw in the face of certain conduct by the client does not

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11. This definition is largely an abbreviated restatement, in informal language, of the precise elaboration of necessary conditions for coercion set out by Robert Nozick. Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440, 441-43 (S. Morgenbesser, P. Suppes & M. White eds. 1969). Peter Westen has developed a generally similar specification of the elements of coercion. Westen, "Freedom" and "Coercion": *Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 559-69. Westen notes that he disagrees with Nozick's requirement that threats be successful in order to be called "coercion." *Id.* at 559 n.70. This issue need not be pursued here, and the definition given in the text simply refers to "successful coercion."

This definition focuses on coercion by threats. It might be argued that coercion should be defined much more broadly, to include any action that tends to prevent another from acting as he chooses. According to this definition, locking the front door of a house, which tends to prevent those without keys from entering without the householder's consent, could be said to coerce them into not entering except with such consent. See Held, *Coercion and Coercive Offers*, in *NOMOS XIV: COERCION*, *supra* note 5, at 49, 50-51 (offering a similar, though somewhat narrower, definition). An attorney may be able to coerce a client in this sense (for example, by refusing to accept collect calls an attorney may force the client to pay for phone conversations), but the central concern of the discussion in the text will be with coercion by threats.

12. By contrast, Kent Greenawalt in another context has defined coercion to include "creating unfair conditions of choice," but not, it appears, "fair"—albeit frightening—conditions. Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U.L. REV. 1081, 1096 (1983). If imprisonment of criminals is fair, then the threat of such imprisonment could not be called coercive in this sense. Both because the threat of imprisonment seems commonly to be called coercion, see Westen, *supra* note 11, at 577, and because an account of coercion in terms of fairness seems to partially collapse the issue of the justifiability of coercion into the definition of the term, I do not adopt Greenawalt's definition.



mean that the lawyer's announcement of her intention to withdraw is noncoercive.

It follows that the lawyer who announces her intention of withdrawing, in a successful effort to change her client's behavior by making clear that his failure to change will have undesirable consequences, is engaging in coercion *if* her announcement constitutes a threat. Not every announcement of undesirable consequences, however, is a threat.<sup>13</sup> When the lawyer tells her client that the statute of limitations is about to expire, she does not describe any harm that she herself will cause; rather she informs the client, or "warns" him, of the impending actions of others (here, of the legal system).<sup>14</sup>

It might be argued that in some cases even the lawyer's announcement of action she herself will take should be considered a warning rather than a threat. For example, where the lawyer would be legally obliged to withdraw if the client did not change his planned behavior, the lawyer's decision to inform the client of this fact—like the decision to inform him of the running of the statute of limitations—does not change the client's situation, but instead simply tells him of the undesirable consequences that already await him.<sup>15</sup> Thus a speaker might be said to "threaten" only when the undesirable consequences she announces are part of a voluntarily adopted plan by the speaker to induce action by her listener.

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13. The phrase "undesirable consequences" masks the troublesome question of the standard of "undesirability." An offer of representation in return for the payment of a fee can be recast as a threat not to provide representation unless a fee is forthcoming. It may be possible to remedy this ambiguity by extending the category of coercive pressures to include some enticing offers. See, e.g., Held, *supra* note 11, at 54–57. Alternatively, coercion may be defined by specifying a "baseline" for determining whether the consequences the speaker announces are undesirable in light of his listener's expectations or entitlements, see, e.g., Westen, *supra* note 11, at 569–89, although this solution, if it is feasible at all, may reintroduce considerations of fairness (entitlements) into the definition of coercion. I do not address these problems here, but instead assume that the announcement of a plan to withdraw from the case is indeed the statement of an "undesirable consequence."

14. See Greenawalt, *supra* note 12, at 1096 (describing "warnings").

15. Nozick is "inclined" to call such statements warnings rather than threats. Nozick, *supra* note 11, at 456.

Even if we accept this rather restrictive definition of threats,<sup>16</sup> it is easy to imagine circumstances in which the threatening character of the lawyer's announcement of her intention to withdraw would be plain. Suppose that the lawyer believes the client is insisting on foolish tactics, but she would in principle rather handle the case as the client wishes than drop it altogether. Realizing that the client can be frightened into abandoning these tactics, however, she decides to tell the client that she intends to withdraw if he does not change his course. Here the lawyer is not merely predicting what will happen; she has altered what will happen and now speaks in accordance with her plan.<sup>17</sup> This, surely, is a threat, and, if successful, is coercion.

Coercion abridges its victim's freedom to choose for himself.<sup>18</sup> To the extent that coercion is used to press clients into abandoning preferences which they were legally authorized to pursue, it also violates the principle of client competency with which this Article began—that clients are entitled to choose for themselves within the limits of the law and their circumstances.<sup>19</sup> As a disregard of client competency it calls for justification; whether such justification exists remains to be seen.<sup>20</sup>

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16. Although Greenawalt might not consider the lawyer's announcement of her obligation to withdraw coercive (since it might well be "fair"), he would classify it as a "warning threat," since this statement, although it describes consequences which have not been devised for the purpose of coercion nonetheless is meant to induce action by the other person. Greenawalt, *supra* note 12, at 1100-01.

17. Greenawalt characterizes such conduct as a "manipulative threat." Greenawalt, *supra* note 12, at 1097-99. Nozick also views comparable conduct as a threat. See Nozick, *supra* note 11, at 454-55.

If the lawyer actually would not carry through on her threat if the client refused to budge from his own wishes, then her threat would be false, but it would remain coercive. *Id.* at 442-43.

18. While this statement seems intuitively correct, it is not obvious just how coercive threats abridge the freedom to choose, since the person who yields to threats presumably does choose to comply with the demands being made on him and could have chosen to endure the threatened sanction instead. For an exploration of such problems, see Nozick, *supra* note 11, at 458-65; Bayles, *supra* note 5, at 24-29.

19. Indeed, coercion may abridge this principle of client competency even when it is used to prevent clients from acting illegally. It may be questioned, after all, whether a person who is unable to choose to act illegally is altogether free to choose to act legally.

20. Part III of this Article will focus on the justifications for attorneys' manipulation of their clients, and will also briefly discuss the applicability of the ratio-

For our purposes, however, threats and coercion are not the central concern, for coercion is probably not the most common breach of the principle of client competency. The circumstances in which lawyers can threaten consequences as stark as withdrawal from the case are somewhat circumscribed by the provisions of legal ethics that specify the conditions under which such threats can lawfully be carried out. Perhaps more important, a lawyer who reaches the point of threatening her client is likely to be a lawyer who risks alienating or even losing the client—not outcomes many lawyers regularly welcome—and who already is on tense or hostile terms with the client. Surely lawyers who seek to influence their clients also commonly hope to do so without such fireworks, both to assure their successful influence and to preserve their own peace of mind.<sup>21</sup>

B. *Manipulation and Vigilant Decisionmaking*

To avoid such costly and distressing combat with their clients, lawyers may resort to another problematic mode of influence—manipulation. Like coercion, manipulation is not simply defined. Nonetheless, some instances of manipulation spring readily to mind: lying, for example, or withholding of relevant information, or playing on emotional needs of which the other person is unaware. These examples suggest that manipulation should be understood to have two principal elements. First, manipulation is an effort by one person to guide another's thoughts or actions in a direction desired by the person guiding. Second, the manipulator seeks this goal by means that undercut the other person's ability to make a choice that is truly his own. These elements, however, need further articulation.

The first criterion—that the manipulator seeks to guide another person's thoughts or actions—does not mean that the manipulator necessarily seeks to harm the other person,

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nales for manipulation to the defense of coercion. See *infra* note 103 and accompanying text.

21. No doubt these generalizations are not always correct. There may well be lawyers who thrive on pushing their clients around. There may also be clients who accept or even welcome such treatment, for example because they believe that a lawyer who is tough with her clients will be even tougher on the opposition. Whatever the actual frequency of such lawyers and clients, however, such behavior by attorneys is surely not highly valued in client-centered lawyering, as the description of characteristic elements of such lawyering below will make clear.

or to help himself. While manipulation for these purposes may be particularly reprehensible, it seems clear that lawyers may seek to mold their clients' thinking and actions in the service of what they see as their clients' own interests or for the sake of the interests of society. As we shall see, lawyers may even manipulate their clients in an effort to help their clients make decisions for themselves.

Plainly this concept of manipulation includes a wide range of behavior. Some of this conduct will be frankly exploitative, while some will be intended to be benign. Some will profoundly and permanently breach a client's right to choose for himself, while some may in the long run vindicate this right. Some, finally, will be unjustifiable, while some may be proven to be essential to the proper practice of law. Nonetheless I believe that, at least in the context of attorney-client relations, it is proper to define manipulation broadly, so as to insure that even well-intentioned, or seemingly modest, interferences with client decisionmaking do not escape scrutiny. To exclude such conduct from the definition of manipulation would ignore a wide range of intrusions on clients' ability to choose for themselves in dealing with the law.

In addition, neither the first nor the second criterion requires that the manipulator consciously intend to weaken the other person's opportunity to choose for himself. Deliberate efforts to distort a client's decisionmaking may be particularly reprehensible. The desire to manipulate, however, may be unconscious or obscured and yet exist. Moreover, a lawyer who does not desire to manipulate may nonetheless treat her clients in ways that seriously undercut the clients' ability to make their own decisions. Indeed, even conduct that normally is altogether nonmanipulative may inadvertently impair a particular client's capacity for reflection and choice—though conduct that a lawyer reasonably should anticipate would have such effects is surely of greater concern.

But what conduct actually does undercut the clients' ability to make their own choices? I suggest that we should find such interference in actions that tend to weaken substantially the client's ability to make a decision in a fully competent fashion. I also suggest that people make decisions most competently when three conditions are met: first, they are aware that a decision is to be made and that they are

entitled to make it; second, they know the choices open to them and comprehend the extent and the likelihood of the costs and benefits of the various alternatives; and, third, they are acting with as full an understanding of their own values and emotional needs as possible.<sup>22</sup> To interfere with any of these prerequisites to clients' "vigilant" or "fully competent" decisionmaking concerning their legal options is manipulative. As a breach of the principle that clients are entitled to choose for themselves, such manipulation requires justification.

Implicit in this definition of manipulation is the view that a person's choices are most fully his own when he makes them in the informed, careful, and self-aware manner that I have called "competent." For many people, particularly when they are making important decisions—and surely the kinds of decisions for which lawyers are consulted are likely to be important ones—this view may well be entirely correct. These people may believe that competent decisionmaking is a way to increase their control over their own lives.<sup>23</sup> They may also believe that only decisions made in this careful fashion are truly chosen and can truly express their own values and preferences.<sup>24</sup> They may maintain as well that only careful and comprehensive decisionmaking is fully rational.<sup>25</sup> For these reasons, and perhaps others, such people

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22. This standard is derived in part from the much more elaborate statement of the procedural criteria for "vigilant information processing" offered by Irving L. Janis and Leon Mann. I. JANIS & L. MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE AND COMMITMENT* 11 (1977). My use of the term "vigilant" derives from this work as well.

23. Daniel Wikler makes such an argument for education, which he says "generally provides information and [thus] generally increases our power, since it enhances the likelihood that our decisions will accomplish our ends." Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Lifestyles*, in *PATERNALISM* 35, 52 (R. Sartorius ed. 1983).

24. Joel Feinberg writes that:

Chosen actions are those that are decided upon by *deliberation*, and that is a process that requires time, information, a clear head, and highly developed rational faculties. . . . Such acts . . . represent the agent faithfully in some important way: they express his or her settled values and preferences. In the fullest sense, therefore, they are actions for which the agent can take responsibility.

Feinberg, *Legal Paternalism*, in *PATERNALISM*, *supra* note 23, at 3, 7 (emphasis in original).

25. Such decisionmaking might be seen as a defense, albeit an imperfect one, against what Gerald Dworkin sums up as "our irrational propensities—deficien-

will themselves seek to make their decisions as competently as possible.

Not everyone, however, will necessarily share this positive view of "fully competent decisionmaking." We make many decisions on impulse and on the spur of the moment; many others we make in the heat of strong emotions without a sober weighing of all the consequences.<sup>26</sup> Indeed, as David Luban has persuasively demonstrated, we, or some of us, may believe that making decisions in these spontaneous or emotional ways is good. "[M]any people, perhaps even most people, would find unbearable a life in which improvisation was no value at all. . . . [I]t may well be part of the good life to found some of our values on inspirations, even though these may not be prudent."<sup>27</sup>

If we accept that clients are competent—entitled—to make decisions, then we should also accept that they are competent to choose a decisionmaking method as well. To reason otherwise, asserting that those who prefer other, less "vigilant" decisionmaking methods are in fact so mentally disordered that they are not entitled to make decisions because they are "incompetent," could justify the exercise of control over substantial numbers of people.<sup>28</sup>

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cies in cognitive and emotional capacities and avoidable and unavoidable ignorance." Dworkin, *Paternalism*, in *PATERNALISM*, *supra* note 23, at 19, 29.

26. I do not mean to say, however, that only decisions that are made slowly and coolly meet the standards of "fully competent decisionmaking" described in the text. In an emergency, the gathering and assessment of information required for decisionmaking that is as vigilant as possible in the circumstances can be done very quickly indeed. See I. JANIS & L. MANN, *supra* note 22, at 65. Moreover, the anxiety associated with important decisions can encourage careful consideration and choice. *Id.* at 51. (Certain decisions, in addition, may only be made by people under stress—for example, the decision whether to accept a plea bargain for a life sentence instead of going to trial in a capital case.) But *some* decisions made rapidly or emotionally will not reflect such thorough evaluation and so will not, in these terms, be "fully competent."

27. Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 475.

28. The impact of such a judgment would be particularly sweeping if it were extended to say that those people who accepted the desirability of vigilant decisionmaking as a matter of principle but failed to implement it were also incompetent. The argument for their incompetence may well be stronger than the argument for the incompetence of those who disagree with the principle that such decisionmaking is preferable, since it can be said of those who fail to make their decisions by a method they themselves consider desirable that they are not acting in accordance with their values. *Cf. id.*, at 473 (describing the "presumed consent" justification for paternalistic intervention designed to implement the values of the person subjected to the intervention).

Even if people have the right to choose other methods of decisionmaking, it might be argued that "vigilant" decisionmaking produces objectively better results. If so, then lawyers' interference with their clients' ability to decide in this fashion would undermine the clients' chance of reaching the decision that would best serve their own interests—and perhaps the prerogative of not seeking what is in one's best interests should be reserved to clients. It may indeed be true that the more closely people approach the standards of vigilant decisionmaking for any single decision, the more likely it will be that the resulting decision will serve their interests best, though this is not a proposition that is easily tested.<sup>29</sup>

It is by no means clear, however, that all people will closely approach full vigilance, nor is it clear that it would always be wise for them to attempt to do so. Comprehensive judgment in a complex situation may, after all, require the simultaneous weighing of a very large range of factors. In fact, "so many relevant variables may have to be taken into account that they cannot all be kept in mind at the same time. The number of crucially relevant categories usually far exceeds 7 [plus or minus 2], the limits of man's capacity for processing information in immediate memory . . . ."<sup>30</sup>

Moreover, even the effort to ascertain all of the relevant considerations may be extremely time-consuming and difficult, so burdensome, in fact, that it may be essential that

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29. Janis and Mann write that "[a]lthough systematic data are not yet available, it seems plausible to assume that decisions satisfying these seven 'ideal' procedural criteria [which they specify as the elements of vigilant decisionmaking] have a better chance than others of attaining the decision maker's objectives and of being adhered to in the long run." I. JANIS & L. MANN, *supra* note 22, at 11.

30. *Id.* at 22. There is also evidence that people are prone to systematic errors in evaluation of information, perhaps resulting from their use of simplifying—but in certain circumstances misleading—"heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations." Tversky & Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974). Tversky and Kahneman have also suggested that people systematically weigh both probabilities of future events, and the desirability or undesirability of those events, in ways different from those suggested by "expected utility" theory (which assesses outcomes based on objective measures of their probability and desirability). Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453-54 (1981). The more problematic human processing of information is, the more it might be argued that defining competent decisionmaking to include thorough and accurate processing of information is implausible.

most human decisions be made in ways that are not thorough and comprehensive. Rather than seeking the optimal decision, people may wisely make most of their decisions by methods such as "satisficing"—selecting a course of action which, although not necessarily ideal, is "good enough."<sup>31</sup> Human beings, as "creatures of 'bounded or limited rationality,' " are

not inclined to collect information about all the complicated factors that might affect the outcome of [their] choice, to estimate probabilities, or to work out preference orderings for many different alternatives. . . . [They are] content to rely on 'a drastically simplified model of the buzzing, blooming confusion that constitutes the real world.'<sup>32</sup>

But if manipulation is conduct that undercuts a client's ability to make his own choices, and if it cannot always be said either that decisions made in a "fully competent" manner are most truly the decisionmaker's own choices, or that this method of decisionmaking is necessarily the best, why should manipulation be defined as interference with *this* form of choice? I suggest that ultimately the reason should be found in an aspect of the role that lawyers are assigned to play with their clients. The crucial aspect of that multifaceted role for these purposes is the lawyers' task of functioning as a limited, paternalistic check on decisionmaking whose wisdom we somewhat hesitantly question.<sup>33</sup>

That the role of the lawyer towards her client is somewhat paternalistic is evident from the profession's codes of ethics. The Code of Professional Responsibility urges that:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so.<sup>34</sup>

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31. I. JANIS & L. MANN, *supra* note 22, at 25.

32. *Id.* at 26 (quoting H. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISIONMAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* xxix (3d ed. 1976)).

33. David Luban has also suggested that lawyers play a paternalistic role. See Luban, *supra* note 27, at 492-93. This discussion stimulated my thinking on this issue, although the scope of lawyers' paternalism of which he would approve may be considerably narrower than I suggest is appropriate.

34. MODEL CODE, *supra* note 1, EC 7-8.



Not only should the lawyer undertake to inform the client of relevant considerations even without the client's asking for the information, according to the Code, but the lawyer should also often give the client advice about considerations that derive from morality and "the fullness of the lawyer's experience as well as his objective viewpoint."<sup>35</sup> The Model Rules of Professional Conduct also authorize and guardedly encourage extremely wide-ranging advice.<sup>36</sup>

Whether or not the particular forms of intervention into clients' decisionmaking that the professional codes endorse are ideal, the principle that the lawyer has a role to play in improving her clients' decisionmaking is appropriate. Our desire not to override individuals' idiosyncratic values and decisionmaking styles should not cause us to overlook the substantial value placed by many people in our society on making decisions in a careful and thought-out way. Nor should our uncertainty about the ideal decisionmaking method blind us to the high stakes in many legal decisions, or to the extent to which sound choices in such contexts appear likely to result from the thorough and self-aware evaluation of accurate information that vigilant decisionmaking entails.

Rather, I suggest that the arguments in favor of fully competent, vigilant decisionmaking in legal choices are sufficiently strong to justify at least modest steps to encourage the use of this method of decision. It remains to be seen what sorts of steps are justifiable on this basis, although our very uncertainty about the strength of the justifications for vigilance suggests the need to limit the potency of any such steps. But it is at least appropriate to require lawyers to justify any conduct that moves clients away from vigilant decisionmaking rather than towards it. If we define manipulation as an effort by one person to guide another's thoughts or actions in a direction desired by the person

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35. *Id.*

36. See MODEL RULES, *supra* note 2, Rule 2.1 and comment. The comment asserts, however, that "[i]n general, a lawyer is not expected to give advice until asked by the client." *Id.* comment. While this observation might be taken as an anti-paternalistic limitation on the lawyer's duty to intervene in the client's decisionmaking, it may also be seen as a protective device meant to shield lawyers from potentially troublesome obligations. Elsewhere, the Model Rules permit lawyers to take the highly paternalistic step of withholding information, at least temporarily, from their clients. See *id.* Rule 1.4 comment.

guiding, by means that undercut the other person's ability to make a vigilant decision,<sup>37</sup> we will be able to insist on such justification.

## II. THE POWER OF CLIENT-CENTERED LAWYERS

Armed with a clearer understanding of the forms of lawyers' interference with their clients' right to choose, we can now ask whether client-centered lawyering avoids these problems. In *Legal Interviewing and Counseling: A Client-Centered Approach*, David Binder and Susan Price have offered a thoroughly elaborated guide to the practice of client-centered law.<sup>38</sup> Again, I want to emphasize that I believe this book's suggestions for handling the difficult skills of interviewing and counseling have much to recommend them. Before endorsing these suggestions, however, we should understand them, and so I want to look closely, as Binder and Price do, at both interviewing and counseling, and to examine the character of the attorney-client relations that Binder and Price advocate.

### A. Interviewing

Binder and Price start from a recognition that clients have many reasons for being reluctant to speak frankly to their lawyers. Clients may be embarrassed or ashamed about relevant matter; they may fear that its revelation, whether or not it is personally unpleasant, will be damaging to their case, and they may have a range of other sources of hesitation.<sup>39</sup> To win the client's "full participation,"<sup>40</sup> Binder and Price urge the use of "facilitators." As we shall see, these tools for effective interviewing are also potential devices for manipulation.

#### 1. Non-Judgmental Empathetic Understanding

The facilitator Binder and Price most emphasize is "the effective use of empathetic understanding."<sup>41</sup> By "providing

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37. This definition incorporates the concept of vigilant decisionmaking into the definition originally offered at the beginning of Section IB. See *supra* p. 726.

38. D. BINDER & S. PRICE, *supra* note 9.

39. *Id.* at 10-14. Gary Bellow and Bea Moulton offer a similar analysis. See G. BELLOW & B. MOULTON, *supra* note 8, at 162-69.

40. D. BINDER & S. PRICE, *supra* note 9, at 14.

41. *Id.*

a client with the feeling that he/she has been heard, understood, and yet not judged"—in fact, by showing that despite all that has been heard and understood the client still enjoys the lawyer's "non-judgmental acceptance"<sup>42</sup>—the lawyer can have "an enormously facilitating effect."<sup>43</sup> Indeed, "people generally respond fully only in the presence of someone who exhibits non-judgmental understanding."<sup>44</sup>

Binder and Price believe that non-judgmental empathetic understanding is probably best conveyed through the techniques of "active listening."<sup>45</sup> Active listening "is the process of picking up the client's message and sending it back in a reflective statement which mirrors what the lawyer has heard."<sup>46</sup> Thus the lawyer's response in the following exchange is an example of "active listening":

Client:

I felt *bummed out* when I found out she was having an affair with him. I thought our marriage meant something. *I guess I was wrong.*

Lawyer:

You felt *hurt* and *disappointed* when she told you about the affair.<sup>47</sup>

By conveying back the essence of what the client has said, the lawyer demonstrates that she has understood; by conveying only this rather than her own approval or condemnation or explanation of what the client has told her, she also confirms that she has not judged.<sup>48</sup> Such a response, Binder and Price conclude, is "completely empathetic."<sup>49</sup>

In a section on "difficulties in mastering active listening," Binder and Price seek to dispel sources of "discomfort" with the technique of active listening.<sup>50</sup> One of these sources of discomfort is the feeling that "active listening is being manipulative." Though Binder and Price concur that "[t]he employment of active listening skills is indeed the use of a technique to gain information," and defend it primarily

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42. *Id.* at 25.

43. *Id.* at 20.

44. *Id.* at 35.

45. *Id.* at 20-23.

46. *Id.* at 25 (emphases omitted).

47. *Id.* at 26 (emphasis in original).

48. *Id.* at 25, 31-32.

49. *Id.* at 25.

50. *Id.* at 32-36.

on the ground of necessity, they do not directly agree or disagree with the charge of manipulateness.

But this charge is well-founded, for the communication of non-judgmental empathetic understanding encourages the client to speak freely on the basis of a significantly incomplete, or even false, impression of the lawyer's attitudes. The sources of this falsity lie both in the lawyer's decision to convey this attitude of acceptance and in the client's perception of the attitude being conveyed.

For the lawyer, the attitude of non-judgmental empathetic acceptance is often likely to be wholly or partly a pose.<sup>51</sup> It is hardly probable, after all, that lawyers regularly accept their clients' actions and desires as entirely good or just. It is not necessary to approve of a client in order to recognize that his feelings and conduct are natural and human, and thus to offer him a measure of acceptance—but the projection of non-judgmental empathetic acceptance appears to censor out all attitudes which the lawyer has towards her client except this acceptance.

Moreover, for any given lawyer there are likely to be some clients who have some features for which the lawyer cannot muster acceptance. Binder and Price do not explicitly provide a solution for the lawyer faced with such a client, but they seem to favor

a belief that lawyers can adequately employ active listening techniques even though they cannot truly empathize. The belief is that, although true empathy is lacking, lawyers can proceed professionally by reflecting feelings in a way that creates the impression of non-judgmental understanding. For lawyers with these beliefs, such action is the only appropriate response of a professional whose job is to represent people in need.<sup>52</sup>

The clients of such lawyers have a decision to make during their interview—namely whether to speak frankly or not. If they do so because they believe they are accepted, then they have been misled. Now it might be argued that clients

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51. William Simon has made a very similar point in Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 134 [hereinafter Simon, *The Ideology of Advocacy*], and has criticized other aspects of "psychologist" lawyers' suppression of themselves in Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) [hereinafter Simon, *Homo Psychologicus*].

52. D. BINDER & S. PRICE, *supra* note 9, at 34.

understand that their lawyers need information—and indeed clients may have this knowledge.<sup>53</sup> Perhaps such clients also understand that their lawyers are not necessarily expressing genuine personal acceptance when they convey an attitude of acceptance in the interview, but instead are simply engaged in skillful interviewing. Perhaps, then, these clients perceive the possible falsity of active listening, and so are neither deceived nor manipulated.

This argument is flawed, however, on at least three counts. First, this defense is difficult to square with the power Binder and Price attribute to the technique of active listening. That power comes from the projection of the attitude of non-judgmental acceptance; if clients are really aware that the attitude they see projected may not exist, their apparent responsiveness to the technique requires explanation.<sup>54</sup> Second, this view ignores the rather subliminal nature of the reassurance offered by active listening. As Binder and Price put it, clients become more forthcoming “[a]lmost without realizing it.”<sup>55</sup> To resist these blandishments might call for considerable alertness and vigilance on the part of the client.

Third, this position attributes a striking level of sophistication to clients. Clients may well understand that lawyers have a job to do and are doing that job during their interviews, but that perception is far removed from an awareness that the seemingly personal feelings projected by the lawyer may be false. In fact, lay people may be at least slightly more disposed to think of lawyers as helpful and understanding

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53. Cf. Mindes & Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 190 & n.45 (1982) (citing survey evidence that most members of the public believe that lawyers genuinely try to understand what their clients want).

54. William Simon has argued that in reality this technique is by no means as effective as Binder and Price suggest, apparently in part on the ground that clients will perceive its falsity. Simon, *The Ideology of Advocacy*, *supra* note 51, at 135. Simon urges the establishment of more intense and even contentious relations between attorneys and clients, and it may well be true that such relationships would in some ways have even greater impact on clients than the ties that active listening may generate. But I doubt that he is correct to question that active listening, a close analogue of techniques evidently widespread in psychotherapeutic settings, is also a strongly motivating force. See *infra* text accompanying notes 112–16 (discussing Simon's proposals for restructured advocate-client relationships); text accompanying notes 150–51 (discussing the psychotherapeutic use of techniques resembling those advocated by Binder and Price).

55. D. BINDER & S. PRICE, *supra* note 9, at 15.

than to see them as manipulative and tricky.<sup>56</sup> It seems unlikely that such people, experiencing a potent psychological technique in the course of an interview with their lawyer, will regularly see it for what it is.

Clients' misunderstanding may in fact go even deeper. To see why we must understand more precisely what non-judgmental empathetic acceptance is. As it happens, Binder and Price do not give an altogether clear-cut definition, and use somewhat different phrases at different times to describe the stance that they believe lawyers should take. Thus at one point they refer to "non-judgmental understanding,"<sup>57</sup> at another to "empathetic understanding,"<sup>58</sup> and at yet another to the "empathetic ideal of 'non-judgmental acceptance.'"<sup>59</sup>

Now these phrases do not, at first blush, have precisely equivalent meanings. A lawyer displaying "non-judgmental understanding" might want merely to show an intellectual comprehension of the client's account of himself, and a willingness not to address any question of rights and wrongs. "Empathetic understanding," by contrast, seems to call for a much more intimate engagement with the client, an engagement so close that the lawyer might need to make clear to the client that she was participating in or vicariously experiencing the client's feelings and desires.<sup>60</sup>

Finally, "acceptance," particularly empathetic acceptance, obviously might imply approval. To be sure, Binder and Price are careful to identify statements such as "I don't blame you" or "You certainly have a right to feel that way" as judgmental and hence not empathetic.<sup>61</sup> But the guidelines they give for proper responses ultimately bring back a flavor of approval.

Admittedly, no approval is explicit in the standard active listening response. As indicated earlier, active listening

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56. See Mindes & Acock, *supra* note 53, at 191-92.

57. D. BINDER & S. PRICE, *supra* note 9, at 15.

58. *Id.* at 14.

59. *Id.* at 25.

60. Webster's defines empathy as "the capacity for participating in or a vicarious experiencing of another's feelings, volitions, or ideas . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 742 (1981) (definition 2).

61. D. BINDER & S. PRICE, *supra* note 9, at 31. The statements quoted in the text embody positive rather than negative judgments, but they express judgments nonetheless.

responses reflect back to the client what the lawyer has heard. With a client who is not clearly articulating his own feelings, Binder and Price take the view that the lawyer's clear statement of what she has heard demonstrates her empathetic understanding.<sup>62</sup>

With a client who has already supplied the clarity, however, the usual response reduces to repetitive "parroting." Under these circumstances, Binder and Price say, "the lawyer can often empathize by directly expressing that the lawyer can understand the client's reaction," and they describe the lawyer's response in the following exchange as "fully empathetic":

Client:

I was so angry and frustrated when he again refused to go through with the deal.

Lawyer:

I can understand how angry and frustrated you'd feel after he did it again.<sup>63</sup>

Binder and Price explain that the client is describing a situation so common that "the client will readily believe the lawyer has been in the same or a similar situation." But if the client believes that, and the lawyer then expresses her understanding of the client's feelings, isn't the lawyer in effect expressing her agreement that the client's feelings were natural and similar to what her own feelings would be in similar circumstances? The lawyer is not labelling these feelings as "right," of course, but surely in implying that they are natural and that she would share them she has come extremely close to saying they are appropriate as well. And if this response is "fully empathetic," it would seem that the unstated content of the more typical responses of active listening must be similar.

At the very least, it seems inevitable that some clients will mistake the lawyer's evident desire to enter into their world and to recognize the naturalness of their reactions for something more than "non-judgmental understanding." Such mistakes are all the more likely because much of the

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62. Thus in the example given in the text *supra* accompanying note 47, Binder and Price see the lawyer as responding to the client's vaguely stated feelings (for instance, of being "bummed out") with a clear reflection of what she has heard (that the client was "hurt" and "disappointed").

63. D. BINDER & S. PRICE, *supra* note 9, at 30.

message of "non-judgmental understanding" is communicated only implicitly, "between the lines." Perhaps the resultant risk of misunderstanding could be removed if the lawyer stated explicitly what attitude she intended to convey—but such a statement might undercut the subliminal encouragement the technique is meant to impart. In any case, Binder and Price never suggest any such explicit statement. Thus the client, unschooled in the subtleties of non-judgmental acceptance, receives no warning that he may be garnering less approval than meets his eye.

We may expect, then, that some clients will think that what is meant to be "non-judgmental acceptance" is actually affection and approval. We may expect, too, that a client who encounters such unexpectedly, and unintentionally, warm responses will sometimes respond in kind, with "reciprocal" affection and trust. Such feelings no doubt will frequently encourage him to be even more frank with his lawyer, but his decision to open himself up will be a manipulated one. Once such a tangle of misunderstanding has developed, moreover, it may be hard to unravel; even if the lawyer perceives the client's feelings and understands their source, she may be reluctant to risk a "clarification" that could destroy the very rapport she set out to nurture in the first place.

In short, a central "facilitator" of the successful "client-centered" interview has seriously manipulative elements. Indeed, the borrowing of this quasi-therapeutic technique for the sake of lawyering practice may well place in the hands of lawyers—whose psychological expertise and sensitivity are often otherwise quite modest—a powerful weapon for creating a semblance of intimacy whose effect on the client will be dramatic.

## 2. The Other Facilitators of Clients' Full Participation

Most, if not all, of the other facilitators described by Binder and Price also have manipulative elements. These additional facilitators include the use of "expectations," "recognition," "altruistic appeals," and the promise of "extrinsic reward." The first three of these I will discuss only briefly; the last raises a range of problems which will require more attention.



The manipulative potential of these facilitators is evident in the use lawyers can make of "expectations." Faced with a client reluctant to communicate, Binder and Price suggest that the lawyer can "verbally and non-verbally convey a strong expectation that the sought data should be revealed."<sup>64</sup> "Consciously or unconsciously," it appears, clients may respond to these expectations, out of a need to conform "'to the group of peers and to the suggestion of higher status persons in society.'"<sup>65</sup> When a lawyer taps a client's unconscious desire to please peers and superiors, she is prompting the client to act on the basis of needs that the client himself does not recognize are in play—a form of manipulation.

Like the use of expectations, the offer of "recognition" clearly provides ample opportunity for manipulation. Binder and Price suggest that lawyers provide recognition through "direct, sincere praise" of the client's cooperation or help,<sup>66</sup> but even when the lawyer speaks sincerely she apparently is taking advantage of "a need for attention and recognition,"<sup>67</sup> a need which the client may not fully recognize in himself. Of course, the client who responds to the lawyer's sincere attention and esteem may respond to insincere flattery as well.

Similarly, lawyers plainly can "employ altruistic appeals"<sup>68</sup>—that is, they can urge people to believe that the action the lawyer wishes them to take will serve some higher value than self-interest—sincerely or insincerely. Even when the appeal is sincere, its effect may derive from its boost to the would-be altruist's self-esteem, an effect of which the "altruist" may be quite oblivious.

It might appear that an appeal to "extrinsic reward"—for example, to the need for full information so that the lawyer can best insure the client's victory in court—is the least manipulative of the facilitators. In many cases, this appearance is not deceiving.

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64. *Id.* at 16.

65. *Id.* at 15 (quoting R. GORDEN, *INTERVIEWING STRATEGY, TECHNIQUES AND TACTICS* 84 (1969)).

66. *Id.* at 17.

67. *Id.* at 16.

68. *Id.* at 17.

But it is by no means always true that the client serves his own interests best by "full participation" and frank communication. In a well-litigated case, truth may be the best defense—but not all clients will face the discovery and cross-examination of litigation, and even some of those who do might still serve their own goals best by perjury. Binder and Price do not in the end assert that lawyers will always want to learn the truth from their clients,<sup>69</sup> but the interviewing goal of "full participation" which they establish at the beginning of their book at least suggests a general presumption that lawyers will indeed want the truth.

Like Binder and Price, I do not want to debate the question of how vigorously lawyers should press their clients for the truth. Certainly the lawyer's desire to hear the truth from the client has powerful foundations, in moral and perhaps legal duties and in pragmatic calculations. What I want to explore, rather, is the extent to which the lawyer should induce the client to speak frankly by offering the facilitator of "extrinsic reward."

Truth may serve the client's interests in certain cases, and perhaps it will even do so most of the time. But as long as we grant the possibility that truth may not be pragmatically best, any statement by the lawyer that offers the client "extrinsic reward" for speaking frankly but leaves out this possibility of "extrinsic loss" is plainly, and manipulatively, incomplete. At the same time, any statement by the lawyer that suggests the client should try to gauge for himself the strategic value of telling the truth or lying may present ethical problems for the lawyer, either as a matter of personal conviction or conceivably under professional ethical guidelines.<sup>70</sup> Where an appeal to "extrinsic reward" seems neces-

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69. *Id.* at 115 & n.1.

70. The Code of Professional Responsibility calls on lawyers to inform their clients of "relevant considerations" affecting the clients' decisions. MODEL CODE, *supra* note 1, EC 7-8. It also admonishes them, however, "never [to] encourage or aid [a] client to commit criminal acts." *Id.* EC 7-5. Such conduct is also prohibited by DR 7-102(A)(7). See also DR 7-102(A)(6) (prohibiting a lawyer's "participat[ion] in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"). It is at least arguable that advising the client, even tacitly, to assess whether perjury would best serve his interests approaches the conduct disapproved by these provisions.

The Model Rules of Professional Conduct are, if anything, more cryptic. Rule 1.2(d) declares that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer

sary, therefore, the lawyer may be ethically unable to provide her client with a nonmanipulative account of the actual possibilities of reward.<sup>71</sup>

Moreover, the lawyer's duty not to present false evidence may also be in tension with her duty to assist her client to identify as fully as possible all those facts that promote his cause, for the same facilitators that jog a client's memory may also lead him to invention. Binder and Price offer the following example of effective questioning of a client whose initial account of his encounter with a car salesman provides little information:

Lawyer:

I know it's difficult to remember, but it's really important to your case that you try. Go back in your mind's eye. Try to picture yourself there with the salesman. Think very carefully, what else did he say?<sup>72</sup>

As they point out, this response by the lawyer offers empathy for the client's difficulty, the promise of extrinsic reward for his improving, and the force of expectations (implied in the question, "what else did he say?") to elicit more information from the client.<sup>73</sup> But the techniques that

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may discuss the legal consequences of any proposed course of conduct with a client . . . ." MODEL RULES, *supra* note 2, Rule 1.2(d). The comment adds that "[a] lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct . . . . There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." These observations do not make crystal clear whether advice to a client which explains, or even simply reveals, the possible utility of perjury should be treated as proper or not.

71. I doubt that this dilemma can be avoided simply by the lawyer telling the client that it is "usually" in his best interest to speak frankly to his lawyer. If the lawyer hopes, by inserting the word "usually" into her promise of "extrinsic reward," simultaneously to make full disclosure and to maintain the impact of the extrinsic reward, her statement may well be designed both to formally reveal and to effectively obscure the possibility that the client's self-interest lies elsewhere. If the lawyer really seeks to present this possibility to the client, on the other hand, she might have to call it to his attention and explain why it is a possibility. But at this point she may be approaching the ethical problems involved in counseling that shades into the encouragement of crime. *See supra* note 70.

In general, given the emotional and subtle character of most of the types of facilitators at the lawyer's disposal, it seems likely that lawyers can manipulate their clients' understanding and appreciation of a situation successfully even while providing the clients with disclosures that may be formally sufficient to avoid the charge that information has been concealed.

72. D. BINDER & S. PRICE, *supra* note 9, at 93.

73. *Id.* at 94-95.

prompt a faulty memory and uncover accurate facts may also lead the client to begin, even without any conscious intention to distort, to invent new "memories." As Monroe Freedman has written in a related context, "[o]n the one hand, we know that by telling the client that a particular fact is important, and why it is important, we may induce the client to 'remember' the fact even if it did not occur. On the other hand, important facts can truly be lost if we fail to provide the client with every possible aid to memory."<sup>74</sup>

Again, I don't want to debate the issue of where the line should be drawn between helping the client to recall the relevant facts and prompting him to invent them. This line has to be drawn, however, and wherever it is drawn the lawyer's questions will then motivate, or not motivate, the client in ways that the client presumably will not fully perceive. It is difficult to imagine how the lawyer could offer the client a choice on this matter, despite its integral importance to his case, without either interfering with the process of motivating recall or raising questions about the encouragement of perjury—or both. Yet if the lawyer says nothing and simply embarks on a strategy of questioning, she will expose the client to a range of pressures to remember and to invent (or the opposite), in response to which he will make a range of decisions or judgments about what he believes the facts to have been. As with the issue of the strategic value of truth, so with the issue of the questioning strategy for eliciting the truth: the lawyer's position towards her client seems inescapably powerful and fraught with the potential for manipulation.

At the heart of the effort to obtain full participation from clients, therefore, are major choices about the vigor and methods of seeking truth, choices which will affect the client's fate but of which he may have, at best, only limited awareness. Yet in the service of this somewhat unilaterally—or manipulatively—imposed goal of full participation, the client-centered lawyer will employ a series of facilitators designed or likely to play on clients' emotional needs and on their misperceptions of the attorney's true attitudes and opinions. The principal justification for these steps is, presumably, that they will in the end enable the lawyer to better

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74. M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 68-69 (1975).

serve the client's goals. Let us turn, therefore, to the interactions through which lawyer and client come to a joint understanding of what those goals actually are, and how they should be realized: the counseling process.

### B. *Counseling*

The keystone of client-centered lawyering may be its insistence on client-centered decisionmaking. As Binder and Price elaborate this principle, it calls on the lawyer to allow and indeed to press the client to make the central decisions about his case. The lawyer's role normally is not to make the decisions, or even to urge a particular decision on the client, but rather to help the client identify and assess the various alternatives in light of the client's, and only the client's, concerns. Paradoxically, however, the counseling process through which the lawyer pursues these objectives proves on close examination to protect the principle of client choice in part by impairing it through the use of somewhat manipulative means.

#### 1. The Lawyer's Reluctance to Give Her Opinion

In at least one respect, this manipulation is an integral part of the lawyering Binder and Price recommend. Out of a belief that clients will make better decisions for themselves than their lawyer will,<sup>75</sup> and out of a fear that clients will be powerfully influenced by their lawyer's preferences,<sup>76</sup> Binder and Price strongly urge the lawyer to "communicate neutrality and the desirability of the client making his or her own decision."<sup>77</sup>

To this end, the lawyer is encouraged to take several specific steps. First, although she of course is likely to arrive at some opinion about the decision the client should make—indeed, "[t]he lawyer will often form a strong impression about what is an appropriate course of action long before the client does"<sup>78</sup>—she apparently should conceal both what her opinion is and even that she has an opinion at all.

The examination [of alternatives] must . . . be conducted in such a way that the client does not get a feeling that

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75. D. BINDER & S. PRICE, *supra* note 9, at 147-53.

76. *Id.* at 166.

77. *Id.*

78. *Id.* at 190-91.

despite what the lawyer says, the lawyer really does have a preference about what alternative is chosen. . . . [Otherwise], the final decision may be made not so much on the basis of the client's values as on the basis of what the client surmises the lawyer thinks is best.<sup>79</sup>

Second, the lawyer should firmly encourage the client to feel that it is his role and responsibility to make the decision. Indeed, as an initial matter the lawyer evidently should not so much as mention the possibility that the client could ask for, and receive, the lawyer's advice. The "Preparatory Explanation" which Binder and Price suggest should preface the exploration of alternative decisions thus makes no mention of any advice from the lawyer on the final decision.<sup>80</sup>

Despite the lawyer's effort to keep the possibility of her giving advice from even occurring to the client, some clients may still choose to ask for this advice. Binder and Price recognize that in some situations the lawyer may have a "fairly good sense of the client's value system" and may "know that no matter what the lawyer says, the client will retain an independent decisionmaking capacity," and in those circumstances they agree that "it may be quite appropriate for the lawyer to comply with the client's request."<sup>81</sup> At least with such a client, the lawyer's giving advice is *not* manipulation in the sense defined in this Article, since it should not undercut the client's ability to make a fully vigilant decision.

But Binder and Price believe that "[g]enerally . . . the appropriate response to the client's request for the lawyer's opinion should be an explanation of why the client should decide."<sup>82</sup> When the lawyer makes this effort to "parry the initial request," he should "watch the client's non-verbal behavior for indications that the client is quite dissatisfied with the explanation."<sup>83</sup> Apparently so long as the client does not sharply object, the lawyer should proceed with the normal counseling process.<sup>84</sup>

The net result of these various tactics is potentially to block the client from realizing that it is up to him whether or not the lawyer gives advice—that is, to manipulate him by

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79. *Id.* at 166.

80. *Id.* at 189.

81. *Id.* at 186.

82. *Id.* at 187.

83. *Id.* at 198.

84. *Id.* at 198–99.

depriving him of an awareness that a decision about counseling procedure must be made and that more than one procedure is available. Even when clients perceive the choice their lawyers have obscured, the behavior suggested by Binder and Price will place the weight of the lawyer's authority and expertise behind the position that it is right for the client to decide, and—the other side of the coin—wrong for the client to seek or rely upon the lawyer's advice.

If, indeed, clients are as prone to deference to their attorneys as Binder and Price suggest, then clients may defer to this view as well. At least, clients may no longer voice their desire for advice, though their silence may mask feverish efforts to discern the lawyer's hidden opinions. Yet this partial or total acceptance of the lawyer's position may well not stem from a reasoned decision made after full discussion, for in fact the lawyer apparently seeks to stifle discussion of this issue. Instead, the client may be acting out of his mistaken sense of duty or out of habits of obedience to those with authority. The client thus may be acting on the basis of motivations, perhaps unconscious ones, that the lawyer has brought into play in an effort to prevent the client from weighing the relevant considerations or pursuing his own inclination for advice more fully.

## 2. The Framing of Alternatives and Consequences

Ironically, the same lawyer who determinedly seeks to avoid stating her opinions will dramatically influence the client's decisionmaking in other, more interstitial ways. Binder and Price recommend that during the counseling process the attorney and her client should develop a list of the potential alternatives and then identify the advantages and disadvantages associated with each option. This process, as Binder and Price recognize, offers countless opportunities for the lawyer to influence the client's thinking, both in defining alternatives and identifying their consequences. Indeed, this process requires the lawyer to influence the client, for the lawyer must at least simplify the dizzying array of possibilities so that the client can address a clear set of choices.

A client with a legal problem, after all, is likely to have an extremely wide range of options. A tenant facing eviction, for example, may need money from welfare, or de-

fenses in housing court, or psychotherapy for his difficulties in managing his daily life, or political organizing to challenge his landlord.<sup>85</sup> A lawyer who mentions some of these options but not others—and we may doubt that lawyers would routinely raise so wide a range of legal, political and therapeutic possibilities—is inescapably and perhaps manipulatively affecting the client's ultimate choice. Yet a lawyer who seeks to mention all of the options is likely both to fail in the attempt and to confuse or divert her client's thinking in the process.

Similarly, each of these options may have a range of possible consequences. If the lawyer in any manner calls attention to one set of consequences, or seems to weigh certain consequences more heavily than others, she will breach the rigorous demand for attorney neutrality.<sup>86</sup> Indeed, a lawyer who does not consciously want to exploit this process may still find it extremely hard to avoid doing so if, as no doubt is common, she fairly quickly arrives at her own opinion about the best decision. Even when the lawyer acts precisely as she should to give the impression of neutrality, a client who despite the admonitions he has received still wants to know the lawyer's opinion may imagine that he perceives it in her conduct of this examination of consequences.

Yet the lawyer cannot avoid carrying out this examination, and cannot avoid some measure of responsibility for guiding and simplifying it. As Binder and Price note, "[o]bviously, there are innumerable gradations of result which the lawyer might provide for the client. However, in our experience, there can be such a thing as providing too many possibilities. At some point, the possibilities are so numerous they serve only to confuse."<sup>87</sup>

Is the lawyer's omission of information in order to avoid confusion a form of manipulation, since it means that the client does not himself have all the relevant information? If the effect of the omissions is not to obscure relevant aspects of the situation but rather to clarify them, then we may say that they do not undercut the client's ability to make a vigilant decision, and so are not manipulative. Simplification, in

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85. This example is inspired by a somewhat similar case set out in G. BELLOW & B. MOULTON, *supra* note 8, at 1001-02.

86. D. BINDER & S. PRICE, *supra* note 9, at 172.

87. *Id.* at 161.



short, need not be manipulation.<sup>88</sup> But the lawyer's role in the framing of the client's options provides ample room for omissions that are less circumscribed in effects and less benign in purpose.

### 3. The Exclusion of Moral and Political Concerns

In at least one respect, the role that Binder and Price prescribe for lawyers in the decisionmaking process does embody, or at least suggests, an aspect of the lawyer's values—her view of the sorts of issues that are likely to be of concern to the client. This perspective can affect the options she calls to the client's attention, and it can determine the course of the discussion of the consequences of those options that are identified. Binder and Price emphasize that each alternative can have both legal and nonlegal consequences, all of which must be taken into account. They believe that the lawyer should assist the client in identifying the nonlegal consequences by asking him about them;<sup>89</sup> otherwise, presumably, consequences which the client would identify if asked may not be given appropriate consideration in the decisionmaking process.

Given the importance of the lawyer's asking, the lawyer's choice of topics is also important. As Binder and Price define "nonlegal consequences," these "refer principally to the economic, social, and psychological results that will arise upon choosing a given course of action."<sup>90</sup> The tenor of the discussion of these nonlegal consequences strongly suggests that Binder and Price are focusing on the consequences to the various self-interests of the client.

Yet much more is at stake in any case than one side's gain or loss. The acts that serve a client's self-interest may

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88. What if the lawyer withholds relevant information because she believes its provision will so jar the client as to prevent him from soundly assessing the full range of information that he needs to consider? Such conduct could be called manipulative, since it deprives the client of information he would need if he were capable of making a fully competent decision. But it could also be called nonmanipulative, since for this client the omission will (the attorney believes) enable him to make a more competent decision than he otherwise would. I suggest that this conduct should be considered manipulative, since it has blocked the client from making a fully competent decision. At the same time, this conduct may well be justified, since it has rendered the client more competent than he otherwise would have been.

89. D. BINDER & S. PRICE, *supra* note 9, at 147.

90. *Id.* at 138.

take unfair advantage of other people or cause them more damage than they deserve to suffer. If the lawyer does not also ask the client about moral or political consequences, she may implicitly exclude these effects on others from the counseling process. Her silence may suggest to her client—by now powerfully moved to trust her by the lawyer's careful facilitation of communication in earlier stages of the relationship—that she believes such concerns are irrelevant. Even if the client does not draw this inference, the sheer intellectual difficulty of assessing all the competing considerations affecting a legal choice may well obscure any issues that have not been highlighted in the course of the identification of the costs and benefits of the possible decisions.

This exclusion cannot be justified on the ground that the client himself is indifferent to any effects on others which do not cause him social, economic or psychological loss. Certainly some clients may possess such depths of indifference, but others may—if the question is raised—consider these consequences well worth their attention. Some clients may assume that such considerations are important, and only overlook them under the lawyer's apparent lead. As a result, a lawyer who fails at least to suggest the existence of this dimension of the case may well have limited the issues the client will understand to be appropriate, without the client's knowing, voluntary consent.

To be sure, a lawyer who seeks out the various economic, social and psychological consequences that the client foresees will also encounter the client's moral and political convictions. But the lawyer's apparent preoccupation with the client's self-interest may not offer the client a framework for discussing these issues. Thus Binder and Price offer, with apparent approval, the following example of a lawyer's discussion with her client concerning whether or not the client should accept a plea bargain in a criminal case, a bargain which would require the client to stipulate, contrary to her (the client's) asserted belief, that there was probable cause for her arrest.

[Lawyer]:

What else can you think of that might be an advantage [of the plea]?

[Client]:

Nothing really, but with that probable cause thing, I would be admitting something I don't believe.

[Lawyer]:

That the police officer didn't realize he was wrong. I can tell that would really bother you. Do you think it would bother you for a long time?

[Client]:

I really don't know. What do you think?

[Lawyer]:

Mary, you know yourself best; I really can't predict how you're going to feel. Only you can know that, and how you feel is what's important because you're going to have to live with the decision. Think about it. Do you think it would bother you for a long time that you had sort of admitted the officer was right when you don't feel that way?

[Client]:

I think it would.

[Lawyer]:

Okay, then we have a disadvantage in going the [plea] route. . . .<sup>91</sup>

As one reading of this dialogue suggests, the lawyer who translates the client's desire to act in a morally correct and socially responsible way into a "psychological" need to avoid guilt may be diverting the client from a consideration of the moral or political standards governing the situation, the issue with which he is (or perhaps should be) concerned, to a concentration on his emotional needs.<sup>92</sup>

#### 4. The Structuring of a Vigilant Decisionmaking Process

But this decisionmaking process can influence the client whether or not the lawyer's actual or supposed opinions creep in, and whether or not the lawyer's concentration on the client's supposed self-interests sways the client away from other issues. The process itself is likely to influence the client, by guiding him towards a particular method of decisionmaking.

A brief description of the full counseling process, which Binder and Price set out in detail,<sup>93</sup> will illuminate its impact on the client. The first step will often be a "Preparatory Ex-

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91. *Id.* at 178-79.

92. William Simon has extensively criticized the apolitical character of what he calls "psychologist" lawyering. See Simon, *Homo Psychologicus*, *supra* note 51.

93. D. BINDER & S. PRICE, *supra* note 9, at 135-210.

planation,” designed to inform the client that a decision needs to be made, to describe “the process of identifying alternatives and consequences and the roles which the lawyer and client will play in the process,” and to confirm that the client will make the final decision.<sup>94</sup>

Then it is the lawyer’s responsibility to lay out the alternatives and their most likely results, and to carry out, with the client, a comprehensive exploration of the consequences of each alternative. As these consequences are identified, the lawyer classifies them as advantages or disadvantages, and ultimately provides a “brief and compact summarization of *all* the consequences which have been identified,” for without such a summary “most clients find it difficult to reach a decision.”<sup>95</sup> Usually the most effective form of summary is a written list of the consequences of the various alternatives, a list lawyer and client can prepare together. Finally, the client makes his decision, perhaps after taking the list home to consider it.

These guidelines are designed to assist and lead the client to carry out as fully as possible a form of the “fully competent” decisionmaking process that we have already discussed.<sup>96</sup> But the selection of a decisionmaking method is itself a decision, and Binder and Price appear to assume that the lawyer will normally do the choosing, and will explain rather than share her decision with the client. The client may perceive neither that a choice of method must be made, nor that the choice may have a major impact on his ultimate decisions.<sup>97</sup> It seems fair to say, accordingly, that the guidelines offered by Binder and Price call on lawyers to manipulate their clients into making nonmanipulated decisions.

Binder and Price themselves offer a portrayal of client decisionmaking that may suggest its susceptibility to influence by process. Their description, which is consistent with other characterizations of the limitations on human deci-

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94. *Id.* at 188.

95. *Id.* at 183 (emphasis in original).

96. See *supra* text accompanying notes 22–37.

97. Certain types of “difficult clients,” however, may ask or impel the lawyer to adopt different strategies. For example, clients who insist on hearing the lawyer’s opinion may be entitled to hear it. At the other extreme, clients who are making an extremely bad decision may hear the lawyer’s opinion without having asked for it. D. BINDER & S. PRICE, *supra* note 9, at 192–210.

sionmaking abilities,<sup>98</sup> maintains that clients "usually cannot precisely identify for themselves what values they place on various consequences."<sup>99</sup> When, after the laborious identification of alternatives and consequences, clients finally come to make their choices, Binder and Price say that clients try to take these various considerations into account through "an intuitive weighing process . . . [in which] there is no attempt to quantify the various consequences, nor is there an effort to systematically rank them. The pros and cons are lumped together and weighed, and the risk factor is also somehow included."<sup>100</sup>

We may well expect that so hazy a judgment will be readily affected by the intended and the inadvertent emphases that lawyers place on various factors in the course of the vigilant decisionmaking that they guide. Moreover, it is at least possible that for some clients this vigilant process will lead them to decisions which they will feel are less truly their own, or less desirable, than those they might have reached by some other mental route. Perhaps some clients are so puzzled by the elaboration of alternatives in the company of a lawyer that they lose convictions to which they otherwise would have adhered. Perhaps others find themselves forced by the neutral listing of various consequences of a decision to give them a weight they first intended to resist, and thus to value "rationality" or even "deference to the lawyer" over the passion which first led them to the lawyer's office.<sup>101</sup>

It may well be, nonetheless, that the decisionmaking process Binder and Price envisage will in the end serve most clients' interests well, and that most clients will be well satisfied with the process in which they have participated.<sup>102</sup> Yet this analysis demonstrates that the process of client-centered counseling affects, and in important respects manipulates its clients, both by denying them ready access to advice they might desire, and by engaging them in a decisionmaking process with the potential to shape their thinking subtly but

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98. See *supra* text accompanying notes 30-32.

99. D. BINDER & S. PRICE, *supra* note 9, at 149.

100. *Id.* at 153.

101. For a discussion of other modes of decisionmaking, see *supra* text accompanying notes 26-32.

102. That clients may be pleased with the process does not mean that they have made a nonmanipulated choice, or necessarily any focused choice at all, to engage in that process.

profoundly. As in the process of client-centered interviewing, so in counseling—even the attorney who most seeks to represent her client's true desires still retains, and uses, manipulative power over her client.

### III. IN DEFENSE OF MANIPULATION

If Part II of this paper has shown that manipulation plays a major role even in lawyering that seeks to be client-centered, it has by no means shown that the presence of manipulation is a cause for condemnation. The use of manipulation to guide clients' decisions among legal options does, however, call for justification, for it is a violation of the principle that clients are entitled to choose for themselves. This part of the Article will examine whether such treatment of clients can be justified.<sup>103</sup>

As a preliminary matter, we will need to consider whether the issue of justification is obviated by the sheer inevitability of manipulation, resulting either from the inherent nature of the attorney-client relationship or from particular legal rules that may be thought to mandate manipulative conduct. If inevitability is not a sufficient defense, we must then ask whether manipulation can be justified without abandoning the principle of client choice itself. I will argue

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103. The discussion to come focuses almost entirely on manipulation rather than coercion. Since each of these forms of lawyer conduct is a violation of the principle of client competency, the justifications for both types of behavior are likely to be similar.

Nonetheless, these two intrusions on client decisionmaking are not identical, and so the arguments for and against their use may not be identical either. Coercion has the virtue of being overt; as a result, the client subjected to coercion will know what he needs to resist. Coercion probably also has the virtue of being blunt rather than subtle, so that it can be used more readily to force compliance than to obtain allegiance. Thus it may well be that coercion has less effect on its victim's personal beliefs and values, and so, arguably, on his integrity as a person, than does manipulation.

On the other hand, it may be easier to apply extremely sharp coercive pressure than to achieve equally potent manipulation. Manipulation may be slower and gentler than coercion. As a result, the behavioral changes manipulation usually achieves may be more modest, and its impact may be easier for clients to resist, even if its use can be so subtle that clients are not aware that it is being applied.

It is difficult to draw from such comparisons any clear rule that manipulation or coercion is the preferable form of interference with client decisionmaking. In any case, since both manipulation and coercion may be applied with widely varying intensities and for widely varying aims, any such absolute rule would not readily do justice to the complex comparisons that are likely to be required.

that in many cases a respect for client decisionmaking can be the basis for client manipulation, but that lawyers who seek to implement the principle of client decisionmaking fully should offer their clients less intimacy, but more advice, than Binder and Price suggest.

A. *Is Manipulation Inevitable?*

Perhaps the very persistence of manipulation, even in lawyering meant to protect clients' right to make their own decisions, demonstrates that the question of justification is superfluous, because such conduct is simply inherent in lawyering. Perhaps, indeed, such conduct is simply inherent in human interaction; given the complexity of human motivation, it may well be that almost all behavior has some edge of manipulative intent. But we have been principally concerned here with actions by lawyers that tend to weaken substantially their clients' ability to make fully competent decisions. To say that human behavior is imperfect by no means demonstrates that conduct of this gravity—the conduct this Article defines as manipulation<sup>104</sup>—is unavoidable.

Perhaps, instead, manipulation follows automatically from the development of complex legal institutions and the division of the public into expert lawyers and lay clients. Clients presumably come to lawyers in large measure because they are unable to make fully competent decisions on legal matters without expert help. It might be argued, then, that the various forms of guidance to clients in client-centered practice are compelled by this basic fact of client dependence.

We have indeed identified certain aspects of contemporary legal practice that seem to encourage manipulation. So long as a lawyer is required not to present evidence she knows to be false, for example, she cannot easily give nonmanipulative advice to clients about the practical utility of speaking frankly to their attorneys.<sup>105</sup> Moreover, whatever the lawyer's view of the proper resolution of the tension between helping her client to recall and inducing him to falsify, she may conclude, for ethical or practical reasons, that she cannot tell her client the details of the choices

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104. See *supra* text accompanying notes 21–37.

105. See *supra* text accompanying notes 69–71.

she makes in framing her questions, or offer to alter her style to suit his view of the correct decision between assisting recall and stimulating invention.<sup>106</sup> Similarly, a lawyer who seeks to give her client a comprehensible description of the options he faces, and the various possible consequences of these options as the lawyer sees them, must engage in a process of simplification or editing that can easily become manipulation.<sup>107</sup>

But it is important not to overstate the extent of manipulation which such dilemmas as these may require of attorneys. In each of the examples just given, after all, the lawyer can choose to limit the manipulative conduct in which she engages. The methods of achieving this goal will likely fall short of wholly eradicating manipulation, and these methods may have costs for the performance of other aspects of the attorney's role—but such methods can be devised. The lawyer who cannot give nonmanipulative advice to clients about the effects of speaking frankly may be entitled to tell the client that she is forbidden by law to address this topic fully, or she may simply refrain from addressing it at all. The lawyer who wishes to help her client to remember, but not to invent, may formulate at least a general description of her questioning methods and principles and present this self-description to her client. The lawyer who wishes to avoid distorting her client's decisionmaking by omitting options or consequences that concern him can spend time asking him about the sorts of issues to which he wants attention paid.

Even the lawyer whose legal duties authorize or require her to override her client's stated wishes may not need to engage in manipulation. A lawyer representing a class, for example, may agree to and advocate judicial approval of a settlement despite objections from members of the class, but in communicating with anxious or objecting class members she may be able and willing to confront their concerns frankly. Similarly, a lawyer whose client plans to commit perjury has a duty to seek to dissuade her client from this

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106. *See supra* text accompanying notes 72–74.

107. *See supra* text accompanying notes 85–88.



intention,<sup>108</sup> but she too may choose to bring pressure to bear openly rather than covertly.<sup>109</sup>

To be sure, the possibility of limiting manipulation does not mean that all manipulation can be avoided. But we should be careful not to assume that because some manipulation may be inevitable, any given instance of manipulation is likewise inescapable. Instead, we should ask whether particular aspects of lawyers' manipulation of their clients flow inevitably from the intrinsic nature of the relationship, or instead represent conduct that could be altered—and so should call for justification. I believe that this examination will reveal that even very familiar aspects of lawyering are, as we might expect, the product of individual and social choice.<sup>110</sup>

Let us consider, for example, the lawyer's offer of non-judgmental empathetic acceptance to her clients. Although Binder and Price have paid special attention to the precise modulation of the attorney's emotional tone, their endorsement of non-judgmental empathetic acceptance in a sense is simply a refinement of some very familiar notions about the prerequisites to effective work with clients: that the attorney must gain her client's confidence, and that she should do so by refraining from judging her client, and adopting instead an attitude of zealous loyalty towards him.

It is possible, however, to conceive of attorney-client relationships that do not rely on non-judgmental acceptance or some close cousin of this attitude. Most mundanely, an attorney might explicitly inform her client that she took no position on whether what he wanted was good or bad, and thus clarify the ambiguity otherwise engendered by the pro-

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108. The Supreme Court observed last year that the effort to dissuade the client from committing perjury is "the attorney's first duty when confronted with a proposal for perjurious testimony." *Nix v. Whiteside*, 475 U.S. 157 (1986).

109. The lawyer may well find it necessary to warn the client that if he seeks to pursue his plan she will seek to withdraw from the case. If this statement is true, it need not be manipulative. In addition, since her effort to withdraw may be mandatory in these circumstances, *see* MODEL CODE, *supra* note 1, DR 2-110 (B)(2); MODEL RULES, *supra* note 2, Rule 1.16(a)(1), this warning might not constitute a threat and so would not be coercive. *See supra* text accompanying note 15.

110. Even such commonplace aspects of much legal practice as the holding of client interviews in the lawyer's office are neither necessary—for lawyers could make house calls—nor in fact universal. For a striking discussion of the range of possible interview settings, including the client's home, *see* G. BELLOW & B. MOULTON, *supra* note 8, at 173-76.

cess of active listening. Still more bluntly, an attorney might tell her client that she deeply disapproved of his stance in the case, but that she would represent him vigorously anyway. Such an attorney might win her client's confidence in part by treating him with such incisiveness and detachment that the client would anticipate that her treatment of the opposition would be even more ferocious.<sup>111</sup>

The terms of the lawyer-client relationship could also be more fundamentally revised. William Simon, for example, has offered a model for a more contentious relationship between client and advocate in his sketch of the contours of "non-professional advocacy."<sup>112</sup> He explains that:

[t]he non-professional advocate presents himself to a prospective client as someone with special talents and knowledge, but also with personal ends to which he is strongly committed. The client should expect someone generally disposed to help him advance his ends, but also prepared to oppose him when the ends of advocate and client conflict. . . . [T]he major principle of conduct [in non-professional advocacy] is this: advocate and client must each justify himself to the other.<sup>113</sup>

Simon suggests that from this struggle can come ties far deeper than those which the display of non-judgmental empathetic acceptance can foster. "Non-professional advocacy," he writes, "must recognize that a relation of respect and understanding between autonomous individuals can rarely be an entirely accepting relation."<sup>114</sup> He may well be

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111. For a fictional, but quite plausible, illustration of attorney behavior somewhat along these lines, see R. TRAVER, *ANATOMY OF A MURDER* 29-69 (1958).

112. Simon, *The Ideology of Advocacy*, *supra* note 51, at 130-44. Simon himself says that "[n]on-professional advocacy is difficult to describe with precision," *id.* at 131, but its central feature is the rejection of a concept of a special "professional ethics" in favor of the view that "the problems of advocacy should be treated as a matter of *personal* ethics." *Id.* (emphasis in original). Simon would abandon the notion of the legal profession as a body of experts, responsible for the zealous pursuit of any claims that citizens want pressed. Instead, nonprofessional advocates would act as advocates in order to satisfy their own political and moral goals, and would interact with their clients not as agents to principals but as allies or, in some cases, enemies.

113. *Id.* at 132-33.

114. *Id.* at 134-35. Robert Burt has offered a somewhat similar view of the value of conflict between attorneys and clients. See Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981). Burt argues that mistrust between attorneys and clients, at least in certain areas of law, is already endemic. He suggests that, paradoxically, rules requiring attorneys (under pain of being held liable to injured third parties) to "pursue reasoned suspicion of clients in order to discover illegalities," *id.* at 1030, and then to disclose what they have learned (even

right. In some cases, however, the result of this struggle between attorney and client is likely to be discord and divorce rather than deepening respect. In some broader range of cases, clients may approach their advocates with a wariness and dissembling that will cloud whatever relationship is established. Perhaps most important, the view that the advocate may struggle with her client for the sake of her own goals, and that this struggle may "sometimes end in betrayal"<sup>115</sup> by the advocate, seems to tempt such advocates to exercise sweeping and manipulative power over their clients.<sup>116</sup>

Nonetheless, Simon's vision of nonprofessional advocacy at least confirms that we cannot readily vindicate client-centered manipulation as simply part of the inherent nature of advocacy. Not only can we discern lawyering styles that would lessen the intensity of such manipulation, but we can posit an alternative model of lawyering that rejects client-centered approaches more fundamentally. Simon's alternative may well abandon client-centered manipulation only at the peril of embarking upon other, perhaps even more manipulative paths. Yet so long as we know there are alternatives, we must look for justifications for the particular quality and quantity of manipulation entailed in client-centered practice.

## B. *Manipulation and Client Choice*

### 1. The Nature of Lawyers' Duties to Their Clients

We cannot decide the proper weight to accord to the possible justifications of manipulation without a standard of

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from client confidences) might help *restore* trust. Placed under pressure to "act on their suspicions" of their clients in order to avoid liability for conduct they should have discovered and disclosed, *id.*, attorneys would have an incentive to engage in "honest conversations" with the clients, whereas today attorneys and clients avoid such conversations precisely because they do not trust each other. The result of requiring "mutually suspicious inquiry" might in the end be, at least for many attorneys and clients, to reveal to both sides that each can trust the other. *Id.* at 1031-32. I suspect that the effects of this proposal, for better and for worse, would resemble the impact of Simon's suggested reconstitution of advocate-client relations.

115. Simon, *The Ideology of Advocacy*, *supra* note 51, at 134.

116. More recently, in describing his conception of "Critical lawyering," Simon has offered standards for attorneys' conduct that plainly risk extensive manipulation of clients in the name of ideals to which the lawyer, but not necessarily the client, will be committed. *See infra* text accompanying notes 153-62.

measurement. I suggest that the standard should be a conception of the primary responsibilities that lawyers should meet in our society. It might be argued, for example, that the lawyer's role, like that of the entrepreneur, is to promote the general welfare by pursuing economic opportunities. If so, the lawyer's manipulation of her client to protect her own economic interest in a case might be altogether appropriate and desirable.<sup>117</sup> Or it might be said that lawyers have a major responsibility for insuring that their own clients' behavior is lawful or just—in which case the lawyer's defense of society's interests in her dealings with her client could be the first priority.<sup>118</sup>

I want to offer and briefly suggest the basis for a different conception, one in which the principle of client decision-making occupies a much more prominent place. Let me begin with the proposition that lawyers should seek to foster the autonomy of their clients within the law.<sup>119</sup> I will not attempt to offer a full philosophical analysis of the concept of autonomy, but I do suggest that the three aspects of autonomy that I discuss below represent important elements in an individual's attaining rational control over his own life, and, in particular, in making legal choices that may have profound effects on him and his world.

The first of these aspects of autonomy is the client's right to make decisions among his legal options, to "seek any lawful objective through legally available means, and . . . present for adjudication any lawful claim, issue, or defense."<sup>120</sup> The individual "cannot rightfully be compelled to do or forbear because it will be better for him to do so, be-

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117. Cf. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-84 (1986) (arguing that in certain fields of class and derivative litigation, it is analytically more helpful to see the lawyer not as a fiduciary and agent of the client, but "more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions").

118. Cf. Kraakman, *Corporate Liability Strategies and the Cost of Legal Controls*, 93 YALE L.J. 857, 888-96 (1984) (discussing the imposition of "gatekeeper liability" on groups such as outside directors, lawyers, accountants, and investment bankers, who are not part of the corporation but are in a position to monitor and/or control aspects of its behavior).

119. Charles Fried so construed the lawyer's role in his well-known article, Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

120. MODEL CODE, *supra* note 1, EC 7-1.

cause it will make him happier, because, in the opinion of others, to do so would be wise, or even right."<sup>121</sup> Hence the lawyer should afford her client the opportunity to make his own decisions about the pursuit of his goals within the legal system and to have them implemented.

The second aspect of autonomy is the individual's actual capacity to make a decision that is truly his own—the capacity, in other words, to take advantage of the opportunity for choice. It is not easy to state what this capacity consists of; as we have already seen,<sup>122</sup> different people may adhere to fundamentally different ways of decisionmaking as well as to widely differing decisions. But we will discuss shortly a range of ways in which we may be able to say that this capacity, however difficult to define, has been palpably impaired.<sup>123</sup> A lawyer should seek to remedy such impairments and thus assist her client in attaining the competence to decide.

The third aspect of autonomy is the individual's exercise of this capacity for choice. This exercise, of course, typically includes the identification of alternatives and their consequences. It equally includes the individual's selection of a course of action based on his values.<sup>124</sup> Binder and Price do protect this third aspect of autonomy in their suggestions, described above,<sup>125</sup> for careful identification of the consequences as the client sees them. But what we want—what we might identify as positive consequences—is not necessarily what we most value.<sup>126</sup> Because choice is a matter of

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121. J.S. MILL, ON LIBERTY 9 (A. Castell ed. 1947).

122. See *supra* text accompanying notes 23–28.

123. See *infra* text accompanying notes 139–162.

124. Dan Brock has suggested, "For convenience, call all actions when our motivating desires are as we want them to be cases of autonomous action; in autonomous action, agents seek their good as they perceive it." Brock, *Paternalism and Promoting the Good*, in PATERNALISM 237, 248 (R. Sartorius ed. 1983).

125. See *supra* text accompanying notes 93–102.

126. David Luban has discussed the distinction between wants and values at length, and has characterized "wants" as "subjective events." Luban, *supra* note 27, at 468. "Values," on the other hand, he sees as "those reasons [for acting] with which the agent most closely identifies—those that form the core of his personality, that make him who he is. This is why we feel that we understand a person's actions when we comprehend them as 'flowing from' his values. . . ." *Id.* at 470. Luban's definitions may overstate the centrality of an individual's consciously acknowledged values to his personality, but he nonetheless points, I believe, to a genuine aspect of our moral experience. Many of us, surely, have wanted to be better persons than we are.

values, in turn, I understand the full exercise of the capacity for choice to include the critical reconsideration, if appropriate, of one's own wants and values.<sup>127</sup>

Plainly, not every person will wish to engage in such a critical reconsideration of his own values, or even to undertake a detailed exploration of options and consequences in terms of his present values. Indeed, a refusal to engage in such decisionmaking can itself be an act of autonomy, though sometimes a very costly one. The lawyer's role, however, is not to compel such decisionmaking but only to facilitate or encourage it. In a related context, Charles Fried has rejected the argument that "a lawyer must assume that the client is not a decent, moral person, has no desire to fulfill his moral obligations, and is asking only what is the minimum that he must do to stay within the law."<sup>128</sup> The lawyer who seeks to enable her client to act autonomously should similarly reject the assumption that her clients will refuse the opportunity. To this end, she should offer her client not only assistance in the collating of relevant considerations bearing on a decision but also "the fullness of [her] experience,"<sup>129</sup> including her sense of the moral factors bearing on the client's decision.

Let us now consider, in light of this understanding of lawyers' responsibilities to their clients, whether manipulation can be justified. We may begin by outlining the reasons that a lawyer might wield such power over her clients. Broadly, she may do so for any of three purposes: to serve her own interests, to serve her clients' interests as she understands them, or to serve the interests of third parties or society. Perhaps surprisingly, each of these reasons may, in certain contexts, be consistent with the duty to foster the autonomy of the client.

## 2. Manipulation in the Lawyer's Self-Interest

If the lawyer's role is to foster her clients' autonomy, her manipulation of clients for the sake of her own self-interest seems at first blush to be wholly inappropriate. Indeed, the legal profession's ethical codes strongly disapprove of

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127. Luban points out that "[v]alues are in principle intersubjective, and susceptible to argument and disputation." *Id.* at 468.

128. Fried, *supra* note 119, at 1088.

129. MODEL CODE, *supra* note 1, EC 7-8.

representation of clients by lawyers whose own interests conflict with their clients' needs.<sup>130</sup> To permit lawyers to manipulate for ostensibly client-serving reasons may invite them to serve their own interests instead; to permit manipulation explicitly in the service of lawyers' self-interests is to throw clients to the wolves.

It deserves to be mentioned, however, that the implicit definition of "conflict" in the professional codes is a careful one. Clients desire not to lose money and lawyers desire to receive fees. These desires are in conflict, yet in most circumstances the bar accepts the legitimacy of conditioning the rendering of legal services on the rendering of payment in return.<sup>131</sup>

Similarly, clients presumably want the best legal service they can afford, and lawyers want the most rewarding group of clients they can represent. The bar permits lawyers to handle any case for which they are competent, and while lawyers are generally urged to bring all relevant considerations to the client's attention in the course of the representation, they appear to be under no obligation to advise potential clients of the availability of other, more competent lawyers who could handle their cases.<sup>132</sup> No doubt there are other interests, for example in peace of mind or freedom from interruption, which lawyers may pursue without "conflict" with their clients.

It is quite conceivable that such interests could be served by manipulative conduct. A lawyer might try to impress a prospective client with a general aura of expertise despite her actual ignorance of the field of law relevant to the client's case. Similarly, she might falsely threaten to withdraw from the case to press the client to pay her fee. Or she might try to push the client to make quick decisions in order to avoid spending scarce time in lengthy consultations. The legitimacy of such steps should be in question, in light of the weight we are placing on fostering clients'

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130. *See id.* DR 5-101; MODEL RULES, *supra* note 2, Rule 1.7.

131. For a striking exception, see *Evans v. Jeff D.*, 106 S. Ct. 1531, 1538 & n.14, 1550 & n.5 (1986) (Brennan, J., dissenting) (describing and, in the dissent, adopting the view that an attorney in evaluating a settlement offer for his client must do so without regard to her own interest in obtaining a fee).

132. *See* MODEL CODE, *supra* note 1, EC 6-1; MODEL RULES, *supra* note 2, Rule 1.1 and Comment.

unimpaired decisionmaking. But because lawyers who find their work economically or intellectually or emotionally draining may do less or worse work as a result, the protection of clients from manipulation also requires at least some protection of lawyers.<sup>133</sup>

It is possible, however, to formulate a much broader, and much less palatable, argument for lawyers' manipulation in their own self-interest. If clients enjoy autonomy, after all, so do lawyers. If autonomy entails acting in accordance with one's values, lawyers' actions should be in accord with *their* values, and so lawyers who believe that manipulation is appropriate should be acknowledged to have a right as autonomous persons to implement that belief.

Such a sweeping notion of lawyers' autonomy, however, will not withstand scrutiny. The autonomy a civil society protects, after all, cannot be the right to act wholly in accordance with one's values, but only some more modest guarantee of protection for the pursuit of those values within a just system of laws. It seems hard to claim that justice requires that lawyers be free to manipulate their clients at will. Such a rule would plainly deprive clients of any shield against the individual predilections of their lawyers, and so might profoundly disrupt such protection of clients' autonomy as our legal system affords.<sup>134</sup> Moreover, the range of attorney interaction with clients that this Article finds consistent with client autonomy is substantial enough to allow lawyers considerable opportunity to express, and sometimes to implement, their personal moral beliefs while remaining faithful to their clients. To expand radically the

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133. Lawyers may also find that they need to manipulate in order to fend off the pressures, and even the manipulations, of their clients. Cf. Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 121-22 (1986) (describing the lawyer's effort to defend himself against the client's emotional transference and testing).

134. *But cf.* A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980). Goldman argues for a "principle of moral right," *id.* at 139, which "would require a lawyer to aid his clients in achieving all and only that to which they have moral rights." *Id.* at 138. Under this principle, each lawyer would presumably have to judge whether a client's legal rights amounted to moral rights, and would presumably do so based on her own understanding of "moral right." Though Goldman maintains that clients will still be able to secure representation unless their moral claims are clearly unfounded, his proposal would seem at least to abridge clients' assurance that their legal rights—which I have called an aspect of their autonomy—would be vindicated.



opportunities for lawyers' expression of their personal beliefs in their practice would be to liberate lawyers at the expense of their clients.

### 3. Manipulation in the Client's Self-Interest

A more familiar rationale for attorneys' manipulation of their clients is that a lawyer has a duty to protect the client's best interests even if the client does not perceive them. If this argument is taken to sanction paternalistic intervention to override the wishes of a client who is capable of making his own choices, then it amounts to a breach of the requirement that lawyers must afford their clients an opportunity to make their own legal decisions. But in other circumstances paternalistic manipulation may serve rather than disserve the autonomy of clients.

#### a. *Client Consent*

First, a client might freely and voluntarily decide, as Binder and Price recognize, to let the lawyer make decisions for him.<sup>135</sup> Presumably a client could voluntarily decide to let his lawyer manipulate him too—for example, by asking the lawyer to reassure him that a decision is a wise one. Surely it can be paternalistic *not* to honor such choices. Arguably, moreover, clients regularly, even if implicitly, ask for precisely this service from their lawyers.<sup>136</sup>

There are, however, serious difficulties with this rationale. Lawyers disposed to make decisions for their clients may sharply overestimate the frequency of such authoriza-

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135. D. BINDER & S. PRICE, *supra* note 9, at 198.

It could even be argued that citizens *en masse* have consented to lawyers' manipulation by approving, or failing to disapprove, the professional codes of ethics under which lawyers operate. If it is fair to say that the public has given any such consent at all, however, I think it cannot be claimed that the professional codes provide sufficient notice of lawyers' use of manipulative techniques to justify finding real public authorization of this aspect of legal practice.

136. Cf. C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK, & L. ROTH, INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 25 (1984) (describing study in which patients were given information about the risks of angiography only if they indicated, in response to offer, that they wanted to receive the information; only about one-third of the patients wanted to be informed). The authors emphasize, however, that empirical data concerning the application of the doctrine of informed consent in medical care—a doctrine somewhat analogous to the right of client decisionmaking focused on in this Article—is limited. *Id.* at 24-32.

tion, particularly if the supposed "authorization" is implicit. Moreover, to act on such "authorization" assumes that what clients ask for is freely and knowingly chosen. To the extent that clients assume that legal services, by definition, include lawyer decisionmaking, their request for such decisionmaking may not be free.<sup>137</sup> Even if lawyers offer the choice of decisionmaking allocation to their clients—probably not a very common occurrence—the clients may have little grasp of the issues at stake.<sup>138</sup>

b. *Clients' Lack of Relevant Information*

Clients may frequently, even typically, lack essential knowledge required for decisionmaking. Binder and Price, who make clear their dislike of uninformed advice from lawyers concerning the clients' interests, nevertheless agree that lawyers' legal expertise means that they must bear "the responsibility for identifying the probable legal consequences of any particular alternative."<sup>139</sup> Current ethical standards and constitutional decisions in the field of criminal procedure assert similar grounds for vesting in lawyers startling amounts of authority not only to advise but to decide on crucial questions of litigation strategy.<sup>140</sup>

Lawyers' expertise and clients' ignorance might be said to justify lawyers' exercise of authority in making decisions or their manipulation of their clients' decisions about legal questions. But this argument is not overpowering, for it would be possible to fashion a system which responded to clients' ignorance much more with education or simplification<sup>141</sup> than with control. To empower clients rather than their lawyers, however, would have costs—in systemic efficiency, perhaps in lawyers' pleasure in their work and its rewards (and thus perhaps ultimately in the quality of legal

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137. See Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 49 (1986) (discussing the difficulties faced even by fee-paying criminal clients in finding a lawyer willing to share decisionmaking power over issues normally reserved to lawyers).

138. See *id.* at 50; Spiegel, *supra* note 8, at 82 n.160, 83 (arguing that clients are unable to make educated general decisions about allocation of decisionmaking authority at the beginning of the attorney-client relationship).

139. D. BINDER & S. PRICE, *supra* note 9, at 143.

140. See Berger, *supra* note 137, at 10-59.

141. As noted earlier, see *supra* text accompanying notes 87-88, lawyers' "simplification" of these issues so as to help their clients make decisions need not be manipulative.

services), and surely in the time and cost of legal services for people who would now face arduous educational endeavors in the process of solving the far from academic problems which brought them to a lawyer's office.<sup>142</sup>

Some of these costs are essentially trade-offs between the interests of clients in making their own decisions and the interests of society in minimizing the resources eaten up in conflict resolution. But to the extent that lawyers decide (or are required) to provide education rather than direction and thus perhaps to drive up the costs and scarcity of legal assistance, the very value of autonomy that education protects may be jeopardized. Since the principle of client decision-making is meaningless unless decisions once made can be carried out, a system which prices some people out of the market for the assistance they need to press their claims has performed only a dubious service for clients.<sup>143</sup>

When neither education nor simplification could give the client the ability to approach a fully competent decision, therefore, manipulation of the client's decision seems justifiable.<sup>144</sup> Such manipulation should, however, remain as

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142. Many of these costs are identified by Vivian Berger and Mark Spiegel. See Berger, *supra* note 137, at 10-59; Spiegel, *supra* note 8, at 113-23.

143. Spiegel has urged that client decisionmaking in legal situations be protected by requiring lawyers to obtain the clients' "informed consent" to a wide range of decisions, many of them dealing with procedural rather than solely substantive choices. Spiegel, *supra* note 8, at 123-26. He argues that the cost of this proposal will be reduced by the likelihood that clients will not choose to make every decision when they are offered the opportunity. If this prediction is correct, it means that the costs of informed consent will be tempered by clients' willingness not to be informed.

It seems likely, however, that clients who forego the opportunity to give informed consent will often do so on the basis of sparse information. In other words, their decision not to give informed consent may be an uninformed one. It also seems likely that lawyers seeking their clients' authorization to make decisions without informed consent may fall into manipulation in the process. The advice Spiegel himself suggests that a lawyer might give in presenting this issue to a client seems both factually accurate and potentially subtly tilted against client decisionmaking:

Lawyer: We now have to decide what court to file in. Choosing state court would mean a long delay but might mean a better chance of winning. If you leave the decision to me, I will go to state court, but if the delay is important to you, we can discuss it. This is your decision, if you wish, but if we do discuss it, it may take a half hour or so, which, as you know, costs \$25 of my time. What do you want to do?

*Id.* at 112 n.295.

144. As Henry Monaghan has pointed out to me, there is no room for education in night court.

faithful as possible to the principle of client choice. The lawyer may be able to evaluate, or at least surmise, what choice the client would have made if he had been fully competent; if so, she should seek to manipulate the client towards this choice. When this hypothetical choice cannot be discerned, however, it would seem that the lawyer would be justified in manipulating her client into protecting his interests as the lawyer perceives them—for she has no other competently selected course by which to steer.

We should not leave the subject of clients' lack of information without noting one other obvious remedy for it: the lawyer's advice and recommendations. Binder and Price emphasize the risk that even the shadow of the lawyer's advice may sway the client's decision,<sup>145</sup> and this risk surely is a large one. Yet to call this prospect a "risk" will sometimes be a mistake, for the lawyer's advice may affect the client not by overpowering but by informing him.

Lawyers do have valuable expertise, and an experienced practitioner is likely to have valuable insight into the practical and human considerations of a case as well as into its legal problems. A fully vigilant decisionmaker, one who seeks to understand as well as possible the costs and benefits of the options open to him, may welcome the lawyer's advice. Such a client would not be overwhelmed by the advice when he received it; indeed, Binder and Price themselves speak of clients who will, despite hearing advice, retain their decisionmaking capacity.<sup>146</sup>

For such a client the lawyer's advice would be information, perhaps very important and influential information, but not direction. It seems fair to say that a lawyer who avoids giving advice to a client capable of assessing it is acting with disrespect towards her client by failing to treat him as a competent person.<sup>147</sup> A lawyer who fails to give advice to a client capable of assessing it, moreover, could actually be impairing her client's decisionmaking by withholding data that he might find helpful. In these circumstances, it is not

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145. See *supra* text accompanying notes 75–84.

146. D. BINDER & S. PRICE, *supra* note 9, at 186.

147. Cf. Fried, *supra* note 119, at 1088 (discussing the lawyer's breach of her duty to treat her client with respect when she assumes that the client is not a moral person who will be concerned to understand and fulfill his moral duties).

the provision of advice but the failure to provide it that may be manipulation.

c. *Clients' Emotional Disabilities*

A lawyer may also decide to manipulate (or override) her client's expression of his wishes because the client is emotionally unable to make his own decisions, or at least unable to make them well. Probably most people go to lawyers rarely, and overcome their hesitancy or distaste only when they have relatively pressing and unfamiliar problems to resolve. Many clients arrive in lawyers' offices in emergencies. Situations alien and intractable to such clients may be familiar and even routine to their lawyers. The advantage lawyers then have in decisionmaking is not only a product of their "knowing the ropes," but of their relative detachment and assurance at a time when clients may be frantic, impulsive or paralyzed.

Again, the emotional weaknesses in clients' decision-making capacities do not necessarily justify lawyers' making or manipulating decisions. Binder and Price mention at least two alternatives: referring the client to a mental health professional and recommending that the client wait before making a decision.<sup>148</sup> In many cases, however, clients who are *not* suffering from serious mental illness *will* be facing issues that demand resolution without delay, and will find themselves handicapped by the stress their situations impose on them. Even those clients who could benefit from treatment may not be able to get it—an example of the impact of broader social decisions and priorities on the degree of decisionmaking freedom that the lawyer-client relationship can provide.

Surely much that is manipulative in Binder and Price's recommendations is meant to help this array of troubled clients. Non-judgmental empathetic understanding can make such clients feel accepted, cared for, and reasonable. The carefully structured decisionmaking process can give the client a method for coping with his complex, even contradictory concerns. Surely, too, manipulation of this sort, aimed at restoring or at least improving the client's decisionmaking capacities, is particularly readily justified, for this conduct di-

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148. D. BINDER & S. PRICE, *supra* note 9, at 207-08, 211-23.

rectly addresses the lawyer's responsibility for helping clients attain the capacity to make decisions that are truly their own.

Even so, the lawyer's decision to attempt to resolve decisionmaking problems her client is experiencing is not one to be made lightly. It is easy for a lawyer to discern decisionmaking problems in a client whose decisions the lawyer considers mistaken, yet mistakes are part of the prerogative of competent decisionmakers.<sup>149</sup> Similarly, the lawyer may be prone to confuse her client's competent preference for visceral, impulsive choice with a decisionmaking deficiency that impairs his ability to make a vigilant decision.

It must also be emphasized that the practice of active listening echoes a similar approach characteristic of psychotherapy.<sup>150</sup> That resemblance should be troublesome. Patients in psychotherapy may experience major personal shifts as a result of treatment—a measure of the potency of the techniques in play. Yet patients in therapy may well have sought out and in some sense consented to the therapist's effort to change them, while it seems less likely that lawyers' clients expect therapy in their lawyers' offices. In addition, therapists are likely to make better, more discriminating use of such techniques than psychologically untrained lawyers are able to.

We should not understate the degree of manipulation potentially entailed in using techniques borrowed from therapeutic settings to assist clients facing legal decisions. Nor should we overlook the potential breach of client autonomy that can follow from a judgment that a client's decisionmaking strategy is defective.

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149. See, e.g., Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 306-07 (1983) (criticizing a standard of assessing the competence of a child that turns on the "rightness" of the child's decision).

150. See I. JANIS & L. MANN, *supra* note 22, at 370 (describing attitudes very similar to those of non-judgmental empathetic regard as among "standard features of the clinical stance adopted by many well-trained psychotherapists"); W. Pachter, *An Investigation of Variables Related to Client Evaluation of the Lawyer-Client Relationship in Divorce Cases* 80-81 (1984) (unpublished dissertation) (citing evidence of the importance of "nonspecific factors, such as communication of understanding, respect, interest, encouragement and acceptance by the therapist" to therapeutic success).

Once such a judgment has been made, a professional seeking to assist the client in making decisions more effectively may act in strikingly manipulative ways. For example, such a "decision counselor" may respond to clients who do not recognize the urgency of their situation, or the dangers of the course of action they wish to adopt, with "dosage[s] of fear-arousing communications." For a client who is pessimistic and demoralized, the counselors may select "appropriate reassurances" and "convey a sense of optimism." Such techniques, all potentially within a lawyer's arsenal, offer the lawyer an avenue into the client's soul, and surely for that reason should be used only sparingly.<sup>151</sup>

Even after the client's problems have been alleviated, the effects of these psychological tools may persist. A client who has come to look to his attorney for warmth, reassurance and support may be ill-equipped indeed to treat her views on his situation merely as data for him to accept or reject as he sees fit. Out of fear of alienating his attorney, or out of the deep trust he may have developed for her, such a client may have become less able to resist influence by the attorney at the same time that he became more able to deal in other respects with his situation. As a result, a lawyer who has offered the client such emotional sustenance may be unable to give otherwise acceptable advice without overbearing her client. We will return to this tension between emotional support and pragmatic counsel below.<sup>152</sup>

d. *Clients' Ignorance of Their Own Interests*

So far we have discussed manipulation by lawyers to remedy their clients' lack of special expert knowledge or their suffering from special emotional stress. The argument for intervention to remedy client deficiencies, however, can be pressed much further, by pointing to the possible inequality between lawyer and client in their political or moral understanding of the world. This inequality may be no more

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151. These techniques are described in I. JANIS & L. MANN, *supra* note 22, at 374-75. Janis and Mann offer them as tools for "decision counselors," or for any other professionals, including lawyers, who are qualified to function in such a role. *Id.* at 369. The use of such techniques, moreover, need not be terribly time-consuming; Janis and Mann suggest that they can be used in as little as one or two hours of counseling. *Id.*

152. See *infra* text accompanying notes 167-69.

than a difference—but probably few people altogether accept that a difference in political or moral views is not also a difference between wise and unwise, or between right and wrong. Does such a difference in judgments justify the lawyer's exercise of power over her client?

William Simon has addressed this issue as well. In an article written some years after his proposal of nonprofessional advocacy, he develops a description of "Critical lawyering." Critical lawyering is a form of practice that is not based on the representation of clients' "preexisting subjective ends,"<sup>153</sup> but instead "is willing to consider that people might have interests of which they are not aware."<sup>154</sup> Critical lawyering, accordingly, appeals not to "ostensibly preexisting subjective interests" but to "the ideal of nonhierarchical community."<sup>155</sup>

Simon readily acknowledges that the meaning of this ideal is far from clearcut. The Critical lawyer, however, seeks simultaneously to intuit its contours and on that basis shape her lawyering, and "to enhance the client's capacity to express her own interests."<sup>156</sup> Ultimately, it appears, the lawyer may remain faithful to the client's interests; even a Critical lawyer perhaps could not "represent" a client with a view to causing deliberate harm to her client's interest.<sup>157</sup> The test of the accuracy of the lawyer's judgment of the client's interests, however, is not what the client may have to say in the here-and-now, but:

that the client come to share that judgment under conditions which lawyer and client agree are nonhierarchical. The expectation that the client will do so is as much a hope as a prediction, and it can be fully vindicated only where the client has had an opportunity to disappoint and refute it.<sup>158</sup>

Obviously this is a test that may never have to be passed. Even if client and lawyer arrive at this nonhierarchical state, the interactions that have brought them to that point surely are likely to affect the client's judgment about

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153. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 485 (1984).

154. *Id.* at 488.

155. *Id.* at 485.

156. *Id.* at 486.

157. *See id.* at 489 n.47.

158. *Id.* at 488.



the course of their association, and so to diminish further the force of this criterion.

Yet in order to catalyze the clients' understanding of their true interests (as opposed to those they only believe they have), or to engage the clients in the pursuit of their interests, the Critical lawyer may be entitled to engage in dramatic manipulation of her clients. Simon himself illustrates this dismaying prospect in his description of a deposition taken in a farmworker housing case. The deposition was taken at the housing camp, and thus permitted the tenants to see their housing manager subjected to the rigors of legal inquisition. The result was to energize the clients politically.

As Simon sees it, this deposition "does not appear to have been instrumental to any initially articulated goal. It does not appear to have produced valuable information or to have had any strategic impact on the adversary. Its importance lies in the way it affected the clients."<sup>159</sup> It seems reasonable to infer that a lawyer seeking such effects would not announce them to the clients in advance, at least with any great detail, for such an announcement would both lessen the dramatic impact of the scene and risk tainting it with annoyance, on the clients' part, at being subjected to such condescension. But the decision to create such an experience for the clients, an experience not without risk,<sup>160</sup> without informing them of what they are about to be exposed to or the true reasons for exposing them, is surely an act of manipulation.

Simon's model of Critical lawyering is troublesome in part because it authorizes such stark manipulation of clients, and so undercuts the client's opportunity to make his own choices—the first form of autonomy on which we have focused. The preceding pages have argued, however, that manipulation may be justifiable, despite its interference with some aspects of clients' freedom to choose if its purpose is to remedy deficiencies in their ability to choose that prevent them from fully exercising that freedom.

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159. *Id.* at 483. The account of the deposition quoted does not make clear what advice, if any, the lawyer gave the clients about it. *Id.*

160. This deposition could, for example, have infuriated the camp manager and led to reprisals against those tenants unlucky enough to have witnessed his humiliation.

The Critical model might also be defended as endorsing manipulation as a remedy for client incapacity—here, a political incapacity.<sup>161</sup> But this explanation is itself troubling, because Critical thought affirms so broad a notion of client incapacity, or, to use a more traditional and political term, “false consciousness.” If we push the range of incapacities justifying intervention so far, we begin to dispose of the original premise that adults, our peers in the world we live in, can and should make the decisions that govern their own lives. In certain circumstances political leaders make such judgments,<sup>162</sup> but I suggest that lawyers should normally hew more closely to the principle that their clients are able to choose for themselves.

#### 4. Manipulation in the Interest of Third Parties

Manipulation of clients might be justified, finally, on a third ground: that such conduct is required to protect the interests of third parties or society. The basic legitimacy of some exercise of power by lawyers for the sake of third parties is currently beyond question. After all, lawyers are required to refrain from suborning perjury, even when their clients might help themselves by committing this crime. The reason is that lawyers, even in the lawyer-client relationship, are under some duties, and impose some duties on their clients, derived from obligations to the larger society.

Such intervention raises no problem of paternalism, because it does not claim to benefit the client against his will,

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161. Robert Amdur has emphasized to me the special intrusiveness of such a view of political incapacity. I should note that Critical lawyering may not itself assert the incapacity of clients as the basis for its prescriptions. It may be that Critical lawyers would justify their conduct as an expression of their own values, or as a vindication of the interests of third parties, rather than as a variant on paternalistic responses to incapacity.

162. Thus Michael Walzer has sought to elucidate the moral constraints on activists,

given the claim they commonly make: to speak or act on behalf of oppressed men and women. It is important to try to do this, since the activists are rarely authorized to speak or act on behalf of anyone (I do not mean that they have no right to do so), nor is it easy for the mass of the oppressed to repudiate them because of what they say or do.

M. WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 52–53 (1970). He concludes, in part, that “activists must pay attention to and be guided by the consciousness of the oppressed (even if they hope to change that consciousness).” *Id.* at 59.

but rather asserts that it benefits third parties. By the same token, however, such intervention seems very hard to square with the premise that a lawyer's function is centrally to aid her own clients in expressing and implementing their wishes.

Even if such a sacrifice of clients to third parties were more tenable as a matter of theory, lawyers' intervention with their clients might well fail to serve effectively the interests of third parties. It is surely open to question whether the interventions that such a system would encourage would implement any unified social policy, or would instead merely impose the varying views of individual lawyers—whose views may be quite different from the positions of the public as a whole—on more or less unsuspecting clients. It is also open to question whether lawyers, sharply constrained as they are by their needs for clients and popularity, would apply any principles of intervention with great vigor. And it is, finally, open to question whether clients, if they learned that such interventions were the price of dealing with lawyers, would approach their lawyers with much openness or trust.

Although we already rely on lawyers, perhaps simply for lack of a better alternative, to intervene for such purposes as the prevention of perjury, I suspect that the questions just set out make broader general use of lawyers to control their clients' decisions for the sake of social good unpromising.<sup>163</sup> But that judgment does not support the conclusion that Binder and Price appear to have accepted—that the lawyer should never seek to engage the client in discussion of the political or moral quality of his actions.

On the contrary, a fully autonomous decisionmaker is a person prepared to consider, if appropriate, the correctness of the values he is bringing to bear on his decision.<sup>164</sup> Moreover, such a decisionmaker has the capacity to assess the lawyer's views on political or moral questions, just as he can assess the lawyer's advice on more purely legal issues.<sup>165</sup>

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163. There may well be exceptions to this generalization. For suggestions of settings in which lawyers might be able to play an enforcement role, see Kraakman, *supra* note 118, at 888–96.

164. See *supra* text accompanying notes 119–29.

165. It might be argued that the lawyer who expresses only his own moral views, rather than the full range of possible moral stances on the issue in question, is manipulating the client by presenting him with incomplete information. This argument has some force, and I do think that it behooves lawyers who are giving

Perhaps, in fact, a layman can better assess a lawyer's views on morality, an area in which lawyers probably do not enjoy a reputation for special expertise, than he can judge the lawyer's evaluation of issues of law.

To refrain from raising such arguments on the grounds that expressing them might unduly influence the client is thus to deny the client's competence, and perhaps to diminish this competence by diverting the client's attention from factors he would otherwise consider.<sup>166</sup> Since political or moral arguments may speak to the interests of the decisionmaker himself, the failure to raise such considerations

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advice to acknowledge the existence of other views or even to suggest that the client talk further about the matter with other people whom he trusts.

Once a lawyer has made clear that she is stating only her own view, however, I would not characterize her expression of only that view as manipulation. In part this judgment is a parsing of the concept of manipulation; the lawyer's expression of her own views, presented simply as her own views, provides the client with no more and no less information than the lawyer has promised.

To be sure, it could still be said that the lawyer has withheld other information—other moral views of which she, but perhaps not her client, is aware. But an attempt to express all of the possible views could rob the lawyer's statements of clarity and weaken the force of her own views, and so might prevent the lawyer from engaging the client in a serious moral dialogue. For some clients, at least, only a lawyer who can present her views fully will be able to help her client in a meaningful reconsideration of his position. Thus the lawyer's presentation of her views is akin to the simplification which Binder and Price emphasize is necessary for the lawyer's effective explanation of the consequences of the options available to her client.

To require the lawyer to present opposing views on issues of morality or politics may also amount to a special intrusion on the lawyer's own autonomy, since it would require her to express values of which she herself disapproves. On the offer of moral counsel as an expression of the lawyer's autonomy, see *infra* note 167.

166. To say that lawyers should be able to raise political and moral concerns with their clients does not, however, altogether resolve the question of *which* views the lawyer should raise. There may be circumstances in which a lawyer's frank expression of her values will—far from overwhelming her client—instead profoundly alienate him. Thus, for instance, a lawyer might indeed hesitate before urging the virtue of confession on a criminal defendant.

As Robert Dinerstein has pointed out to me, there may also be situations in which the lawyer should at least put before her client values she does not share. A defendant in a politically charged case, for example, may need to be reminded of the selfish reasons for accepting a plea bargain. I am inclined to view these instances as results of the obligation of lawyers to ensure that their clients understand the advantages and disadvantages of the options they are weighing, and, as such, as justified limitation on lawyers' autonomy.

may also blunt the decisionmaker's perception even of his own self-interest.<sup>167</sup>

Nonetheless, it is surely true that some clients whose lawyers seek to press political views upon them will yield to these arguments for such manipulative reasons as their assumption of the need to defer to their lawyers. The way out of this conundrum is not, however, to silence lawyers' political and moral speech. Instead, we should seek to recognize both the propriety of lawyers' *nonmanipulative* efforts to persuade their clients to reassess the moral or political rectitude of their acts, and the importance of preserving clients' decisionmaking authority. More generally, we should seek the contours of a practice that will support each of the three elements of clients' autonomy identified earlier in this Article: the client's enjoyment of the opportunity to choose, his attainment of the capacity to choose, and his full exercise of that capacity.

## 5. Practice in the Support of Clients' Autonomy

To discern the course of a practice in support of clients' autonomy, we must confront the uncomfortable reality that efforts to aid one aspect of a client's autonomy may undercut the client in another respect. Elaborate education or subtle emotional approaches meant to remedy clients' decision-making deficiencies may tax the lawyer's skills and both parties' time and money. As a result, these well-intentioned steps may diminish clients' access to the help they need if they are even to recognize the opportunities for decision-making that confront them. The careful use of active listening to help the client develop some assurance that he is capable of making decisions may also engender such trust and affection for the lawyer that advice from the lawyer which the client would previously have dismissed out of

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167. As Fried also points out, the lawyer herself is (or aspires to be) an autonomous person. He suggests that a lawyer who gives advice to her client on moral issues "experiences the very special satisfaction of assisting the client not only to realize his autonomy within the law, but also to realize his status as a moral being." Fried emphasizes that the lawyer is "in no way disentitle[d] . . . from experiencing this satisfaction." Fried, *supra* note 119, at 1088. I would add that the legitimacy of such counseling tends to diminish the force of an argument that lawyers should be entitled, for the sake of their own moral integrity, to manipulate their clients with greater freedom. See *supra* text accompanying notes 133-34.

hand, or evaluated with detachment, comes to enjoy the status of Holy Writ.

Perhaps no set of steps that an attorney can take will provide absolute assurance against manipulation.<sup>168</sup> But we have not sought in this exploration of lawyers' interaction with their clients to erase the shadow of manipulative motives or effects altogether, and it is possible to suggest the elements of a practice that would seek to support clients' autonomy more fully than the model suggested by Binder and Price, or the opposing visions offered by William Simon.

The guiding goal of such a practice is that a lawyer should strive to enable her client not only to know what choices await him, but also to reach full decisionmaking capacity, and then she should participate in her client's exercise of that capacity by offering information, legal advice, and those other perspectives, be they moral or political, that constitute the "fullness of [her] experience." Unfortunately this goal, however ideal, may often be unattainable precisely because it may be impossible to assist a client's autonomy in one respect without damaging it in another.

That reality requires the lawyer to make judgments, early in the case and perhaps repeatedly thereafter, about her client's needs. Clients come to lawyers with legal problems, and it is reasonable to say that the lawyer's first duty should be to insure that her client has the capacity to confront the principal legal choices awaiting him. To this end, the lawyer may conclude that she must offer the client such intense, even therapeutic support that she will ultimately win his deep trust and affection. If so, she may then be constrained to follow the suggestions Binder and Price offer for the scrupulous avoidance of advice—advice which her trusting client no longer could resist.

If, on the other hand, the lawyer discerns that her client's decisionmaking capacities are more substantial, she may find that she can help him to acquire the information he needs, and to organize it for evaluation, without eliciting such strong emotional bonds. She may, for example, be able

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168. Simon believes that the Critical lawyer must "remain open to persuasion by the clients; she as well as the client is vulnerable to change in the process of representation." Simon, *supra* note 153, at 488–89. This is surely an appropriate admonition, but Simon does not suggest that such openness will resolve the problem of lawyers' power over their clients.

to state from the start that she does not approve of her client's past conduct, but that she is prepared nonetheless to work zealously to resolve the problems he now faces. Having treated her client with more distance, she will then be in a position to address him with more frankness. Such a posture will allow her to offer her views on his alternatives, and even on his moral and political concerns, without undue fear of overwhelming him.

It will surely not be easy for lawyers to distinguish these two groups of clients, particularly since any given client may move from group to group in the course of a case. But, with some hesitation, I suggest that the underlying concern for clients' autonomy also offers us a guide to the resolution of close questions about clients' competency—namely, that the lawyer should favor the conclusion that her client is fully competent. This disposition will help protect the client (and the lawyer) from the risk, reflected in the model of Critical lawyering, that the lawyer will adopt so sweeping a concept of clients' diminished capacity that many or even most adult citizens will be considered unable to enjoy full autonomy.

Finally, candor requires the recognition that the development of a relationship that is both reasonably trusting and reasonably free of lawyers' domination may take considerable time<sup>169</sup>—time that may be unavailable. The results of these time constraints can be painful. A lawyer may, for example, believe she must manipulate the client intensely in order to protect his interests, because there is no time to help him develop a capacity to assess his interests well himself. In another case she may conclude that she must refrain from offering her client counsel that she otherwise would provide, because in the circumstances this advice would be manipulative. While her goal should still be to protect the client's autonomy as fully as possible, she may well be unable to protect more than the client's most immediate and obvious interests in the situation.

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169. Donald Gifford has emphasized the development of the lawyer-client relationship over time. D. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context* (1986) (paper presented at the UCLA-Warwick International Clinical Conference).

## CONCLUSION

We have arrived at an uncomfortable destination. Having set out to protect clients' right to make decisions while not altogether abandoning the goal of protecting their best interests as well, we have found that it is ultimately impossible to assist clients' decisionmaking without at the same time jeopardizing it, and that the effort to enable clients to make their own decisions may well entail manipulating them as well. These conclusions do not leave us with an easy or clear path to a truly client-centered practice. In finding that the protection of the autonomy of clients is an ambiguous and complex task, however, we have only encountered in the interaction between attorneys and clients a difficulty we must recognize throughout our struggle to be free.



