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# Manipulation by Client and Context: A Response to Professor Morris Reply

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# REPLY

## MANIPULATION BY CLIENT AND CONTEXT: A RESPONSE TO PROFESSOR MORRIS

Stephen Ellmann\*

In his thoughtful comment<sup>1</sup> on my article,<sup>2</sup> John K. Morris raises two broad issues. I sought to explicate the contours of lawyering practice in the support of clients' autonomy, and the latter part of Morris' piece proposes to redraw some of these contours.<sup>3</sup> I also used lawyers' responsibility for supporting their clients' autonomy as the touchstone for judging their treatment of their clients, and in the first part of his article Morris argues for the importance of other interests as well.<sup>4</sup> Let me first consider again the proper elements of practice meant to aid clients' autonomy, and then ask whether and to what extent such practice should be modified because of interests other than the clients'.

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\* I am grateful to Robert Amdur and Nancy Rosenbloom for their comments during my work on this response.

1. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781 (1986).

2. Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1986). I had the benefit of reading Professor Morris' comment before making my last, minor revisions to my own article, but none of these revisions, I think, altered the substance of our differences of view. More importantly, I had already substantially rewritten the paper which Professor Morris had available to him when he drafted his piece, and largely as a result the debate between us may seem somewhat less pointed than it might otherwise have been. Nonetheless I believe that our areas of agreement and disagreement still to a large extent emerge.

3. Morris, *supra* note 1, at 800-09.

4. *Id.* at 785-800.

## I. THE PROTECTION OF CLIENT AUTONOMY

In my article I argue that the techniques of interviewing and counseling recommended by David Binder and Susan Price<sup>5</sup> in their guidelines for client-centered practice are in many respects manipulative.<sup>6</sup> I also suggest that important instances of the manipulative conduct they recommend, as well as some they do not urge, can be justified. Specifically, I accept the use of non-judgmental empathetic understanding as a way of helping emotionally troubled clients, and offer the same rationale for the carefully structured decisionmaking process that Binder and Price endorse.<sup>7</sup> I also assert the appropriateness of manipulation when an ill-informed client cannot be effectively helped by either education or simplification to understand the issues he must decide.<sup>8</sup> But I emphasize as well that manipulation is a troublesome form of attorney behavior, which should not be undertaken without justification and which may, if used at one point in an attorney-client relationship, constrain the attorney's behavior at other, later stages.<sup>9</sup>

Morris agrees "that lawyers influence clients in a variety of ways, that it is worthwhile to examine the effects of such influence, that client autonomy and client decisionmaking are important, and that interference with client decisionmaking requires justification."<sup>10</sup> But he resists calling client-centered techniques "manipulation," and he defends some of these techniques—including some that I also accept—on rather problematic grounds.

A. *The Definition of Manipulation*

Should the techniques I discussed be called "manipulation," or should they be classed under Morris' rubric of "influence"? I defined manipulation as "an effort by one person to guide another's thoughts or actions in a direction desired by the person guiding, by means that undercut the other

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

6. Ellmann, *supra* note 2, at 733-53.

7. *Id.* at 768-69.

8. *Id.* at 767.

9. *See, e.g., id.* at 776-78.

10. Morris, *supra* note 1, at 783 (footnote omitted).

person's ability to make a vigilant decision."<sup>11</sup> Such conduct includes "lying, for example, or withholding of relevant information, or playing on emotional needs of which the other person is unaware."<sup>12</sup> Morris argues that "manipulation" is unfairly pejorative.<sup>13</sup> One response might be that lying and comparable conduct plainly deserve a pejorative label.

But this answer would not be sufficient, and I do find Morris' objection troubling. I take him to be arguing that much of the behavior in which I find falsity, withholding of information, or similar features is actually so benign, or familiar, or essential that its dissection in this manner is unfair. To Morris, the manipulative elements of this conduct are, perhaps, simply too insignificant, too "trivia[l],"<sup>14</sup> to warrant so harsh a label as "manipulation."

Client-centered techniques surely *are* sometimes employed in circumstances so substantially free of manipulative design or effect that they do not constitute manipulation. Whatever the proper label for discrete instances or elements of such lawyering, however, the battery of techniques available to the client-centered lawyer offers, particularly in the aggregate, the potential for substantial interference with clients' decisionmaking. Moreover, we certainly should not avoid the term "manipulation" because of the good intentions of those who use these techniques; paternalistic manipulation is surely familiar conduct among parents, governments, and, I suspect, lawyers.<sup>15</sup> If we do not face squarely those elements of even well-intentioned lawyering that represent the deflection of one person's emotions or understanding by another, we can hardly hope to fashion less intrusive methods of practice. And if we call such conduct by the colorless term "influence," we may also miss the

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11. Ellmann, *supra* note 2, at 732.

12. *Id.* at 726.

13. Morris, *supra* note 1, at 800-01 n.78.

14. *See id.* at 805.

15. Nor do dictionary definitions assert, as Morris seems to, *see* Morris, *supra* note 1, at 800-01 n.78, that only conduct directed to the actor's own advantage is manipulation. *See id.* (quoting VI OXFORD ENGLISH DICTIONARY 125-26 (1933) (manipulation is "[t]he act of operating upon or managing persons or things with dexterity; *esp.* with disparaging implication, unfair management or treatment")); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1376 (1971) (definition 1(d) of manipulation: "management with use of unfair, scheming, or underhanded methods *esp.* for one's own advantage"). Selfish manipulation may be the most familiar form—but selfless manipulation is hardly unheard of.

moral truth that even such benign intervention can make profound and troubling inroads on its subjects.

B. *The Use of Non-Judgmental Empathetic Regard*

These differences of terminology are reflected in the differences of substance that Morris identifies as well. Morris clearly feels that substantively, as well as definitionally, at least one form of attorney conduct that I argued was manipulative, the use of non-judgmental empathetic regard, does not deserve a great deal of concern.<sup>16</sup> He suggests that empathy works only if it is sincere;<sup>17</sup> from this premise it might be argued that any efforts by the lawyer to project empathy while feeling other, or additional, emotions will be unsuccessful.<sup>18</sup> This conclusion, however, does not necessarily follow from its premise. If we can love the sinner and hate the sin, it seems likely that a lawyer can sincerely feel empathy for a client while also feeling a variety of other emotions, such as disapproval. When the lawyer sincerely expresses her empathy, but conceals other, less supportive emotions in order to avoid being judgmental, she may well be acting manipulatively.

Suppose, however, that such an incomplete self-presentation will in fact register on the client as insincere and so lose any manipulative force it might otherwise have had. If so, this would certainly moot any ethical worry about the fal-

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16. Morris, *supra* note 1, at 803-05.

17. *Id.* at 803-04 & n.94. If clients will see through false or incompletely presented feelings, then in lawyer-client encounters where the lawyer's feelings take on importance for the client, only lawyers with positive feelings, or perhaps even wholly positive feelings, could meet the clients' requirements. It might then be argued that in such circumstances "counselors and clients have to like each other for effective legal consultation to take place." Robert S. Redmount and Thomas L. Shaffer raise this possibility, and appear partially to accept it for non-litigation contexts, in R. REDMOUNT & T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* 19-23 (1980).

18. I do not think that Binder and Price would agree that a lawyer can use empathy only if that is her sole emotion towards the client. Binder and Price take up this issue in their discussion of "difficulties in mastering active listening." D. BINDER & S. PRICE, *supra* note 5, at 33-34. They suggest that an interviewer who feels unable to empathize with a client may only be unable to empathize with particular feelings, *id.* at 34, and so, presumably, could express empathy with other aspects of the client's situation. They also describe at length, though they do not expressly endorse, "a belief that lawyers can adequately employ active listening techniques even though they cannot truly empathize . . . . For lawyers with these beliefs, such action is the only appropriate response of a professional whose job is to represent people in need." *Id.*

sity or incompleteness of non-judgmental empathetic regard. If we extend the argument to suggest that clients will perceive insincerity whenever it appears in the lawyer's use of any of the facilitators described by Binder and Price, then we could dismiss concern about falsity in interviewing altogether. We would also then have to ask whether lawyers can effectively interview clients, or witnesses, in circumstances where they cannot sincerely deploy some or all of these facilitators—or, at least, whether some other arsenal of weapons besides those offered by Binder and Price is available for such cases.

But we *know* that lies and half-truths sometimes work. Perhaps, as Morris suggests, a client-centered psychotherapist cannot function effectively unless she is able to be genuine and "real" in her sessions.<sup>19</sup> It may well be true that a lawyer who feels absolutely no positive feeling towards a client cannot adequately represent him.<sup>20</sup> Yet, as Morris himself points out,<sup>21</sup> legal counseling is not identical to psychotherapy. Legal counseling is likely to be fairly brief,<sup>22</sup>

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19. Morris, *supra* note 1, at 803-04 & n.94 (quoting Rice, *The Relationship in Client-Centered Therapy*, in *PSYCHOLOGY AND PATIENT RELATIONSHIPS* 36, 42 (M. Lambert ed. 1983)). I must admit to doubt that even client-centered therapists always feel for their patients only the empathic understanding and unconditional positive regard that Rice describes as being additional conditions of effective client-centered work. A more psychoanalytic theory, by contrast, seems to expect the therapist to develop a range of emotional reactions to her patient, known as the "counter-transference," and stimulated both by the actual interaction between patient and therapist and by the therapist's own past experiences and psychological traits. See WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* 11-26 (1976), *quoted in* G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 230-32 (1978).

20. In such cases as these, "a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30 (1981) [hereinafter MODEL CODE].

21. Morris, *supra* note 1, at 803-04 n.93.

22. In courts of general jurisdiction, "a typical [litigated] case involves relatively few lawyer hours . . ." Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 90 (1983). Donald Gifford has used data from this study to estimate the time spent in negotiations, *see* D. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context* (paper presented at the UCLA-Warwick International Clinical Conference), and we may similarly estimate the time spent in client sessions. Trubek and his colleagues report data indicating that the median case studied took 30.4 hours of a lawyer's time, and that the mean for these cases was 72.9 hours. Trubek, Sarat, Felstiner, Kritzer & Grossman, *supra*, at 90. They also report that lawyers spent 16% of their time in these cases conferring with their clients. *Id.* at 91. (Perhaps some additional time described

so that the client does not have the time to perceive the nuances of behavior that a therapeutic patient might pick up. The client may also be less likely to scrutinize his lawyer with the intensity that a patient may bring to bear on his therapist, for he probably expects from the lawyer legal assistance rather than a probing of his most intimate thoughts and feelings. While clients may sense the lawyer's concealed feelings even in briefer interactions, and may maintain some measure of reserve towards the lawyer as a result, we cannot assume that they will be fully aware of, or immune to, the lawyer's insincere efforts at empathy or other encouragement.<sup>23</sup>

### C. *The Structuring of Client Decisionmaking*

Morris does acknowledge that another aspect of client-centered lawyering, the lawyer's withholding of her opinion, presumably does influence clients, even if it does not manipulate them. But he argues both that the lawyer should decide how to structure the decisionmaking process and that this particular structure, in which the lawyer withholds her opinion, is appropriate.<sup>24</sup> While I do not wholly disagree with either of these conclusions, I address these questions by routes somewhat different than those Morris follows.

The lawyer should choose the structure of the decisionmaking process, Morris writes, because the lawyer is more competent to do so, and because her doing so is consistent with client expectations.<sup>25</sup> To say that the lawyer is more competent suggests that the choice of a decisionmaking method is a matter of technique and expertise rather than a question of values. A client who prefers to make decisions impulsively, however, may be expressing a conviction about how he wishes to lead his life rather than a misunderstanding

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as factual investigation also involved the clients, but this possibility need not concern us here.) A rough figure for the median time spent in client conferences, then, would be 16% of 30.4 hours, or slightly less than 5 hours. It seems plausible that comparable nonlitigated cases involving individual clients call for attorney-client sessions of somewhat similar length.

23. For additional discussion of the reasons for concern that unsophisticated clients may accept, or even exaggerate, the warm feelings they perceive from their lawyers, see Ellmann, *supra* note 2, at 734-39.

24. See Morris, *supra* note 1, at 805-07.

25. *Id.* at 427.

ing of the most efficient mode of decisionmaking.<sup>26</sup>

Moreover, even if we view the choice of a decisionmaking method as solely a matter of technique, it is far from clear that lawyers' skills in decisionmaking are so sharply superior to those of their clients that lawyers should make the decisions about process unilaterally, without consultation and without even acknowledging that decisions are being made. Morris is no doubt correct that "[l]awyers are more likely than clients to have thought purposefully about how to structure the attorney-client interaction,"<sup>27</sup> but we may well question how thoroughly lawyers have pondered this matter and how much expertise their thinking has won them.

We may also question the value of expertise in this area. After all, decisionmaking is not an altogether arcane science; everyone makes decisions all the time. Many people may have a quite good idea of how they best make decisions, and some of those ideas may be inconsistent with any preconceived structures favored by their lawyers. Such clients may, for example, be quite capable of telling their lawyer whether they want to hear her advice or not.<sup>28</sup>

Morris might suggest that such people as these should indeed be treated differently by lawyers, but that other clients, the ones he believes I am concerned with, are not so capable. Morris sees the clients on whom I focus as perhaps being at one "extreme[] of the client continuum"<sup>29</sup>—competent but unsophisticated, powerless, and distraught. Though such people are indeed part of my concern, I believe that the range of clients potentially subject to manipulation or coercion is considerably broader than this. I wrote

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26. See Ellmann, *supra* note 2, at 729.

27. Morris, *supra* note 1, at 807.

28. The argument that clients have the ability to select, or at least participate in selecting, a decisionmaking process resembles arguments that clients have the ability to make decisions on the merits of their cases as well. For an illustrative example of the latter argument, see D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1977). There Douglas E. Rosenthal addresses at length the question of whether the problems of personal injury litigation are "clear choices which professionals are trained to make with a high degree of certainty according to relatively standardized and objective criteria—choices and criteria which, furthermore, tend to be inaccessible to lay comprehension." *Id.* at 63. He concludes that "so many of the factors that will influence the claim outcome are unforeseeable even to the specialist, that a lay client who knows his own feelings is qualified to participate in the assessment of what is to be gained or lost by alternative choices." *Id.* at 93.

29. Morris, *supra* note 1, at 799.



that my article was “particularly concerned with individual clients, relatively unskilled in legal matters, and relatively disadvantaged in their dealings with lawyers,”<sup>30</sup> and I added my suspicion “that even rich and well-informed clients sometimes find themselves at least subtly steered by their attorneys.”<sup>31</sup> If the class of clients at risk of manipulation is in fact this wide, then it hardly seems plausible to suggest that every member of this group is unqualified to assist in selecting a decisionmaking style.

But even if we focus solely on the most disadvantaged end of the client continuum, as Morris suggests, I do not think we should so quickly assume that clients are unable to participate in structuring their relationship with their attorney. Many people may suffer such inability when they enter the lawyer’s office; some surely will not. Among those who do, the lawyer will find some who can acquire this competence if the lawyer works with them to help them do so. If the lawyer simply assumes her clients are incapable, rather than inquiring carefully of each individual and helping those who can gain this capacity to do so, I think she runs the risk of impinging on an important principle—that “our peers in the world we live in, can and should make the decisions that govern their own lives.”<sup>32</sup>

Nonetheless it could be argued that the lawyer’s choice of decisionmaking method is justified by clients’ expectations, if not by their capacities. Morris invokes client expectations in defending both lawyers’ choosing a method and their deciding, in dealing with substantially disadvantaged clients, that the correct method is to withhold their own views.<sup>33</sup> But the argument from expectations has two profound weaknesses. First, we have very little detailed knowledge of what clients actually expect. If we must rely on speculation, I would suggest that clients probably assume that their lawyers will structure the process and will give advice about what they believe should be done; the latter expectation, of course, Binder and Price normally prefer not to

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30. Ellmann, *supra* note 2, at 719 n.4.

31. *Id.*

32. *Id.* at 773. I realize that a lawyer might find such an effort to evaluate and aid her clients prohibitively time-consuming. If so, she might well be justified in manipulatively structuring the decisionmaking process. My point is not that manipulation must always be proscribed, but that it should always be acknowledged.

33. Morris, *supra* note 1, at 807.

fulfill. Second, and perhaps more important, clients' expectations may grow out of the very disadvantage and confusion that a lawyer seeks to ameliorate. For example, clients may assume that lawyers will exercise control over them because they do not realize that both lawyers and clients could act differently. If clients would not accept the customary allocation of authority after they understood the possible roles they could play, then their uninformed expectations may not legitimize lawyers' continued exercise of that authority.

Having taken such issue with the details of Morris' argument on this score, however, I want to emphasize the extent of my agreement with him. I did not focus on the question in my article, but I agree that lawyers must sometimes structure the decisionmaking process unilaterally, particularly in order to help an otherwise overwhelmed client. Similarly, I acknowledged in my article that there may be cases in which clients require so much support from their lawyer, and are so prone to being overwhelmed by her, that the lawyer should withhold her views on the correct choice among the options the client faces. Finally, I share Morris' conviction that the lawyer must vary the techniques she uses in light of the varying capacities of the clients whom she serves—a belief also evident in Binder and Price.<sup>34</sup> I join in his hope that further scholarship may provide us with guidelines that will assist lawyers in dealing more sensitively with the different clients whom they serve.

## II. THE INTERESTS OF LAWYERS AND OF THIRD PARTIES

While Morris considers my treatment of the lawyer's impact on her client's decisionmaking too exacting, he argues that in focusing only on the protection of clients' autonomy I have unduly narrowed the range of considerations that bear

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34. Binder and Price approve, for example, of the lawyer's provision of her own opinion to a client who is an "independent decision maker." D. BINDER & S. PRICE, *supra* note 5, at 198. They also recognize that even a dependent client may be so intent on hearing the lawyer's opinion of what he should do that the lawyer may conclude that she should provide it. *Id.* at 200. In those cases in which "the client's decision would very likely result in substantial economic, social, or psychological harm in return for very little gain," they recommend that the lawyer intervene in the client's decisionmaking. *Id.* at 203. It is most plainly in their guidelines for the standard client, "someone who is willing [to make] and capable of making a reasonable decision," *id.* at 192, that Binder and Price describe a more limited role for attorneys—one which I have urged should be modified.

on evaluating lawyers' conduct. He maintains that lawyers' conduct should also be shaped in appropriate circumstances by their own interests, and by the interests of third parties or society. I agree that such considerations have a role in lawyers' conduct, but I do not think that they provide very firm justification for manipulation of clients. Though I am not certain whether or to what extent Morris would defend manipulation for the sake of lawyers or third parties, his argument for weighing autonomy interests against these other concerns seems logically to permit the conclusion that manipulation for these reasons is appropriate. It is this possibility on which I want to concentrate here.

I wrote that "a lawyer's function is centrally to aid her own clients in expressing and implementing their wishes."<sup>35</sup> Morris agrees that "client autonomy and client decisionmaking are important,"<sup>36</sup> but perhaps does not concede that client autonomy is "central."<sup>37</sup> Whether client autonomy is *the* central concern of the attorney, or merely *a* central concern, need not detain us. If we merely take as a premise that client autonomy is important, we can address the question of whether manipulative breaches of this autonomy are justifiable.

#### A. *The Interests of Attorneys*

Morris suggests two broad attorney interests that deserve weight: their interest in "the competent and satisfying performance of their craft,"<sup>38</sup> and their interest in the moral quality of their own actions.<sup>39</sup> Morris is quite right in saying that I gave little attention to the first of these, the attorney's interest in her craft. As important as job satisfaction is to an attorney or any other worker, however, I am not convinced that it provides a persuasive reason for attorneys to manipulate their clients.

For the interest in craft to justify a modification of attorney behavior that was otherwise mandated by client concerns, we would presumably have to conclude that without this modification attorneys' satisfaction and effectiveness in

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35. Ellmann, *supra* note 2, at 774.

36. Morris, *supra* note 1, at 783.

37. *See, e.g., id.* at 792.

38. *Id.* at 791.

39. *Id.* at 786-87.

their work would be substantially diminished. I agree that a claim that the forms of practice I endorse were ineffective would raise a serious challenge to their use, though I would probably consider it serious more because of its impact on clients than because of its effect on attorneys. If practice in the support of clients' autonomy is effective, however, then the craft argument for its modification can rest only on the need to increase attorneys' satisfaction. For such an argument to succeed, we would at the very least want clear reason to believe that attorneys were seriously dissatisfied and that the change in question would significantly improve their feelings about their work. Even then, we might well question whether attorneys should be allowed the pleasure of serving their clients less effectively.

We need not resolve that question unless we can discern elements of practice in support of clients' autonomy that do impair lawyers' competence or satisfaction. The most vivid example of so flawed a form of practice that Morris suggests seems to be in his proposed remarks by a lawyer laboriously seeking to dispel any falsity from her friendliness to her client.<sup>40</sup> Since I don't advocate such behavior, I am not troubled by the dissatisfaction or ineffectuality attorneys might experience if they engaged in it. More generally, it seems fair to observe that attorneys' work contains many obstacles and sources of frustration, which attorneys must strive to overcome daily. To some extent lawyers' pleasure in their craft is precisely a pride in overcoming such obstacles. If one of these obstacles were—as indeed it probably is—the challenge of dealing properly with clients, I would assume that attorneys would find satisfaction in meeting this challenge as they do in meeting others.

The lawyer's interest in the moral quality of her actions is a much more serious concern. I entirely agree that lawyers have an interest in acting in accordance with their values.<sup>41</sup> I believe Morris is right to express concern over the potential effect of lawyering on lawyers' characters and to recognize the lawyer's interest in doing morally justifiable

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40. *Id.* at 805.

41. I discuss aspects of this interest in Ellmann, *supra* note 2, at 763-64, 774-76 & nn.165-67. (My brief reference to autonomy in note 166 was added after I had read Morris' comment.)

work.<sup>42</sup> But if this interest is to be the basis for abridging clients' freedom from manipulation, we must again, at a minimum, have evidence that lawyers' moral freedom under existing rules is unduly constricted. Only then would it be necessary to ask whether that freedom should be expanded at the expense of clients.

Perhaps surprisingly, I believe that attorneys already enjoy substantial moral autonomy in their work—more autonomy, perhaps, than they are eager to exercise. The exact borders of this autonomy are not entirely clear, but they are suggested by a series of provisions in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. Lawyers who are offered cases which they find so repugnant that they could not handle them effectively are urged, or perhaps even required, to decline them.<sup>43</sup> Even when lawyers could work effectively despite their distaste for the case, they appear to have some freedom to decline it.<sup>44</sup> Given their discretion to decline cases altogether, lawyers may be able to offer instead to represent clients only for specific purposes, rather than to aid the clients in those objectives of which they disapprove.<sup>45</sup> Once they

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42. See Morris, *supra* note 1, at 787-91.

43. According to the MODEL CODE, *supra* note 20, EC 2-30, a lawyer "should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."

The Model Rules of Professional Conduct direct the lawyer not to take a case if "the lawyer's . . . mental condition materially impairs the lawyer's ability to represent the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(2) (1983) [hereinafter MODEL RULES].

44. The Model Code declares that "[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client," MODEL CODE, *supra* note 20, EC 2-26. Because the Model Code also asserts that "[r]egardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse," *id.* EC 2-27, however, it is difficult to determine the exact scope of a lawyer's prerogative under these rules to reject a case because of moral or other scruples.

The Model Rules' view of this question can be inferred from the provision for lawyers to withdraw from cases if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." MODEL RULES, *supra* note 43, Rule 1.16(b)(3). If the lawyer can rely on this justification for withdrawing from representation that has already begun, she surely can decline to enter a case at all for the same reason.

45. The Model Rules expressly permit a lawyer to "limit the objectives of the representation if the client consents after consultation." MODEL RULES, *supra* note 43, Rule 1.2(c). The Comment to this Rule adds that "[s]uch limitations may exclude objectives or means that the lawyer regards as repugnant," although the

have taken the case, moreover, attorneys remain free—or even encouraged—to press moral concerns on their clients.<sup>46</sup> Should they fail in those efforts (and perhaps even if they never undertake them), they are often entitled to withdraw from a case for moral or other reasons.<sup>47</sup>

In short, lawyers have considerable freedom not to represent clients or objectives of which they disapprove, and, even after they have taken on a case, to challenge their clients or withdraw from the representation if they are faced with morally repugnant demands upon them. To be sure, lawyers' autonomy is not unlimited. For example, lawyers cannot withdraw from litigation if the tribunal forbids their withdrawal;<sup>48</sup> nor are they permitted by current rules to rep-

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lawyer cannot secure the client's consent to incompetent representation or to surrender his right to terminate or settle the litigation. *Id.* Comment.

While the Model Code contains no provision directly paralleling Rule 1.2(c), it does authorize a lawyer who feels that an action in the client's best interest is unjust to "ask his client for permission to forego such action." MODEL CODE, *supra* note 20, EC 7-9.

46. The Model Code urges the lawyer to "bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." MODEL CODE, *supra* note 20, EC 7-8. In the MODEL RULES, *supra* note 43, Rule 2.1, the lawyer is instructed that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

47. Under the Model Code, a lawyer is required to withdraw if "[h]is mental . . . condition renders it unreasonably difficult for him to carry out the employment effectively." MODEL CODE, *supra* note 20, DR 2-110(B)(3). The lawyer is permitted to withdraw if his mental condition simply renders effective work "difficult." *Id.* DR 2-110(C)(4). Withdrawal is also permitted if the client "[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules." *Id.* DR 2-110(C)(1)(e). The lawyer is also at least generally free to seek the client's "knowing and free assent" to withdrawal. *See id.* DR 2-110(C)(5).

The Model Rules mandate withdrawal where the lawyer's mental condition "materially impairs the lawyer's ability to represent the client." MODEL RULES, *supra* note 43, Rule 1.16(a)(2). The Rules also permit withdrawal, even if it will damage the client's interests, where "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." *Id.* Rule 1.16(b)(3).

The two sets of rules also contain fairly similar provisions requiring lawyers to stay on cases where a court has refused to permit them to withdraw, even if good grounds for withdrawal exist. *See* MODEL CODE, *supra* note 20, DR 2-110(A)(1); MODEL RULES, *supra* note 43, Rule 1.16(c).

48. *See supra* note 47.

resent someone whom they cannot serve loyally because of their own personal beliefs or moral convictions.<sup>49</sup> Yet the range of moral discretion open to lawyers overall seems quite substantial.

Of course, the fact that lawyers have moral freedom does not mean that they exercise it. Perhaps various aspects of the lawyer's position, from the habit of adversariness to the need for clients, effectively discourage lawyers from acting according to their own moral convictions.<sup>50</sup> In that case, one might argue that lawyers should be required to act more morally. Lawyers themselves, however, do not appear to desire such constraint—as witness the bar's resistance to a number of potential limits on adversariness contained in the proposals for the Model Rules.<sup>51</sup> Hence further moral constraint on lawyers, if imposed for the sake of their own autonomy, might well constitute unjustifiable paternalism.

Given the extent of lawyers' moral freedom under present rules, and their reluctance to take on greater moral obligations, I think it is difficult to maintain that clients should be subjected to greater manipulation in order to secure their lawyers' moral autonomy. Even if we were to conclude that lawyers' autonomy needed protection, I would think that impairing clients' autonomy through manipulation would not be a preferred solution. Perhaps no other solution exists<sup>52</sup>—but I would want stronger proof of the need for such conduct and of its value for attorney autonomy before adopting a solution that so compounds the moral difficulties of the attorney-client relationship.

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49. Thus the Model Code declares that “[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.” MODEL CODE, *supra* note 20, EC 5-1. (The corresponding Disciplinary Rule, however, appears to permit such representation “with the consent of [the] client after full disclosure.” *Id.* DR 5-101(A).)

The Model Rules offer similar guidelines. See MODEL RULES, *supra* note 43, Rule 1.7(b) and Comment.

50. Deborah Rhode surveys some of these constraints in Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 626-38 (1985).

51. For discussion of the bar's dilution of such proposals during consideration of the Model Rules, see *id.* at 592-626.

52. Murray L. Schwartz expresses considerable, though not complete, pessimism about the prospects for bringing lawyers to take personal moral responsibility for their work in Schwartz, *Comment*, 37 STAN. L. REV. 653 (1985).

B. *The Interests of Third Parties and Society*

Morris also argues that the attorney's treatment of her clients should be shaped by the interests of third parties or of society. I entirely agree with Morris that the moral quality of attorneys' conduct should be judged, in part, by its effects on others besides the client. Moreover, Morris and I appear to be in substantial agreement that in certain circumstances attorneys should give moral, if not political, advice to their clients,<sup>53</sup> although he appears to rest this judgment primarily on the interests of lawyers and third parties,<sup>54</sup> while I assert the client's interest in fully competent decisionmaking as a primary rationale.<sup>55</sup> But Morris argues that the standard for determining when such advice should be given can probably only be "careful consideration of the various interests that are involved."<sup>56</sup> This guidance suggests that he might permit such advice even when its impact proved manipulative, because of the interests of the lawyer and of third parties that it might serve. I have already set out my reasons for resisting manipulation in the interest of the lawyer; I believe that manipulation and comparable exercises of attorney power over clients in the interests of third parties are also likely to be troublesome.

Such conduct is problematic, first, because the need for it is not clear. I share Morris' concern that much of what lawyers do may not promote just results.<sup>57</sup> But manipula-

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53. Morris suggests, in Morris, *supra* note 1, at 808 n.103, that Binder and Price also accept the propriety of moral or political discussion between lawyer and client. I do not think the footnote he cites, D. BINDER & S. PRICE, *supra* note 5, at 148 n.7, wholly bears him out, for this footnote is largely limited to a survey of the bar's ethical pronouncements rather than an explication of recommendations of Binder and Price themselves. Moreover, since Binder and Price are generally opposed to the lawyer's giving her opinion, *a fortiori* they must generally oppose her explicating her own moral and political views about the client's situation—opinions that may not even fully speak in terms of the client's own values. See also Ellmann, *supra* note 2, at 748–50. David Binder has indicated to me, however, that he does believe that there are some circumstances in which the lawyer can appropriately express her own moral views.

54. See Morris, *supra* note 1, at 808–09.

55. See Ellmann, *supra* note 2, at 774–76. I share Morris' belief, however, that such conduct also vindicates the lawyer's own interest in moral autonomy. See *id.* at 859 n.167.

56. Morris, *supra* note 1, at 809.

57. See *id.* at 790. For extended discussion of such problems, see Rhode, *supra* note 50, at 595–626; Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83–122 (D. Luban ed. 1983).



tion for the sake of third parties, like manipulation in the lawyer's interest, is an intrusion on clients' rights. It bears remembering, moreover, that manipulation for these purposes, unlike manipulation on behalf of the client, cannot be called benign—at least from the client's point of view—and so should be harder to justify than the manipulative conduct characteristic of client-centered lawyering. Surely such intrusion should not take place unless less troublesome courses of action are unavailable and unless manipulation is likely to be an effective tool in protecting third parties' rights. I am inclined to think that manipulation could be effective, at least in many cases, but I am not persuaded that lawyers who made full use of their existing ethical discretion would have a pressing need for this further weapon.<sup>58</sup>

Second, public recognition that lawyers may manipulate clients in the interests of third parties seems bound to create problems in attorney-client relationships, even in cases in which the attorney contemplates no manipulative conduct. These problems would resemble those likely to be triggered by the nonprofessional advocacy urged by Simon.<sup>59</sup> Perhaps these difficulties could be ameliorated if lawyers systematically concealed from their clients their belief that they were entitled in some circumstances to manipulate them. But surely such massive concealment, even if it were practicable, would pose ethical problems of its own.

Third, the endorsement of such conduct is troublesome because it is so hard to define appropriate standards for it. This difficulty is evident in Morris' own account. Morris recognizes that "[l]ack of consensus on vague social goals may cause one to hesitate to impair client autonomy in their name."<sup>60</sup> But he asserts that "immediate harm to identifiable persons is easier to ascertain and more concrete in a way that makes it an appropriate counterweight to client autonomy."<sup>61</sup>

I believe this standard is more elusive than Morris acknowledges. After all, "immediate harm to identifiable per-

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58. Perhaps lawyers cannot be persuaded to use their existing moral autonomy. Yet the moral weakness of lawyers is at least a troubling justification for increasing their power over their clients.

59. See Ellmann, *supra* note 2, at 757-58 & n.114.

60. Morris, *supra* note 1, at 793; see Ellmann, *supra* note 2, at 774.

61. Morris, *supra* note 1, at 793.

sons" can be described as the *goal* of much legal action, including criminal prosecutions and many if not most civil suits. Just punishment is not wrong, nor is the just imposition of damages or injunctions, despite the harm they work. The criterion for intervention therefore cannot be "harm" but rather something akin to "unjust harm." But when "injustice" becomes the standard, surely we must approach and frequently enter the realm of "vague social goals" on which there is no consensus.<sup>62</sup>

So ambiguous a standard puts broad discretion in the hands of attorneys. Some lawyers may intervene rarely. We might speculate that these attorneys will be precisely those attorneys who already feel most subject to their clients' power—yet these attorneys, and their powerful and sophisticated clients, are presumably the people whose actions wreak the greatest harm on ill-defended adversaries and undefended third parties. Other attorneys may intervene much more frequently. Again, we might speculate that relatively unsophisticated clients, whose ability to "shop around" for a lawyer may be quite limited,<sup>63</sup> will have little success in identifying those lawyers with whom they feel morally compatible, and so—unlike their more deft and destructive counterparts—will be subject to the vagaries of individual attorneys' moral predilections.

Finally, such conduct is troublesome to the extent that it abridges clients' legal rights.<sup>64</sup> I have argued that the cli-

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62. Thus Murray Schwartz, though he advocates lawyers' moral responsibility for the clients' ends in civil contexts, observes that the question of such accountability "probably touches upon relatively few instances of lawyer behavior. In the overwhelming majority of civil cases, there will be no significant moral issue; the client's ends will be clearly moral ones, or if the moral conclusion is unclear, there will be reasonable arguments on both sides." Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150, 161 (D. Luban ed. 1983). Similarly, Deborah Rhode argues that lawyers can take moral responsibility despite the presence of uncertainty, Rhode, *supra* note 50, at 622-23, but comments that "[f]or lawyers in practice, the appeal of [moral] agnosticism often increases [beyond what law school encourages]. Pure victims and villains are hard to come by; factual uncertainties, extenuating circumstances, and normative dissonance confound all but the rarest cases." *Id.* at 618.

63. See D. ROSENTHAL, *supra* note 28, at 129 (commenting that according to his study of New York personal injury claimants, a study which preceded the rise of lawyers' advertising, "[g]enerally speaking, clients choose the first lawyer they know who comes to mind, the first lawyer recommended to them, or the first lawyer they meet").

64. In my article I wrote that "such intervention [on behalf of third parties] seems very hard to square with the premise that a lawyer's function is centrally to

ent's right to pursue his legal claims is an aspect of his autonomy, the impairment of which should trouble us.<sup>65</sup> While the applicability of concerns for autonomy to institutional clients can be debated,<sup>66</sup> those relatively unsophisticated, individual clients most likely to face manipulation are also probably those whose autonomy is most meaningfully affected by the course of their legal claims. Even where autonomy is not at stake, moreover, the abridgement of legal rights—which are, after all, the product of our efforts at collective self-government—on the basis of individual lawyers' moral codes seems to me to trench on the broad interests of third parties, and society at large, in democratic decision-making. I question, therefore, whether a system that approves such intervention will in fact protect citizens' interests better than the one we now have.<sup>67</sup>

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aid her own clients in expressing and implementing their wishes." Ellmann, *supra* note 2, at 774. This statement was somewhat too broad, at least in one respect, for the lawyer's function is not to aid her clients in achieving her wishes at any cost but to assist them in realizing their objectives within the law. Particularly if the lawyer's interventions merely avert clients' violations of the law, as in the prevention of perjury, the lawyer does not disserve her function of lawfully assisting the client. Moreover, attorneys' efforts to enforce the law are not subject to such forceful charges of vagueness and unpredictability as their efforts to pursue their personal moral or political convictions would be—although these charges may still retain some force.

While attorneys' enforcement of legal standards is thus less subject to some of the objections that I have raised against their protection of third parties in general, manipulation even—perhaps sometimes especially—in the service of law enforcement does seem to me to pose a risk of undermining trust between lawyer and client. Ironically, a requirement that attorneys monitor their clients' compliance with some set of legal requirements might also conflict with lawyers' beliefs that their clients are morally right even if they are legally wrong, and so might limit attorneys' moral autonomy. Before we increase such costs as these by expanding attorneys' law enforcement role, we should first assess whether such a role for attorneys is needed and likely to be effective. *Cf.* Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 888–96 (1984).

I have benefited from discussion of attorneys' law enforcement role with Bruce Ackerman.

65. Ellmann, *supra* note 2, at 759–60.

66. Compare A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 128 (1980) (questioning the application of autonomy to corporations) with Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1075–76 (1976) (asserting the appropriateness of protecting the autonomy of institutional clients).

67. Alan Goldman challenges this concern on a number of grounds. See A. GOLDMAN, *supra* note 66, at 128–33, 140–48. His own proposed standard of intervention, however, seems to me to illustrate the risks entailed in calling for such conduct. For Goldman urges that lawyers:

aid [their] clients in achieving all and only that to which they have

Nonetheless, I have argued that lawyers *should* give moral or political advice to some of their clients. Morris contends that my approval of lawyers' giving such advice is inconsistent with opposition to lawyers' intervening in their clients' decisions for the sake of third parties or society.<sup>68</sup> If the rationale for lawyers' giving such advice were primarily that their advice protected the interests of third parties, this objection would be a telling one.

I suggest, however, that such advice aids the clients themselves, by helping them to make more fully autonomous decisions.<sup>69</sup> Despite their flaws as champions of third parties, lawyers may be able to engage their clients in moral or political dialogue that will have this effect. Lawyers' weaknesses, after all, are hardly unique. Few people have views untainted by prejudice or preconception or self-interest—yet people can learn from encountering each other's different views. Moreover, to the extent that moral or political judgment is informed by experience, lawyers' judgments will sometimes benefit from the broader acquaintance they may have with particular problems (such as, for example, the impact of various divorce custody arrangements on children). Finally, while lawyers' acquisition of moral or political wisdom may be spotty or unpredictable, their attainment of interviewing and counseling skills is more a matter of training and practice. Though they are rarely saints or political visionaries, lawyers can learn to be skilled counselors.

For these reasons, lawyers may succeed in aiding their clients' autonomy by offering them moral or political advice, even though they generally should not seek to protect the interests of third parties by manipulating their clients. The

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moral rights. This would call upon lawyers to exercise independent judgment in refusing to violate moral rights of others even in the pursuit of that to which clients might be legally entitled. It also might call upon them to exceed legal bounds in order to realize moral rights of their clients.

*Id.* at 138. Perhaps Goldman is right that, except where the supply of lawyers is limited, only clients with blatantly immoral legal claims will be unable to obtain representation under this standard, *id.* at 130–31, although this view seems to pay little heed to search costs. But the range of cases in which lawyers might find moral justification for violating the law on their clients' behalf, if such conduct were considered morally praiseworthy, does not seem to confirm Goldman's assurance that such violations of the law will be "rare," *id.* at 146.

68. Morris, *supra* note 1, at 792 n.49.

69. See *supra* note 55.

successes of such moral or political counselors, to be sure, will not be automatic or universal, for the weaknesses that afflict lawyers' judgment and understanding certainly will limit their ability to give fruitful advice. Still, I would hope that on balance such counseling would improve clients' own assessment of moral and political issues, and that the failures of this counseling will themselves promote the search for better methods of carrying out this process.

If such counseling achieves its modest goal, it may also achieve another. When clients address more fully the moral and political impact of their own decisions, they may honor the interests of third parties and of society more wholeheartedly or more wisely, and so, in the end, a lawyer's advice may protect not only the client's autonomy but the needs of those whom the client affects as well. In this indirect way, then, the lawyer's giving of moral or political advice may also be justified as a protection of third parties in society—despite strong arguments against lawyers' manipulation for the same purpose.

All that said, I must still acknowledge that the interests of third parties *could* be so morally pressing that they would justify the moral harm involved in lawyers' manipulation of their clients. But I do not think that the case for general acceptance of the legitimacy of manipulation for the sake of third parties has yet been made.

#### CONCLUSION

Though Professor Morris and I disagree on a range of issues, I suspect that we are in agreement on the answers to many or most of the questions about the proper treatment of clients and others, in particular cases. We are certainly in agreement on the need to continue to refine both our techniques for working with clients and our understanding of the reasons for selecting, or not selecting, particular modes of conduct for particular clients and contexts.<sup>70</sup>

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70. These efforts, to which Binder and Price have already contributed so much, will surely be further advanced by their forthcoming volume (with Paul Bergman) in this field.