

CLIENT-CENTERED COUNSELING: REAPPRAISAL AND REFINEMENT*

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I. INTRODUCTION

Of all the skills that good lawyers must possess, the ability to counsel clients effectively may be the most critical.¹ To counsel clients about their legal problems, lawyers must be knowledgeable about substantive and procedural law. They must be able to engage in strategic planning. They must have well-developed interpersonal skills.² They must be able to predict with some degree of certainty the likelihood of certain results occurring as a result of particular action(s) or failure(s) to act.³ They must effectively communicate to the client the many nuances of their craft in understandable and non-technical language. They must have a breadth of vision that enables them to present to clients a wide range of alternatives and options to consider and weigh. Yet the lawyer's vision must be deep as well as wide, for the counselor must be able to assist the client in examining the underlying reasons for her goals and contemplated actions.⁴ In Anthony Kronman's terms, "[t]he wise counselor is one who is able to see his client's situation from within and yet, at the same time, from a distance, and thus to give advice that is at once compassionate and objective."⁵

Definitions of legal counseling⁶ abound, from the deceptively simple,⁷ through the relatively technical,⁸ and the highly specialized,⁹ to the almost

1. See, e.g., T. SHAFFER & J. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 2 (2d ed. 1987) ("counseling is the heart and soul of lawyering").

2. See, e.g., Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 8 (1975) ("the best lawyer-counselors are those who recognize the human encounter in counseling, who are really open to and accept their client, who respond to the whole person of the client, and who help their clients help themselves"); Feldman & Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311 (1981) (reporting on study that showed that "clients" would rate lawyers with high relational skills and low legal competence higher than lawyers with low relational skills and high legal competence).

3. See generally G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 966-1080 (1978).

4. See A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* 11-12 (1976).

5. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 866 (1987).

6. I use the term "legal counseling" to connote the counseling that lawyers conduct in the course of a lawyer-client relationship. While distinguishing legal counseling from other forms of counseling, such as psychotherapeutic counseling, I do not mean to imply that counseling in the lawyer-client relationship should only concern itself with narrow conceptions of the requirements of the legal system or statements of substantive law. Rather, I argue for a broader

lyrical.¹⁰ But under any definition of the term, an examination of legal counseling must address the complex interactions¹¹ and negotiations¹² between lawyers and clients concerning the variety of decisions within the lawyer-client relationship. Legal counseling inevitably raises questions about the proper role of the lawyer with respect to her¹³ client and the degree of the client's participation in the decisionmaking process. Who should decide what actions to take — lawyer, client, or a combination of the two? Is the lawyer's

conception that eschews legalism in favor of a richer understanding of the client's concerns and goals.

7. See, e.g., D. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 184 (1989) ("*Counseling* can be defined as the interaction between the lawyer and the client as they decide how to achieve the client's best interests") (emphasis in original). Gifford's definition is so broad that it appears co-extensive with the lawyer-client relationship itself.

8. David Binder and Susan Price define counseling as: "[T]he process by which lawyers help clients reach decisions. Specifically, 'counseling' refers to a process in which potential solutions, together with their probable positive and negative consequences, are identified and then weighed in order to decide which alternative is the most appropriate." D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 135 (1977).

9. Some commentators equate client counseling with importuning clients on moral issues. According to David Luban:

"Client counseling" is simply a shorthand way of describing a complex kind of lawyer-client negotiation in which the lawyer brings his or her *phronesis* [practical wisdom] in order to divert clients away from projects that harm the common good. Client counseling may mean kindling the clients' consciences, but more often it will mean inventing alternative ways for clients to satisfy their interests. Sometimes it means persuading clients that the course of action they propose will harm them even when that is not necessarily so. In other instances, client counseling will require threatening to withdraw from a representation or refusing to follow a client's instructions. In extreme cases, it means telling the client that if he does not back away from a course of action, the lawyer will blow the whistle on him.

Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *VAND. L. REV.* 717, 737-38 (1988).

10. Consider the definition of legal counseling that Thomas Shaffer and Robert Redmount have proposed:

Legal counseling is an exercise in value choices: the choice between legality and authority, between historical tradition and immediate needs and circumstances, between transcendent social values and immediate private preferences, between possibility and compulsion, between humanistic concern and the values of rigor and discipline, between concern for self and concern for others, between self-limiting honesty and self-aggrandizing seeking, between the exercise of power and the predominance of humane concern, between change and constancy — the list of opposites could go on.

T. SHAFFER & R. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING* 19-5 (1980). The authors go on to denounce the tendency to see counseling as an essentially technical and ministerial activity. *Id.*

11. Like D. Gifford, *supra* note 7, Joseph Harbaugh and Barbara Britzke define counseling broadly as interaction and argue that the two most important components of counseling are advising (reporting on factual developments and placing those developments in a legal context) and guiding ("the process of assisting the client in making decisions with respect to what action ought to be taken based on the lawyer's advice"). J. HARBAUGH & B. BRITZKE, *PRIMER ON NEGOTIATION: A VIDEO HANDBOOK* 15-16 (1984).

12. See Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93, 96, 125 (1986) ("Lawyer-client interaction involves attempts to negotiate acceptable resolutions of problems in which lawyers and clients usually have different agendas, expectations, and senses of justice.").

13. I use masculine and feminine pronouns interchangeably throughout this article to refer to both lawyers and clients.

professional role to make decisions for the client, advise the client about what decision the client should make, or simply lay out the options and let the client decide? Should client decisions be judged by an informed consent standard? These questions are not unique to the lawyer-client relationship — in some sense they arise in all professional/layperson relationships — but they have particular salience within that relationship.

The traditional view of legal counseling (and the lawyer-client relationship generally) maintains that the client should make the critical decisions concerning the overall goals of the representation, with the lawyer exercising a great deal of influence over how such decisions are made and what the actual decisions are. This view holds that the client should stand by passively while the lawyer lays out all relevant legal considerations for the decision and indicates what decision he believes, as a matter of his professional judgment, the client ought to make. The lawyer then urges the client to make the recommended decision. The client-centered or participatory model of counseling, with the client empowered to make decisions for him or herself, is a response to this traditional model.

Advocates for the client-centered model have made a number of arguments, based variously on philosophical, political, psychological, ethical and utilitarian grounds, for their model's superiority over the traditional approach. Some of the model's most committed advocates are clinical law teachers, who have adopted it for use in both live-client clinical law programs and simulation courses. David Binder and Susan Price's 1977 text, *Legal Interviewing and Counseling: A Client-Centered Approach*,¹⁴ has been the primary influence on these teachers. In their book, Binder and Price propose a counseling model that concretizes their particular version of client-centeredness. Both the number of educators who have adopted the book¹⁵ and the relative paucity of academic criticism that it has received¹⁶ suggest the extraordinary influence of the model within clinical education circles.

But if the Binder and Price model has not been subjected to substantial academic criticism, the concept of client-centered counseling has, at least implicitly. Some writers have criticized its emphasis on client autonomy to the exclusion of other values, especially in circumstances in which the client is not the powerless, disadvantaged client that most clinical programs represent. Others have suggested that client-centered counseling is too time-consuming and

14. D. BINDER & S. PRICE, *supra* note 8.

15. See Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 811 n.21 (1987) (94 schools have adopted Binder & Price text).

16. There are of course exceptions. Stephen Ellmann has made the most explicit criticism. See Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987) (arguing that Binder and Price model contributes to lawyer manipulation of clients). Don Gifford and Paul Tremblay, respectively, suggested criticisms of the model, but did not go into such criticisms in depth and, in any event, adopted the model despite their reservations. See Gifford, *supra* note 15, at 821-22, 830 (criticizing Binder and Price counseling model for unduly simplifying the counseling process, for its de-emphasis of conversational give-and-take between lawyer and client, and for neglecting pre-negotiation counseling), and Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 529 n.65 (eschewing an in-depth critique of Binder and Price but criticizing the model for its inattention to interpersonal dynamics between lawyer and client).

economically infeasible for practicing attorneys. They see the strict client-centered lawyer's reticence towards his client — his unwillingness even to suggest what the client ought to do for fear that he will unduly influence the client's choice — as denying guidance to the clients that need it most. And if, as some argue, one goal of the counseling process is to foster an often contentious dialogue between lawyer and client, the client-centered lawyer's excessive deference to her client denies important dialogic opportunities and results in an unnecessarily impoverished decisionmaking process.

Part II of this article describes briefly the traditional counseling model and outlines the Binder and Price client-centered counseling model developed in response to it. Part III assesses and re-examines the arguments for client-centered counseling. It contends that some of these arguments do not withstand close examination, while others may support a more limited or contextualized version of client-centeredness than advocated to date. Specifically, arguments based on autonomy and socio-historical developments in the professions provide the strongest support for a broad form of client-centeredness. The argument based on political empowerment provides strong support for clients who historically and currently *need* political empowerment, but does not apply to clients who possess substantial economic, social and political power. The psychological argument, when properly limited, can provide powerful support for client-centeredness, but the full therapeutic implications of the argument are troubling. Finally, some arguments, in particular the ethical argument and the utilitarian argument that client-centeredness produces better results for clients, are simply unproven.

In Part IV, the article examines the arguments against client-centeredness in general and the Binder and Price version in particular. These counter-arguments, which emanate from both traditional and Critical Legal Studies perspectives, fail to support the complete rejection of client-centeredness but do illuminate the contextual limitations on its sweep. In particular, they suggest some limitations on the psychological and autonomy arguments supporting client-centeredness. But the critics of client-centeredness have, for the most part, failed to come to grips with the risks inherent in their proposed alternative approaches. In both Parts III and IV, the article offers some speculations about the nature of the client, lawyer, and lawyer-client relationship interests affected by adoption or rejection of client-centered counseling. This approach recognizes that it is not possible to write about these entities as if there were not enormous differences within these categories that substantially affect any analysis of the virtues of client-centeredness.

In Part V, the article contends that the Binder and Price client counseling model, if applied judiciously and with attention to the variety of contextual factors suggested by the above analysis, can provide a useful model for appropriate client-centered lawyering. The article contends, however, that in one critical aspect of the counseling process, the discussion between lawyer and client of the client's alternative courses of action, the Binder and Price model perpetuates an excessively lawyer-centered approach. Part V proposes a variation on the Binder and Price model that is truer to a client-centered lawyer's approach to counseling. The article then applies this model to a client counseling simulation that the author has used in an interviewing, counseling and negotiation course and attempts to demonstrate how the proposed variation

on the Binder and Price model results in a richer counseling session. Finally, the article considers some possible criticisms and limitations of this variation on the Binder and Price model.

II. CLIENT-CENTERED COUNSELING DEFINED

A. *The Traditional Model*

Traditional legal counseling reflects an absence of meaningful interchange between lawyer and client. The client comes to the lawyer with some idea about his problem. The lawyer asks questions designed to adduce the information necessary to place the client's problem within the appropriate conceptual box. At the proper time, he counsels the client by essentially conducting a monologue: the lawyer tells the client something of the nature of his actions on the client's behalf and then advises the client about the course of action he recommends. The lawyer may go into great detail about the rationale for his advice. Alternatively, she may provide a relatively terse recitation of technical advice and let the client decide how to proceed. The lawyer is concerned with the client's reaction to his advice but tends not to value client input, for he believes that the client has little of value to contribute to the resolution of his legal problem.¹⁷ Lawyer and client are likely to talk at, rather than with, each other. Any assurance that the lawyer provides to the client — and it could be substantial — is likely to be based on the client's perception that the lawyer is "taking care of matters" rather than on a belief that the lawyer truly tried to understand the client as a whole, complex person.¹⁸

In general, the traditional legal counseling model assumes that clients should be passive and delegate decisionmaking responsibility to their lawyers; that ineffective professional service is relatively rare; that professionals give disinterested service and maintain high professional standards; that effective professional services are available to all who can pay; and that professional problems tend to call for technical solutions beyond the ken of laypersons.¹⁹

17. See Reed, *The Lawyer-Client: A Managed Relationship?*, 12 ACAD. MGMT. J. 67, 76 (1969) (survey of civil lawyers in which majority believed clients were generally unhelpful in generating solutions to legal problems). See also former Justice Fortas' approving description of Thurman Arnold's approach to lawyering, in which he describes Arnold as never allowing a client "to dictate or determine the strategy or substance of the representation, even if the client insisted that his prescription for the litigation was necessary to serve the larger cause to which he was committed." Fortas, *Thurman Arnold and the Theatre of Law*, 79 YALE L.J. 988, 996 (1970).

18. Cf. J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 100-02 (1984) (criticizing trust relationship between patient and doctor when based on analogy to earliest stages of infant-parent relationship and arguing instead for trust based on the doctor's ability to help the patient make his own decisions).

19. See D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 13 (1974) (table 1.1). Continuing legal education publications are a rich source of the assumptions that underlie traditional legal practice. See, e.g., Shrager, *How to Handle a New Client: The Initial Interview in a Medical Negligence Case*, in *THE PRACTICAL LAWYER'S MANUAL ON LAWYER-CLIENT RELATIONS* 45, 47-48 (1983) (lawyers should be wary of clients who overly complain about the medical profession) [hereinafter *THE PRACTICAL LAWYER'S MANUAL*]; Savitz, *How to Handle a New Client: The Initial Interview with a Business Client*, in *THE PRACTICAL LAWYER'S MANUAL* at 55, 62 (lawyers must control interview because clients tend to ramble and provide unnecessary information); Shull, *Personalized Service*, in *THE PRACTICAL LAWYER'S*

B. *The Binder and Price Counseling Model*²⁰

Client-centered counseling is a critical component of client-centered lawyering.²¹ Client-centered counseling may be defined as a legal counseling process designed to foster client-decisionmaking.²² Its goal is not only to provide opportunities for clients to make decisions themselves but also to enhance the likelihood that the decisions are truly the client's and not the lawyer's. To accomplish these goals, client-centered counselors must attend to the means they employ in the counseling process, as well as the end of client decisionmaking they attempt to achieve.

Binder and Price describe a relatively straightforward, but highly structured, legal counseling model²³ to be used in litigation contexts.²⁴ With respect

MANUAL at 117, 118 (lawyer should keep client informed of developments in his case by sending copies of pleadings and correspondence; even though client is unlikely to understand the information he will at least know that the lawyer is doing something); Bebout, *Promoting Clients' Acceptance of Lawyers' Fees* in THE PRACTICAL LAWYER'S MANUAL at 139, 140 (same; clients also need to be conditioned to pay lawyers' fees).

20. The Binder and Price model, though by far the most popular model of client-centered counseling, is not the only one. See, e.g., T. SHAFER & J. ELKINS, *supra* note 1, Ch. 7. This article addresses differences between the Binder and Price and other models when relevant to the topic under discussion.

21. See Ellmann, *supra* note 16, at 744.

22. I prefer the term "client decisionmaking" to "client-centered decisionmaking" because of the former's emphasis on the client as actual decisionmaker. In theory, a lawyer could be client-centered in his approach and still act paternalistically towards the client, so long as his actions were designed to serve the client's interests as he understood them. On this reading of client-centeredness, even the most traditional, paternalistic lawyers could embrace the term. Both Paul Tremblay and Mark Spiegel have used the term "client decisionmaking" at times in their work to signify client-centered counseling. See Tremblay, *supra* note 16, at 545 n.125; Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 107 (1979). Tremblay also uses the term "client-based decisionmaking," but that term seems to have the same liabilities as client-centered decisionmaking. See Tremblay, *supra* note 16, at 526 (a decision could be based on the client and his needs and yet not be by the client). The term "client-participatory decisionmaking" has the advantage of suggesting the need for the client to take an active role in the decisionmaking process, but unfortunately would also be consistent with a model of counseling in which the client merely contributed her views to the lawyer who then made the ultimate decision. See *infra* note 204 and accompanying text. My choice of the term "client decisionmaking" is not meant to suggest that its use is unproblematic, however. The focus on the client as decisionmaker tells us little about the process by which the client is to make the decision(s) in question. A lawyer could still dominate the decisionmaking process and yet the client might still make the formal decision. As I use the term, "client decisionmaking" connotes a client-based counseling *process* (or means) that leads to client decisionmaking (end) in more than a formal sense. The use of client-decisionmaking as both means and ends parallels the definition and use of the term "normalization" regarding services for people with developmental disabilities. See W. WOLFENBERGER, B. NIRJE, S. OLSHANSKY, R. PERSKE & P. ROOS, *THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES* (1972). If nothing else, the term "client decisionmaking" is the shortest of these various circumlocutions.

If "client decisionmaking" is a tolerable substitute for "client-centered decisionmaking," however, I have not found a comparable substitute for "client-centered counseling." "Client counseling" is too broad a term, embracing the entire area of legal counseling. "Client-based counseling" and "client-participatory counseling" have the same defects noted above. Thus, despite its imperfections, I continue to adopt the convention of calling the kind of counseling that fosters client decisionmaking "client-centered counseling."

23. D. BINDER & S. PRICE, *supra* note 8, at 135-91. The discussion of legal counseling follows an extensive discussion of interviewing. *Id.* at 1-134. Binder and Price (as well as others, see, e.g., G. BELLOW & B. MOULTON, *supra* note 3, Chs. 3 & 8), separate out these

to the basic go/no-go decision²⁵ about whether to litigate,²⁶ the lawyer first sets out the legal alternatives for the client.²⁷ Next, she solicits the client's input on generating additional alternatives. Then, the lawyer engages the client in a discussion of the positive and negative consequences of the options. These consequences include not only the legal consequences, as to which the lawyer is enjoined to make predictions of the most likely outcome of each alternative, but the social, psychological and economic consequences as well.²⁸ Finally, the lawyer assists the client in weighing these consequences with an eye towards having the client make the final decision.

lawyering skills for pedagogical purposes even though interviewing and counseling often blend together during particular sessions between lawyer and client. See D. BINDER & S. PRICE, *supra* note 8, at v-vi; cf. Gifford, *supra* note 15, at 829 (separation of counseling and negotiation processes causes theorists to miss areas of overlap between two). Although this article does not purport to discuss the Binder and Price interviewing model in any depth, the reader should at least understand the context in which the legal counseling session described in the text would occur. The Binder and Price lawyer first conducts an initial interview in which she learns the client's stated goals for the representation and what the lawyer believes to be the relevant facts of the situation. Binder and Price propose that interviews be conducted in three stages: preliminary problem identification; chronological overview; and theory development and verification. D. BINDER & S. PRICE, *supra* note 8, at 53. At the first interview, the lawyer generally gives only cursory legal advice subject to further legal and factual research. *Id.* at 99-103. In addition to discussing techniques of questioning, the authors devote a great deal of attention to the psychological aspects of interviewing and using the technique of active listening to build rapport with clients. *Id.* at 20-37. Subsequent to the interview, the lawyer presumably would conduct legal research and a factual investigation to enable her to advise the client on the legal ramifications of his possible courses of action. At the counseling session, the lawyer would present the options to the client for his consideration.

24. Binder and Price state that their interviewing and counseling models are meant to apply explicitly to litigation contexts only, and not to planning or transactional settings (such as preparation of a will or setting up a corporation). D. BINDER & S. PRICE, *supra* note 8, at v. Nevertheless, the authors note that similarities between interviewing and counseling exist in all legal settings, *id.* at vi, and two book reviewers opined that the overall Binder and Price approach is applicable to non-litigation settings as well. See Frank & Krause, Book Review, 18 CREIGHTON L. REV. 1427, 1437 (1985). It would seem that the book's focus on litigation is particularly relevant to its interviewing model because that model is predicated on the lawyer obtaining a chronological overview of the facts that would be inapplicable to a will interview, for example. For the most part, this article assesses the use of client-centered counseling approaches in litigation or mixed litigation and planning situations, unless the context indicates otherwise.

25. See J. FREUND, *LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE* 268 (1979) (defining go/no-go decision in part as "whether or not to proceed with a possible course of action. . .").

26. Although Binder and Price explicate their model with respect to "the basic decision to litigate," they maintain that the model is also fully applicable to "auxiliary" dilemmas (such as whether to consult a spouse) that arise during the consideration of litigation. D. BINDER & S. PRICE, *supra* note 8, at 135. See also D. BINDER & S. PRICE, *INSTRUCTOR'S MANUAL FOR LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147 (1979) ("The definition of counseling provided in the text is also generally applicable to decisions other than those involving whether or not to litigate.").

27. Throughout their discussion of the lawyer-client relationship, Binder and Price assume that an individual client comes to see an individual lawyer concerning what the client believes to be a legal problem. For the purposes of the explication of the Binder and Price model, I retain this convention.

28. For a criticism of Binder and Price's failure to include moral and political concerns among these non-legal consequences, see Ellmann, *supra* note 16, at 748-50. Ellmann argues that the non-legal consequences Binder and Price describe relate principally to the client's self-interest. *Id.* at 748.

Binder and Price set out their philosophy of client decisionmaking and its rationale as follows:

The ultimate decision regarding which alternative should be chosen should be based upon an evaluation of which alternative is most likely to bring the *greatest client satisfaction*. If a decision is to be made on the basis of maximum client satisfaction, there first must be knowledge of the importance or value which the client attaches to each of the consequences involved. Only when the client's values are known can there be a determination of which alternative, on balance, will provide maximum client benefit. However, it is our belief that, by and large, lawyers cannot know what value clients really place on the various consequences. We therefore conclude that lawyers usually cannot determine which alternative will provide maximum client satisfaction and that decisions should be left to the client.²⁹

The authors argue further that the ABA Code of Professional Responsibility supports client decisionmaking³⁰ and that the client will be more likely to accept a decision if she has made it herself.³¹

The most controversial aspect³² of Binder and Price's client-centered counseling model is their great resistance to the lawyer giving the client her opinion as to what action the client should take. The authors are concerned that if the lawyer communicates her opinion to the client the latter will end up making the decision that he believes the lawyer wants him to make rather than the decision that is best for him. Because clients frequently "are remarkably sensitive to, and easily swayed by, what they guess their lawyer thinks is best for them,"³³ it is crucial that the lawyer consciously communicate her neutrality to the client.³⁴ Although Binder and Price allow for the possibility that a client who is an independent decisionmaker could receive the lawyer's opinion without being overwhelmed by it, they are concerned about clients who are passive decisionmakers or clients whom the lawyer is unable to categorize as independent. They argue that, in cases where the client asks for the lawyer's opinion about what to do, the lawyer should "parry the initial request with an explanation about why the decision should be made by the client."³⁵ Moreover, as Stephen Ellmann observes,³⁶ Binder and Price apparently would not recommend that the lawyer tell the client at the beginning of the counseling

29. D. BINDER & S. PRICE, *supra* note 8, at 148-49 (emphasis in original).

30. *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 and 7-8 (1980)). For an assessment of this argument, see *infra* Part III.A.5.

31. D. BINDER & S. PRICE, *supra* note 8, at 153. In light of the many arguments that could be made in favor of client-centeredness, see generally *infra* Part III, it is striking that Binder and Price proffer such limited rationales for its adoption.

32. See, e.g., Ellmann, *supra* note 16, at 744 (arguing that "manipulation is an integral part of the lawyering Binder and Price recommend" insofar as they argue that the lawyer should withhold her opinion from the client).

33. D. BINDER & S. PRICE, *supra* note 8, at 166.

34. *Id.*

35. *Id.* at 198.

36. Ellmann, *supra* note 16, at 745 (commenting that in the Binder and Price lawyer's "Preparatory Explanation" at the beginning of the counseling session the lawyer makes no mention of the possibility of giving advice to the client regarding his decision).

session that the client could choose to have the lawyer give him her advice.³⁷ While Binder and Price describe a number of situations in which client decisionmaking may be inapplicable,³⁸ their emphasis on a client decisionmaking model that eschews the lawyer's explicit presentation of advice establishes them as perhaps the strongest advocates of unmediated client-centeredness.

The Binder and Price model is an important contribution to our understanding of legal counseling in general and client-centeredness or client decisionmaking in particular. The model's emphasis on the client's role in the counseling process provides a needed response to the worst excesses of the traditional lawyer-dominated model of counseling. Its view of the professional's role is also refreshing. Implicit in the model is a view of professionalism that does not depend upon mystification of laypeople or obfuscation of those areas in which the professional's expertise is of questionable value to the client.³⁹ The assumptions of the model are fully consonant with developing notions of informed consent in law and other disciplines.⁴⁰ The model's emphasis on psychological aspects of the lawyer-client relationship, while not without controversy, serves a useful purpose in challenging the lawyer's traditional view of facts as objective and given.⁴¹

The Binder and Price model is especially valuable as a model for teaching client-oriented counseling to law students.⁴² Students have few models for counseling prior to entering law school.⁴³ Counseling seems to require a

37. Despite their recognition that independent decisionmakers are likely to be able to resist the lawyer's influence, Binder and Price do not explicitly propose that lawyers of such clients indicate that they are available to give more explicit advice if asked. The distinction between independent and passive decisionmakers appears to relate to the lawyer's response to client-generated attitudes or questions rather than to any reorientation in the lawyer's perception of her role as counselor. See D. BINDER & S. PRICE, *supra* note 8, at 186-87 (where the lawyer knows that the client retains independent decisionmaking capacity, "it may be quite appropriate for the lawyer to comply with the client's request" for her opinion, so long as she explains her rationale in light of her perception of the client's interests) (emphasis added).

38. See *id.* at 153-55 and 192-210 (client-centeredness may be inappropriate where clients are truly incapable of making a decision; where clients have a strong belief in the appropriateness of the lawyer making the decision; or where the client has made a decision that would cause him "substantial economic, social, or psychological harm in return for very little gain").

39. Cf. Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1392 (1984) (lawyers use obfuscatory language as instrument of deception).

40. See *infra* Part III.A.4. Binder and Price refer explicitly to the informed consent analogy in discussing how the lawyer's presentation to the client of the probable results of litigation enables the client to understand the litigation alternative. D. BINDER & S. PRICE, *supra* note 8, at 160 n.2.

41. See *infra* note 194 and accompanying text.

42. See, e.g., Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 809 (1987). As Elliott Milstein has observed to me, some of the Binder and Price book's more categorical statements about interviewing and counseling could be understood as purposely overstated in order to challenge (and even manipulate) students' preconceptions about the lawyer-client relationship. To the extent these statements seem to be overstatements they may be consciously so. Commentators, however, have tended to accept the Binder and Price formulations at face value.

43. The absence of models of the counselor would appear to extend to lawyers themselves, as well as students. See Mindes & Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 185 (descriptions of the "Helper" image of the lawyer, analogous to the counselor, are rare), 207, 212 (lawyers see themselves as "Helpers", and clients see lawyers as "Helpers" as well, but lawyers systematically underesti-

mix of judgment and skill that daunts students. The description of the counseling model, complete with transcript excerpts of counseling sessions that make the lessons of the text less abstract,⁴⁴ can empower students otherwise quite fearful of the prospect of counseling clients. The model's focus on the importance of the client's role in counseling (and the concomitant limitation of the professional's role) serves as an antidote both to the absence of the client from many parts of the law school curriculum and to many law students' easy acceptance of hierarchical relationships between elites and non-elites.⁴⁵ With the exceptions to be noted below, the Binder and Price model is useful as a prescriptive model for students even if its descriptive value of what lawyers actually do in counseling clients is more problematic.⁴⁶

III. THE ARGUMENTS IN FAVOR OF CLIENT-CENTERED COUNSELING

Clinical teachers' widespread acceptance of the Binder and Price client-centered counseling model has tended to submerge the debate about the desirability of the client-centered approach in general.⁴⁷ Advocates for client-centered approaches have made a number of arguments in support of the concept,⁴⁸ but some of these arguments have been less than fully developed. And while many clinical teachers have accepted client-centeredness wholeheartedly, legal commentators writing from different perspectives have challenged at least some of the assumptions underlying the concept.

The arguments for client-centered counseling may be divided into two broad, if somewhat overlapping, categories: systemic arguments, directed

mate the degree to which clients see lawyers in this light). Students who enter law school directly from undergraduate education, with limited life and employment experiences prior to law school, often have had few opportunities to engage in any kind of counseling. In contrast, children engage in negotiation behavior from an early age (as any parent can attest, children negotiate over bedtime, bathtime and other activities even before they are able to talk) and have the opportunity to observe trial lawyer behavior, however imperfectly rendered, on television and in other mass media.

44. There are many examples in Binder and Price of such transcripts. See, e.g., D. BINDER & S. PRICE, *supra* note 8, at 176-80 and 188-89. The disadvantage of the transcripts is that, despite the authors' warnings about applying their model too literally, the transcripts may contribute to students' attempts to parrot the versions of interviews and counseling sessions reproduced in the text. As a result, many students believe that the model is too mechanistic.

45. See generally Kennedy, *Legal Education As Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40 (D. Kairys ed. 1982). But see Morris, *supra* note 42, at 785 n.23 ("[C]urrent law students do not impress me generally as presenting much of a danger of overwhelming anyone with the strength of their convictions about anything.")

46. See *infra* note 342. With their colleague Paul Bergman, Binder and Price are in the process of revising their textbook. Based on an examination of a draft chapter on client counseling, there is some indication that the revised text, while retaining the essence of the client-centered approach described above, adds some nuances that serve to qualify some of the specifics of client-centered counseling techniques discussed in the first edition.

47. Cf. Tremblay, *supra* note 16, at 526 n.49 (noting paucity of literature critical of informed consent as applied to lawyers, defined as roughly equivalent to client-centeredness); Gifford, *supra* note 15, at 815 ("Unlike the near universal acceptance of the client-centered model for client counseling, there is little agreement among legal negotiation theorists regarding a preferred prescriptive model for the lawyer as negotiator.") (emphasis added).

48. Actually, the literature on lawyering contains few extended defenses of client-centeredness *per se*. For a discussion of two of the defenses that have been proffered, see *infra* note 63.

towards analyzing the relationship between the lawyer/client dyad and the legal and political system in which it operates ("macro" analysis), and arguments that look specifically to the lawyer-client relationship and seek to address client and lawyer functioning within it ("micro" analysis).⁴⁹ Within these broad categories there are a number of sub-arguments on behalf of client-centered counseling.⁵⁰

A. Systemic Arguments

The systemic arguments for client-centered counseling comprise a number of sub-arguments: the philosophical argument, which sees client-centeredness as enhancing individual client autonomy; the political argument, which views the development of client-centeredness as a means of empowering economically and politically disadvantaged clients; other political trends, such as feminism, supporting client-centeredness; the socio-historical argument, which attempts to connect developments in the legal profession with parallel changes in professional/layperson relationships in other professions, especially medicine (with its focus on informed consent doctrine); the ethical argument, principally related to the precepts of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct; the psychological argument, which relates client-centered lawyering to developments in client-centered or nondirective psychotherapy; and the argument that client-centeredness produces better results for clients. Some of these arguments, while often made, appear on closer examination to provide questionable, or at most limited, support for client-centered lawyering. Only by examining critically these arguments can the advantages and disadvantages of a client-centered approach be weighed responsibly.

1. The Philosophical Argument: Enhancing Client Autonomy

The core argument supporting client decisionmaking is that it enhances the client's individual autonomy. Autonomy, or self-determination, means that a person can choose and act freely, according to her own life plan.⁵¹ There are many possible definitions of autonomy,⁵² but the capacity to make choices is a

49. I borrow the micro/macro distinction, in a slightly different form, from Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 556 (1980).

50. Any effort to categorize the client-centeredness arguments such as the one proposed in the text runs the risk that the reader will see bright lines where dimmer lines are intended. The purpose of this (or any) categorization is to simplify understanding of the basic issue by organizing the arguments along lines that one hopes are at least plausible. But the particular categorical scheme proposed is less important than an appreciation of the manifold arguments supporting (and, in Part IV, opposing) client-centeredness.

51. See J. CHILDRESS, WHO SHOULD DECIDE? 60 (1982).

52. See, e.g., R. FADEN & T. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 235, 238 (1986) (defining autonomous action, which the authors distinguish from autonomous persons, as action taken intentionally, with understanding, and without controlling influences); Dworkin, *Autonomy and Informed Consent*, in 3 MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 63, 70 (1982) (Pres. Comm'n for the Study of Ethical Probs. in Med. & Biomed. & Behav. Res.) ("Autonomy is a second-order capacity to reflect critically upon one's first-order preferences and desires, and the ability to either identify with these or to change them in light of higher-order preferences and values.") [hereinafter MAKING HEALTH CARE DECISIONS]. Faden and Beauchamp observe that autonomy theorists have tended to adopt either a freedom or authenticity model of autonomy. They suggest that the

key component of the concept.⁵³ Recognizing a person's autonomy is essential to according respect to that person; respect for autonomy is a cornerstone of liberal legal theory and of the American political system.⁵⁴ It can be justified for its intrinsic value and on utilitarian grounds.⁵⁵

A person's autonomy can be compromised in a number of ways. One such way is through paternalism,⁵⁶ which operates in counterpoint to autonomy.⁵⁷ Pure paternalistic actions, which by definition are taken to benefit the person(s) whose will is being overborne,⁵⁸ are problematic precisely because

authenticity model, associated with Dworkin among others, may be a too-demanding criterion for autonomy unless it is seen clearly as an ideal. R. FADEN & T. BEAUCHAMP, *supra*, at 236-37. See also *id.* at 236 (describing Stanley Benn's theory of autonomy and characterizing Benn's autonomous person as "consistent, independent, in command, resistant to control by authorities, and the source of his or her basic values and beliefs. The person's life as a whole expresses self-directedness.") (citation omitted).

53. See, e.g., Ellmann, *supra* note 16, at 759-60 (describing essential components of autonomy as the client's right to make her own choices, her capacity to make such choices and her exercise of that choice-making capacity). The importance of the individual's capacity to make her own choices is also central to Isaiah Berlin's oft-quoted (see, e.g., D. ROSENTHAL, *supra* note 19, at 168) concept of positive liberty:

I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer — deciding, not being decided for, self-directed. . . . I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes.

Berlin, *Two Concepts of Liberty*, in I. BERLIN, *FOUR ESSAYS ON LIBERTY* 118, 131 (1969). While liberty and autonomy are closely related concepts, they are not identical. See Dworkin, *supra* note 52, at 71.

54. See R. FADEN & T. BEAUCHAMP, *supra* note 52, at 7-8; Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 462; Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEMINISM 7 (1989). As feminist theorists have observed, autonomy need not be conceived of as mindless atomism, but can include a person's connections to and relationships with different social and political communities. See *id.* at 10-11.

55. See, e.g., Dworkin, *supra* note 52, at 73 (autonomy has intrinsic and instrumental value). Accord Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315, 336-39 (discussing deontological and utilitarian rationales for autonomy).

56. Gerald Dworkin defines paternalism as "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced." Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 108 (R. Wasserstrom ed. 1971).

Autonomy can also be violated on a person's behalf through coercion and manipulation. See R. FADEN & T. BEAUCHAMP, *supra* note 52, at 258-62. For an extended discussion of the problems of lawyer manipulation of clients and its concomitant denial of client autonomy, see Ellmann, *supra* note 16, and *infra* note 301.

57. See Dworkin, *supra* note 52, at 70 (paternalism is the denial of autonomy; autonomy is "the value against which paternalism offends").

58. Dworkin distinguishes paternalistic interference into pure and impure kinds. See Dworkin, *supra* note 56, at 111. In pure paternalism, the person being benefitted is the person coerced (or whose autonomy is being compromised). In impure paternalism, one person's autonomy is restricted so that a third person may benefit. Dworkin gives as an example of the latter a law that prevents people from manufacturing cigarettes so that cigarette users would not develop lung cancer from cigarettes. Dworkin also uses pure and impure paternalism in another sense in noting that many actions that are paternalistic are also justified on non-paternalistic grounds (motorcycle helmet laws may be justified as paternalistic protection of the motorcyclist

they deny people their fundamental right to make their own decisions in their own ways, even if those decisions could somehow objectively be shown to be wrong.⁵⁹

At least in American society, law plays an important function in facilitating an individual's ability to function autonomously.⁶⁰ As mediators and interpreters of the law, lawyers are the conduits through which people can express their autonomy.⁶¹ By creating mechanisms that empower their clients to make their own decisions in their own way, client-centered lawyers contribute to their clients' autonomy.⁶²

The importance of autonomy led at least two commentators to argue that client decisionmaking with respect to all aspects of a lawsuit is presumptively required.⁶³ Few scholars dispute the importance of autonomy as a value.⁶⁴ The

and as reflecting society's interest in not having the helmetless cyclist become a public charge). *Id.* at 108.

59. See Ellmann, *supra* note 16, at 759-60 (citing J.S. MILL, ON LIBERTY 9 (A. Castell ed. 1947)).

60. See, e.g., Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617.

61. See, e.g., Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976); Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191, 204 (1977). For the role of lawyers as legitimating agents, see *infra* note 115.

While Fried's focus on client autonomy is a useful starting point for analyzing the appropriate role for the lawyer in the lawyer-client relationship, his analogy of the lawyer as special-purpose friend has been justly criticized. See Dauer and Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 106-13. Cf. E. FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 173 (1986) ("A work relationship cannot possibly entail the particularism of an intimate social relationship in which the full-blown uniqueness of an individual is plumbed and responded to freshly and in which time, energy, and cost count for little."). But see Donagan, *Justifying Legal Practice in the Adversary System*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 123, 128 (D. Luban ed. 1983) (friendship analogy not necessary part of Fried's argument) [hereinafter THE GOOD LAWYER]. Of course, as Tom Wolfe observes, a client may do better with a lawyer than with a friend:

What did I tell you the first time you walked into this office? I told you two things. I told you, 'Irene, I'm not gonna be your friend. I'm gonna be your lawyer. But I'm gonna do more for you than your friends.' And I said, 'Irene, you know why I do this? I do it for money.' And then I said, 'Irene, remember those two things.' Idd'n 'at right? Did'n I say that?

T. WOLFE, THE BONFIRE OF THE VANITIES 382 (Bantam Book ed. 1988).

62. Cf. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 744 (1975) ("the ethical practice of law turns on the lawyer's ability to help clients arrive at essential choices, not on the ability to make choices for clients."); Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) (role of criminal defense counsel "is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, not to make choices for him") (emphasis in original).

63. Strauss, *supra* note 55, at 340; Spiegel, *supra* note 22, at 72. Both authors indicate that the presumption can be overcome in certain circumstances, although they describe the circumstances somewhat differently.

Strauss writes that client decisionmaking could be overcome for reasons of professional autonomy (a client should not be able to insist that a lawyer act illegally), efficiency (when client decisionmaking threatens to compromise the legal process itself, or when time is exceedingly short and an attorney cannot communicate within the time-frame the information that would allow a client to choose effectively) and the importance of other values. Strauss, *supra* note 55, at 340-41. For example, Strauss would re-examine client decisionmaking if, given society's strong interest in convicting only the guilty, it resulted in a greater number of innocent people

dispute is over: (1) the extent to which other values, such as the moral autonomy of the lawyer or third parties, may limit the exercise of autonomy,⁶⁵ and (2) whether a client-centered model of lawyering is the best route to maximizing autonomy. The first issue will be discussed in Part IV.A.1, *infra*, though at this point, two preliminary observations are in order. First, in examining models of client counseling the question is less whether client-centeredness fosters client immorality than whether it is any more likely to do so than other client-counseling models. Second, it is not a necessary part of the autonomy argument for client-centeredness that a client's autonomy can never be overridden. Rather, if autonomy is an important value, client-centered counseling is desirable if it furthers autonomy and is especially desirable if it tends to further it more than other client-counseling models, so long as it does not unduly trench upon other important values.

That leaves the second issue respecting autonomy and client-centered counseling: does the model in fact maximize client autonomy? The principal autonomy objection to the client-centered counseling model is that if the lawyer acts paternalistically and exercises more power over her client's choices (and over the manner in which the client considers those choices) the client's

being convicted. *Id.* She then argues that clients are capable of rational decisionmaking, and so, implicitly, we need not fear that an expansion of client decisionmaking would lead to unjust or incorrect results. This is a curious defense of autonomy because it seems to deny the extensive discussion in other parts of the article concerning the importance of respecting autonomy even when it might lead to wrong results. Moreover, it is easy to see how traditional, paternalistic lawyers could use the laudable goal of limiting their clients' convictions to swallow completely the presumption in favor of client decisionmaking.

Spiegel argues that presumptive client control is justified by a congeries of autonomy-based interests, including the client's quasi-property interest in his case and his interest in being adequately represented, as reflected in the structure of the legal system that makes parties the masters of their fate and lawyers their representatives. Spiegel, *supra* note 22, at 73-77. The latter argument sounds in terms of an agency-based rationale for client autonomy. See also D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 324, 324-26 (1988). But see Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 *YALE L.J.* 219, 275 & nn.240-41 (1985) (agency analogy is as yet undeveloped in relationships between professionals and lay persons). Spiegel restates his thesis as: "[A] lawyer should be affirmatively required to obtain informed consent when client values or lawyer conflicts of interest are involved." Spiegel, *supra* note 22, at 73. He then would allow clients to negotiate for either more or less decisionmaking authority, though he would not allow clients to waive their right to informed consent at the beginning of the relationship. *Id.* at 82-83. In Section IV of his article, Spiegel suggests how his division of responsibility would work in specific cases. For example, he would declare as a basic value the client's right to present his story in litigation. *Id.* at 123. The client would be empowered to decide which claims to argue, witnesses to call, and forum in which to file, as well as whether to ask for a jury or non-jury trial. *Id.* at 124. Because of the high risk of lawyer disloyalty, a client would have the right to decide whether to file a lawsuit and whether to conduct discovery. *Id.*

64. But see *infra* Part IV.A.1.

65. Even two of the strongest recent advocates for client autonomy, Charles Fried and Stephen Pepper, recognize that in some circumstances autonomy must be limited. See Fried, *supra* note 61, at 1076 (lawyer's duty is of exclusive concern for the client *within the law*) (emphasis added), 1086 (lawyer is entitled to harm other persons so long as the harm is institutionally sanctioned and not merely personal); Pepper, *supra* note 60, at 614 (lawyer is entitled to act without moral opprobrium on behalf of a client so long as client's goals are legal, even if immoral). As David Luban observed, if no restrictions on autonomy were permissible there would be no rule of law at all. Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 *AM. B. FOUND. RES. J.* 637, 643.

autonomy will actually be enhanced.⁶⁶ The traditional lawyer's decisionmaking superiority over the client is deemed to be based in part on the lawyer's professional and technical training⁶⁷ and in part on the lawyer's status as a dispassionate decisionmaker.⁶⁸

This argument fails on several levels. First, even if lawyer paternalism increased client autonomy in the long-run it would violate the notion of autonomy as a side-constraint.⁶⁹ Second, the danger is great that a paternalistic lawyer would construe a client's disagreement with her views as indicative of the client's lack of sophistication and need for the lawyer's expertise rather than a different (though rational) calculation about what choice to make.⁷⁰ Third, clients must make many decisions that do not primarily implicate the technical expertise of the lawyer but instead implicate the client's personal values, wants and desires; the client, not the lawyer, is the expert on these issues.⁷¹ Finally, the traditional model's assumption that the lawyer will have the best interest of the client at heart is overbroad and insufficiently sensitive both to conflicts of interest between lawyer and client and questionable lawyer competence.⁷²

When compared to the traditional counseling model, then, the client-centered counseling model provides more assurance of client autonomy.⁷³ Yet

66. See, e.g., Spiegel, *supra* note 22, at 85-86.

67. *Id.* at 86.

68. See Basten, *Control and the Lawyer-Client Relationship*, 6 J. LEGAL PROF. 7, 17 (1981).

69. J. CHILDRESS, *supra* note 51, at 64-65, draws the following distinction (after Robert Nozick) between autonomy as a side-constraint and autonomy as an end or goal:

If autonomy is a *side constraint*, it limits the pursuit of goals such as health and survival; it even limits the pursuit of the goal of the preservation and restoration of autonomy itself. In pursuing goals for ourselves or for others we are not permitted to violate others' autonomy. . . . In contrast, when autonomy is viewed as an *end state* to be realized, its function in moral argument is very different. Autonomy is a condition, not a constraint, and the goal might be to minimize damage to autonomy. . . . In this view, some violations of autonomy . . . might be justified because overall more autonomy would result, and that is the desirable end state.

(emphasis in original). He goes on to argue that autonomy as a side constraint is more central to the principle of respect for persons than is autonomy as an end state. *Id.* at 66. In essence, Childress argues that the end of autonomy could not justify means that compromised autonomy.

70. This phenomenon certainly exists in the field of psychiatry where psychiatrists have been skeptical of their patients' complaints about the side effects of psychotropic medications. See, e.g., Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978) (subsequent history omitted).

71. See Spiegel, *supra* note 22, at 100-03; cf. Simon, *supra* note 61, at 52-55.

72. See Spiegel, *supra* note 22, at 87-99; D. ROSENTHAL, *supra* note 19, Ch. 4.

73. Both Basten, *supra* note 68, at 10, 19-23, and D. ROSENTHAL, *supra* note 19, at 2, allude to a third possible model of lawyering, the client-control model, in which the client makes all decisions in the case and the lawyer plays no role in limiting the client. Ostensibly, such a model might enhance client autonomy to a greater degree than client-centered approaches. Both Basten and Rosenthal, however, conclude that no one actually advocates such a model. *But see* Simon, *supra* note 61, at 141 (ideally every client would be her own advocate). If the client-control model is defined as a model in which the client makes significant decisions with the lawyer's input, it is indistinguishable from a client-centered model. To the extent the client-control model allocates no role for the lawyer, it is tantamount to self-representation, and, as such, resolves the issue of the lawyer's role by excluding him from the counseling relationship altogether. Of course, even if a client-control model were superior to client-centered approaches in enhancing autonomy, it might be less desirable as a lawyering model because of its failure to satisfy other interests. See, e.g., Sammons, *Meaningful Client Participation: An Essay Toward*

in one important sense, client-centered lawyering, at least as defined by Binder and Price, may be inconsistent with maximizing client autonomy. As noted previously,⁷⁴ Binder and Price in general require lawyers to refrain from giving clients their opinions on what alternatives the clients should choose. They apparently allow no room for lawyers to attempt consciously to persuade their clients to make particular decisions. But some informed consent theorists have asserted that persuasion is not only an acceptable but a necessary part of an autonomous relationship.⁷⁵ If so, the Binder and Price lawyer denies her client autonomy by eschewing the use of persuasion.

This is a serious argument, but one that, in my judgment, proves too much. Although I will postpone, for now, the full consideration of persuasion's role in enhancing client autonomy,⁷⁶ several preliminary considerations are in order. Whether persuasion enhances or detracts from client autonomy will depend on a number of circumstances, including the nature of the relationship between lawyer and client, the power difference between them, their values, and the nature of the legal problem. Where, in particular and carefully limited cases, persuasion may enhance autonomy, the client-centered lawyer is, or ought to be, permitted to use the technique. But given the propensity of lawyers, and perhaps law students, to act paternalistically toward their clients,⁷⁷ a client-centered model that establishes a presumption against the lawyer's use of persuasion is preferable to one that presumes persuasion is acceptable behavior.

2. Client-Centeredness: The Political Argument

Like all social relationships, the lawyer-client relationship does not exist in a vacuum. It is subject to political, social and economic trends in society.

a Moral Understanding of the Practice of Law, 6 J. L. & REL. 61, 72-73, 87 (1990) (lawyer allows client to participate in resolving disputes otherwise too complex for the client; lawyer also "provides the distance the client needs from himself as a moral agent").

Client-control questions have arisen in the criminal law area concerning, e.g., the criminal defendant's right to self-representation, recognized in *Faretta v. California*, 422 U.S. 806 (1975), and his right to control the issues his lawyer presents on appeal, rejected in *Jones v. Barnes*, 463 U.S. 745 (1983). The issue of lawyer vs. client control in criminal cases, and the consequences of its resolution for federal habeas corpus law, are, for the most part, beyond the scope of this article. For a discussion of these issues, see Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9 (1986).

While perhaps not rising to the level of a model, some Critical Legal Studies ("CLS") approaches question the autonomy-enhancing aspects of client-centeredness and, on some readings, seem to argue that CLS approaches enhance client autonomy to a greater degree. See, e.g., Simon, *supra* note 61, at 134-35, 139. These criticisms are discussed *infra* in Part IV.

74. See *supra* notes 32-38 and accompanying text.

75. See, e.g., Thompson, *Psychological Issues in Informed Consent*, in 3 MAKING HEALTH CARE DECISIONS, *supra* note 52, at 83, 99 ("few would object" to a physician exercising influence over a patient's choice by offering advice so long as she communicates information in an accurate and non-manipulative manner); R. FADEN & T. BEAUCHAMP, *supra* note 52, at 261-62, 346 (persuasion, defined as "the intentional and successful attempt to induce a person, through appeals to reason, to freely accept — as his or her own — the beliefs, attitudes, values, intentions, or actions advocated by the persuader," is not problematic for informed consent and can even facilitate autonomous decisions).

76. See *infra* Part IV.A.1.

77. See, e.g., Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 19 (1975); Bellow, *The Limits of Humanistic Law Teaching*, 53 N.Y.U. L. REV. 592, 644 (1978).

Client-centered lawyering must be placed in the particular political and historical context in which it arose.⁷⁸ Moreover, political situations change. Even if client-centered lawyering and counseling served certain political values when it was introduced, there is no assurance that it continues to serve those same values, or that those values have the same significance today. In this sub-section, I will attempt to analyze briefly two aspects of the politics underlying client-centeredness: the political influences upon the development of client-centeredness and political values that continuing fealty to the concept might serve. My goal here is to place client-centeredness in context and thereby suggest both the possibilities and some potential limitations on its broad applicability.

The origins of client-centered lawyering are inextricably bound up with the development of "modern" clinical legal education⁷⁹ itself. Full exploration of this development would present a fascinating story but one that unfortunately is beyond the scope of this article.⁸⁰ Nevertheless, modern clinical legal education developed in the crucible of the political activism of the 1960's and early 1970's.⁸¹ Many of the proponents of the client-centered approach were

78. See S. Macaulay, *Lawyer-Client Interaction: Who Cares and How Do We Find Out What We Need to Know?* (Working Paper 1984, Disputes Processing Research Program, University of Wisconsin-Madison Law School). Any brief sketch such as this one of the political and intellectual antecedents of an idea (here, client-centered lawyering or counseling) risks either oversimplifying (and therefore trivializing) the nature of those influences or overstating their power in a teleological fashion. Such an approach also risks oversimplification of the idea itself. See, e.g., Gifford, *supra* note 15, at 819 n.40, where the author argues among other things that Charles Fried's lawyer-as-friend analogy is "the most widely accepted contemporary justification for the lawyer-client relationship" and therefore has influenced the development of counseling models. See also *id.* at 817-20 (brief discussion of "political and intellectual trends [that] conditioned" law teachers to adopt the Binder and Price model) (emphasis added). Even if Gifford were right in his characterization of the response to Fried's lawyer-client model, and I do not believe that he is, in order to buttress the claim of influence one would still have to assess whether teachers of client counseling referred to Fried's model as justification for their acceptance of client-centered practices. There is little evidence that they have done so. Bellow and Moulton's *THE LAWYERING PROCESS*, an influential book for clinical educators, see *infra* note 85, does include a lengthy excerpt from Fried's article, but also includes a lengthy criticism (by William Simon) and raises its own concerns with the model Fried proposes. See generally G. BELLOW & B. MOULTON, *supra* note 3, Ch. 2, especially 65, 115-16. Cf. Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 N.Y.U. L. REV. 457, 466-71 (1978) (Fried and clinical teachers described as representing divergent responses to the purposes of legal education). While Fried's focus on client autonomy is useful (though hardly original), I do not think that his influence on client-counseling models has been established. In sum, I think Gifford paints with too broad a brush here. In order to avoid similar problems, I will attempt to restrict my discussion of political and other antecedents of client-centered counseling to those that can be reasonably well-documented.

79. For a discussion of earlier efforts to establish clinical education programs at law schools, see R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* 214-16 (1983).

80. For a brief description of this history, see R. STEVENS, *supra* note 79, at 214-16, 240-41. See also Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 68-69 (1979); Wizner & Curtis, "Here's What We Do": *Some Notes About Clinical Education*, 29 CLEV. ST. L. REV. 673, 674-76 (1980).

81. Many commentators have noted this connection. See, e.g., Auerbach, *supra* note 78, at 470 and, more recently, Barrette, *Content in Context: A Process of Clinical Teaching and Learning*, 14 OHIO N.U.L. REV. 45, 51 & n.11 (1987); *Panel Discussion: Clinical Legal Education: Reflections of the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U.L. REV. 337, 341 (1987) (remarks of Dean Hill Rivkin) ("It was the societal legacy of the sixties, however, that most shaped clinical education.") [hereinafter *Panel Discussion*]; and Barnhizer,

former legal services or public interest lawyers who entered academia as clinical law teachers.⁸² The experience of these lawyer-teachers with poor clients had a profound effect on their assessment of problems in the lawyer-client relationship and their proposed solutions.⁸³ In particular, these teachers' goals of empowering politically disadvantaged clients provided a rationale for client-centered practice on behalf of poor people.⁸⁴

Any discussion of clinical teachers must start with Gary Bellow, one of the founders of modern clinical education, as well as one of its most prominent influences.⁸⁵ Consequently, Bellow's background and views about lawyering assume particular importance in charting the origins of client-centered counseling and lawyering. Bellow's short but influential 1977 article, *Turning Solutions Into Problems: The Legal Aid Experience*,⁸⁶ described a number of practices in which legal services lawyers engaged that raised troubling questions about how those lawyers dealt with their clients. Among other things, Bellow

The University Ideal and Clinical Legal Education, 35 N.Y.L. SCH. L. REV. 1 (forthcoming 1990).

82. Barnhizer, *supra* note 81, at 1, 18 & n.3, 70-71 (large percentage of clinical faculty, identified as such in AALS Directory, who began teaching between 1968 and 1976 had legal services backgrounds; lesser number from public defender and civil rights settings). My interaction with clinical teachers at clinical teachers' conferences and workshops over the last seven years bears out the impression that many clinical teachers continue to come from legal services, public defender (and to a lesser extent) public interest backgrounds. Given the focus of many "live-client" clinical programs on the legal problems of poor people, this connection is likely to remain strong. Cf. Barnhizer, *supra* note 80, at 94 (background and interests of many clinical teachers causes many clinical programs to focus on aspects of public interest practice).

83. Clinicians' felt need to restructure and redefine the lawyer-client relationship was part of the broader experience of poverty lawyers at the time. See J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 269-70 (1976) (describing establishment of Office of Economic Opportunity legal services program).

84. William Simon, in *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 556 (1980), argues that the "Psychological Vision" that he believes animates the thinking of many clinical teachers in fact represents these teachers' abandonment of legal services and public interest practice rather than an embodiment of it. For Simon, these lawyers' frustration with the political realities of a progressive law practice leads them to de-emphasize any political component to lawyering in their clinical teaching. If Simon is correct, that sense of political frustration is likely to be even more intense after eight years of Reaganism. But here, as elsewhere in his article, Simon engages in overbroad generalization that tends to blunt the effectiveness of the otherwise provocative points he wishes to make. Rather than viewing clinical teachers as burnt-out cases from practice, I prefer to see them as uniquely situated to study and profess about the relationship between theory and practice.

85. For Bellow's influence, see, e.g., Menkel-Meadow, *supra* note 49, at 558 (Bellow generally regarded as the "theoretical father" of clinical education), and R. STEVENS, *supra* note 79, at 257 n.93 (Bellow was "[p]robably the most articulate spokesperson for intellectualized clinical legal education") (citation omitted). With Bea Moulton, Bellow wrote *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978), the first "casebook" for clinical teachers. Organized principally along the lines of such lawyering skills as interviewing, negotiation, counseling, and case theory (though a major contribution of the text is its explicit consideration of lawyer values), *The Lawyering Process* gathers an impressive array of material drawn from such diverse fields as literature, sociology, psychology, and game theory. While anecdotal evidence suggests that many students find the book frustrating, perhaps because of the breadth of its focus, clinical teachers continue to draw significant inspiration from it. See *Panel Discussion*, *supra* note 81, at 357 (remarks of Philip Schrag).

In focusing on Bellow's influence, I do not mean to deny the significant influence of numerous other early clinical teachers. But Bellow, while hardly representative of other clinical teachers, was an articulate spokesperson for a viewpoint that gained wide acceptance within clinical circles.

asserted that, in the main, legal services lawyers tended to process their clients' cases routinely; to define client problems narrowly; to impose solutions upon clients without meaningful discussion; and to push their clients into accepting settlements.⁸⁷ He urged that legal services lawyers recognize the political dimension of their practice and discuss with clients the immanent political choices their cases presented. He also stressed the need for legal services lawyers to educate their clients and provide for greater client participation in their cases.⁸⁸

Bellow's advocacy for politically-conscious lawyering, empowerment of poor clients, and increased client participation did not, of course, spring forth suddenly in the 1977 article but was consistent with views he expressed considerably earlier.⁸⁹ His approach suggests a pressing concern with clients' experience of powerlessness and their need for greater participation in both societal institutions and the lawyer-client relationship.⁹⁰ That focus on increased client participation and empowerment was consistent with much of

86. 34 NLADA BRIEFCASE 106 (Aug. 1977).

87. *Id.* at 108-09. Bellow's observations about the practices of legal services lawyers were not unique, nor have the concerns he noted dissipated. See *infra* notes 352, 355.

88. NLADA BRIEFCASE, *supra* note 86, at 119-22.

89. See Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1077, 1087-88 (1970) (interviews with Bellow discussing his views on importance of political organizing and political perspective for dealing with problems of poor people).

Interestingly, Bellow's views do not necessarily support a Binder and Price version of client-centeredness. In particular, his criticism of the professional pose of neutrality and his advocacy for active engagement with the client's cause seem to distance him from the Binder and Price technique. In Chapter 8 of *The Lawyering Process*, ("Counseling: The Circle Closes"), Bellow and Moulton include an excerpt from Binder and Price on counseling. G. BELLOW & B. MOULTON, *supra* note 3, at 1051. The authors note the Binder and Price argument that, because of the subjectivity of client preferences, decisions must be left to the client, but add that "some would argue that this subjectivity justifies more rather than less intervention." *Id.* In Chapter 2 ("Being a Lawyer: The Problem of Values"), Bellow and Moulton attempt to convey the complexity of current conceptions of legal practice and the lawyer-client relationship. While noting their view that the legal profession "does not offer an adequate conception of justice" and pays insufficient attention to issues of class, race, and power, they note also the problems with the alternative visions of lawyer-as-client's tool and lawyer-as-imposer-of-values. *Id.* at 116. They add:

We realize this offers little solace to those who, like us, must daily act amidst these contradictions. But it does point the way, albeit hesitantly, to some possible focal points: (i) the need to begin to articulate a less process-dominated conception of justice; (ii) the importance of the profession's paying attention to problems of privilege (including its own) in American life, and the impact of privilege on the operation of the legal system; (iii) the responsibility of individual lawyers to experiment — with each other and with clients — with modes of relationships which enhance mutuality, honesty and trust. . . .

Id. See also Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 51 B.U.L. REV. 337, 386-89 (1978) (suggesting lawyers take greater responsibility for fairness of clients' ends despite decrease in client autonomy).

90. The *Yale Law Journal* Comment in which Bellow's observations about lawyering for poor people appeared also contained a brief discussion about the client relationships that different public interest lawyers attempted to foster. See Comment, *supra* note 89, at 1120-24. Several lawyers commented about the importance of empowering clients in the lawyer-client relationship, while noting the tension between individual client interests and broader political interests that motivated the lawyers. For a brief discussion of these conflicts, see *infra* note 379.

the citizen participation and community control rhetoric of the 1960's and 1970's.⁹¹ As Stephen Wexler wrote in a 1970 article:

The hallmark of an effective poor people's practice is that the lawyer does not do anything for his clients that they can do or be taught to do for themselves. The standards of success for a poor people's lawyer are how well he can recognize all the things his clients can do with a little of his help, and how well he can teach them to do more.⁹²

While Wexler's observation was made in the context of advocating that poverty lawyers focus more on community organizing than on solely legal solutions, it is consistent with an enhanced role for the client within the lawyer-client relationship.⁹³

The political pedigree of client-centered lawyering is of more than historical interest. The realization that it arose out of a law practice that dealt primarily with poor people is essential to understanding the concept as it has developed. Yet when clinical teachers write about clinical education issues today, few stress the political underpinnings of client-centered approaches.⁹⁴ Rather, it is Critical Legal Studies adherents and others concerned with developing more explicitly political law practices who have stressed the need for greater client participation in the lawyer-client relationship.⁹⁵ Indeed, some of

91. See generally D. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1969); D. ROSENTHAL, *supra* note 19, at 167. See also Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120, 1139 (1968) ([I]ncreased client participation "reflect[s] a growing realization that . . . there is in our society a renewed consciousness of the importance of meaningful participation in matters concerning one's own fate. . .").

92. Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1055 (1970).

93. These developments in the legal field parallel those in other disciplines, such as informed consent in medicine. See R. FADEN & T. BEAUCHAMP, *supra* note 52, at 87-88 (offering tentative hypothesis that informed consent, and its underlying themes of self-determination, individualism and autonomy, "were but instances of the new rights orientation that various social movements of the last thirty years introduced into society," including, *inter alia*, civil rights, women's rights, institutionalized persons' rights, and consumers' rights movements).

94. See *Panel Discussion*, *supra* note 81, at 342 (remarks of Dean Hill Rivkin) (decrying decreased attention in clinical education to political issues); Barnhizer, *supra* note 81, at 15, 32-33 (clinical movement's initial focus on social justice has been superseded by an emphasis on improved legal technique and skills). One must be careful here to distinguish between what clinical teachers *write* about and what they *do* and *teach*. The absence of a substantial body of political literature within contemporary clinical education is undeniably significant. In some sense, what we choose to write about reflects who we are and what kind of discourse we value. But the existence of substantial time and other pressures on "line" clinicians that militate against production of scholarship means that the literature may be less a reflection of what is really going on in clinical education than it would be in other more strictly academic pursuits. Put bluntly, many people are too busy doing it to write about it. See also *Remarks By Gary Bellow Upon Receipt of the 1987 Award of the AALS Section on Clinical Legal Education*, AALS SEC. ON CLINICAL LEGAL EDUC. NEWSL. 13 (Nov. 1987) (clinical teachers feel strongly about widespread injustice in legal system but write about it in excessively restrained manner).

95. See, e.g., Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 376, 407, 409 (1982-83) (urging "power-based" advocacy in which lawyer seeks to develop "a relationship of genuine equality and mutual respect with her client" and to drop pretense of professional mystique that serves to separate lawyers and clients); Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (advocating critical perspective on lawyering in which lawyers and clients struggle in non-hierarchical fashion towards true community of interests, based in part on lawyer's own political understanding); White, *To Learn and Teach: Lessons from*

these writers, far from embracing developing notions of client-centeredness, forcefully criticize the concept.⁹⁶ But if poor and disadvantaged clients needed empowerment in the 1960's and 1970's, it can hardly be contended that they need it less so in the 1990's.⁹⁷

Does its historical relationship to poverty law mean that client-centered counseling should be restricted to representation of poor people? I do not take the argument nearly that far. For one thing, middle-class clients may be significantly disempowered by the legal system.⁹⁸ Power, after all, is relative. Middle-class white women may have a great deal of power in society at large, but may feel essentially powerless if locked into an abusive domestic situation. Middle-class white parents who are parents of children with mental disabilities may be rendered helpless trying to get a recalcitrant school system to provide statutorily-required educational services.⁹⁹ Even the businessperson, such as the one in the simulation discussed in Part V of this article, may be powerless to effectuate his goals because of his adversary's personal and financial power. I do not mean to imply that these situations are all equivalent, or that they raise the same political issues as access of poor people to the legal system. But if the political argument for client-centeredness is an argument about the redistribution of power, one must recognize that power can be redistributed in any number of ways.

Certainly, to the extent that empowerment of clients provides a strong argument in favor of client-centeredness, advocates for the concept must

Driefontein on Lawyering and Power, 1988 WIS. L. REV. 699, 740-41 (quoting South African lawyer on importance of empowering clients in the lawyer-client relationship), 760-66 (advocating lawyering for oppressed groups along lines of "third dimension" in which lawyers (or, as the author describes them, outsiders) engage clients in process of dialogic reflection and action rather than impose solutions on clients). See also Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987) (written by Anita Hodgkiss).

Clinicians and CLS advocates do not, of course, comprise two entirely separate groups; a number of people consider themselves to be involved with both movements. It is beyond the scope of this article to attempt either to define the groups precisely or to draw distinctions among clinicians (e.g., whether they teach in live-client, simulation or externship contexts, whether they teach large-case or small-case clinics, etc.) insofar as such distinctions might affect their views on the political component of lawyering. I also have consciously used the terminology in the text — clinical teachers writing about clinical education issues — to indicate that the issue is not whether clinicians are writing about political issues but whether their work reflects explicit integration of clinical and political themes in the same article.

96. The most vocal critic, of course, has been William Simon. For a discussion of his criticisms of client-centeredness, see *infra* Part IV.A.1.

97. It may be tempting to see client-centeredness as inextricably linked with politically progressive views, but some political conservatives also may be attracted to the concept. See *Are Lawyers Strangling Legal Services?*, 14 HUM. RTS. 25, 26-27, 47 (Spring 1987) (interview with W. Clark Durant III, former chairman of the Legal Services Corporation under President Reagan) (arguing for client-centeredness, client-control, and deprofessionalization of legal services).

98. See, e.g., D. ROSENTHAL, *supra* note 19 (discussing the experiences of middle-class clients).

99. But see Handler, *Dependent People, The State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1010 (1988) (upper- and middle-class parents of disabled children hold their own in administrative process while average lower-class or minority parents do not) [hereinafter *Dependent People*]. See generally J. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* Chs. 3 & 4 (1986).

consider the nature of the client and specifically whether the clients in question are so powerful as not to *need* further empowerment. For such clients, political empowerment is not a compelling argument for a client-centered approach to counseling.¹⁰⁰

Does client-centered counseling in fact contribute to empowering poor and otherwise disadvantaged clients? There are a variety of ways to approach answering this question. Clients empowered in their relationship with their lawyer might carry over that sense of power to their relationship with bureaucracies and other power structures. Furthermore, if client-centered counseling values the client's individual experience by providing an outlet for its expression within the lawyer-client relationship, clients could be expected to have more opportunities to assert themselves authentically within whatever system they are challenging (or being challenged by) by being able to insist to their lawyers that their perspective gets heard.¹⁰¹ Yet client-centered counseling is not a panacea. It does not necessarily address the concerns of some that focusing on legal rights for poor people diverts their attention from the kind of political organizing likely to provide the only hope for fundamental change in their circumstances.¹⁰² And it may be less effective than the critical lawyering techniques that some advocate in redressing fundamental economic and political inequities.¹⁰³ Despite these concerns, however, the client-centered lawyer's commitment to client dialogue, non-routine handling of client problems, and the client's significant role in contributing solutions to his legal problem would be salutary developments in poverty law practice.

100. See *infra* Part IV.A.1.

101. Thus, the political argument for client-centered counseling provides support for a freewheeling brainstorming session between lawyer and client over the various alternatives that the client (as well as the lawyer) sees in the matter at hand. See *infra* Part V.

102. For recent efforts to address the problems and possibilities of rights-based discourse, see generally Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 182 (1987).

103. See sources cited *supra* note 95. There are few explicit efforts to compare the relative political effectiveness (however defined) of client-centered and critical approaches. But see Simon, *supra* note 84, at 523, in which the author criticizes decontextualized client-centeredness that focuses on accepting feelings as perversely *justifying* the disempowerment of clients rather than providing a rationale for overcoming it. Simon also criticizes politically liberal clinical teachers who teach client-centeredness in one context (poverty practice) while sending their students out to another context (the representation of powerful individuals and corporations) where the lessons of client-centeredness may not travel well. *Id.* at 523 n.238. Simon overstates the problem considerably, tending to assume both that clinicians are politically naive and that all law students come from elite institutions that serve as feeders to large corporate law firms. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 783 n.117 (1984) (literature on lawyer dominance derives from models of representation of poor and powerless clients; other different but troubling concerns arise when considering the situation of powerful clients). I do agree with Simon's implicit point that the critical lawyer's commitment to seek political change may make her better suited to a more explicitly political style of lawyering than her client-centered colleague; I leave to others the question of whether such a practice is more politically effective than more conventional approaches. For a recent discussion of the role of the political lawyer, and the justifications for his manipulation of clients for political purposes, see D. LUBAN, *supra* note 63, Ch. 14.

3. Other Political Trends Supporting Client-Centeredness

While representation of poor people sensitized clinical educators to issues of client-centeredness, other political trends have helped to sustain it. Most significant of these trends is feminism, with its emphasis on the relational and dialogic aspects of the lawyer-client relationship.¹⁰⁴ Clinical teachers influenced by feminist thought have emphasized the need to avoid professional domination within the lawyer-client relationship.¹⁰⁵ Feminist theory's focus on the experience of women's domination as a starting point for the transformation of social relationships provides a way of understanding clients' sense of being dominated and the need to move towards a more egalitarian, participatory kind of lawyer-client relationship.¹⁰⁶ On the other hand, feminist theory's insight that the dominant male discourse tends to characterize alternatives in either/or terms provides a cautionary note for any analysis of client decisionmaking that attempts to juxtapose lawyer domination and client domination as the only available choices for the lawyer-client relationship.¹⁰⁷

104. See generally Schneider, *supra* note 102; Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter *Portia in a Different Voice*]. Cf. Menkel-Meadow, *supra* note 103, at 763 n.28 (relationship between feminist theory and problem-solving negotiation).

105. See, e.g., Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go To Law School,"* 38 J. LEG. EDUC. 61, 82-85 (1988) (transformative thrust of feminist theory). Feminist-inspired distrust of professional domination was also an important source of the challenge to the legitimacy of the medical establishment in the 1960's and 1970's. See P. STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 390-91 (1982).

106. See, e.g., Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289, 316 (1989) (arguing that the feminist ethic of care would lead to client participation in decision-making).

107. Cf. *id.* at 315. Feminists have not been the only ones concerned about the false dichotomy between dominance and submission. See R. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* 99-100, 118-19 (1979).

The increasing number of women entering the legal profession may promote greater resort to client-centered approaches to legal counseling. Carrie Menkel-Meadow has speculated that women lawyers may be better able to empathize with clients and see a greater number of issues affecting their clients than do their male counterparts. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 104, at 57-58. See generally Menkel-Meadow, *supra* note 106, at 312-19 (speculations about the effect of increased numbers of women in the legal profession).

Carol Gilligan's book, *In a Different Voice: Psychological Theory and Women's Development*, which posits the greater tendency of women than men to adopt a relational morality of care in their moral reasoning patterns, has greatly influenced legal commentators interested in the effect of gender differences on lawyering behavior. C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). In a recent study applying Gilligan's categories to lawyers' opinions about legal and moral problems, the authors (one of whom was a doctoral student of Gilligan's) opine that because women historically have tended more towards a care orientation (as opposed to a more formalistic rights orientation) they are more likely to bring contextual reasoning into their legal representation behavior. R. JACK & D. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 157-58 (1989). This greater use of contextual reasoning could lead to an increased use of client-centered counseling approaches, in part because a lawyer concerned with the rich context of the client's problem might be more attentive to a broader range of issues than the lawyer who focuses on the client's narrow legal problem. For a discussion of the potentially problematic side of contextual reasoning when applied to counseling clients about moral issues, see *infra* note 286.

4. *The Socio-Historical Argument: Developments in the Other Professions and Informed Consent*

Critical to any conception of client-centeredness is the notion that the client should play a greater role in the lawyer-client relationship. This focus on the enhanced role of the lay client in the professional relationship is tied in part to the demystification of the professional role and parallels recent developments in other professions.¹⁰⁸ A number of commentators have viewed the development of informed consent doctrine in medicine as reinforcing greater client involvement in the lawyer-client relationship. Yet while the informed consent experience has contributed to the development of client-centered approaches in law, the analogy between the two concepts is an imperfect one. This section discusses the critique of professionalism and developments in informed consent. It attempts to draw distinctions between the different senses in which informed consent has been used in order to clarify the utility of the concept for client-centered advocates.

Although the historical and sociological literature on the professions is far too extensive to be summarized here, it is possible nevertheless to sketch out some general themes. Modern professions grew in influence in the United States in the late nineteenth and early twentieth centuries. Their growth coincided with the rise of industrial capitalism and corporate power,¹⁰⁹ and was

I am not aware of any studies on whether minority lawyers are any more likely to be client-centered than whites. Nevertheless, the speculations here might be interesting. Cf. Franklin, *Differential Clinical Assessments: The Influence of Class and Race*, 59 SOC. SERV. REV. 44, 57 (1985) (empirical study in which black social workers were found likely to be more non-directive with clients than were white social workers). But cf. Berman, *Counseling Skills Used by Black and White Male and Female Counselors*, 26 J. COUNSEL. PSYCHOLOGY 81 (1979) (black male and female counseling students in study more likely to use directive counseling style than whites). See generally B. SOLOMON, *BLACK EMPOWERMENT: SOCIAL WORK IN OPPRESSED COMMUNITIES* (1976). It would also be interesting to study whether lawyers from particular ethnic or cultural groups are more or less likely to employ client-centered approaches.

Some studies in non-legal counseling fields purport to show that minority counselees, in contrast to white, middle-class clients, prefer directive over non-directive counseling styles. See, e.g., Ponce & Atkinson, *Mexican-American Acculturation, Counselor Ethnicity, Counselor Style, and Perceived Counselor Credibility*, 36 J. COUNSEL. PSYCHOLOGY 203 (1989) (group of Mexican-American college students preferred directive over non-directive counseling style); *id.* at 207 (citing studies showing that Blacks, Mexican-Americans, American Indians, and Asian-Americans prefer active over passive counseling styles); Atkinson, Matsui & Maruyama, *Effects of Counselor Race and Counseling Approach on Asian Americans' Perceptions of Counselor Credibility and Utility*, 25 J. COUNSEL. PSYCHOLOGY 76, 81 (1978) (majority of Asian-American students in study preferred directive over non-directive style). These studies may not translate well to the legal counseling field because the definitions of directive and non-directive counseling do not correlate closely with client-centered and traditional legal counseling approaches. See, e.g., *id.* (directive style defined as "logical, rational, structured;" non-directive "affective, reflective, ambiguous"). One thing is clear, however: lawyers must be aware of cultural and racial (and gender) differences with their clients that may impede the success of their legal counseling efforts. See Kessler, *The Lawyer's Intercultural Communication Problems With Clients From Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64 (1988); Note, *Cross-Cultural Legal Counseling*, 18 CREIGHTON L. REV. 1475 (1985).

108. That developments in law may parallel those in other professions does not necessarily mean, however, that concepts that are useful in one profession can be applied mechanically in another. See Berger, *supra* note 73, at 34-35 & 35 n.144.

109. M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 4-6 (1977).

closely tied to the increasing power and influence of the middle class.¹¹⁰ Bledstein well summarizes the essential characteristics of the profession as it developed in the late nineteenth century and as it has continued to evolve:

As commonly understood, a profession was a full-time occupation in which a person earned the principal source of an income. During a fairly difficult and time-consuming process, a person mastered an esoteric but useful body of systematic knowledge, completed theoretical training before entering a practice or apprenticeship, and received a degree or license from a recognized institution. A professional person in the role of a practitioner insisted upon technical competence, superior skill, and a high quality of performance. Moreover, a professional embraced an ethic of service which taught that dedication to a client's interest took precedence over personal profit, when the two happened to come into conflict.¹¹¹

Professionals also typically enjoy a significant amount of autonomy in at least some of aspects of their work.¹¹²

Perceptions of the role of professionals in society and the esteem in which professionals are held have changed significantly in recent years. Early

110. See generally B. BLESTEIN, *THE CULTURE OF PROFESSIONALISM* 80-128 (1976).

111. *Id.* at 86-87. Bledstein's criteria are roughly equivalent to those identified by other students of the professions, but different writers tend to stress different characteristics. For example, Richard Wasserstrom notes that professions constitute largely self-regulating economic monopolies; are associated with high prestige and, frequently, economic well-being; often address deeply personal concerns of clients; and involve, at bottom, a significant interpersonal relationship between professional and layperson. Wasserstrom, *supra* note 77, at 1-2 n.1. Interestingly enough, his definition does not include any explicit recognition that professionals enjoy a substantial degree of autonomy in their work, a characteristic that many see as critical to the professional enterprise. See J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 22 (1982) (identifying traditional sociological view that professionals have an unusual degree of autonomy with respect to their clients, based on their superior knowledge base). Wilbert Moore adds to the concept of the profession its commitment to a calling, that is, "an enduring set of normative and behavioral expectations" to which its members seek to adhere. W. MOORE, *THE PROFESSIONS: ROLES AND RULES* 5 (1970). At some level, all definitions of professions and professionals are problematic in that they tend to mix descriptive and evaluative criteria. See E. FREIDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* 3 (1970). See also Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977) (no consensus within literature on definition of a profession). For a criticism of the view that the above characteristics in fact distinguish professions from other occupations, see M. LARSON, *supra* note 109, at xi-xii.

112. See, e.g., W. MOORE, *supra* note 111, at 6; J. HEINZ & E. LAUMANN, *supra* note 111. Freidson writes that "Autonomy of technique is at the core of what is unique about the profession, and . . . when that core is gained, at least segments of autonomy in the other zones will follow after." E. FREIDSON, *supra* note 111, at 45. As Freidson also recognizes, the question of whether professionals have autonomy is a complicated one. Professionals may exercise some degree of judgment and control in their work, but they have limited autonomy in that they often work for organizations in which someone else exercises the important powers of resource allocation and control. See E. FREIDSON, *supra* note 61, at 154-55. See also Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 19 n.57 (1988) (distinguishing among autonomy in organizational form, work conditions, and the larger political economy as distinct issues of professional autonomy). One significant aspect of a professional's claimed autonomy, of course, is her insistence that a client trust her and follow her advice; traditionally, the profes-

twentieth-century scholars presented an essentially favorable picture of the professional.¹¹³ While the writings of post-World War II sociologists reflected some awareness that professionals did not always live up to the high standards they set for themselves, especially when economic self-interest was involved, they also presented an undeniably positive view of the mainstream professional.¹¹⁴ He (and it was inevitably he, not she) was someone, who by virtue of his specialized knowledge and commitment to service, performed an important social function and was entitled to virtually unquestioned respect.¹¹⁵ This functionalist school of sociology gave way in the 1960's to more critical approaches.¹¹⁶ Sociologists from different traditions challenged the view that professionalism inevitably benefitted laypeople. Some sociologists were critical of the power that professionals exercised over laypersons.¹¹⁷ Others stressed the economic self-interest of professionals and attempted to link the rise of professionalism with the exercise of market control and the problems of capitalism.¹¹⁸ These expert criticisms resonated with popular criticisms of the

sional asserted that lay people were not in a position to judge the quality of the services that the professional provided. See Hughes, *Professions*, 92 DAEDALUS 655, 656-57 (1963).

113. See generally E. FREIDSON, *supra* note 61, at 27-28.

114. *Id.* at 28 (citing authors).

115. The most influential sociologist of the professions during this period was Talcott Parsons. See, e.g., Parsons, *A Sociologist Looks at the Legal Profession*, in T. PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 370-385 (rev. ed. 1954). Parsons was associated with the functionalist model of sociology, which emphasized that the expertise professionals develop is of crucial importance to society, and, as a result, "[i]ndividually and, in association, collectively, the professions 'strike a bargain with society' in which they exchange competence and integrity against the trust of client and community, relative freedom from lay supervision and interference, protection against unqualified competition as well as substantial remuneration and higher social status. As guarantees of this self-control they point to careful recruitment and training, formal organization and informal relations among colleagues, codes of ethics, and professional courts or committees enforcing these codes." Rueschemeyer, *Professional Autonomy and the Social Control of Expertise*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 41 (R. Dingwall & P. Lewis eds. 1983) [hereinafter *THE SOCIOLOGY OF THE PROFESSIONS*]. Parsons was well aware of the ways in which professionals, and especially lawyers, served as agents of social control. Lawyers, wrote Parsons, functioned not merely as advocates for their clients' desires but also as filters of improper or unrealistic desires. "The lawyer stands as a kind of buffer between the illegitimate desires of his clients and the social interest." Parsons, *supra*, at 384. Lawyers shape their clients' goals not only instrumentally "but through the impact on the client of the *attitude* of the lawyer, his expressed or implied approval of this as so legitimate that a lawyer is willing to help him get it, whereas other elements of the client's goals are disapproved and help in getting them is refused." *Id.* at 384-85 (emphasis in original). Parsons saw this buffering function in a basically positive light, viewing it as important to maintaining stability in an ever-changing society. Later critics of the professions did not necessarily disagree with all aspects of the functionalist approach so much as dispute the almost naively positive cast to the professions some of its proponents gave. See, e.g., Rueschemeyer, *supra*, at 42-43.

116. See, e.g., Freidson, *The Theory of the Professions: State of the Art*, in *THE SOCIOLOGY OF THE PROFESSIONS*, *supra* note 115, at 19-20 (noting critical approach of 1960's sociological writing and shift from analysis of professional norms and work interaction to economic and political analyses). See generally Haskell, *Introduction*, in *THE AUTHORITY OF EXPERTS* xiii-xviii (T. Haskell ed. 1984) (societal skepticism about professions in the 1960's and 1970's).

117. The most prominent sociological critic of the extent of professional power is Eliot Freidson. See E. FREIDSON, *supra* note 111, Ch. 15; E. FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* (1970) [hereinafter *PROFESSIONAL DOMINANCE*]; E. FREIDSON, *supra* note 61, at 171-78.

118. See generally M. LARSON, *supra* note 109.

professions¹¹⁹ and with other social and political developments in the 1960's and 1970's.¹²⁰

In its most extreme form, the critique of professionalism denies that there is any societal value to having professionals.¹²¹ Most critics, however, do not go so far. Rather, they argue that professional power must be analyzed more closely and the area of legitimate professional expertise defined precisely. Insofar as professionals must deal with technical issues, the role for professional expertise is plain. But to the extent that moral, personal, or other non-technical issues are involved in the professional/layperson relationship, the legitimacy of professional expertise is considerably less clear.¹²²

For the consulting professions like law and medicine that depend on service to clients (or patients), the relationship between professional and layperson is inevitably problematic.¹²³ For Eliot Freidson,

[S]ince the only justification for a consulting profession's very existence lies in the needs of its clientele, the clientele's own conception of its needs should have a strong influence on its practice. Laymen, therefore, must be able to have something to say about whether or when they wish a service and how that service is to be presented. They must be able to have something to say about

119. See, e.g., I. ILLICH, *DISABLING PROFESSIONS* (1977); M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968). For a recent popular criticism of lawyers, see M. MCCORMACK, *THE TERRIBLE TRUTH ABOUT LAWYERS* (1987). While not new, the number and virulence of attacks on the professions increased substantially in the 1960's and 1970's. See Haskell, *supra* note 116, at xiii.

120. See *supra* Part III.A.2. Argyris and Schön describe the dissatisfaction with professional education and the professional role felt by students and young professionals in the 1960's and 1970's, a dissatisfaction that grew out of the student movement of the 1960's and a concern with the problems of disadvantaged people. C. ARGYRIS & D. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 139-41 (1974). Nathan Glazer linked the criticism of the professions to the rise of the consumer protection movement and what he characterized as the revisionist history of social institutions. Glazer, *The Attack on the Professions*, 66 *COMMENTARY* 34 (Nov. 1978). The deep involvement of lawyers in the Watergate scandal not only highlighted the deficiencies in lawyers' ethical training but also led to questioning of such critical components of the professional paradigm as selfless service, ethical conduct, and the success of self-regulation. Cf. Wasserstrom, *supra* note 77. See generally Rothman, *The State as Parent: Social Policy in the Progressive Era*, in W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, *DOING GOOD: THE LIMITS OF BENEVOLENCE* 69-96 (1978) (modern re-thinking of Progressive Era assumptions about the role of the state); *id.* at 84 (in contemporary society there is "a pervasive distrust of all constituted authorities, a general decline in the legitimacy of the authority of a whole series of persons and institutions.").

121. Cf., e.g., Simon, *supra* note 61, at 130-44 (urging non-professional advocacy). In *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1084 n.1 (1988), Simon states that he now does not believe that the professional role need be abandoned. For a critique of the underlying assumptions of anti-professional rhetoric, and an argument that anti-professionalism is actually an embodiment of professionalism, see Fish, *Anti-Professionalism*, 7 *CARDOZO L. REV.* 656 (1986).

122. See E. FREIDSON, *supra* note 111, at 338. A crucial problem is to determine the criteria for making these distinctions and who will apply them. If the professional does the defining, her self-interest and tendency to transform moral issues into technical ones will work to expand the realm of professional expertise. If the lay clientele or a surrogate does the defining one might expect more issues to be reserved for the domain of the client.

123. E. FREIDSON, *PROFESSIONAL DOMINANCE*, *supra* note 117, at 105.

what their own good is, and when something really is for their own good.¹²⁴

Freidson's call for increased client participation and decreased autonomy for professionals with respect to their clients strongly argues for client-centered lawyering.

Freidson's analysis implies that professionals must become "de-professionalized." They must shed those trappings of their professional role based on an unjustified expansion of their expertise. The writings of a number of commentators on the legal profession support this position.¹²⁵ For example, John Leubsdorf's Personal Responsibility model of lawyering "deprofessionalizes the lawyer by requiring him to justify his behavior morally and socially without relying on a code applicable only to lawyers;"¹²⁶ it requires the recognition that lawyers are just people helping people.¹²⁷ The dominance of *some* lawyers over *some* clients results from a combination of factors, including, among other things, the differential social and economic status between lawyers and clients; lawyers' use of mystifying technical language; inadequate client information for making informed choices on who to hire as lawyers; and the embattled emotional state of many clients who come to see lawyers.¹²⁸ Because these factors are not easily overcome, complete de-professionalization is unlikely to be accomplished easily, and, in any event, would not necessarily be the all-encompassing solution that some of its proponents believe it would be.

The struggle for a less professionalized world, and the concomitant reallocation of power between professional and client, might nevertheless be worth undertaking if it led to a professional practice characterized less by professional self-interest and client dissatisfaction than the present one. Client-centered legal counseling fits hand in hand with this rethinking of the professional's role in society. Requiring lawyers to facilitate client decisionmaking and avoid overreaching clients is consistent with limiting illegitimate professional power.¹²⁹

Much of the literature on the sociology of the professions has focused on medicine. The informed consent doctrine has been the most significant development in the relationship between doctor and patient in recent years.¹³⁰ Several legal commentators, drawing on the medical profession's rhetorical

124. E. FREIDSON, *supra* note 111, at 352.

125. In addition to William Simon's writings, see, e.g., Wasserstrom, *supra* note 77; Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021 (1982).

126. Leubsdorf, *supra* note 125, at 1045.

127. *Id.* at 1048.

128. See Ellmann, *supra* note 16, at 768.

129. The need to limit lawyers' professional power over clients applies more to the "personal plight" segment of the legal profession than to the corporate sphere. See J. HEINZ & E. LAUMANN, *supra* note 111. See also *infra* Part IV.A.1.

130. The informed consent doctrine is of relatively recent origin, dating from 1957. See J. KATZ, *supra* note 18, at 60-65. For a history of the development of informed consent doctrine, see generally *id.* and R. FADEN & T. BEAUCHAMP, *supra* note 52.

embrace of this practice, have urged the adoption of an "informed consent" approach to lawyering.¹³¹

Applying the informed consent doctrine to lawyering first requires some definitional clarity about the meaning of the term. According to one definition,

Informed consent is . . . the willing and uncoerced acceptance of a medical intervention by a patient after adequate disclosure by the physician of the nature of the intervention, its risks and benefits, as well as of alternatives with their risks and benefits.¹³²

Other definitions emphasize the connection between informed consent and patient autonomy.¹³³ For my purposes, the most interesting definitions of informed consent focus on its supposed requirement of shared decisionmaking between physician and patient¹³⁴ and the underlying assumption that informed consent reflects society's felt need to limit the power of professionals over their lay clients.¹³⁵ This latter sense of informed consent has been termed the ethical doctrine of informed consent, as compared to the legal doctrine typified by the definition quoted above.¹³⁶ To the extent that shared decisionmaking is critical

131. See, e.g., Spiegel, *supra* note 22; Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U. CALIF. DAVIS L. REV. 1049 (1984); Strauss, *supra* note 55; Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C.L. REV. 225 (1987). Berger opines that informed consent doctrine may have been attractive to legal commentators because of the "surprising paucity of guidance" that lawyers' ethical codes provided on the allocation of decisionmaking authority between lawyer and client. Berger, *supra* note 73, at 35.

132. A. JONSEN, M. SIEGLER & W. WINSLADE, *CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE* 69 (1982), *quoted in* R. FADEN & T. BEAUCHAMP, *supra* note 52, at 283. This definition of informed consent is a fairly standard one. See, e.g., J. KATZ, *supra* note 18, at 2 (citing *Natanson v. Kline*, 350 P.2d 1093 (Kan. 1960) (similar components to above definition, adding requirement that physician disclosure to patient must be in understandable language)). Faden and Beauchamp state the traditionally accepted components of informed consent as follows:

Action X is an informed consent by person P to intervention I if and only if:

1. P receives a thorough *disclosure* regarding I,
2. P *comprehends* the disclosure,
3. P acts *voluntarily* in performing X,
4. P is *competent* to perform X, and
5. P *consents* to I.

R. FADEN & T. BEAUCHAMP, *supra* note 52, at 275 (emphasis in original).

133. See, e.g., J. KATZ, *supra* note 18, at 104-55; P. APPELBAUM, C. LIDZ & A. MEISEL, *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* 3 (1986) (one component of informed consent definition is its status as an ethical doctrine based on patient autonomy and self-determination); R. FADEN & T. BEAUCHAMP, *supra* note 52, at 277-80 (one sense of informed consent is as autonomous authorization by the patient for the physician's actions).

134. See J. KATZ, *supra* note 18, at 86 (informed consent demands sharing of authority and joint decision-making between physician and patient); 1 *MAKING HEALTH CARE DECISIONS*, *supra* note 52, Ch. 1, especially 36-39.

135. See Spiegel, *supra* note 22, at 42.

136. See C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, *INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY* 4 (1984) [hereinafter *INFORMED CONSENT*]. Lidz, et al., provide an especially instrumental definition of legal informed consent:

Unless a doctor discloses to a patient certain types of information before undertaking a diagnostic, therapeutic, or research procedure, the patient may collect damages from the doctor if he or she is injured by the procedure, even though the procedure itself was properly performed.

to the concept of informed consent,¹³⁷ the arguments on which ethical informed consent is based buttress those for client-centered lawyering. For informed consent as shared decisionmaking approaches, in theory at least, client decisionmaking in the legal context.¹³⁸

It is not my purpose here to assess how informed consent doctrine would work in the context of the lawyer-client relationship; legal commentators have essayed this task with varying degrees of success.¹³⁹ My concern is whether the nature of the decisions to be made in medicine and law are sufficiently similar to make informed consent a useful concept for those interested in analyzing the lawyer-client relationship and increasing its client-centered focus.

A number of studies note that informed consent *in practice* is very different from the shared decisionmaking that some believe is at the heart of the concept. The authors of one study of informed consent in a psychiatric setting concluded that there was little evidence of mutual participation in decisionmaking even when mental health professionals explained to the patient the costs and benefits of different treatment modalities.¹⁴⁰ Other studies reflect additional

Id. Jay Katz, one of the principal proponents of ethical informed consent, has recognized that few courts have pursued the full implications of the concept as he has articulated it. J. KATZ, *supra* note 18, at 82-84. See also 1 MAKING HEALTH CARE DECISIONS, *supra* note 52, at 29-31 (noting both limitation of court decisions in informed consent and inherent difficulty of applying legal sanctions to the shared decisionmaking vision of informed consent); Handler, *Dependent People*, *supra* note 99, at 1004.

137. Unlike Katz and the President's Commission, Faden and Beauchamp would not require shared decision-making between doctor and patient for informed consent requirements (in their sense of informed consent as autonomous authorization by the patient) to be met so long as the patient authorized the physician's actions in an autonomous fashion. They would view the delegation of certain decisions from the patient to the physician, even the delegation of all treatment decisions, as consistent with informed consent. R. FADEN & T. BEAUCHAMP, *supra* note 52, at 279. The authors maintain that in a personal communication to them Katz indicated that the patient's delegation of decision-making authority to the physician was consistent with his model of shared decisionmaking. *Id.* at 295 n.14.

138. Mutual or shared decisionmaking only approaches client decisionmaking because shared decisionmaking might still result in professional dominance in a way that client decisionmaking would not. Shared decisionmaking could envision sharing each critical decision in the relationship or alternatively that some decisions are for the doctor and some for the patient. Under the latter interpretation, few changes might result in the nature of decisionmaking. Patient or client *participation* in decisionmaking need not be equivalent to actually empowering the patient or client to make the decision. Nevertheless, the arguments for shared decisionmaking or mutual participation — *e.g.*, that it enhances patient autonomy and that it results in a proper allocation of power between doctor and patient — would certainly support client-centeredness in law.

139. See sources cited *supra* note 131.

140. INFORMED CONSENT, *supra* note 136, at 8. The authors studied three settings in a mental health institution: the evaluation and admission unit; the research ward (organized as a therapeutic community); and an outpatient unit. Informed consent practices were followed least on the admission unit. The authors concluded that, in general, therapists there did not disclose the advantages of treatment; did not provide alternatives to the patients; seemed unconcerned with whether patients understood the information presented; provided the most information to the patients they perceived as most competent and as sharing their view of what caused the problem (*e.g.*, psychiatric rather than social or legal); and often provided information after the patient made the decision, thereby indicating that they did not perceive the information to be necessary for the decision. *Id.* at 80-100. They observed few instances of mutually participatory decisionmaking. *Id.* at 134. On the research ward, psychiatrists provided more information about treatment modalities, especially such invasive procedures as electroconvulsive therapy, but often manipulated patients to get them to follow their decisions by re-visiting patient decisions or acting as if the patient had not made a decision. *Id.* at 210-12. Even on the outpatient unit,

problems with the implementation of the concept.¹⁴¹ These problems might give client-centered advocates pause before seeking to adapt informed consent to the legal counseling sphere.

Yet there are reasons why informed consent might be more difficult to implement in medicine than in law. Differences in the professional orientations of doctors and lawyers,¹⁴² the nature of knowledge in the respective disciplines,¹⁴³ and the nature of the medical delivery system,¹⁴⁴ make informed

where relations between psychiatrists and patients were more natural, and where patients and doctors frequently shared similar views about the nature of the patient's situation, staff decisionmaking predominated. *Id.* at 287.

For an extended review and criticism of some of the Lidz study's conclusions, see Shapiro, *Is Autonomy Broke?*, 12 LAW & HUM. BEHAV. 353 (1988). Shapiro, like Faden and Beauchamp, see *supra* note 137, argues that patient delegation to doctors of decision-making responsibilities may sometimes enhance, rather than detract from, patient autonomy. Shapiro, *supra*, at 371 (discussion and advocacy of "fair assent" model of informed consent).

141. See *A Review of Empirical Studies on Informed Consent and Decisionmaking*, in 2 MAKING HEALTH CARE DECISIONS, *supra* note 52, at 1; Louis Harris & Associates, *Views of Informed Consent Decisionmaking: Parallel Surveys of Physicians and the Public*, in 2 MAKING HEALTH CARE DECISIONS, *supra* note 52, at 17; Lidz & Meisel, *Informed Consent and the Structure of Medical Care*, in 2 MAKING HEALTH CARE DECISIONS, *supra* note 52, at 317, 390, 399 (actual consent and information disclosure practices vary substantially from the decisionmaking process contemplated by informed consent doctrine). See also Priluck, Robertson & Buettner, *What Patients Recall of the Preoperative Discussion After Retinal Detachment Surgery*, 87 AM. J. OPHTHALMOLOGY 620 (1979) (post-operative patients forget a significant amount of the pre-operative information physicians give them, and tend to retain information consistent with their decision to have surgery); Roter, *Patient Participation in the Patient-Provider Interaction: The Effects of Patient Question Asking on the Quality of Interaction, Satisfaction and Compliance*, 5 HEALTH EDUC. MONOGRAPHS 281 (1977) (physicians react negatively to persistent patient information requests); Nelson & McGough, *The Informed Client: A Case Study in the Illusion of Autonomy*, 6 SYMBOLIC INTERACTION 35, 43 (1983) (doctors allow childbirth patients to experience the illusion of autonomy while reserving ultimate decisionmaking authority); Faden & Beauchamp, *Decision-Making and Informed Consent: A Study of the Impact of Disclosed Information*, 7 SOC. INDICATORS RES. 313, 326-27 (1980) (despite reported benefits of factual disclosures to patients, ninety-three percent of patients in study decided about non-surgical contraceptive devices prior to receiving factual disclosures). Perhaps the most significant problem with implementing informed consent is doctors' resistance to the concept. See J. KATZ, *supra* note 18, at 26 & passim. For a discussion of studies reporting that terminal patients are much more likely to want to be told of their illnesses than doctors are likely to tell them, see R. VEATCH, *DEATH, DYING, AND THE BIOLOGICAL REVOLUTION* 229-41 (1976).

142. Doctors are trained to believe in the virtue of pursuing health, a pursuit that may appear more important than respecting the patient's liberty or autonomy. It is not difficult to see how a doctor committed to making his patient healthy, and believing that the treatment of choice is plain, would attempt to persuade his patient quite vigorously to follow his recommendation. See generally Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 420-429 (1988) (discussing medical profession's focus on aggressive, action-oriented intervention in the fighting of disease at the expense of other values). See also J. KATZ, *supra* note 18, at 2 (physicians have traditionally valued custody over liberty). Lawyers, in contrast, are trained to value (overvalue?) and be sensitive to due process and liberty issues (whether or not their subsequent practices reflect this). Their problem is that they are also trained to be persuasive and so whether they could easily avoid persuasive behavior bordering on manipulation and coercion is at least somewhat open to question.

143. Modern medicine is the most scientific of the traditional professions. See P. STARR, *supra* note 105, at 4. Despite Christopher Columbus Langdell's best efforts, law is not a science. As Spangler puts it:

[S]cientific knowledge is objective, replicable, intrinsically suprahistorical and supracultural, while legal knowledge has none of these once-and-for-all qualities.

consent potentially more problematic in the medical sphere. Indeed, even the term informed consent implies that the patient must *agree* to the doctor's proposed intervention rather than *make the decision* either him or herself or with the doctor's guidance.¹⁴⁵

Lawyers, of course, have attempted to stress the technical side of their work in arguing for autonomy from clients. But the lawyer's technical knowledge — predicting what an adversary will do or how a court or jury will decide — is much less certain than the doctor's knowledge. One consequence of this decreased certainty in legal prediction is the likelihood that clients will challenge the lawyer's arguments more easily than the doctor's.¹⁴⁶ Also

Rather, it is cultural knowledge: informed estimates about which arguments will be persuasive in specific jurisdictions under particular circumstances.

E. SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 184-85* (1986) (citations omitted). *But see* T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970 ed.) (difference between assumptions and practices of normal science and revolutionary science). Spangler's observation has clear implications for the differences between patient and client counseling. In the medical context, a relatively clear technical diagnosis and technical solution is more likely. The patient has a burst appendix; an appendectomy is the principal way to deal with the problem. *See* Redmount, *New Dimensions of Professional Responsibility*, 3 J. LEGAL PROF. 43, 48 (1978). That doctors have a tendency to overstate the technical aspects of their practice does not deny the core truth of modern medicine's scientific grounding. The doctor is likely to approach her meeting with the patient with a clear idea of her proposed treatment for the patient's problem. That clear idea is not necessarily shaken by a full airing of the costs and benefits of the treatments and a discussion of alternatives.

144. The medical delivery system is structured in part according to specialty and by technical disease category. *See* J. HEINZ & E. LAUMANN, *supra* note 111, at 334. Eliot Freidson has distinguished two types of medical practices: client-dependent (where the patient comes to see the general practitioner because of a perceived medical problem or for a check-up) and colleague-dependent (specialty practices that depend on referrals from general practitioners or others for their patients). E. FREIDSON, *supra* note 111, at 107-08. Increasingly, medicine has moved towards greater colleague-dependent practices. *Id.* at 352. The colleague-dependent doctor or specialist is predisposed to apply his expertise (*e.g.*, to perform surgery) to the patient; since he is not dependent on the patient (client) for his business, he has a decreased need to respond to the patient's wishes and desires. *See also* J. HEINZ & E. LAUMANN, *supra* note 111, at 333-42 (comparing legal and medical professions), especially at 339 (patients exercise less control over doctors than clients do over lawyers because patients do not generally control payment for services). For a discussion of the growth of medical specialization in the 1920's and 1930's and its relationship to physicians' professional dominance, see P. STARR, *supra* note 105, at 220-32.

145. James Childress observes that the term "consent" takes on different meanings for doctors and patients depending on their choice of metaphor for the doctor-patient relationship. J. CHILDRESS, *supra* note 51, at 7 (paternalists view consent as *acceptance* of their proposed action and refusal as indicative of incompetence; those who view the relationship contractually interpret consent as *decision* and see acceptance or refusal as equally valid and possible). *See also supra* note 140 (even on outpatient ward, patients at most accede to physician decisions rather than make them themselves).

146. We can perhaps only speculate about this point. Another factor to consider is the mental state of the layperson when meeting with the professional. While there are certainly many medical problems that are less serious than legal ones (*e.g.*, plastic surgery versus whether to go to trial in a murder case), health-related issues seem especially threatening. As Paul Starr has put it:

Physicians offer a kind of individualized objectivity, a personal relationship as well as authoritative counsel. The very circumstances of sickness promote acceptance of their judgment. Often in pain, fearful of death, the sick have a special thirst for reassurance and vulnerability to belief. The therapeutic definition of the profession's role also encourages its acceptance: Its power is avowedly enlisted solely in the interests of health — a value of usually unambiguous importance to

lawyers should, in theory, be more willing to approach decisions with their client more openly and with a greater willingness to be convinced by the client's reasoning. A lawyer, even a client-centered one, may have to reach a tentative decision before counseling a client in order to understand better the circumstances surrounding the decision.¹⁴⁷ But tentative deliberation about the decision¹⁴⁸ is a far cry from making a decision and then becoming an advocate for it with the layperson.

Somewhat paradoxically, then, while legal or doctrinal informed consent may serve as only a partially useful analogy for client-centered advocates, ethical informed consent may be easier to adopt in law than it is in medicine.¹⁴⁹

5. The Ethical Argument: The Model Code of Professional Responsibility and the Model Rules of Professional Conduct

Some legal commentators argue that either the Model Code of Professional Responsibility ("Model Code") or the Model Rules of Professional Conduct ("Model Rules") or both solidly supports a client-centered approach to lawyering. Upon close examination, these arguments are unpersuasive. At best, the Model Code and Model Rules support client-centeredness at a level of generality that is essentially meaningless. At worst, they are consistent with and therefore perpetuate fairly traditional conceptions of the lawyer-client relationship.

Model Code Ethical Consideration 7-7 provides support for client-centered lawyering insofar as it indicates that it is the client's exclusive right to make decisions except "in certain areas of the representation not affecting the merits of the cause or substantially prejudicing" the client's rights, in which case the lawyer may make decisions on his own.¹⁵⁰ But the kinds of decisions that EC 7-7 reserves to the client are basic to the representation;¹⁵¹ they hardly

clients and society. On this basis, physicians exercise authority over patients, their fellow workers in health care, and even the public at large in matters within, and sometimes without, their jurisdiction.

P. STARR, *supra* note 105, at 5. One can imagine situations (e.g., in the case of a serious illness such as cancer) where the economically and socially powerful executive is quite dependent on his physician in a way that he is not on his lawyer even if a substantial fine and jail term are at stake.

147. See G. BELLOW & B. MOULTON, *supra* note 3, at 998 n.12.

148. "Deliberation is 'an imaginative rehearsal of various courses of action.'" J. CHILDRESS, *supra* note 51, at 62 (quoting J. DEWEY, *THEORY OF THE MORAL LIFE* 135 (1960)). See also Kronman, *supra* note 5, at 39 (lawyer must deliberate on client's behalf about choice client is to make).

149. In a recent talk, William Simon argued that an informed consent approach to lawyering was "misleading or radically incomplete" because it ignored "lawyers' needs to make and act on their own judgments of what clients' best interests are." W. Simon, *Allocation of Authority in the Client/Lawyer Relation* (AALS Mini-Workshop on Teaching The Law and Ethics of Lawyering Throughout the Law Curriculum, San Francisco, Calif., January 4, 1990) (AALS Tapes 3 & 4). Simon's criticism relates closely to his concerns about the over-emphasis on client autonomy and the impossibility of lawyers avoiding influencing their clients. These criticisms are discussed *infra* in Part IV.A.1.

150. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980). See Spiegel, *supra* note 22, at 65-67 (arguing that plain reading of EC 7-7 could support client control over almost all case decisions, but finding no indication that drafters meant to go that far).

151. In relevant part, EC 7-7 provides:

extend to the full range of decisions that the client-centered lawyer would consider to be the client's. EC 7-8's discussion of the role of the lawyer in fostering the client's decisionmaking also emphasizes the client's primacy in determining the objectives of the representation, even as it recognizes that the lawyer has interests in the lawyer-client relationship worth protecting.¹⁵² But these Ethical Considerations are aspirational, not mandatory. The mandatory Disciplinary Rules are considerably less clear on the issue of the relative authority of lawyer and client.¹⁵³

While most commentators who have addressed the issue criticize the Model Code's equivocation on the appropriate allocation of decisionmaking authority between lawyer and client,¹⁵⁴ some suggest that the Model Rules

As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

See also STANDARDS RELATING TO THE DEFENSE FUNCTION § 5.2(a) (Approved Draft 1971) (accused, after consultation with counsel, is to decide plea to enter, whether to waive jury trial, and whether to testify).

152. Although EC 7-8 urges the lawyer, *inter alia*, to give advice to clients that is not confined to narrow legal considerations and "to bring to bear upon this decisionmaking process the fullness of his experience as well as his objective viewpoint," and authorizes the lawyer to seek withdrawal from representation in a nonadjudicatory matter if the client fails to follow her advice, it also states that "[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer]." Stephen Ellmann notes that EC 7-8's requirement that, if the client fails to do so, the lawyer should initiate a decisionmaking process with the client that takes into account all relevant considerations puts the lawyer in a paternalistic stance towards his client. Ellmann, *supra* note 16, at 731-32.

153. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1980) provides that "a lawyer shall not intentionally: (1) fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B)." The latter provision states that "where permissible, [a lawyer may] exercise his professional judgment to waive or fail to assert a right or position of his client." The precise interplay between these two provisions, let alone their relationship with the Ethical Considerations, is unclear. On its face, the exception in DR 7-101(B) could easily swallow the rule of DR 7-101(A). For a discussion of the ambiguity of these various provisions, see Maute, *supra* note 131, at 1056-57.

154. See, e.g., Maute, *supra* note 131; Spiegel, *supra* note 22, at 65-67; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2, notes: Legal Background at 15 (Proposed Final Draft May 30, 1981) ("The distribution of decision-making authority has never been fully addressed in the profession's standards of conduct."). Binder and Price's brief discussion of the Model Code implies that ECs 7-7 and 7-8 provide support for their client-centered approach, although they seem to recognize that applying client decisionmaking to auxiliary decisions is an implicit extension of ethical precepts. D. BINDER & S. PRICE, *supra* note 8, at 147. Interestingly, Binder and Price do not make explicit mention of the significance of EC 7-7's requirement that a criminal defense lawyer should advise his client fully on whether a particular plea to a charge appears to be desirable. On its face, such advice would appear to be contrary to the authors' strong stance against the lawyer's opinion-giving. Moreover, EC 7-8's admonition to the lawyer to "bring the fullness of his experience" to counseling the client could easily justify a more persuasive and interventionist mode of counseling than Binder and Price advocate. It is perhaps these divergences between the authors and the Model Code that John Morris refers to when he gently criticizes Binder and Price for limiting the counseling options available to lawyers under the ethical rules. Morris, *supra* note 42, at 809. The Model Rules, of course, had not been promulgated at the time of the 1977 publication of the Binder and Price text.

represent a fundamental reconceptualization of the lawyer-client relationship.¹⁵⁵ As originally proposed, the text of Model Rule 1.3 could have been read as reserving virtually all decisions to the client.¹⁵⁶ But the inconsistency between the text of Rule 1.3 and the comments on decisionmaking authority was palpable.¹⁵⁷ In later drafts and the adopted version of Rule 1.2, the Model Rules adopt the means/objectives distinction that was suggested in the comment to draft rule 1.3 and that follows fairly naturally from EC 7-7.¹⁵⁸ Although the commentary to the Model Rules recognizes that this distinction may be difficult to apply,¹⁵⁹ the very perpetuation of the distinction confuses the locus of decisionmaking responsibility.

Model Rule 2.1 is the natural successor to EC 7-8 in its language requiring the lawyer in his representation to "exercise independent professional judgment and render candid advice."¹⁶⁰ As with EC 7-8, Rule 2.1 and the comments following it stress the desirability of the lawyer providing broad and not merely technical advice.¹⁶¹ The Rule and comments do not recognize the

155. See, e.g., Maute, *supra* note 131, at 1052, 1057 (Model Rules represent new joint venture model for attorney-client decisionmaking); Gifford, *supra* note 15, at 817 (Model Rules solidly reject paternalistic approach). But see Morris, *supra* note 42, at 802 ("If anything the Model Rules, in comparison to the Model Code, shift the locus of power toward the attorney.").

156. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3(a) (Discussion Draft 1980) (Client Autonomy), provided in relevant part that "A lawyer shall accept a client's decisions concerning the objectives of the representation and the means by which they are to be pursued. . . ." (emphasis added). The exceptions to this broad injunction were that the lawyer could not pursue a course of action that was illegal or violated ethical rules, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3(b), and need not pursue objectives that she found to be "repugnant or imprudent" if she disclosed to the client such a desire to limit her actions prior to undertaking the representation, or, if such occasions presented themselves only after commencing representation, she obtained the client's consent. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (incorporated by reference in Rule 1.3(c)). For an analysis of the 1980 Discussion Draft's provisions on lawyer-client decisionmaking, see Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003.

157. See Spiegel, *supra* note 156, at 1005. For example, the comment following Model Rules of Professional Conduct Rule 1.3 stated that while the client had the ultimate authority to determine the objectives of the legal representation, he only had "a right to consult" on the means to be used, thus seemingly contradicting the plain language of the rule itself. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (Discussion Draft 1980). The remainder of the Comment alternated confusingly between recognizing the pre-eminent right of the client to control the representation and acknowledging the permissibility of the lawyer exercising professional judgment and controlling what were said to be wholly technical matters.

158. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983) (Scope of Representation) provides in part that "[a] lawyer shall abide by 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 (date?) (Scope of Representation). As with the Proposed Draft, there are exceptions to this allocation of decisionmaking responsibility. One change from the Proposed Draft is that Rule 1.2(c) provides simply that a lawyer may limit the objectives of representation if the client consents; the "imprudent or repugnant" language of the Proposed Final Draft, see *supra* note 154, has been placed in the comment section.

159. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983) ("A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking."). See also Maute, *supra* note 131, at 1061-62.

160. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

161. *Id.* and comment.

possibility that the lawyer will overreach her client in providing such advice.¹⁶² Far from supporting client-centeredness, such provisions could contribute to lawyer domination.

The only real difference between the Model Rules and the Model Code in allocating decisionmaking authority is that the dismantling of the dichotomy between ethical considerations and disciplinary rules resulted in an arguably stronger commitment to the decisionmaking priorities formerly consigned to the hortatory ECs.¹⁶³ Surely, though, to describe the Model Rules as client-centered¹⁶⁴ deprives that term of any significant meaning.

Perhaps the most that can be said is that the Model Rules's vagueness will force lawyers and clients to struggle towards accommodation of their different interests in the lawyer-client relationship.¹⁶⁵ Yet it seems at least as likely that

162. Indeed, the comments suggest that lawyers should resist clients' efforts to confine the lawyer's advice to technical matters when the client is inexperienced in legal matters. Experienced clients, in contrast, are deemed able to opt out of non-technical advice from the lawyer. This provision is not only paternalistic with respect to inexperienced clients, but limits the lawyer's counseling role with respect to clients that might need moral and other non-technical advice the most (and who could handle it without having their will overborne by the lawyer).

163. Although recognizing that the Model Rules adopt "in part" the provisions of the aspirational Ethical Considerations in the Model Code, Maute, probably the strongest proponent of the view that the Model Rules adopts a client-centered approach, argues nevertheless that unlike previous professional codes the Model Rules do not purport to "vest primary decision-making authority in either participant." See Maute, *supra* note 131, at 1057. It is difficult to square this observation with the plain language of Model Rule 1.2 and Model Code EC 7-7, on which it is obviously based. (Rule 1.2, however, does expand the number of situations in which a criminal defense lawyer must abide by a client's decision, and excludes from the civil context the lawyer's deference to the client's decision whether to waive an affirmative defense.) Both EC 7-7 and Rule 1.2 attempt to draw the same distinction regarding decisionmaking authority: the lawyer is the primary decisionmaker with respect to means or technical issues and the client is the primary decisionmaker regarding objectives or goals. Arguably, the only significant difference between these provisions is that EC 7-7 apparently did not require the lawyer to consult with the client about the means to be employed while Rule 1.2 does require such consultation. The right to be consulted, of course, is not the same as the right to decide. The Model Rules are superior to the provisions of the Model Code in requiring lawyers to communicate with their clients, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983), but the nature of the required communication is exceedingly vague.

164. Robert Kutak, the Chairman of the American Bar Association Commission on Evaluation of Professional Standards, which drafted the Model Rules, wrote in his Introductory Note to the June 30, 1982 Final Draft of the Proposed Model Rules "that never before has there been a more client-centered code." MODEL RULES OF PROFESSIONAL CONDUCT (1982) (Chairman's Introductory Note). Maute cites this language approvingly as part of her argument that the Model Rules represents a fundamental break from previous professional codes in their allocation of decisionmaking responsibility. See Maute, *supra* note 131, at 1052, 1057. This broad use of the term client-centeredness presents precisely the problem identified earlier: client-centeredness can simply mean that the Model Rules attempt to focus on protection of the client's interests not on protection of his decisionmaking authority. See *supra* note 22. From the context, it is clear that the Chairman was responding to critics of the Commission who had charged that earlier drafts of the Model Rules sacrificed client service for professional policing functions. See generally Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605-17 (1985).

165. Both Maute and Spiegel argue that the absence of clear distinctions between lawyer and client authority will inevitably result in a healthy increase in lawyer-client dialogue respecting this and other issues. See Maute, *supra* note 131, at 1066 (to avoid risk of liability, lawyers will perform engage in dialogue with clients); Spiegel, *supra* note 156, at 1010-15 (questioning the values of strict rules for allocation of decisionmaking authority and seeing Model Rules's ambiguity as fostering dialogue). This appeal to the open-textured nature of ethical rules has much in common with William Simon's argument in *Ethical Discretion in Lawyering*, *supra* note 121,

those traditional lawyers who retain benighted views of the appropriate division of decisionmaking responsibility between them and their clients will interpret the Model Rules as allowing them to proceed as they always have. The Model Code and Model Rules may not provide much sustenance to critics of client-centered approaches but they also provide scant support for its advocates.

6. *The Psychological Argument*

The consideration of client-centered legal counseling's development inevitably must focus on its roots in humanistic psychology and Rogerian non-directive or client-centered therapy. This section will discuss the systemic influence of client-centered therapeutic approaches on the development of client-centered legal counseling. Part III.B.1 examines some of the assumptions that client-centered therapy makes about the counselor and client and assesses their relevance for the lawyer-client relationship.

Psychologist Carl Rogers's explication of his theory of client-centered therapy¹⁶⁶ not only provided legal commentators and theorists with a name for the kind of legal counseling they advocate,¹⁶⁷ but, more importantly, supplied much of the basic theoretical underpinning for that counseling. Though not a static concept,¹⁶⁸ client-centered or nondirective therapy is solidly in the tradition of humanistic psychotherapeutic counseling.¹⁶⁹ Starting with the assumption that the individual is basically good,¹⁷⁰ but that civilization has alienated him, client-centered therapy seeks to unlock the person's potential for solving the conditions of his own unhappiness. To assist the client in accomplishing this task, the client-centered therapist must exhibit several characteristics: she must express unconditional positive regard for the client; she must demonstrate acceptance or empathic understanding; and she must be congruent, that is, she must actually feel and believe the attitudes and feelings that she expresses towards the client.¹⁷¹ The therapist's attitude towards the

and Robert Burt's argument in Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981) (greater lawyer disclosure of client confidences — as proposed under the original draft of the Model Rules — will force lawyers and clients to engage in dialogue and confront the pervasive mutual distrust that operates between them).

166. Rogers first attempted to describe client-centered therapy in 1940. C. ROGERS, *CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY* 9 (1951).

167. Rogers indicated that his use of the term "client" for the person being helped in the relationship in lieu of more standard terms such as patient was meant to reflect the sense that the person was seeking help voluntarily and actively, without surrendering his responsibility for resolving his situation. *Id.* at 7 n.1.

168. See *id.* at 5-6 (concepts in client-centered therapy are dynamic and subject to constant revision based on research and clinical findings). See also Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 433-34 (1971) (Rogers's initial approach stressed the therapist's creation of an accepting emotional climate for the client; only later did he emphasize the deeply personal and intimate aspects of the counseling relationship).

169. See, e.g., Homans, *Carl Rogers' Psychology and the Theory of Mass Society*, in *INNOVATIONS IN CLIENT-CENTERED THERAPY* 319 (D. Wexler & L. Rice eds. 1974) (noting that survey texts also often categorize Rogerian psychology with European existential therapies).

170. See, e.g., *Appendix: Dialogue Between Martin Buber and Carl R. Rogers*, in M. BUBER, *THE KNOWLEDGE OF MAN* 166, 179-80 (1965) (Rogers's statement that human nature is "something that is really to be trusted") (emphasis in original).

171. For a general description of Rogers's theory, see, e.g., C. ROGERS, *supra* note 166; Rogers, *A Theory of Therapy, Personality, and Interpersonal Relationships, as Developed in the Client-Centered Framework*, in 3 *PSYCHOLOGY: A STUDY OF A SCIENCE*:

client is non-directive but not passive;¹⁷² her stance is that of objective subjectivity.¹⁷³

Rogers's client-centered therapy parallels the philosophical writings of Martin Buber, whose articulation of the I-Thou relationship bears at least some connection to the accepting therapeutic relationship that Rogers advocates.¹⁷⁴ The philosophical orientation of the counselor toward the client respects the client's capacity to choose; his goal is to allow the client to make responsible choices.¹⁷⁵

In Rogers's view, the principles underlying client-centered therapy, originally proposed as a form of psychotherapeutic treatment, also applied to

FORMULATIONS OF THE PERSON AND THE SOCIAL CONTEXT 185-256 (S. Koch ed. 1959) [hereinafter *A Theory of Therapy*]; Homans, *supra* note 169; Rice, *The Relationship in Client-Centered Therapy*, in *A GUIDE TO PSYCHOTHERAPY AND PATIENT RELATIONSHIPS* 36-60 (M. Lambert ed. 1983) (cited in Morris, *supra* note 42).

172. See C. ROGERS, *supra* note 166, at 27.

173. Cf. A. WATSON, *supra* note 4, at 10. Client-centered therapy grew out of psychoanalysis although it differs from it in a number of respects. See, e.g., Homans, *supra* note 169, at 323-25. Both schools bemoan the alienation of the individual from society, but draw quite different conclusions from the existence of this phenomenon. As Homans puts it, with respect to alienation, psychoanalysis seeks to have the person accommodate to it, while client-centered therapy seeks to obliterate it. *Id.* at 327. Psychoanalytic therapy seems more likely to explore emotions historically, while client-centered therapy is oriented towards the present. See Simon, *supra* note 84, at 515-16, 519. Client-centered therapists and psychoanalysts view human nature very differently. See Rogers, *A Theory of Therapy*, *supra* note 171, at 248 (Rogers describing psychoanalysts as believing that the individual is inherently destructive in contrast to his own view of individual's goodness). Moreover, the respective roles of the psychoanalyst and client-centered therapist differ. The former is often perceived as dominant and controlling; the latter attempts to convey an attitude of participation with the client. See D. ROSENTHAL, *supra* note 19, at 10-11 (psychoanalysts see patients as needing direction and control, while Rogerians stress that patient should make all choices themselves). For Freudians, the concept of transference is critical, while the Rogerian downplays its significance. See generally C. ROGERS, *supra* note 166, Ch. 5. Transference refers to the strong feelings of attachment and anger that the patient develops for the helper, based not on the immediate relationship between them but on the patient's past relationships with others and the psychological attributes of those relationships. See T. SHAFFER & J. ELKINS, *supra* note 1, at 106-07. In each form of therapy, however, theorists stress that the therapist's recognition of his or her own feelings and attitudes is a prerequisite for effective counseling. See C. ROGERS, *supra* note 166, Ch.2; Ferreira & Rosen, *Therapeutic Relations in Psychotherapy-Psychoanalytic Modality*, in *A GUIDE TO PSYCHOTHERAPY AND PATIENT RELATIONSHIPS*, *supra* note 171, Ch. 3, esp. 72-77 (discussion of counter-transference).

174. M. BUBER, *I AND THOU* (1970 ed.). I-Thou relationships, according to Buber, are "characterized by genuine mutuality, directness, presentness, intensity, and ineffability." See Friedman, *Introductory Essay*, in *THE KNOWLEDGE OF MAN*, *supra* note 170, at 11, 12. They are distinguished from I-It relationships, the primary means by which people experience the world and in which the person treats the other as an object. *Id.* Buber is the primary philosopher of dialogue; for him, an individual becomes essentially him or herself only through a mutual dialogue with another. *Id.* at 27. Relationships are rarely completely I-Thou or I-It, but often alternate between the two modes. *Id.* at 26. For the explicit connection between Rogerian psychology and Buber's philosophy, see, e.g., *id.* at 166 app.; Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97, 125 (1985). Significantly, Buber concluded that relationships between professionals and lay people could never truly be I-Thou in nature because the participants lack reciprocity of interest; both the patient-client and therapist are interested in the patient-client's situation, not the therapist's. See M. BUBER, *THE KNOWLEDGE OF MAN*, *supra* note 170, at 170-73 app.

175. See C. ROGERS, *supra* note 166, at 20, 51.

many different types of relationships.¹⁷⁶ Nevertheless, the goals of therapeutic relationships and relationships such as that between a lawyer and client are far from identical.¹⁷⁷ Those differences are critical to understanding the usefulness of client-centered psychotherapy as a means to analyze the lawyer-client relationship.

In psychotherapy, the therapist seeks to induce therapeutic change in the individual. The individual comes to the therapist presumably because, at some level, she desires to undergo such change. While psychotherapeutic schools' views of the therapist's role in causing psychotherapeutic change differ, it is not implausible to believe, as the Rogerians do, that the focus of change resides within the individual. Furthermore, it is conceivable that the therapist can truly adopt an attitude of following the client's lead at the client's pace, because the pressure for change will relate in large measure to the needs that the client perceives.¹⁷⁸ As one commentator put it succinctly, "the client-centered therapist doesn't challenge defenses, doesn't typically make interpretations, and doesn't serve as an educator or an information-giver."¹⁷⁹

In the lawyer-client relationship, however, an undeniable external reality constrains the degree to which the lawyer and client can afford to engage in the sometimes languorous exploration of self that client-centered therapy contemplates. Clients must deal with the activities and demands of actual or potential adversaries, associates, judges and interested others. The pressures of this external reality necessarily lead the lawyer to adopt a different attitude from that of the client-centered therapist. The lawyer becomes the mediator between the client and the external world.¹⁸⁰ Her approach to her client and her willingness to contribute to the client's ability to make her own decisions may be client-centered, but she must assure that a decision is made.¹⁸¹ At some point in the counseling session, the lawyer must become somewhat directive in suggesting strategies for the client and encouraging the client to make a conscious choice about how to proceed.¹⁸² Because the lawyer often must

176. See *id.* at 12 & Part II, and C. ROGERS, *ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY* 52 and especially Part VI (1961).

177. See, e.g., Morris, *supra* note 42, at 803 n.93.

178. Cf. C. ROGERS, *supra* note 166, at 69, 71 (indicating that client-centered counselors have concluded that it is inappropriate for them to attempt to structure the therapeutic session), 276 (in child therapy, "the therapist does not try to affect the pace or the direction of therapy; he follows rather than leads the child.").

179. Rice, *supra* note 171, at 37.

180. See Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 *NOTRE DAME L. REV.* 229, 234 n.26 (1977).

181. In many circumstances, the failure to make a decision would itself be a decision. This would certainly be true in the simulation described in Part V of this article, where the client's failure to decide on a course of action would result in his loss of the land on which he held the option contract.

182. Rogers recognized the differences between therapeutic applications of his theory and its applications in other settings, and believed that in the latter situations the professional would very likely need to provide more information to the client than in the former. See, e.g., C. ROGERS, *supra* note 166, at 398 (educational setting). One researcher suggests that because of the differences in time frame and problem definition between Rogerian psychotherapeutic counseling and short-term counseling in such settings as a weight-loss clinic or a stop-smoking clinic, the counselor in the latter setting must use a counseling model that operates between the poles of non-directive and directive styles. See Janis, *Problems of Short-term Counseling*, in *COUNSELING ON PERSONAL DECISIONS: THEORY AND RESEARCH ON SHORT-TERM HELPING*

engage in such activities as interviewing potential witnesses and examining documents, she is in a position to verify or disprove independently many of the client's claims. If the lawyer concludes that the client is lying, it may be considerably harder to feel (and communicate) the attitude of unconditional positive regard that Rogers proposes.¹⁸³

Unlike the client-centered therapist, who seeks to demonstrate to the client that other individuals should not be permitted to establish "conditions of worth" on his value,¹⁸⁴ the lawyer must apprise the client of the opinions others (witnesses, adversaries, potential judges and jurors) hold on his actions. Those opinions become not simply impediments to the person's achievement of a healthy self-image; they help to establish part of the texture of reality that the client must confront. Whether or not such considerations are objective in nature,¹⁸⁵ they cannot be discarded lightly.¹⁸⁶

Despite these differences between the therapist-client and lawyer-client relationships, Rogerian theory served as a powerful influence on advocates for client-centered legal counseling, especially early advocates.¹⁸⁷ At a minimum,

RELATIONSHIPS 6 (I. Janis ed. 1982) [hereinafter COUNSELING ON PERSONAL DECISIONS]; Janis, *Helping Relationships: A Preliminary Theoretical Analysis*, in COUNSELING ON PERSONAL DECISIONS, *supra*, at 31-32 (unconditional positive regard, a staple of Rogerian counseling, may hinder patient motivation for change in short-term counseling situation).

183. For differences between therapeutic and legal counseling, see T. SHAFFER & J. ELKINS, *supra* note 1, at 286-87.

184. See C. ROGERS, *supra* note 166, at 149-57.

185. Consider the following description by Redmount, one of the "legal psychologists" Simon criticizes in *Homo Psychologicus*, *supra* note 84, at 508 nn.68, 72, 73 and accompanying text, of the differences between psychological and legal counseling:

[Theories of personal and interpersonal counseling] have in common a parochial quality that gears them almost exclusively to the internal states of individuals, and to the subjective meanings of such sensing behavior as feeling and seeing or awareness. They seek to probe the unconscious and its effect on external perception and activity. They imply that to deal effectively with the 'world of reality' one must properly position oneself subjectively so as to receive and respond to the elements *au dehors* with a minimum sense of disturbance. In legal counseling, this is useful, but hardly enough. Interpretations of perception and feeling are an essential to life, and clearly they should be highly developed in counselors. But, there is bias in the psychological view in the serious underestimation of the complexity of client needs, problems and capabilities, which the lawyer need not adopt. The importance of seeing and understanding may be exaggerated. There may be more pessimism than necessary about a client's capacities and decisions, and the elements of doing and attending to objective experience may be neglected. The lawyer, being brought in, as he is, at the point of an external event has a point of reference, an obligation and an opportunity that a psychologist or psychiatrist asked to analyze the subjective does not have.

Redmount, *Who Is The Counselor? What Does He Do? How Does He Do It?*, in H. FREEMAN & H. WEIHOFFEN, *CLINICAL LAW TRAINING* 158, 162 (1972). In the same textbook, David Riesman observes that the lawyer typically possesses more practical wisdom and common sense than the therapist, possibly because of the nature of the concerns dealt with by each professional. Riesman, *Beyond the Call of Obvious Duty*, in *CLINICAL LAW TRAINING*, *supra*, at 149, 150, 153-54.

186. Nor, of course, must they be accepted uncritically. The lawyer may often seek to change the perceptions of these other actors. To do so, she must know what they are.

187. See, e.g., T. SHAFFER, *DEATH, PROPERTY AND LAWYERS* 94-100 (1970); H. FREEMAN, *COUNSELING IN THE UNITED STATES* 102 (1967); Elkins, *supra* note 180, at 234 n.26; Redmount, *The Nature of Client Counselling and the Code of Professional Conduct*, 47 *SASK. L. REV.* 186, 190 (1982/1983). The Binder and Price and Bellow and Moulton texts also rely heavily on the concepts of client-centered therapy in their interviewing and counseling

these writers adopted the Rogerian emphasis on client participation and choice, professional acceptance of the client, and the importance of professional self-knowledge and congruence.¹⁸⁸ But it would be erroneous to conclude that they failed to recognize the limitations of Rogerian theory or believed there were no differences between therapy and lawyering.¹⁸⁹ By the time the lawyer is counseling the client,¹⁹⁰ she is taking an active role that is not limited to active participation in the client's world, as it would be in therapy. It includes active

models. See D. BINDER & S. PRICE, *supra* note 8, at 15 n.12; G. BELLOW & B. MOULTON, *supra* note 3, at 977. For a useful summary of the relationship between client-centered therapy and client-centered legal counseling, see Gifford, *supra* note 15, at 818 n.38. See also Simon, *supra* note 84, at 511 n. 93.

188. See, e.g., T. SHAFFER & J. ELKINS, *supra* note 1, Ch. 6 (emphasizing companionship model of lawyer counseling with its view of the client as a valuable resource); Bastress, *supra* note 174, at 100 (client-centeredness facilitates meaningful human relationships, including the lawyer-client relationship); *id.* at 119 (client-centered lawyer must be true to and know herself); Redmount, *supra* note 187, at 188-90 (distinction between counseling to, for, and with the client; latter view is based on Rogerian and Buberian concepts); *id.* at 192-93 (client-centered lawyer consults closely with and even defers to the client on decisions); Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 985 (1961) (lawyers cannot avoid biases but should be conscious of what they are) [hereinafter *Attorney Personalities*]; Freeman, *The Role of Lawyers as Counselors*, 7 WM. & MARY L. REV. 203, 211 (1966) (definition of counseling with heavy emphasis on professional acceptance of the client); H. FREEMAN, *supra* note 187, at 35-37 (importance of lawyer acceptance of client and helping client help himself); H. FREEMAN & H. WEIHOFFEN, *supra* note 185, at 101 (psychological maturity of the helper); T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS & TRUSTS* 10 (2d ed. 1979) (importance of Rogers and concepts of congruence, empathy and unconditional positive regard); T. SHAFFER, *supra* note 187, at 98-100 (need for lawyer openness and candor and lawyer's participation in experimental mode of inquiry).

189. William Simon, the sharpest critic of the legal psychologists, seems to miss some of the qualifications and nuances of what he describes as the Psychological Vision. See, e.g., Simon, *supra* note 84. For example, he reads the phrase "feelings are facts", a phrase popularized by Thomas Shaffer, as meaning *only* feelings are facts rather than as feelings are facts *also*. Perhaps Rogers would argue the former proposition, but the legal psychologists certainly would not. Descriptions of the counseling models that such legal psychologists as Shaffer, Elkins, and Redmount advocate reveal a definite role for the lawyer in providing some reality-testing for the client. Indeed, the degree to which commentators like Shaffer and Redmount would countenance lawyer persuasion of clients on moral and religious as well as psychological grounds in fact places them much closer to Simon's approach than, perhaps, he would be comfortable with. See *infra* Part IV.A.1. Simon also fails to recognize sufficiently the eclectic quality of these commentators' adoption of psychological theories. See, e.g., T. SHAFFER & J. ELKINS, *supra* note 1, at 161-62 (discussing different psychological theories, including Freudian, Rogerian and Jungian, that lawyers should consider examining). Simon's focus on particular works to the exclusion of other writings results in a distortion of these authors' views. Thus, Simon can be highly critical of the heavy psychologizing in Shaffer's *The Planning and Drafting of Wills and Trusts*, *supra* note 188, while not attending to other of his voluminous writings that emphasize very different aspects of the lawyer-client relationship. See T. SHAFFER & J. ELKINS, *supra* note 1, at 6 (agreeing with Simon that an approach to legal counseling based solely on psychological considerations would be problematic, but arguing that such concerns cannot be understood as discontinuous from social and political concerns). James Elkins especially criticizes Simon's treatment of Shaffer's work. See Elkins, "All My Friends are Becoming Strangers": *The Psychological Perspective in Legal Education*, 84 W. VA. L. REV. 161 (1981).

190. Any tendency for these commentators to "psychologize" the lawyer-client relationship is much more likely to arise in interviewing than in counseling because of the need for a decision in the latter setting. In the early portion of the interview, the client-centered lawyer is likely to adopt a stance that allows the client to tell his story relatively uninhibited by the lawyer's judgments and observations. But even in the interview, as the lawyer listens to the client's story, she must attempt to elicit facts relevant to some articulable legal theory. See, e.g., D. BINDER & S. PRICE, *supra* note 8, at 85 et seq. (description of theory-verification stage of interviewing process).

participation in the decisionmaking process, and necessarily includes both external and internal aspects. The legal counselor structures reality to enable the client to make a decision that is true to her own frame of reference. The very nature of lawyer's work substantially abates the danger that the client-centered lawyer will focus exclusively on the client as the locus of all reality.¹⁹¹

Client-centered therapy's emphasis on the individual's ability to solve his own problems justifies the attitude of the client-centered lawyer who wishes to convince her client, if necessary, that the client is fully capable of making his own decisions. As two authors stated:

An individual is more likely to feel committed to a freely made decision. . . . Free, informed choices and internal commitment increases the likelihood of psychological success, which tends in turn to increase the area of experience in which free choice is possible.¹⁹²

A client-centered lawyer's commitment to understanding the client's frame of reference facilitates the client's decisionmaking process by making explicit the relationship between client values and available choices.¹⁹³ Within the context of lawyers' tendencies to act paternalistically towards clients and to take their stated goals at face value,¹⁹⁴ a psychological theory that empowers the individual client as against the all-powerful professional helper has much to recommend it.

Client-centered therapy has significantly influenced client-centered lawyering. If lawyers truly operated as therapists, the concerns about the appropriateness of Rogerian therapy in legal counseling would be well-taken.¹⁹⁵

191. See Sherr, *Lawyers and Clients: The First Meeting*, 49 MOD. L. REV. 323, 353 (1986) (counseling, described along lines of Binder and Price model, need not necessarily be based excessively on psychotherapeutic concepts) (citing A. WATSON, *supra* note 4).

192. C. ARGYRIS & D. SCHÖN, *supra* note 120, at 89.

193. See Appel & Van Atta, *The Attorney-Client Dyad: An Outsider's View*, 22 OKLA. L. REV. 243, 251-53 (1969). *But see* Ellmann, *supra* note 16, at 760-61 (client-centered counseling does not allow for client re-examination of values).

194. See Baernstein, *Functional Relations Between Law and Psychiatry — A Study of Characteristics Inherent in Professional Interaction*, 23 J. LEG. EDUC. 399 (1971) (psychiatric residents more probing than law students in interviewing clients about their legal problems).

195. This is not to say that there are no concerns about lawyers' use of concepts that fit more easily within the psychotherapeutic milieu. Part IV.A.2., *infra*, discusses these concerns, but one may be mentioned here. One of the Binder and Price model's critical aspects is the lawyer's use of empathic understanding, with active listening as one technique for its accomplishment. See D. BINDER & S. PRICE, *supra* note 8, Ch. 3. Clearly, Rogers believes that the therapist must not only use techniques that indicate his feeling of empathy toward the client but also that he actually *feel* such empathy; the attitudes he expresses toward the client must reflect accurately what he really feels. See also Bastress, *supra* note 174, at 118-19. Given the different purposes of the legal and psychological counseling sessions, is it legitimate for the lawyer to use the technique of showing empathy without really feeling it? The issue is sharpened by the observation, which my own supervision of student lawyers in real and simulated cases supports, that "feigned" empathy or disconnected active listening responses by the lawyer may in fact succeed in building superficial rapport between lawyer and client and helping the lawyer elicit necessary facts from the client. Stephen Ellmann especially criticizes this manipulative use of technique. See Ellmann, *supra* note 16, at 735-39; Ellmann, *Manipulation By Client and Context: A Response to Professor Morris*, 34 UCLA L. REV. 1003, 1006-08 (1987). Binder and Price equivocate on the use of the technique without the underlying feeling. See *id.* at 1006 n.18 (discussing Binder and Price's treatment of this issue). In his response to Ellmann, John Morris expresses his conviction that a client would see through the lawyer's use of a technique that was

But, whether for pragmatic reasons or mere lack of consistency, I sense that legal commentators — and, more importantly, lawyers who aspire to a client-centered practice — tend to adopt Rogerian techniques judiciously.

7. Does Client-Centeredness Lead To Better Client Results?

It would be convenient if client-centered lawyering advocates could justify that approach on the basis that clients got better results than with more traditional or other possible lawyering approaches. A pragmatic rationale presumably would appeal to many, especially practicing lawyers, who might otherwise be skeptical of, or relatively uninterested in, the philosophical, sociological, political and psychological arguments described above. In fact, numerous legal commentators present the “better results”¹⁹⁶ argument. Strikingly, however, this argument is based almost solely on the results of one study,¹⁹⁷ Douglas Rosenthal’s 1974 study of a group of New York personal injury clients.¹⁹⁸ As intriguing as the better results argument is, it must be considered as yet unproven and, at best, tentative support for client-centered lawyering.

Rosenthal studied the relationship between certain indicia of client participation and case outcome in sixty relatively serious personal injury cases in which the client recovered at least \$2,000.¹⁹⁹ The plaintiffs all resided in New York City and were of relatively high socioeconomic status. The recoveries all occurred in 1968. Rosenthal defined client participation as comprising the following factors: seeking quality medical attention; expressing a special concern or want to the lawyer; making follow-up demands for the attorney’s attention; and seeking a second legal opinion. To determine case outcome, Rosenthal submitted the cases (stripped of certain identifying data) to an evaluation panel of three experienced negligence lawyers (plaintiff and defendant representatives) and two non-attorney insurance claims adjusters.

not heartfelt. See Morris, *supra* note 42, at 803-05. But I think that Morris is insufficiently sensitive to some clients’ need for their lawyers’ approval, the frequently short duration of the lawyer-client relationship, and the overall dynamics between lawyers and clients that could result in clients failing to see through the lawyer’s technique. While Morris clearly recognizes the significant differences between lawyering and therapy, he sees these differences as relating primarily to the *effectiveness* of Rogerian therapeutic techniques rather than their *appropriateness*. See *id.* at 803-04 n.93. Yet attempting therapeutic techniques that are almost certain to fail is not without cost (in time if nothing else), and, as noted *supra* note 182, techniques such as expressing unconditional positive regard may be inappropriate in short-term counseling relationships, of which legal counseling is certainly a prime example. For a fuller discussion of this issue, see *infra* Part IV.A.2.

196. The phrase “better results” is from Spiegel, *supra* note 22, at 85. The argument in this section is a narrow one: that there is weak support for the proposition that client-centeredness produces “objectively” better case results (such as higher financial awards for plaintiffs). As I argue *infra* in notes 226-28 and accompanying text, client-centeredness should lead to better results in another, different sense: because a client’s individual values are implicated in so many decisions, legal counseling that gives greatest play to such values, by enabling clients to make their own decisions, produces “better results” (i.e., more consonant with the client’s values) almost by definition.

197. See Berger, *supra* note 73, at 35 n.143 (noting that one commentator, Martyn, attempted to analogize supposedly positive results from the practice of informed consent in medicine to such a practice in law).

198. D. ROSENTHAL, *supra* note 19.

Rosenthal concluded that, contrary to the expectations of the traditional lawyering model, active clients not only did no worse than passive clients but actually did better.²⁰⁰ The above four factors correlated, with different degrees of strength, to case outcome measures. According to Rosenthal, seventy-five per cent of the active clients received good results in their cases, as measured by the evaluation panel; only forty-one per cent of the passive clients obtained good results.²⁰¹ Stated most broadly, "clients who participate actively in the conduct of their claim get significantly better results than clients who passively delegate decision responsibility to their lawyer."²⁰²

As noted, numerous advocates of client-centered lawyering cite Rosenthal for the proposition that client-centeredness leads to better case results.²⁰³ But the Rosenthal study is a slender reed on which to make the case for the superiority of client-centeredness. In addition to being dated, dealing with a relatively small sample of geographically homogeneous individuals, and addressing only one kind of case, the study at best demonstrates the virtues of client *participation* and not client *decisionmaking*.²⁰⁴ Rosenthal's criteria for participation may be inconsistent with client passivity but do not necessarily reflect client responsibility for decisionmaking.²⁰⁵ Indeed, the theory that the squeaky wheel gets the grease may most readily explain the data. Given the alarming tendency of some lawyers in the study to ignore their cases, the active

199. The description in this paragraph of the design of Rosenthal's study is from *id.* at 5, 29, 33-38.

200. *Id.* at 3, 38-39, 60-61.

201. *Id.* at 56-57.

202. *Id.* at 3.

203. See, e.g., Martyn, *supra* note 131, at 314-15 (recognizing possible limitations of the study but arguing that the participatory model has universal application); Bastress, *supra* note 174, at 100 (citing Rosenthal study for the proposition that "there is empirical evidence showing that the 'helping' lawyer achieves more favorable settlements for his clients"); Spiegel, *supra* note 22, at 97 n.233, 104 n.266, 105 n.268; T. SHAFFER & J. ELKINS, *supra* note 1, at 283-86 (citing Rosenthal study for the proposition that "research on this point establishes that the domineering model of lawyering, the model suggested here as least human, harms the client"); A. WATSON, *supra* note 4, at 143 (discussing Rosenthal study and data from psychotherapeutic studies); cf. Andersen, *supra* note 131, at 228 n.14 (making no explicit reference to Rosenthal but citing secondary sources, such as Martyn and Spiegel, that rely on Rosenthal). This uncritical reliance and bootstrapping on the Rosenthal study is similar to the tendency of commentators to write reflexively about the litigation explosion. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 63-66 (1983).

204. Mark Spiegel has consistently noted the difference between client participation and client decisionmaking. His description of the results of the Rosenthal study shows considerably more restraint than most. Compare Spiegel, *supra* note 22, at 105 n.268, with Gifford, *supra* note 15, at 818-19 (describing Rosenthal as arguing that clients were financially better off when they made settlement *decisions*), and D. LUBAN, *supra* note 63, at 345 n.10 (Rosenthal study makes powerful case for client control). See also Martyn, *supra* note 131, at 315 (Rosenthal's findings may be limited to "comparatively straightforward personal injury practice").

205. Cf. Sammons' definition of meaningful client participation, which comes closer to participation as decisionmaking:

[H]ow the dispute is resolved matters to the people who go to lawyers. It is something they would like to have some control over. They would like to have a 'say' in it. I call that 'say' participation. Not any 'say' will do. My 'say' must reflect me and that reflection is what I mean by meaningful participation.

Sammons, *supra* note 73, at 73 (footnote omitted).

client might get better results in part because he forces the lawyer to pay at least minimal attention to his case.²⁰⁶

The heterogeneous nature of the legal profession, and its division into corporate and personal hemispheres,²⁰⁷ cautions against broad applicability of the study to other kinds of practice.²⁰⁸ Measuring successful case outcome can also be problematic; the personal injury cases examined in the study are more susceptible to monetary evaluation than many other kinds of cases.²⁰⁹ Strict monetary outcome measures may, in fact, reinforce the traditional lawyering model in such areas as divorce practice. Ultimately, the absence of agreed-upon measures of successful case resolution makes it difficult to assess the connection between client participation and case success.²¹⁰

Even if these problems did not exist, one study, no matter how well done and well-conceived, plainly is insufficient to establish the proposition that client-centeredness leads to better case results.²¹¹ Perhaps the most one can argue, as does Spiegel, is that the case for better results from the traditional model is also not proven.²¹²

B. Micro-Arguments for Client-Centeredness

The above arguments for client-centered counseling looked at the issue from the top down. This section examines arguments for client-centeredness as seen from the bottom up — from the perspective of the lawyer-client relationship itself.²¹³

206. See, e.g., D. ROSENTHAL, *supra* note 19, at 47 (original and referral lawyer vastly underestimated case worth and neglected to meet with client until morning of trial), 54 (lawyer ignored client's case and then farmed it out to another lawyer who convinced client to take settlement substantially below value of case as determined by outside evaluation panel); Spiegel, *supra* note 22, at 97.

207. See *infra* note 295 and accompanying text.

208. Rosenthal recognized the differences between corporate and what he called "lower-class or middle-class law practice." Although he noted instances of high client participation in the corporate area, he suggested the need for further study of the corporate lawyer-client relationship. D. ROSENTHAL, *supra* note 19, at 147-48.

209. While establishing a monetary value for the kinds of injuries suffered in personal injury cases is not necessarily easy, statistics on jury verdicts involving some multiple of special damages are readily available and provide some measure of "objective" evaluation.

210. See Spiegel, *supra* note 22, at 91 n.195.

211. But see T. SHAFFER & J. ELKINS, *supra* note 1, at 283 (research establishes that traditional model of lawyering harms the client).

212. See Spiegel, *supra* note 22, at 85-110. It appears that Rosenthal also began his inquiry from the perspective of testing the hypothesis that traditional lawyering led to better results. See D. ROSENTHAL, *supra* note 19, at 29.

213. This section considers three perspectives: that of the lawyer, client, and the lawyer-client relationship. It might also be possible to base an argument for client-centeredness on its contribution to the general good of society and its recognition of the interests of identifiable third parties. Arguments that client-centeredness benefits society generally tend to be overbroad, or are subsumed within the discussion in Part III.A. See, e.g., Strauss, *supra* note 55, at 338-39 (utilitarian arguments for informed consent in law, including argument that society benefits when individual autonomy is maximized). For an argument that the public's interest in efficient operation of the court system is not necessarily negatively affected by adopting an informed consent approach to lawyering, see Spiegel, *supra* note 22, at 120-23. In my judgment, arguments that client-centeredness would necessarily benefit identifiable third parties are either misconceived, overbroad or circular in nature. They are misconceived in that the essence of client-centeredness is the client's empowerment to make her own decision. Only when the client chooses to con-

Certainly there is no one kind of lawyer-client relationship.²¹⁴ The relationship between the solo practitioner and the first-time individual client with a personal injury claim bears only the most tangential connection to that between the lawyer from the large law firm and her long-time corporate client. Any effort to sort out the supposed advantages of client-centeredness for the lawyer or client or both must be careful to clarify whether those advantages apply only to certain kinds (and stages) of lawyer-client relationships or appear to operate across-the-board.²¹⁵ We should be especially skeptical of the latter kinds of arguments.

1. Possible Advantages from the Client's Perspective

Client-centered lawyering's emphasis on client decisionmaking presents a number of advantages to clients.²¹⁶ Clients who actually make decisions in their

sider the interests of third parties (perhaps in response to the importuning of the lawyer) may client-centeredness aid those interests; there is nothing inherent in the client-centered approach that confers these benefits. Cf. the discussion in Simon, *Ethical Discretion in Lawyering*, *supra* note 121, at 1083 (lawyer should consider the relative merits of the client's goals and claims against claims of others). The arguments are overbroad in that even if a client-centered approach might lead the lawyer and client to consider the interests of third parties it would not uniquely do so. Other very different approaches to decisionmaking might equally, or more effectively, protect the interests of third parties. For example, the traditional lawyer might simply decide that the interests of third parties dictate that the client take a particular approach. William Simon's critical lawyer would clearly have a more substantial warrant to protect the legitimate interests of others than would the client-centered lawyer. See *id.* and Simon, *supra* note 95. Although the means used by the traditional and critical lawyer would differ from those used by the client-centered lawyer, the results would be the same. The arguments are circular in that they imply that client-centeredness benefits third parties when the client deems their interests worth protecting. Under some circumstances, a client-centered lawyer could raise with the client the possible third-party interests to consider, but if she is serious about her commitment to client decisionmaking she must be prepared to live with the client's assessment of those interests' legitimacy.

The argument that client-centeredness benefits third parties seems more than trivial in one respect. If the client-centered lawyer and his client engage in a thorough dialogue concerning the goals and process of the legal representation, the lawyer might be less likely to assume that the client wishes to harm third parties, and the client might be forced to consider, in a concrete way, what those possible interests are. This argument for client-centeredness becomes one of the positive results of a dialogic approach to lawyering, discussed *infra* in Part III.B.3. Of course, whether the lawyer and client will consider or reject the legitimate interests of third parties will depend on a number of factors.

214. Cf. Lopez, *Training Future Lawyers to Work With The Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 343 et seq. (1989) (criticizing legal education for treating law practice as if all people are the same).

215. It is not possible here to categorize all forms of lawyer-client relationships. It is extraordinarily unlikely that any one model of lawyering could accommodate all of the differences between legal services lawyers and corporate lawyers, solo practitioners and large law firm lawyers, personal injury lawyers and tax lawyers, and so on. Most commentators on the lawyering process, therefore, limit their observations to particular kinds of lawyer-client relationships, whether between lawyers and unskilled and relatively disadvantaged clients, see, e.g., Ellmann, *supra* note 16, at 719 n.4, or to lawyers in particular subject-matter areas, see, e.g., Spiegel, *supra* note 22, at 43 n.10 (civil matters only), and Simon, *Ethical Discretion in Lawyering*, *supra* note 121, at 1084 (same). My approach will be somewhat more eclectic, noting relevant differences between kinds of law practices and lawyer-client relationships.

For a discussion of the different dimensions of lawyer-client relationships, see Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 AM. B. FOUND. RES. J. 409 (suggesting that lawyer-client relationships operate on professionalism, business, and social dimensions).

216. See generally Redmount, *supra* note 143 (advantages and limitations of a client-centered approach).

cases may feel better about those decisions precisely because they made them.²¹⁷ Those clients may also follow through on necessary steps in their cases because of greater participation in the decisionmaking process: if clients weigh the advantages and disadvantages of a particular course of action and make a decision based on that analysis, their greater understanding of the background for the decision facilitates their "compliance" with it.²¹⁸ Client decisionmaking aids clients by allowing them to exercise control over their lives and to decrease the anxiety that otherwise results from their passive involvement in the legal process.²¹⁹

Many legal disputes arise because one party believes that another has ignored or sacrificed his or her perspective. When traditional lawyers promote a decisionmaking process that in effect says to the client "tell me what you want but leave it to me to decide how we get there; you'll thank me in the end," the lawyer risks simply perpetuating the sense of powerlessness that brought the client to see him in the first place. If the lawyer ultimately succeeds in the legal representation, the client may forgive him in the end but is not likely to view the experience as ennobling.²²⁰ If the lawyer fails, the client is likely to feel twice abused.²²¹ The different perspectives of lawyer and client²²² only exacerbate the situation. The lawyer may see whether to "play tough" in a child custody battle as only a question of means. The client may see such a decision as inextricably bound up with the ends she is seeking to achieve. The client-centered lawyer is less likely to perpetuate and act upon a false means/ends

217. See D. BINDER & S. PRICE, *supra* note 8, at 153. See also text accompanying *supra* note 191.

218. Cf. Handler, *Dependent People*, *supra* note 99, at 100-07 (discussing informed consent study where doctors engaged renal dialysis patients in more active decisionmaking because of their view that patients needed to understand rationale for treatment in order to comply with its terms). As a related normative matter, we might also say that clients should make their own decisions because they ultimately must live with the consequences of those decisions.

219. See D. ROSENTHAL, *supra* note 19, at 168-69 (discussing the advantages to clients of a client-participatory model of decisionmaking).

220. I am assuming here that the client is not a sophisticated client who has explicitly told the lawyer that she wants the lawyer to take over and get her a particular result by whatever method he chooses.

221. For example, in the recent movie *The Good Mother*, based on S. MILLER, *THE GOOD MOTHER* (1986), the mother's lawyer in a custody dispute persuades her that she must blame her boyfriend for allowing her daughter to touch his penis. The lawyer's theory seems to be that this approach is much more likely to succeed than one based on the mother saying that she now has more liberated views about sex. The lawyer does not consult with the client about this approach, but tells her that is how he will represent her. The client is troubled by this choice of tactics (as is the boyfriend) but is essentially passive in her reaction to the lawyer. In the end, the mother loses custody of her child. The pain of the loss is magnified by her sense of powerlessness over how she allowed herself and her boyfriend to be portrayed in the court proceeding. Her relationship with her boyfriend breaks down, in part because of the discontinuity between their actual experience and the court proceeding's depiction of it. The point here is not that the lawyer's choice was irrational or wrong but that the client played a minimal role in deciding how to tell her story. At the very least, she should have been permitted to choose how to present that story after being provided with all the relevant information, including the lawyer's assessment of the likelihood of success of the different theories of the case. Cf. Spiegel, *supra* note 22, at 123 n.346 (while clients might wish to trade control over the presentation of their stories for a favorable case outcome, those clients who could not prevail would likely find it important to control the manner of presentation of their disputes).

222. See Elkins, *supra* note 180, at 240 (world views of lawyers and clients may be mutually exclusive).

distinction²²³ than his traditional counterpart, and is therefore less likely to run roughshod over the client's individual perspective. The client-centered lawyer may not be able to assure her client that the judge or adversary will listen to him, but she can at least assure that *she* will do so.

A number of studies report that clients value the perceived fairness of the process through which their claims are adjudicated as well as the outcomes they receive.²²⁴ Decisionmaking clients are likely to be more involved in the procedural handling of their cases than those who cede such authority. It would seem, therefore, that client-centeredness increases the chances of a client having a positive view of his representation if not of enhancing the objective results obtained.²²⁵

Client-centeredness furthers the goal of legal representation by increasing the likelihood of client satisfaction.²²⁶ Because legal decisions implicate a client's unique values, client-centered counseling's focus on the client as decisionmaker enhances the possibilities that his decisions will be consistent with both the expressed and implicit values that guide his life.²²⁷ Client-

223. See Strauss, *supra* note 55, at 324-26 (means/ends distinction in lawyers' ethical codes a false dichotomy).

224. See, e.g., the "procedural justice" studies in which several authors concluded that clients in criminal and traffic cases valued procedural fairness at least as much as case outcome in evaluating the quality of their treatment in the legal system. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW & SOC'Y REV. 237 (1978); Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984); Tyler, *What is Procedural Justice?: Criteria Used By Citizens To Assess The Fairness Of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); Casper, Tyler & Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988) (dealing with felonies).

225. See, e.g., Hillary & Johnson, *Social Power and Interactional Style in the Divorce Attorney/Client Dyad*, 12 J. DIVORCE 89 (1989) (divorce lawyers' "client orientation," roughly equivalent to client-centeredness, positively correlated with client perceptions of lawyer competence and client satisfaction with lawyer's representation).

226. See *supra* note 29 and accompanying text. Cf. L. WEITZMAN, *THE DIVORCE REVOLUTION* 287-89 (1985) (women divorce clients distressed that their lawyers appear uninterested in pursuing support awards against their ex-spouses despite the importance clients place on such awards).

227. See, e.g., Strauss, *supra* note 55, at 338 n.106 and sources cited therein; Spiegel, *supra* note 22, at 102-03.

A concrete example of how the different values of lawyer and client might affect choices in a case appeared in *L.A. Law* (NBC television broadcast, Nov. 3, 1987). Lawyer Victor Sifuentes represented a couple who sued a security agency that had promised a quick response to crime. Plaintiffs alleged that because the company's security guards failed to enter the premises on one occasion, the plaintiffs' house was burglarized and the wife raped and assaulted. The plaintiffs sued for negligence and breach of contract. After the case was submitted to the jury but before a verdict was returned, the defendants proffered a settlement to Sifuentes of \$1 million, conditioned upon no admission of liability and no publication of the agreement or its amount. Sifuentes presented this offer to his clients and recommended that they take it, saying that it was a good offer and that there was no assurance that the jury would give them any more money. The husband was inclined to accept the offer, but the wife was adamant about not doing so. She indicated that it was unacceptable to her to keep the settlement under wraps. She needed to feel that she was doing something to counteract what she saw as the shady and dangerous practices of the defendant company. The wife said that every time she went by a house with a sign stating that it was protected by the defendants she wanted to stop the car and warn the people that they were not safe. She directed Sifuentes to reject the settlement offer, which he did. When the jury returned, it found for the defendants on the negligence claim but for the plaintiffs on the contract claim. It awarded damages of \$2.5 million. The client stuck to her

centeredness increases the likelihood that the client can tell his story from his own perspective.²²⁸

Although there may be no *necessary* connection between client-centered counseling and the lawyer's increased sensitivity to the client's emotional concerns,²²⁹ the client-centered lawyer is more likely to consider and attend to the client's psychological motivations than is his traditional colleague. He is less likely to treat the client as an abstract entity with predetermined wants and

principles and obtained the larger monetary settlement to boot. (This was a television show, after all.)

This was a classic case where a good lawyer (and dedicated watchers of the show should have no difficulty in agreeing that Sifuentes is a good lawyer) tried to impose his values on his client. Although the ultimate result was in keeping with the client's goals — Sifuentes followed her choice and rejected the settlement — the client's concerns might have been ill-served had she been less passionate and articulate or had this been a decision that, unlike the decision whether to accept a settlement offer, was not one considered as clearly the client's to make. Sifuentes needlessly sacrificed rapport with his client by failing even to *inquire* about her goals and needs. Apparently, he simply assumed that she considered the size of the settlement offer most important, or, alternatively, that the settlement amount was so great it dwarfed her other concerns. Perhaps Sifuentes wanted her to accept the settlement because of his own risk-aversiveness, or because he believed that he had made tactical errors in the trial that would be submerged if a settlement were accepted. In any event, the conflict was a familiar one: the lawyer predictably valued the monetary settlement to a greater degree while the client sought to uphold the principle. Although it might not have entered into Sifuentes's thinking, there was also the matter of the fee: if Sifuentes handled the case on a contingency basis, he probably stood to get one-third of the settlement figure, and to the extent that the client's choice risked yielding less or no money he had a strong interest in urging that she accept the \$1 million offer. At the least, Sifuentes should have disclosed his monetary interest in the choice his client made. What many viewers probably saw only as a dramatic instance of a client expressing her belief in a principle exemplified (perhaps unwittingly) the importance of a client's values and the need for the lawyer to discuss them with the client.

For all its faults, *L. A. Law* at least addresses interesting issues arising in the lawyer-client relationship even if the resolution of those issues is often problematic, legally if not dramatically. See also Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607, 1612-15 (1989) (praising treatment in early episode of client autonomy issue in divorce case).

228. Spiegel, *supra* note 22, at 123. An increasing number of legal commentators emphasize the importance of lawyers facilitating their clients' story-telling in the legal context and the barriers that lawyers and the legal system create to impede such client story-telling. See, e.g., Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459 (1989); White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990). For the importance of listening to lay stories in the medical context, see R. COLES, *TEACHING AND THE MORAL IMAGINATION: THE CALL OF STORIES* Ch. 1 (1989). For many clients, the need to present their cases through lawyers can be quite frustrating. As one litigant put it:

Of the coming arguments before the U.S. Supreme Court, Joe Cruzan is reported as saying, "I wish to God we could go stand before those nine judges and say, 'Here we are. You ask the questions.' I wish we could present the case. I wish it didn't have to be through an attorney. I feel kind of cheated."

Nankivell, *Does an Incompetent Patient Have an Exercisable Right to Refuse Artificially Administered Nutrition and Hydration?*, 5 PREVIEW SUP. CT. CASES 155, 159 (Dec. 15, 1989) (discussion of Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990)).

That a client's values cannot be communicated to her lawyer (and, indeed, may not be known to the client herself), does not necessarily imply that client-centeredness is the only possible response. See *infra* Part IV.B.

229. *But see* Bastress, *supra* note 174, at 100 (client-centeredness facilitates meaningful human relationships and supports the intrinsic value of the relationship for lawyer and client).

needs,²³⁰ or to infantilize the client.²³¹ The client-centered lawyer's attention to his client's goals also can translate into increased empathy for the client.²³²

To be sure, some clients will want a more traditional relationship with their lawyer in which the latter controls both the decisionmaking process and the decisions made. Other clients will want their lawyers to provide more explicit advice about which possible course of action to select. Corporate executives, for example, may tend to stress the lawyer's involvement in decisionmaking rather than her deferral to the client.²³³ Still other clients will opt for the contentious, challenging relationship with the lawyer that is the focus of critical lawyering²³⁴ in lieu of the "warm and fuzzy" lawyering that seems to characterize client-centeredness. Yet one must be careful not to assume that

230. See Redmount, *supra* note 187, at 186, 188-90 (noting that client's real problem may not be the one that she comes in to see the lawyer about, and suggesting that client-centered lawyer's approach of counseling *with* the client, as opposed to counseling to or for the client, decreases lawyer misperceptions). Cf. Schisgall, *Counsel for the Divorce Lawyer: A Client's View*, 10 LEGAL ECON. 32 (July/Aug. 1984) (divorce client indicating that lawyers should not jump to conclusions about client goals).

231. See Schisgall, *supra* note 230, at 33 (most important thing client's lawyer did in representing her was to emphasize client's role in re-establishing control over her life); H. FREEMAN, *supra* note 187, at 36-37 (goal for the client-centered counselor is to help the client help him or herself); cf. H. FREEMAN & H. WEIHOFFEN, *supra* note 185, at 94 (lawyers who use directive model of counseling foster client dependence and encourage client to shift to the lawyer decisions that the client should make himself; such lawyers also miss the emotional complexities surrounding client choices). The import of these observations is that client-centeredness can enhance the client's sense of psychological autonomy. See A. WATSON, *supra* note 4, at 8 (lawyer's insistence that the client must make decisions "paradoxically" increases client autonomy). See also J. KATZ, *supra* note 18, at 104-29 (discussing psychological autonomy). But see Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1164-66 (1978) (discussing circumstances in which it would be inappropriate for the lawyer to insist on the child client's participation in the child custody decision).

232. See, e.g., Smith & Nester, *Lawyers, Clients and Communication Skill*, 1977 B.Y.U. L. REV. 275, 296-300 (discussion of practices of lawyers sensitive to communicative aspects of lawyer-client relationships).

233. See, e.g., Nিকেle, *General Counsel Offers Perspective From Both Sides of the Line*, in CORPORATE CLIENTS & THEIR LAWYERS: A COLLOQUY 23 (J. Henning & J. Hamby eds. 1986) (corporations want outside corporate lawyers more involved in business decision-making); Rast, *What the Chief Executive Looks for in His Corporate Law Department*, 33 BUS. LAW. 811, 814-15 (1978) (corporate executive wants lawyer to tell him what is mandatory and what is advisable); deButts, *The Client's View of the Lawyer's Proper Role*, 33 BUS. LAW. 1177, 1181 (1978) (corporate executive looks for lawyer to advise about changing conditions). See also Gordon, *supra* note 112, at 25 & n.78. Cf. J. DONNELL, *THE CORPORATE COUNSEL: A ROLE STUDY* 82 (1970) (corporate counsel sought joint decisionmaking responsibilities with clients). The active involvement of the lawyer in the client's decisionmaking process, however, is not necessarily inconsistent with a client-centered approach. The client-centered lawyer is not simply a passive observer. She actively participates with the client but never loses sight of the fact that the client is the ultimate decisionmaker.

234. See *infra* Part IV.B. On the other hand, a client-centered approach such as the Binder and Price model can serve to put clients at ease because of the high degree of decision-making structure that it provides. There is a substantial difference between the lawyer who throws up his hands and says "I don't know, client, you decide" and the client-centered lawyer who fully participates in structuring the decisionmaking process. In the latter situation, the client is freed up to make his own decision. Given the highly emotional nature of many legal problems, that structured freedom might be especially attractive to clients.

entire categories of clients do not wish to make their own decisions,²³⁵ are unable to do so,²³⁶ or can resist the lawyer's forceful articulation of her point of view in attempting to fashion their own decisions.²³⁷ Compared to other possible visions of the lawyer-client relationship, the client-centered approach's presumption of client decisionmaking is least likely to lead to the denial of the client's individuality. That is an advantage not to be lightly discarded.

2. Possible Advantages from the Lawyer's Perspective

Lawyers have several interests that are potentially implicated in the lawyer-client relationship. At a minimum, they have interests in performing their work in an autonomous manner, acting consistently with an acceptable definition of the lawyer's role, performing their craft well, and acting ethically.²³⁸ Client-centeredness may not always promote these interests but it does not necessarily compromise them either.²³⁹

At first blush, client-centered lawyering seems to offer few advantages to the lawyer. The client-centered lawyer has less freedom than his traditional colleague to define his client's interests and determine the course of the representation. If serious about allowing his client to make decisions in the case, the lawyer implicitly accepts that the client may make some choices that the lawyer would not. The lawyer could take this lightly ("it's your decision") but in some cases the lawyer may see the client's decision as rejecting his professional judgment.²⁴⁰ Client-centered decisionmaking is also likely to be more time-consuming.²⁴¹

235. Cf. H. FREEMAN, *supra* note 187, at 161 (lawyers establish good rapport with poor clients, although the lawyer is very directive in the relationship, in part because clients expect the relationship to be so defined).

236. See generally Tremblay, *supra* note 16, for a discussion of the possibility of an expanded role for clients with mental disabilities in a client-centered decisionmaking approach.

237. See R. JACK & D. JACK, *supra* note 107, at 93 (danger of "morally responsive lawyering" is that it can increase lawyer power over clients and lead to their hegemony and arrogance).

238. See Spiegel, *supra* note 22, at 113-20. In addition to recognizing the lawyer's craft interest, John Morris identifies the lawyer's "interest in controlling the personal impacts of role-differentiated behavior and [her] interest in assessing her responsibility for the external consequences of the attorney-client interaction." Morris, *supra* note 42, at 786 (footnote omitted).

239. Spiegel asserts that an informed consent approach to lawyering does not seriously compromise lawyer autonomy because the lawyer retains autonomy in defining the steps in the tasks to be performed, which is more important than determining whether to undertake the task in the first place. Spiegel, *supra* note 22, at 114-15. The lawyer's interests in acting ethically and consistently with his definition of the appropriate role for the lawyer are protected, Spiegel argues, because of the lawyer-client dialogue that inevitably occurs within the informed consent relationship. *Id.* at 115-20. He also observes, correctly in my view, that definitions of role and ethical conduct are in an important sense circular: if it is appropriate for the lawyer to allow the client to make certain decisions then it is consistent with the lawyer's role and ethical obligations to do so. There is certainly nothing inherent in client-centeredness that requires the lawyer to act unethically or in a manner inconsistent with an *a priori* definition of the lawyer's role.

240. Subsumed within the lawyer interests identified in the text is the lawyer's professional interest in giving advice to clients. As noted earlier, Binder and Price limit advice-giving except in unusual circumstances, though other advocates of client-centered counseling are more willing to recognize its appropriateness. See *infra* Part IV.A. Concern about the Binder and Price lawyer's decreased ability to give advice depends on whether advice-giving is considered an important component of the professional role. It is not at all clear that advice-giving is important if the client does not wish to receive it, because the client activates the lawyer-client relation-

But such a view of the lawyer's interests is too narrow. The client-centered lawyer is likely to experience his client as a more fully-realized human being than the stick figure with a predetermined set of ends that is the province of the traditional lawyer. The lawyer's relationship with such a person is thus apt to be more satisfying in the long-run, even if less efficient and more time-consuming. Client-centered counseling's egalitarian thrust allows more consistency between the lawyer's professional behavior and the behavior she chooses to exhibit in other parts of her life.²⁴² Client-centered lawyers are also likely to be more sensitive to the inevitable effect that their personalities have on the lawyer-client relationship.²⁴³ Collaborative decisionmaking also allows the lawyer to share with the client some of the weighty and often isolating responsibility that comes with the professional role.²⁴⁴ Shared responsibility may be particularly attractive to young lawyers,²⁴⁵ though it would be healthy

ship in the first place. For clients who choose to receive advice, the lawyer's interest in providing advice could be worth protecting. The lawyer's interest in giving advice can be sufficiently protected by a counseling approach that, without banning advice in all circumstances, requires the lawyer to self-consciously judge the likely effect of that advice on the client before blithely dispensing it. See *infra* Part IV.A.

241. See *infra* Part IV.B.

242. See Wasserstrom, *supra* note 77, at 15 ("In important respects, one's professional role becomes and is one's dominant role, so that for many persons at least they become their professional being."). See also D. ROSENTHAL, *supra* note 19, at 152 ("A participatory model which looks to the professional and the lay client more nearly as equals capable of joint collaboration takes a more properly balanced view of human nature.").

243. Again, there may be nothing inherent in a client-centered approach that causes the lawyer to be more aware of his biases, but it seems plausible that a lawyer who focuses on the relationship factors and is self-conscious about his role will at least be more likely than the traditional lawyer to examine such factors. See Redmount, *Attorney Personalities*, *supra* note 188, at 984-85.

244. See D. ROSENTHAL, *supra* note 19, at 170 (advantages to the lawyer include sharing responsibility with clients and avoiding having to meet impossible standards of practice).

According to Shaffer and Elkins:

There is good authority — professional and empirical — for the point that it is better to be a companion than a domineering parent in our relationships with clients. The client benefits, materially and psychologically. We argue that the lawyer benefits as well. The final pay-off is both social and personal: Collaborative decisions are less likely than lawyer dominated ones to lead to litigation.

T. SHAFFER & J. ELKINS, *supra* note 1, at 286. Of course, even if decreased lawyer domination led to less litigation, the result would not necessarily be positive. For example, some have argued that alternative dispute resolution mechanisms may deny poor people access to the one system that is at least sometimes available to vindicate their rights. See Handler, *Dependent People*, *supra* note 99, at 1109. If Shaffer and Elkins mean that collaborative decisionmaking decreases unnecessary litigation (however defined), or litigation that is designed primarily to serve the lawyer's interests, I agree with their conclusion.

245. In my experience as a clinical teacher, students initially have great difficulty with some of the key precepts of client decisionmaking. Although at first many of them feel ill-equipped to make decisions for their clients, once they conduct legal and factual research and develop a tentative approach to the case they become strongly invested in having the clients adopt their decision. Perhaps they are especially vulnerable to viewing a client's different choice as rejecting their still nascent professional judgment. Nevertheless, I have suggested to students that, in fact, client decisionmaking can be quite liberating for the new lawyer (or lawyer-to-be). If the student sets out the client's choices fully and fairly and gives the client his best predictions of possible outcomes, the student need not feel fully responsible for the client's decision. It may also be useful for students to experience client decisions that do not necessarily conform to the lawyer's perception of relevant factors. A client choice different from the lawyer's may be cause for re-examination of the decisionmaking process but need not create self-doubt.

for more experienced ones to adopt it as well.²⁴⁶ At some level, client-centered lawyering allows the lawyer to believe, with some justification, that the positions taken in the course of the legal representation are truly the client's and not of some convenient construct created by the lawyer.

Nor need client-centered counseling cause lawyers to act inconsistently with their best professional judgment. Assuming that the dialogue between lawyer and client does not produce a consensus decision, the lawyer does not abdicate his professional responsibility to the client. He retains the right to refuse to represent a client or, under some circumstances, to seek to withdraw from representing her, if he believes that his professional judgment is being compromised. The ethical provisions that address this issue may, in fact, be problematic, but they are not made more so by a client-centered approach.

In describing his client-participatory model, Rosenthal aptly captures the advantages to the lawyer of a client-centered model:

The participatory model serves to protect the integrity of professionals by liberating them from many of the strains and inconsistencies of their traditional ideal. The participatory model reduces the burdens imposed upon the professional by the paternal role. It increases the potential for clients to receive effective service. It removes inconsistencies in the law of professional responsibility. . . . It brings professional-client relationships into closer congruence with deeply rooted economic values in our society — the economic norms which prize freedom of contract between supplier and consumer, and free enterprise in a competitive market rather than contracts of adhesion and mercantilist market restrictions. It also brings professional-client relationships into congruence with this society's abiding commitment to democratic values which values are necessarily challenged by the existence within our society of paternalistic institutions.²⁴⁷

3. Possible Advantages for the Lawyer-Client Relationship Itself

Assessing the effect of client-centered lawyering and its promotion of client decisionmaking solely from the separate perspectives of lawyer and client may not convey an important dimension of this approach to lawyering. The

Client-centered lawyering, at least of the Binder and Price variety, may affect students negatively in another way. Because the Binder and Price student-lawyer is rarely supposed to communicate his choice to the client, the student-lawyer may try to get the client to reconsider the decision to meet the student's own needs to have the client decide his way. Don Gifford reports on one unpublished study that supports the view that students resist (or at least find it difficult to apply) the Binder and Price counseling approach. Gifford, *supra* note 15, at 839 n.127. After law students received training in Binder and Price interviewing and counseling techniques, they were observed on videotape conducting interviews and counseling sessions. While students made significant gains in adopting Binder and Price interviewing techniques, they failed to show any significant reduction in giving advice to clients.

246. The experienced lawyer may have a great deal more invested in having his client follow his recommendation than does the new lawyer. Moreover, the lawyer, experienced or not, may wish to act paternalistically and make decisions for his client. This last interest, though, is insignificant when compared to the client's interest in being treated as an autonomous human being.

lawyer-client relationship that emerges from a client-centered approach looks very different from the one depicted in the world of traditional lawyers and passive clients. In particular, client-centeredness offers greater opportunities for meaningful lawyer-client dialogue than does the traditional approach.²⁴⁸

The traditional model's assumptions about the lawyer-client relationship have already been described.²⁴⁹ In contrast to the silence or serial monologues of the traditional relationship, lawyers and clients in a client-centered relationship have the potential to conduct a true dialogue in which each person contributes to the discussion and is genuinely interested in the other's perspective.²⁵⁰ The insightful client-centered lawyer attempts not merely to make a bare presentation of alternatives to the client but tries to engage in the imaginative understanding of the client's situation. Clients and lawyers must talk to each other in a kind of structured conversation in which the lawyer's role is to assure that certain concerns are addressed and the client's role is to assess her situation as honestly and fully as possible.

The client-centered lawyer also is less likely than the traditional lawyer to treat his client in a paternalistic and patronizing fashion. The resultant lawyer/client relationship raises fewer moral objections because of its anti-paternalistic cast.²⁵¹ It approaches the outlines of an ideal lawyer-client relationship as defined by John Donnell:

The ideal counsel-client relationship is based upon the mutual trust of each party as individuals and upon respect for each other as a person competent in his own field. It is a relationship in which neither party seeks to dominate or permits himself to be dominated; yet each is open to influence from the other. It is a personal, helping relationship that goes beyond providing specialized knowledge and offering legal opinions on fact situations defined by the client. . . . It is a relationship that can only develop

247. D. ROSENTHAL, *supra* note 19, at 169. Rosenthal adds that, in his view, the participatory model increases public knowledge about and respect for the professions. *Id.* at 170.

248. I wish to be careful here, however, not to fall into the trap that I believe has ensnared some other advocates for client-centered lawyering. That trap, in essence, proposes that client-centered lawyer-client relationships inherently are superior to traditional ones because there is greater rapport, understanding and candor between lawyer and client in the former. *See, e.g.,* Bastress, *supra* note 174, at 119; Doyel, *The National College-Mercer Criminal Defense Survey: Preliminary Observations About Interviewing, Counseling and Plea Negotiations*, 37 MERCER L. REV. 1019, 1024-25 (1986). It is not obvious why this is necessarily so. An inept client-centered lawyer could harm rapport and candor in any number of ways while still allowing the client to make the key decisions in the case. Conversely, a sensitive, perceptive lawyer who followed the traditional path could have a terrific rapport with her client even while taking steps that seemed to compromise client autonomy. Even if client-centered lawyers develop a better rapport with their clients, moreover, it is still necessary to show that other important values in the lawyer-client relationship are maintained. A lawyer with poor legal skills, or one who neglects her cases because of overwork, might in the short-run establish good rapport with her client but ultimately not serve her client's interests well. *Cf. Feldman & Wilson, supra* note 2 (simulated clients rated lawyers with high relational skills and low legal competence higher than lawyers with low relational skills and high legal competence).

249. *See supra* Part II.A.

250. For a criticism of the quality of the client-centered dialogue, *see infra* Part IV.B.3.

251. *See Wasserstrom, supra* note 77, at 20-22 (traditional lawyers predisposed to treat clients in morally objectionable way by acting in paternalistic and impersonal manner towards them).

through numerous interactions between counsel and client and, therefore, it must be cultivated over a period of time.²⁵²

Client-centered relationships entail shared decisionmaking responsibility and mutual participation by lawyer and client. By avoiding the trap of either lawyer- or client-dominance, these relationships provide greater opportunities for facilitating wise client decisions in a supportive atmosphere.²⁵³

IV. THE ARGUMENTS AGAINST CLIENT-CENTEREDNESS

From the highly esoteric to the intensely practical, the arguments for client-centered counseling cover impressive ground. Even when some traditional arguments are stripped away or significantly limited, the remaining arguments for client-centeredness are substantial. Yet we should be especially skeptical of ideas that seem to come to us so uncritically. Upon examination, there are indeed criticisms of client-centered counseling as it has evolved. Some of these criticisms are not easily dismissed. Although in my judgment they are ultimately unpersuasive, they are essential for understanding both the appropriate reach of client-centeredness and the limitations on its applicability. Once again, the arguments may be divided broadly into systemic and individual categories.

A. Systemic Arguments Against Client-Centeredness

1. The Problem of Autonomy

The most basic criticism of client-centered lawyering questions its underlying premise, that it is the primary duty of lawyers to foster client autonomy. William Simon is the most articulate spokesperson for the autonomy critique of client-centeredness.²⁵⁴ In his most recent article, *Ethical Discretion in Lawyering*,²⁵⁵ he argues that in civil cases lawyers should have discretion to refrain from pursuing a client's legitimate, legal goals if to do so

252. J. DONNELL, *supra* note 233, at 173-74 (footnote omitted).

253. See, e.g., R. BURT, *supra* note 107; Basten, *supra* note 68, at 23-24; E. DVORKIN, J. HIMMELSTEIN & H. LESNICK, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 202 (1981) (comment of Howard Lesnick) (whether lawyer or client makes decisions matters less than that lawyer treats client as independent person capable of assuming responsibility for decisions).

254. Simon never uses the term client-centeredness explicitly in his critique. The closest he comes is in *Homo Psychologicus*, *supra* note 84, where he takes lengthy and substantial issue with the "legal psychologists," a group of legal educators (e.g., Shaffer, Goodpaster, Watson, Redmount, Bellow and Moulton) that to varying degrees is associated with advocacy for client-centered counseling. More recently Simon's criticism of informed consent in lawyering, see *supra* note 149, is consistent with a critique of client-centeredness. It is apparent that Simon criticizes, at least in certain contexts, some of the basic premises of client-centeredness and in fact presents an alternative vision of the ideal lawyer-client relationship.

Ironically, Thomas Shaffer, whom Simon criticizes sharply in *Homo Psychologicus*, *supra* note 84, is also critical of lawyers over-emphasizing client autonomy. See Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319 (1987). Shaffer's views on client-centeredness are not easily categorized. In *Legal Ethics and the Good Client*, *supra*, he objects to the undiluted pursuit of client autonomy insofar as it assumes that clients exist independently of societal context and history. Shaffer's emphasis on the individual's connection to the community (and the lawyer's membership in that community) reflects the theological approach that informs a number of his writings on legal ethics and professional responsibility.

255. See *supra* note 121.

would frustrate underlying goals of justice or fairness. Criticizing the traditional views of lawyers' ethical responsibilities (which he labels the libertarian and regulatory approaches) as excessively categorical, Simon instead argues that lawyers should have discretion to relate to clients and others in such a manner as to "seek justice."²⁵⁶ Of particular relevance for the client-centeredness debate, Simon asserts that lawyers should consider what he calls the internal merits of the client's goals in deciding how to represent him and what kinds of arguments to make on his behalf.²⁵⁷ For example, the lawyer who believes that technical adherence to regulatory language frustrates the underlying purposes of a statute is disabled from framing the legal issue technically (or formally) in making his legal argument but must look to the underlying purpose of the statutory provision.²⁵⁸ As the lawyer examines that statutory purpose, Simon clearly allows for the possibility that he will choose a course of action inconsistent with the client's interests as the client defines them.²⁵⁹ Under Simon's scheme of representation, lawyers continually subject their clients' goals to a searching inquiry both before and after agreeing to represent them.²⁶⁰

256. Simon writes:

The basic maxim of the approach I propose is this: The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice. This 'seek justice' maxim suggests a kind of noncategorical judgment that might be called pragmatist, ad hoc, or dialectical, but that I will call discretionary. 'Discretionary' is not an entirely satisfactory term; I do not mean to invoke its connotations of arbitrariness or nonaccountability, but rather its connotations of flexibility and complexity. . . . I use the term in what Ronald Dworkin calls 'a weak sense' to indicate that the relevant norms 'cannot be applied mechanically but demand the use of judgment.'

Id. at 1090 (citations omitted).

257. *See id.* at 1096-1113. In addition to having the lawyer assess the internal merits of the client's claims, Simon also would have the lawyer consider the relative merit of the client's claims. *Id.* at 1092-96. That is, in deciding whether to represent a client, the lawyer ought to consider the merit of the client's legal claim (the extent to which successful pursuit of the client's claim would be just) compared to the claims of others that he might represent.

258. Simon considers three antinomies: substance vs. procedure, purpose vs. form, and broad vs. narrow framing of issues. *See id.* at 1097-1113. With respect to the purpose vs. form choice, for example, he gives the example of a lawyer considering whether to argue that a client's acceptance of lodging from his employer in lieu of part of his salary should be considered tax-exempt. After making a series of assumptions about how the issue gets raised and the Internal Revenue Service's enforcement difficulties, Simon concludes that the lawyer should not argue that the lodging ought to be tax-exempt. *Id.* at 1104-05.

259. This does not necessarily mean that, *e.g.*, the lawyer actually makes arguments in court that harm the client's interests. But it surely means that the lawyer explains to some clients that he cannot make certain arguments on their behalf because such arguments violate the lawyer's sense of justice. Presumably the client then must choose whether to abide by the lawyer's wishes and eschew the argument, seek to persuade the lawyer to make the technical argument (or a variation of it) anyway, or get another lawyer. Were this discussion part of a broader lawyer-client dialogue, my concerns with Simon's approach might be manageable, though I would still question the persuasive effects of the lawyer's advice on the client's free choice. Of greater concern, however, is that Simon would permit and perhaps even encourage the lawyer to forego mentioning to the client the possibility of the technical argument because of his view of its inconsistency with the underlying statutory purpose. *See Simon, Ethical Discretion in Lawyering, supra* note 121, at 1104-05 (lawyer should not pursue tax avoidance plan she deems inconsistent with statutory purpose "especially if the lawyer came up with the idea herself and has not yet communicated it to the client").

260. *See Simon, supra* note 61, at 133 (client and advocate must constantly justify themselves to each other).

Simon recognizes that his approach potentially compromises client autonomy, but argues that:

[T]he appeal to individual autonomy or right is not a sufficient basis for client loyalty because it begs the question of why the client's autonomy or right should be preferred to that of the person whose autonomy or right is frustrated by the client's activities.²⁶¹

But whatever the force of his critique with respect to powerful clients bent on pursuing immoral purposes,²⁶² Simon fails to explain adequately how lawyers can responsibly limit the autonomy of all but the most powerful clients without imposing their values on them and denying them the opportunity at least to seek vindication of hypothetically legal interests.²⁶³

The virtue of Simon's approach depends on the degree to which the lawyer's exercise of power over his client is legitimate. Simon addresses the criticism that his discretionary approach gives lawyers too much power over clients by responding:

[T]he discretionary approach does not increase lawyer power because any increase in the lawyer's power to frustrate client goals is exactly balanced by a reduction in the lawyer's capacity to frustrate goals of third parties and the public. Lawyers serve client goals by using power against others. The discretionary approach puts the lawyer in opposition to clients by reducing her power to injure others for the sake of the client.²⁶⁴

This response is clearly unsatisfactory. Even if the lawyer's exercise of greater power over one person (the client) is exactly balanced by the decreased use of power over another (the client's opponent),²⁶⁵ Simon analyzes lawyer power as

261. Simon, *Ethical Discretion in Lawyering*, *supra* note 121, at 1125.

262. Although much of the argument and many of the examples in *Ethical Discretion in Lawyering*, *supra* note 121, seem directed at lawyers representing powerful clients, *see, e.g., id.* at 1094-96 (South African Airways), 1104-05 (highly paid hotel manager), 1109-13 (wealthy private university), *but see id.* at 1105-07 (welfare client), Simon does not purport to limit his argument to such clients. *See id.* at 1130 ("A lawyer should be careful not to exercise such influence over [unsophisticated or poor] clients irresponsibly, but when it is clear that a claim or course of action lacks merit, a client's vulnerability is no reason to go ahead with it").

263. Simon comes closest to articulating how lawyers and clients would resolve their potentially competing interests in an earlier article, *Visions of Practice*, where he writes:

The precept that the lawyer further the client's interests, as she understands them, is qualified by the precept that she also try to enhance the client's capacity to express her own interests. The authoritative test of the lawyer's judgment is that the client come to share it under conditions in which the lawyer believes that the client's understanding is not affected by conditions of hierarchy.

Simon, *supra* note 95, at 486, (citation omitted). Significantly, Simon does not indicate how to establish such non-hierarchical conditions nor how the lawyer knows that the client's adoption of the lawyer's views (or vice versa) was accomplished under non-hierarchical conditions. The opportunities for lawyer self-deception appear numerous.

264. Simon, *Ethical Discretion in Lawyering*, *supra* note 121, at 1127.

265. It is not obvious why the total amount of power that the lawyer exercises always and necessarily remains constant. In Simon's examples of the hotel manager versus the IRS and the welfare client versus the welfare bureaucracy, *see id.* at 1104-07, it appears that the lawyer's capacity to exercise power over his clients is considerably greater than his capacity to exercise power over the opposing agencies. With respect to his clients, the lawyer has the power to prevent the client from seeking a particular benefit. For example, if it is impractical for the client to secure the services of another lawyer, or if the client is unaware that he has foregone a choice

if it exists solely as an independent, disconnected concept. But the lawyer's exercise of power is problematic because she is exercising power *over* her client. While Simon at least addressed this issue in other writings, he thus far has failed to provide a satisfactory answer to the problem of lawyer power.²⁶⁶ Simon's approach offers a great deal to those lawyers seeking justification for a more political and morally rich practice; it offers considerably less solace to the many lawyers engaged in more mundane concerns.²⁶⁷ As for clients, they

that the lawyer kept from him, *see supra* note 259, the lawyer's power over the client in the relationship may be virtually complete. Contrarily, the IRS and welfare bureaucracies are so huge and powerful in their own right that the capacity of any one individual and his lawyer to affect their operations, let alone exercise power over them, is considerably vitiated. In Simon's IRS example, if the lawyer advises the client to seek on-site lodging, thereby reducing his tax liability, the IRS at most loses the tax on the displaced income, a trivial amount compared to the amount of tax revenues it collects. If the IRS learns of the arrangement, or if it conducts a random audit, it can challenge the taxpayer's actions. Finally, even if the IRS were concerned that the taxpayer's choice creates a dangerous precedent, the agency can seek to promulgate regulations or seek statutory clarification of the arrangement to prevent taxpayers from availing themselves of the lodging exemption.

266. Cf. Simon, *supra* note 84, at 494-96 (criticizing "Psychological Vision's" failure to confront issues of power). Additionally, in *Ideology of Advocacy*, *supra* note 61, at 139, Simon argues that:

[T]he non-professional advocate can give his client advice which will enhance, rather than subvert, the client's autonomy. . . . [T]he non-professional advocate is less likely to dominate his client because he presents himself as an ordinary individual rather than as a manifestation of disembodied expertise. Thus, the client is aware of the contingency of the lawyer's definition of the situation. He does not see the lawyer as a component in a system of autonomous procedural institutions. He need not forget either that there is a broad range of choices open to him or that the actions which the lawyer takes on his behalf represent choices he (the client) has made and for which he is responsible.

At least two points are noteworthy here. First, the mere de-professionalization of the lawyer's role would not necessarily diminish the lawyer's (or advocate's) capacity to exercise power over her clients. Based on their social, economic and political power, and their specialized expertise, elite advocates would still be in a position to dominate less powerful clients. Simon recognizes that the client's dependence on an advocate may compromise the former's autonomy; his not very practical solution is to suggest that advocates avoid developing a vested interest in their own power, *e.g.*, by functioning as advocates on a part-time basis only. *Id.* at 141-42. Second, Simon's vision of an advocate-client relationship in which an empowered client is able to recognize the limits of the advocate's expertise in assisting him to make his choices, while the advocate is sensitive to and works to diminish her dominance over her client, *see id.* at 139, appears to embrace the goals, if not the means, of a client-centered relationship. An important component of the various client-centered approaches is to increase client involvement and responsibility, while limiting lawyer dominance. This is especially so in the variation to the Binder and Price model advocated *infra* in Part V. Nevertheless, the models are far from identical, as the discussion in the text reflects.

267. Cf. Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1668 (1989) (criticizing Critical Legal Studies scholarship about the legitimating role of lawyers as being insufficiently attentive to the actual behavior of practicing lawyers). For the different requirements of political lawyering, *see* D. LUBAN, *supra* note 63, Ch. 14. Virginia Held observes that Simon's call for non-professional advocacy in Simon, *supra* note 61 (and although, as noted previously, Simon has now changed his view that advocates must be nonprofessionals, his views on the role of the advocate do not appear significantly changed), could easily lead to increasing power for the political elite if the advocates' values were not egalitarian and redistributionist. Held, *The Division of Moral Labor and the Lawyer*, in *THE GOOD LAWYER*, *supra* note 61, at 60, 76-77.

appear virtually non-existent in this latest formulation of Simon's lawyering model.²⁶⁸

Simon is not the only critic of unbridled client autonomy.²⁶⁹ Although framed more as a criticism of the adversary ethic than of client-centeredness, an increasing number of commentators, writing from a variety of perspectives, challenge the notion that the lawyer has no place exercising moral control over or judging the moral quality of the actions of his client.²⁷⁰ At least with respect to clients in non-criminal cases,²⁷¹ these critics attack the role-morality of lawyers who refuse to take moral responsibility for their client's actions out of a sense that to do so would improperly impose their will on clients and therefore compromise their autonomy.²⁷² Not surprisingly, many of these critiques relate to the practice of elite lawyers representing powerful corporate clients.²⁷³

It is beyond the scope of this article to analyze in depth the complex arguments that underlie the adversary system critique and the lack of justification for lawyers' role morality.²⁷⁴ But several observations may be offered

268. One of Simon's significant contributions to the literature on lawyering is his observation that lawyers improperly tend to impute ends to clients without sufficiently engaging them in an examination of their true needs and interests. Simon, *supra* note 61, at 53-59. But in *Ethical Discretion in Lawyering*, the concrete interests of clients appear to play almost no role in the lawyer's consideration of her ethical responsibilities. See *Ethical Discretion in Lawyering*, *supra* note 121, at 1109-13 (discussion of role of attorneys in hypothetical dispute over union representation). Moreover, Simon seems unconcerned with the client's right, within limits, to define the scope of her legal representation and to participate in, if not control, the tactics used. These rights derive in part from the recognition that the lawyer-client relationship exists primarily to serve the client's needs, interests, and goals and not the lawyer's. For a criticism of the degree of client manipulation countenanced by Simon's model of lawyering, see Ellmann, *supra* note 16, at 771-73.

269. Autonomy is clearly an important value to both advocates and critics of client-centeredness. For an argument that people in relationships are neither wholly autonomous nor non-autonomous, see R. BURT, *supra* note 107, at 99-100, 118-19.

270. For criticisms of the adversary ethic, see, e.g., Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, *supra* note 61, at 83-122; D. LUBAN, *supra* note 63, at 154, 160 (adversary ethic only justified in the context of criminal defense work; in other contexts, lawyers should practice moral activism); Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 *VAND. L. REV.* 697 (1988); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *CALIF. L. REV.* 669 (1978) (criticizing adversary ethic in non-advocacy contexts); Gordon, *supra* note 112. See also Morris, *supra* note 42, at 789 n.40 (collecting sources).

271. See, e.g., D. LUBAN, *supra* note 63, at 202-05. Commentators recognize that the specific constitutional protections afforded to criminal defendants under the Fifth and Sixth Amendments may limit the degree to which lawyers can override client choices. Such limitations may also lead, e.g., to formulation of different rules regarding disclosure of client communications to counsel. See Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351, 357 nn.26-27 and accompanying text (1989).

272. There is a distinction here between arguing that the lawyer's moral counseling is an acceptable intrusion on client autonomy and that such counseling is in fact consistent with and maybe even required by respect for client autonomy. Thomas Shaffer takes the latter position. See Shaffer, *The Practice of Law as Moral Discourse*, 55 *NOTRE DAME LAW.* 231, 246 (1979) ("autonomy allows for, and may even require" openness to moral persuasion; openness to others' influence essential to living a moral life).

273. See sources cited *supra* note 270, especially Luban and Gordon.

274. One criticism of the adversary ethic that implicates arguments for client-centeredness is that the unswerving loyalty to the client that is at the heart of the ethic discourages the client's consideration of the legitimate interests of non-client third parties. Several commentators argue for ethical attitudes or rules that would encourage if not require lawyers to raise third-party interests with clients. See, e.g., Simon, *Ethical Discretion in Lawyering*, *supra*

concerning the significance of the critique for client-centered approaches to lawyering. First, it is not by chance that these criticisms focus on issues of morality. The client's desire to undertake immoral though not illegal actions provides the toughest test for the lawyer who posits that it is not her place to judge her client's ends or goals. This is so primarily because we normally believe that individuals are responsible for the moral consequences of their acts (or failures to act); the adversary ethic asks that lawyers be exempted from what would otherwise be their clear responsibility.²⁷⁵ We also care greatly about moral issues, at least at the rhetorical level. Such issues help define the kind of society in which we aspire to live.²⁷⁶ It is impossible to view the lawyer's morality independently of both society at large and the legal system in which the lawyer operates.²⁷⁷

Second, while the commentators' concern about lawyer morality is understandable, the solutions they offer are far from unproblematic. Many commentators urge the lawyer to engage the client in a moral conversation.²⁷⁸ This can range from simply raising moral concerns with the client, while agreeing to be bound by the client's resolution of the issue,²⁷⁹ to actively seeking to persuade the client of the virtues of the lawyer's own moral vision, refusing to participate in the client's pursuit of immoral conduct and, possibly, disclosing such conduct to a court or third party.²⁸⁰ It is not at all clear what these conversations would actually sound like. If one's paradigm lawyer-client

note 121; D. LUBAN, *supra* note 63; Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C.L. REV. 213 (1990). See also *id.* at 214 n.5 (collecting sources). Raising the concerns of third parties is, in fact, quite consistent with client-centered approaches; such concerns often form part of the relevant context in which the client must make her decision. There is no reason to think that clients will systematically ignore third parties' legitimate interests. See *infra* notes 289-91 and accompanying text. More problematic, however, is the degree to which some of these and other commentators apparently countenance manipulation and betrayal of clients whose unwillingness to accommodate such third-party interests does not accord with the lawyer's views of appropriate client behavior. See *infra* note 280 and accompanying text. But see Margulies, *supra*, at 250-52 (arguing that requiring lawyers to counsel clients on nonlegal matters and the interests of nonclients, while increasing lawyer influence over clients, actually decreases manipulation by encouraging open discussion and dialogue).

275. See Luban, *The Adversary System Excuse*, *supra* note 270, at 87.

276. See A. BENJAMIN, *THE HELPING INTERVIEW* 139 (2d ed. 1974) (describing moral issues as "those sacred, social norms no one in his right senses could possibly oppose or even question.").

277. It is not by chance that Richard Wasserstrom's influential attack on lawyer's role-differentiated behavior followed the disclosure of the Watergate scandal and lawyers' appalling role in it. See Wasserstrom, *supra* note 77.

278. See, e.g., D. LUBAN, *supra* note 63, at 163; Shaffer, *supra* note 272; Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979). Cf. Pepper, *supra* note 60, at 630 (though Pepper is a strong advocate for client autonomy, he calls for moral dialogue between lawyer and client).

279. This is the position that Monroe Freedman, a well-known proponent of client autonomy, takes. See Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331, 332, 335 (1987).

280. See D. LUBAN, *supra* note 63, at 160-74. David Luban and William Simon seem drawn to this view, though in *Ethical Discretion in Lawyering*, *supra* note 121, at 1083-84, Simon analyzes the lawyer's moral concerns as part and parcel of her legal obligations. Thomas Shaffer goes so far as to argue that lawyers should attempt to convert clients to their moral vision. Shaffer, *supra* note 272, at 247. Given the strong religious and theological flavor of this and much of Shaffer's writing, it appears that he means conversion in both a literal and figurative sense.

relationship is of powerful lawyers and powerful clients, one can imagine a far-ranging moral conversation in which both lawyer and client give as good as they get. We would have relatively few concerns that the lawyer could overbear the client's will in a manner that denied the client's autonomy. The difficulty with this scenario is that lawyers for such powerful clients may not even recognize that moral issues are involved or may very well share their clients' moral visions.²⁸¹ The moral conversation will likely end before it begins.²⁸² With powerful lawyers and powerless clients, however, the danger that the client will take the lawyer's moral suggestion as a *diktat* is quite real and, for the most part, unexamined by the critics.²⁸³ One can argue that the client is free to reject the lawyer's moral advice and continue with the goals the client establishes (if the lawyer agrees) or find another lawyer (if the lawyer does not). But such a response to the problem is insufficient. It fails to take account of some lawyers' tendency to dominate their clients.²⁸⁴ While some might claim that clients would see the lawyer's moral advice as occupying a less secure footing than her legal advice,²⁸⁵ the very resonance of moral issues calls such an observation into question. And that is the point: the critics do not want the client to ignore the lawyer's moral advice, they want him to follow it. The trick is to accomplish that result without undermining the client's autonomous choice. It is a trick not yet mastered.²⁸⁶

281. See Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 536 (1985) (large law firm lawyers report rarely turning down assignments on moral grounds). For a criticism of some of Nelson's conclusions, see Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 W. NEW ENG. L. REV. 139, 143-44 (1987).

282. Partly this may be due to the lawyer's tendency to transform moral and other broad issues into technical ones. Even when lawyers talk to corporate clients about moral issues, the moral and technical aspects are likely to be intermixed. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 137, 147-49 (1978).

283. But see Ellmann, *Lawyering for Justice in a Flawed Democracy* (Book Review), 90 COLUM. L. REV. 116, 141 n.50, 147-50 (1990) (reviewing D. LUBAN, *supra* note 63) (critiquing Luban's approach to moral activism).

284. See, e.g., Basten, *supra* note 68, at 15 ("greater moral accountability on the part of lawyers . . . will result in a further diminution of the degree of control exercised by clients, especially by clients from disadvantaged groups").

285. See, e.g., Ellmann, *supra* note 16, at 774-75 (suggesting that clients can evaluate the lawyer's moral and political advice at least as well as if not better than her legal advice).

286. That moral counseling is a difficult enterprise does not deny the virtues of its pursuit. The critics do a great service in calling attention to the vacuity and self-serving quality of lawyers' denial of moral responsibility for their actions. Cf. Lehman, *supra* note 278, at 1082 (suggesting that lawyers adopt instrumental view of counseling because of the difficulty of raising moral issues with clients). But in addressing an undeniable problem, they are guilty of failing to see the dangers of their approach. See, e.g., *id.*, where the author asks plaintively "How do I say to an alcoholic client that he ought to suffer the penalty for a drunk driving charge, rather than be gotten off, or tell a sex offender that he ought to be committed for treatment?" Whether it is legitimate for the lawyer to raise these concerns with his client depends on a number of factors, including: the kind of relationship they have; the relative power of lawyer and client; the likely consequences for the client of "suffering the penalty" or being "committed for treatment," including, in the latter case, whether treatment is a meaningful possibility and whether the client can ever effectuate his release once committed; and the appropriateness of the lawyer proposing a solution generated by the legal system (such as prison or civil commitment) for what may be better characterized as a social, political or psychological problem.

The prolific Thomas Shaffer struggles with a number of the issues discussed in the preceding paragraph in *The Practice of Law as Moral Discourse*, *supra* note 272. Shaffer is a

The notion that adversary lawyers are all too willing to assist rapacious clients in harming others is critical to the moral critics' perception of the need for a new ethic of professional responsibility. But the perception, even if accu-

harsh critic of lawyers' role-morality, which he calls the "Ethics of Role," *id.* at 234 et seq., for its false assumption that the only choices available to lawyers are to do what the client wants (the hired-gun approach) or what the client needs (the paternalistic or best interests approach). He criticizes the latter conception primarily because it requires the lawyer to believe in the virtue of the present system of justice, which for Shaffer is equivalent to a belief in power. Power is not necessarily good; it is not part of a moral dialogue. *Id.* at 239. Shaffer's discussion of the Ethics of Isolation, *id.* at 239 et seq., identifies a number of the problems of moral counseling suggested in the above discussion. While the lawyer functioning under this ethic at least places moral issues before her client (and so is to be preferred to the role-based lawyer who rules such considerations out of bounds), she does so in a formal, unconvincing way. The lawyer asserts a moral position and invites the client to accept or reject it. But there is no moral dialogue, only a series of lawyer and possibly client monologues. As Shaffer puts it, "The client does not come to understand the lawyer's moral assertion and is therefore not persuaded by it. He is not convinced; he is overruled." *Id.* at 241.

So far so good. But in discussing his preferred solution to the problem of moral counseling, the "Ethics of Care," *id.* at 244 et seq., Shaffer fails to come to grips with his criticisms of the other modes of moral discourse. Shaffer argues that the Ethics of Care require that lawyer and client risk openness with each other and accept the possibility that each participant's moral beliefs will be changed by the influence of the other. Shaffer sees the Ethics of Care operating on a continuum from autonomy to conversion; as noted previously, *supra* note 272, he sees the client's willingness to receive moral advice as supportive of autonomy rather than an intrusion upon it. Shaffer recognizes that relationships between professionals and laypeople can never truly be equal, but nevertheless argues that the Ethics of Care are superior to the other conceptions because they at least treat the client as an end and not a means. Shaffer, however, ignores the problem of power that is one basis for his criticism of the Ethics of Role. He does not explain how a client in the Ethics of Care avoids the very kind of capitulation to lawyer moralizing that characterizes the Ethics of Isolation. The principal difference between the two ethics appears to be whether the lawyer considers herself to be susceptible to the client's moral influence. But it is not clear how the lawyer's susceptibility to the client necessarily limits the former's influence over the latter. For example, a parent can demonstrate to a child that she is prepared to change her mind about things based on what the child says, and yet still be seen by the child as exercising substantial power over him. In many conversations, the lawyer's susceptibility to the client's moral views may never come out; the lawyer's mere statement that he is susceptible will not necessarily be believed.

Furthermore, Shaffer's model may implicitly assume that lawyers and clients will both adopt or apply a Judeo-Christian morality. Under such an assumption, the Ethics of Care lawyer exposes himself to some moral risks, but those risks are limited because the ultimate moral reference points are agreed upon. Where such an assumption is inaccurate, Shaffer does not explain how the lawyer and client can have a true moral dialogue.

The Jack and Jack study of lawyers' moral reasoning unwittingly demonstrates one of the problems caused when lawyers representing clients express greater moral sensitivity unchecked by concern about what their clients want. See R. JACK & DJACK, *supra* note 107. In describing what they call Position 3 on the moral reasoning continuum, Recognition of Moral Cost, the authors praise the "contextual caring for the wholeness of a human situation" that characterizes the position, and see it as one that "preserves the virtues of institutional ethics while infusing the critical concerns of care morality." *Id.* at 120. But in the same section, the authors quote as examples of those who occupy this moral position one lawyer who discusses his willingness to "use . . . leverage against my client" in a hypothetical child custody case in which the lawyer questions the client's fitness as a parent, *id.* at 118, and another who states, "I have a responsibility to my clients to assist them in doing what is good for them" rather than what they say they want. *Id.* at 119. Lawyers' greater recourse to moral reasoning is not inherently inconsistent with the respect for client autonomy that is the essence of client-centeredness. But the moral context clearly must include respect for the client's capacity to make choices informed, but not overwhelmed, by moral considerations that the lawyer brings to bear on the situation.

rate,²⁸⁷ need not require that lawyers engage in peremptory moral conversations with their clients.²⁸⁸ There may be greater common ground between client-centeredness advocates and the moral critics than first meets the eye.²⁸⁹ For if the client-centered lawyer does her job well, she raises moral concerns with the client, if for no other reason than that society treats such concerns as important and we should not assume that clients do not wish to consider

287. This is the problem, once again, of imputing immoral ends to clients. See Simon, *supra* note 61, at 59; Fried, *supra* note 61, at 1088.

288. See G. HAZARD, *supra* note 282, at 147-49 (peremptory moral advice); cf. Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1563-64 (the lawyer's refusal, on moral grounds, to implement the client's wishes without a full discussion of the issue amounts to arrogance; refusal following client justification of different moral position reflects intolerance). Stephen Ellmann recognizes, at least, the need for lawyers who choose to engage in moral and political counseling of clients to do so in a non-manipulative manner and with the goal of preserving the client's choice-making capacity. See Ellmann, *supra* note 16, at 776. Ellmann does not indicate precisely how such non-manipulative counseling would occur, except to suggest that lawyers should start with the assumption that clients are competent, by which he means that they are able to receive and evaluate the lawyer's advice. *Id.* at 778. Interestingly, he argues that lawyers who adopt a more distant attitude towards their clients will be in a better position to offer moral advice to their clients without overwhelming them than would lawyers who offered their clients therapeutic support. *Id.* at 777-78. Even assuming that Ellmann accurately identifies the Binder and Price lawyer's goals as therapeutic in nature, the correctness of his argument is not intuitively obvious. It seems just as likely that lawyers and clients who know each other well, and have a relationship approaching friendship (of the pure variety, not the kind Charles Fried advocates), can talk to each other more easily about a number of matters, including moral and political issues, with fewer concerns about overbearing the other's will. While the accuracy of this last proposition is less clear when the lawyer does not really have a close relationship with the client but uses psychological techniques to suggest that he does, it is nevertheless plausible that a person's willingness to grapple with professional advice increases if that advice flows from a more interactive interpersonal relationship than the traditional cold professional one.

289. Bastress argues that client-centeredness and the lawyer's moral accountability are not mutually exclusive. Bastress, *supra* note 174, at 119. Drawing on Rogerian notions that client-centered counselors must be congruent, Bastress argues that true client-centered lawyers must act consistently with their moral understandings. He fails to consider, however, what the client-centered lawyer should do if the client does not come to share her moral understanding, or the effect of the lawyer's statement of moral position on the client. Warren Lehman falls into a similar trap when he observes in connection with advice a lawyer might give to a client who was contemplating a gift now, which, if deferred, would have favorable tax consequences:

It is impossible so to organize my behavior that it is not manipulative. It is impossible to act so as to make another man free. . . . The only thing the lawyer can do for his client is be free himself, which means free to be honest in saying exactly what he thinks and feels, to confront himself. It is transcendence for a lawyer to say to a client: 'I am fearful of influencing you unduly in this matter. The tax saving is there. It may be important to you to save the money. If so, by all means defer the gift. *But money saving is not everything. One should hardly organize one's life around a revenue code.* I will think none the less of you whether you choose to defer or not. Some people, I suspect, may be embarrassed — odd as it may sound — to ignore an apparent financial advantage, for to do so sounds irrational. *Let me assure you, I would respect most highly a man who will do now what seems right to him now.* What sounds rational is not always humanly reasonable. . . .' The important thing about any such message is not that it is calculated to neutralize the legal-rational bias, the legal influence, but that it be honest and not intended to manipulate. Sometimes a side benefit of the speaker's honesty is a shock in the listener that shakes him loose and helps him be free.

Lehman, *supra* note 278, at 1091 (emphasis added). Lehman may not *intend* to manipulate his client, but the above statement makes it quite clear which choice the lawyer sees as the moral one.

them.²⁹⁰ The difference between this approach and that of the moral critics may be one of degree and not kind, but I believe that it goes to the heart of what makes both client-centeredness an attractive concept and moral activism a potentially dangerous one.²⁹¹

Third, it is important not to overstate the importance or prevalence of the moral issues that arise in the day-to-day practice of law. Even if one somehow concludes that client-centered approaches should not be used with

290. See Sammons, *supra* note 73, at 78-79.

291. The difference in approaches may be suggested by the following hypothetical statements by the morally activist and client-centered lawyer. As I read the former, he is likely to say to his client, "I cannot assist you in doing x [where, *e.g.*, x is polluting a stream or interposing the statute of limitations] because I find it to be immoral and my own moral precepts will not allow me to participate in your actions. If you refuse to forego doing x I will certainly no longer represent you and I may even have to blow the whistle on you." (A slightly weaker version of this approach, suggested by one of the participants in the UCLA-Warwick Second International Clinical Scholarship Conference (Sept. 18-19, 1989), has the lawyer saying "I am troubled [morally] by the position you wish to take." I do not see this approach as significantly less problematic than the first statement, in part because it is likely to lead to the earlier statement, although its arguably more tentative formulation is at least less moralistic.) The client-centered lawyer might say to his client, "Have you considered the moral consequences of doing x? Do you see any moral reasons to do x? Do you see any moral reasons to forego doing x?" If the client in the latter setting persists in her moral obtuseness ("As a matter of fact, I don't see any moral problems in pleading the statute of limitations even though I know that I owe the money"), the client-centered lawyer might go so far as to say, "Well, one possible response to your doing x is that one might have the following moral objections to it. Have you considered that?" Unlike the morally activist lawyer, the client-centered lawyer is unlikely to issue his advice peremptorily (if he gives any advice at all) and is presumably prepared to assist the client in some morally questionable actions of which the lawyer does not approve.

The downside of each approach may be considered by imagining how a client might respond to each lawyer. Assuming that the client of the morally activist lawyer agrees to forego the morally questionable action, it is certainly possible that the client does so not because of any new appreciation of the moral consequences of his actions but because his lawyer states the matter so baldly and persuasively. See Ellmann, *supra* note 16, at 776. The positive aspect of the client's response, if the lawyer's moral judgment is one we accept as valid, is that immoral conduct is prevented or diminished. It is not clear that the client will lead a more moral life, however, nor that the client will come back to the lawyer (or, if he does, that he will raise moral problems with him to the extent he can avoid doing so). The client of the client-centered lawyer may be more likely than his counterpart to persist in his immoral conduct. He may also become frustrated by the lawyer's refusal to state his own moral position, although it is not unlikely that he will interpret the lawyer's raising of moral consequences as indicative of the lawyer's position on the matter, especially if the lawyer goes on to make the supplemental observation indicated above. But if he does stop to consider the moral consequences of his actions, it is likely to be more clearly of his own doing and hence more integrated into his approach to life. He will have made a moral choice, rather than capitulated to his lawyer's moral posturing.

I recognize that these statements and responses can be manipulated and analyzed endlessly to prove one's point. Morally activist lawyers need not state their moral concerns in peremptory fashion. In fact, they may be open to being persuaded by the client that the client's moral perceptions are superior. See, *e.g.*, D. LUBAN, *supra* note 63 at 173-74 (morally activist lawyer should discuss moral issues with client in "unmoralistic manner" and be capable of adopting the client's moral position rather than vice versa). Client-centered lawyers cannot hope to be morally neutral and at some level their moral views are likely to come out. My point is that if the moral activists are to be congratulated for putting lawyers' morality on the agenda, they are to be criticized for their failure to consider how their moral conversations might actually work out in practice.

moral issues,²⁹² there are more than ample opportunities for client-centered lawyers to ply their trade.²⁹³

Another challenge to client-centeredness that relates to the interplay between lawyers and their clients' autonomy is based on the corporate control thesis. Simply stated, the thesis holds that while personal plight lawyers exercise power over and control their clients, corporate lawyers, despite occupying the highest status position within the profession, are controlled by their corporate clients.²⁹⁴ To the extent it is accurate, the thesis calls into question the desirability of client-centeredness with respect to this subset of lawyers and clients. Client-centeredness might at best be unnecessary and at worst be a handmaiden to excessive client power.²⁹⁵

Spiegel is one of the few commentators to attempt to reconcile client-centeredness with the corporate control thesis. He identifies two principal ways in which the informed-consent lawyer can avoid complicity in his client's exercise of illegitimate power: by engaging in dialogue with clients concerning moral issues and by using the deprofessionalization intrinsic in informed consent to question the lawyer's role-based morality. These responses may represent wishful thinking; recognizing as much, Spiegel concludes that informed consent will not cure the problems of excessive corporate power and that

292. I do not advocate this argument, however. For one thing, it is unlikely that client concerns can be neatly divided into moral and non-moral issues. Indeed, a related problem of the morality critique may be its implicit assumption that moral issues can always be clearly identified, let alone resolved.

293. See D. LUBAN, *supra* note 63, at 326 ("everyday legal business is not often overtly political and its moral dimension is usually uncomplicated; and so even a moral activist will generally act straightforwardly as her client's agent") (citation omitted). Cf. Nelson, *supra* note 281, at 532-33 (seventy-six percent of law firm lawyers in sample believe it is appropriate to act as moral conscience of client on occasion, but only 2.4 percent report ever having given clients "public relations" advice, which author describes as the closest analogue to moral advice in sample).

294. J. HEINZ & E. LAUMANN, *supra* note 111. See also Spiegel, *supra* note 281, at 143-45 (criticizing Heinz and Laumann thesis to the extent their definition of autonomy focuses exclusively on ends and not means).

Heinz and Laumann observe that it is misleading to talk about one legal profession. They conclude that the profession is divided into two broad groups: those lawyers who serve corporations and those who serve individuals (personal plight lawyers). Social status is client-dependent; corporate lawyers have greater prestige than personal lawyers because their clients are more prestigious. Yet, according to the authors, corporate lawyers have significantly less autonomy from their clients than do personal lawyers. The reasons are several, including the ability of the corporation, through its general counsel's office, to monitor the work of the lawyers more closely and understand the outside lawyer's language more easily, and the corporation's tendency to use legal services on a repeat basis rather than the one-shot nature of much lawyering in the personal hemisphere.

On the other hand, John Donnell's study of corporate counsel and their clients reveals that not just poor clients or personal plight clients are concerned about their lawyer's domination of them:

Fear that the corporate counsel will *dominate* his clients and perhaps usurp their decision-making responsibilities appears to be fairly common among clients, and counsel appears to be very much aware of this feeling.

J. DONNELL, *supra* note 233, at 61 (emphasis in original).

295. See Spiegel, *supra* note 281, at 147 (referring to informed consent lawyering, essentially equivalent to client-centeredness).

perhaps there ought to be different ethical rules for different segments of the legal profession.²⁹⁶

But the dialogue Spiegel talks about is worth focusing on for a moment, for it suggests one way in which the client-centered counseling model is superior to the traditional counseling model in addressing the corporate control thesis. The traditional lawyer's view that most legal problems are susceptible to technical solutions, when combined with the ability of corporate clients, through their in-house counsel, to monitor closely the work of their outside lawyers, most likely results in traditional corporate lawyers exercising rather little restraint on their clients.²⁹⁷ The client-centered lawyer, in contrast, is committed not just to the result of a client-centered decision but to a process that facilitates that decision.²⁹⁸ Through such a process, it is conceivable that some clients will come to believe that certain actions that they are capable of taking should not be taken.²⁹⁹

The above commentators criticize lawyers for glorifying client autonomy.³⁰⁰ But Stephen Ellmann argues that client-centeredness, at least of the Binder and Price variety, *undercuts* client autonomy. He asserts that the Binder and Price lawyer's unwillingness to give his client advice compromises her autonomy by denying her access to what might be an extremely important source of information, the lawyer's views.³⁰¹ While Ellmann agrees with

296. *Id.* at 147-52.

297. See Nelson, *supra* note 281, at 526 (criticizing thesis of Erwin Smigel in E. SMIGEL, *THE WALL STREET LAWYER* (1964) that corporate lawyers function as restraining influence on their clients). *But see* Gordon, *supra* note 112, at 56-57.

298. See *supra* note 22.

299. William Simon's critical lawyer might be more direct than the client-centered lawyer in seeking to deter corporate depredations, but it is unlikely he would ever get through the corporation's front door.

300. One ground of William Simon's critique of the Ideology of Advocacy is its purported denial of client autonomy. See Simon, *supra* note 61. But as the above discussion of his latest article demonstrates, Simon's latest formulation of his thesis in fact represents a significant challenge to client autonomy. In any event, client-centeredness differs substantially from the ideology of advocacy as Simon defines it, so that not all aspects of Simon's critique of the latter concept apply to the former.

In his recent critique of informed-consent lawyering, see *supra* note 151, Simon contends that lawyers need to communicate to their clients their own judgments about the clients' needs because (1) clients want them to do so and because (2) there is no way to avoid influencing them. Determining what clients want is notoriously tricky business. Legal commentators tend to assume that certain types of clients (often poor people) want to know what their lawyer thinks, see *e.g.*, *infra* note 331, an assumption that is surely overbroad if not plain wrong. As for Simon's second point, he maintains that the impossibility of eradicating the lawyer's influence over the client implies the impossibility of significantly enhancing the client's capacity for autonomous decisionmaking. Therefore, there can be no strong distinction between paternalism and autonomy. While Simon may be correct that lawyer influence is inevitable and paternalism cannot be avoided entirely, it does not at all follow that the solution to the problem is for the lawyer to tell the client what he believes should be done. At a minimum, such an approach fails to see important distinctions among the possible degrees of lawyer influence and paternalism. See *infra* notes 305-06, 361-62 and accompanying text.

301. Ellmann, *supra* note 16, at 767. See also Gifford, *supra* note 15, at 822 (criticizing Binder and Price for denying clients the benefits of lawyer's opinion and the intuitive and unarticulated judgments that inform it). Ellmann criticizes the Binder and Price counseling model for its unnecessary manipulation of clients. Such manipulation is reflected in the following ways: the lawyer's refusal to give her client her opinion; the lawyer's inevitable choices in framing alternatives for the client to consider; the lawyer's failure to counsel the client on political and moral issues; and the assumption that the client must adopt Binder and Price's rationalis-

Binder and Price on the desirability of the goal of fostering client autonomy, he differs with them over the optimal means to accomplish that goal. As he recognizes, almost any choice that the lawyer makes concerning her counseling method is likely to compromise some aspect of the client's autonomy.³⁰² But while Binder and Price are most concerned about the lawyer who overpowers her client, Ellmann is most troubled by the lawyer's failure to treat the client as the kind of competent individual able to hear professional advice without capitulating to it.³⁰³

tic counseling model. Ellmann, *supra* note 16, at 744-52. In my judgment, the first of these situations presents the most difficult autonomy issue. The lawyer's failure to counsel about moral and political concerns is an objection to the Binder and Price model that is easily met by including such considerations in the non-legal consequences on which Binder and Price require the lawyer to counsel the client. To the extent that Ellmann argues for the lawyer to provide moral and political advice rather than simply raising moral and political concerns, his concern is subsumed within his overall concern with the lawyer's failure to give advice.

I believe that the brainstorming called for in my variation of the Binder and Price model, *see infra* Part IV, answers to some extent Ellmann's concerns about limiting the alternatives for the client. As for the lawyer's choice of a rationalistic counseling model, such a choice is hardly inevitable, though it does find some support in EC 7-8 of the Model Code of Professional Responsibility, and *some* model may well be preferable to none at all. In any event, I am less troubled by this than Ellmann is, in part because I assume that many clients coming to see a lawyer expect her to structure the interview or counseling session in a manner that the lawyer finds useful.

302. Ellmann, *supra* note 16, at 779. *See also* Nedelsky, *supra* note 54, at 21 (collectivity simultaneously source of and threat to individual autonomy), 21 n.31 (parents source of and threat to children's autonomy; "It is probably the case that all relationships necessary for autonomy can easily be perverted to undermine it").

303. Ellmann also criticizes Binder and Price's counseling model for failing to urge lawyers to encourage clients to subject their wants and values, which underlie the choices that they make and the consequences that they envision, to critical re-examination. Ellmann, *supra* note 16, at 760-61. But in my experience the model actually allows this critical reconsideration, especially in the stage in which the lawyer assists the client in weighing the pros and cons of different possible choices and consequences. *See* D. BINDER & S. PRICE, *supra* note 8, at 183-87. In a recent simulation in our clinic, for example, a student-lawyer (attempting to follow the Binder and Price model) was interviewing a potential client whose children had been seized by the local social services agency because of the parent's alleged neglect. One of the issues in the case was whether the client had sufficient financial resources to care adequately for the children. The client and his spouse were both out of work. When the lawyer asked the client whether he had thought of applying for welfare benefits, the client reacted in a strongly negative manner, stating that he was too proud to seek assistance. The student left the matter there, until later in the interview when she elicited the client's view that getting his children back was the most important thing in the world to him. At that point, she brought up the welfare issue again, and when the client re-stated his resistance to applying for benefits, she asked him whether he had considered re-examining his resistance in light of the stated importance of getting his children back. The client did not immediately change his views on the receipt of welfare benefits, but did stop to consider whether one strongly held principle might have to give way in light of a more important one. At that moment, and presumably thereafter if this had been an actual case, the client had the opportunity to reconsider his values; the lawyer's *relatively* neutral statement of choices contributed to the client's reconsideration. Of course, the student might have brainstormed with the client about whether there were other options (such as getting a job or obtaining a form of assistance that did not compromise the client's need to feel independent) that allowed the client to remain true to both principles, or explored with the client why he felt welfare assistance was illegitimate and provided him with rationales for receiving the benefits that did not compromise his image of self-worth. My point is not that this was a perfect interview, or that Binder and Price lawyers necessarily engage clients in the process of values re-examination, but that the model is not inconsistent with such engagement and does not necessarily require the lawyer to accept uncritically client statements of wants and values. *Cf.* Kronman, *supra* note 5, at 866 ("clients often come to lawyers with confused or conflicting ends and . . . it is frequently

Significantly, not all client-centered commentators take such a strong stance against advice-giving as do Binder and Price.³⁰⁴ But while a lawyer cannot help but influence a client,³⁰⁵ it may be helpful to consider advice as being on a continuum that ranges from the lawyer saying nothing to the client to the lawyer telling the client what to do. On such a continuum, advice is more interventionist than suggestion but less so than persuasion.³⁰⁶

Giving advice presents numerous problems for the counselor committed to assuring his client's autonomy. The lawyer's advice may prevent clients capable of doing so from making decisions.³⁰⁷ What the lawyer sees as the client's need to receive advice may be more the lawyer's need to give it.³⁰⁸ The lawyer's premature dispensation of advice may prevent the client from making her own choice in her own way: once the lawyer gives her advice, it becomes difficult to know if the client's subsequent choice (assuming it is consistent with the lawyer's advice) is a freely made one.³⁰⁹ Clearly, under some circumstances, the lawyer's advice shades into persuasion, and persuasion risks compromising the client's autonomy.

part of a lawyer's job to help the client see what it is that he wishes to do and to decide whether, on reflection, he really wants to do it").

304. In addition to Thomas Shaffer, see, e.g., Shaffer, *supra* note 254, at 328 (discussion of Aquinas's fraternal correction and Barth's conditional advice); Shaffer, *supra* note 272, at 246 (same). See also Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 105 (1969) (value of persuasion in second stage of legal counseling, which he describes as moving from intelligence to decision) and H. FREEMAN & H. WEIHOFFEN, *supra* note 185, at 103-05 (criticizing lawyers for often giving peremptory advice too soon, but implicitly accepting lawyers' use of advice, suggestion and, where necessary, pressure with clients). I use the term advice in a very specific sense: the lawyer telling the client what he recommends the client should do. Some writers construe advice more broadly to mean the process of identifying alternatives for the client and exploring possible consequences. See J. HARBAUGH & B. BRITZKE, *supra* note 11, at 15 (defining advising as "reporting factual developments, the results of investigation, and interpreting those facts in the legal context"). Harbaugh and Britzke distinguish advising from guiding ("the process of assisting the client in making decisions with respect to what action ought to be taken based on the lawyer's advice"), *id.* at 16, and deciding, which is the process by which the client makes a choice. Deciding is for the client to do. Despite their different use of the term advising, the authors ultimately adopt a version of the Binder and Price model on this point. *Id.* at 17-18, 28-30.

305. See, e.g., Gordon, *supra* note 112, at 30.

306. Benjamin defines suggestion as a mild form of advice stated in tentative terms. A. BENJAMIN, *supra* note 276, at 128. He adds:

Suggestion does not demand compliance nor threaten the interviewee with rejection should he not follow it through. . . . Suggestion provides the interviewee with the interviewer's considered opinions but leaves him leeway to accept, refuse, or propose ideas of his own. Indeed its purpose may be to stimulate the interviewee to think and plan for himself.

Id. In contrast, "[a]dvice, essentially, is telling someone else how to behave, what to do or not do." *Id.* at 129. Beyond advice is urging, which the author equates with persuasion and cajoling, and which he defines as "a lead or response the purpose of which is to prod the interviewee, to not let him escape what, in our opinion, he should not evade." *Id.* at 135.

307. See *id.* at 129-31.

308. See *id.* (easiest way for counselor to relieve pressure on himself is to give "disinterested" advice to interviewee); Lehman, *supra* note 278, at 1089 ("I expect a lawyer's inclination to press the merits of his money-saving advice reflects, among other things, a desire to feel that his expertise is really useful. We may know no other way to judge our own usefulness.").

309. See A. BENJAMIN, *supra* note 276, at 129-31.

These problems with advice-giving are well-nigh intractable. When combined with the lawyer's paternalistic tendency towards his client and his training in the persuasive arts, these concerns lead me to advocate reversing Stephen Ellmann's presumption that the lawyer should give advice to the competent client. I would have the lawyer start with the premise that the client does not need the lawyer's advice, at least at the beginning of the lawyer-client relationship.³¹⁰ I take a less unequivocal stand against the lawyer's use of suggestion, although it is important for the client-centered lawyer to recognize that depending on how it is presented, the lawyer's suggestion can easily be meant and interpreted as advice or persuasion.³¹¹ But under carefully considered circumstances I deviate from Binder and Price and permit some lawyers, consistent with client-centered practice, to offer advice to some clients without having to wait for the client to ask for it.³¹²

2. *The Psychological Critique*

From the psychological perspective, client-centered counseling raises a series of concerns. First, even if client-centeredness is desirable in a therapeutic context, it might be unsuitable to the legal counseling milieu, either because it generates an inappropriate amount of client self-revelation or because it fosters excessive client dependence (and thus at a minimum undercuts one of the presumed goals of client-centered counseling in the first place). Second, client-centeredness might make unreasonable demands on the lawyer, by

310. Even the most non-interventionist client-centered lawyer is likely to feel the strong pull of wanting to give advice to his client. That pull may well lead him to manipulate his client to make the decision that he, the lawyer, wants him to make while seeming to insist that it remains the client's decision. One way that this manipulation could occur — and in my experience as both a lawyer and teacher does occur — is for the lawyer to revisit continually the client's decision and the basis for it until the client comes around to the lawyer's point of view. If such manipulation can be shown empirically to occur regularly it would certainly raise serious questions about both the legitimacy and practicality of client-centered counseling.

On the other hand, if one conceives of client-centeredness as a process rather than solely as an end-product, and as reflecting the lawyer's attitude toward her client rather than solely as a mechanical allocation of decisionmaking responsibility, the conversational back-and-forth between lawyer and client can be productive instead of frustrating and manipulative. If the lawyer truly struggles with enabling the client to make her own decision, she may eventually find an effective method of communication that clarifies the considerations for her.

311. See A. BENJAMIN, *supra* note 276, at 128.

312. See *supra* notes 32-38 and accompanying text. If the lawyer in the exercise of her judgment concludes that the client is, in Binder and Price's terms, an independent decision-maker, there seems little reason to restrict the giving of advice to situations in which the client asks for it. If the client is an independent decisionmaker, the need for a request is superfluous; if the client is not such a person, the request is insufficient. Under any circumstances, though, the lawyer should not give advice immediately because even independent decisionmakers might benefit from first trying to resolve the problem without the lawyer's advice on which choice to make. Also, the lawyer should be careful to recognize when a client who he might otherwise consider to be an independent decisionmaker (for example, based on the lawyer's past dealings with the client) is not one under the particular circumstances presented.

No model of lawyering can sensibly take account of all possible situations and so a rule that the lawyer should never give advice would be unworkable as well as unwise. Even the more interventionist technique of urging or persuasion may be appropriate in some circumstances if it supports a client's resolve to take an action previously decided upon. See A. BENJAMIN, *supra* note 276, at 135-36. But as Benjamin warns, the very success of such a technique should give us pause to examine our own motives in using it and the possible effects on the client. *Id.* at 135. What is needed is for the lawyer to adopt a self-conscious, reflective approach to the lawyering techniques that he uses and the attitudes that he adopts.

causing her to question legitimate role limitations and by demanding a level of psychological expertise that lawyers do not possess. Third, client-centeredness might overemphasize the importance of the lawyer-client relationship for its own sake to the exclusion of political and other societal concerns. Each of these objections is discussed briefly in turn.³¹³

Client-centered counseling stresses the lawyer's active involvement in understanding the client's problem, including, at least to some extent, the emotional context. That involvement may offer important advantages to the lawyer in his effort to build rapport with his client, but it presents risks as well. While a person who seeks out a psychotherapist implicitly consents to the therapist's probing of her psyche, few legal clients could be deemed to give comparable consent to their lawyers.³¹⁴ Moreover, while therapists are trained to conduct such probing, lawyers are not, and they potentially could do substantial harm to their clients by playing therapist. Clients subjected to the techniques of the client-centered lawyer may become dependent on him for emotional support. This dependence is not only troublesome on its own terms, but it would interfere with the client-centered lawyer's efforts to facilitate his client's unconstrained choice of goals for the representation. As one commentator has put it,

Indeed, the view of the lawyer as quasi-therapist that some suggest might create a new, albeit concealed, dominance of the lawyer over her client by encouraging her to become involved in the client's decisions.³¹⁵

The lawyer's use of the therapeutic techniques of client-centered therapy for a nontherapeutic purpose may also be problematic. These techniques can have quite a powerful effect on the client; if the lawyer uses them without actually feeling the empathy that underlies them, he is arguably engaging in psychological manipulation of his client. For the lawyer who feigns empathy

313. Furthermore, insofar as it is based on Rogerian client-centered therapy, client-centered legal counseling is vulnerable to criticisms of Rogers's theories. See Simon, *supra* note 84, at 511-20 (criticism of assumptions of Rogerian therapy). See also *supra* note 173 for a discussion of the differences between client-centered and Freudian therapeutic approaches. For an overview of different psychological theories and their relationship to legal counseling, see T. SHAFER & J. ELKINS, *supra* note 1, Ch. 6. Shaffer and Elkins note that:

The principal criticisms of non-directive counseling are that it does not avoid, but rather encourages, client dependence, because it fosters and comes to depend on a strong empathic relationship between counselor and client; and that it does not quickly enough lead to results (choices, decisions, plans of action).

Id. at 159. According to two psychologists,

[T]he greatest danger in the practice of client-centered therapy is *sterility*. If the therapist's only tool is bare reflection, how often is it that nothing new is added to bring life to the process? How often is it that nothing new opens up for the client? The client's likelihood of moving beyond where he is limited by lack of new input. The client's experience is likely to be that he is right where he started, and that although he has not lost his bearings, he has in fact gotten nowhere. The client's complaint to the therapist would then appropriately be, 'Can't you do anything?'

Cochrane & Holloway, *Client-Centered Therapy and Gestalt Therapy: In Search of a Merger*, in INNOVATIONS IN CLIENT-CENTERED THERAPY, *supra* note 169, at 259, 280 (emphasis in original).

314. See Ellmann, *supra* note 16, at 769.

315. Leubsdorf, *supra* note 125, at 1050.

for his client, client-centeredness may contribute to his feelings of inauthenticity and falseness in his professional role. Client-centeredness also presents other psychological risks to the lawyer. Whatever its faults, the traditional model sets out clear boundaries between lawyer and client that can allow the lawyer to maintain needed professional distance. To the extent that client-centeredness encourages the lawyer to become deeply engaged in her client's problems, especially in their psychological dimension, it may cause her to identify too greatly with the client. Such over-identification could lead the lawyer to lose sight of the appropriate limits of legal assistance and cause her to delve into areas well beyond her competence. Students just becoming comfortable with the role of the lawyer might be particularly vulnerable to this role confusion.³¹⁶

If one virtue of client-centeredness is its keen focus on the relational aspect of lawyer-client interactions, a vice may be its purported tendency to glorify the lawyer-client relationship as an end in and of itself.³¹⁷ William Simon argues that client-centered lawyering's focus on the "community-of-two" of lawyer and client denies the role of external social and political factors in the calculus of client concerns and interests. He also asserts that client-centeredness' focus on the acceptance of feelings makes the technique an inherently conservative one.³¹⁸

These criticisms of client-centered counseling, and its grounding in the techniques and attitudes of client-centered therapy, are not so much wrong as overstated and simplistic. It is not at all clear that a lawyer's use of techniques drawn from humanistic psychology are any more problematic than her use of techniques derived from other disciplines, such as moral philosophy.³¹⁹ In each case, the use of technique could be manipulative and lead the lawyer to interfere

316. See Stone, *supra* note 168, at 435-36 (describing destructive relationship between clinical law student and psychologically dependent client).

317. Simon, *supra* note 84, at 502.

318. See *id.* at 523 and *supra* note 98. But see Rogers, *Client-Centered and Symbolic Perspectives on Social Change: A Schematic Model*, in *INNOVATIONS IN CLIENT-CENTERED THERAPY*, *supra* note 169, at 465, 467 ("client-centered therapy has . . . a variety of suggestive values and approaches that could substantially deepen our understanding of social phenomena and of optimal modes of involvement for those interested in facilitating social change" (footnote omitted); 475-95 (application of client-centered perspective to case study of community organization involvement in urban renewal project). But see also Cihlar, *Client Self-Determination: Intervention or Interference?*, 14 ST. LOUIS U.L.J. 604, 605, 610 (1970) (criticizing client-centeredness, which he calls client self-determination, as reflecting a "radical view of individual freedom" and presenting "a radical exaltation of the normative capacity of the individual which incessantly borders on the anarchic").

319. Because there is a distinction between the lawyer functioning on the one hand as a psychologist and on the other as a person attentive to psychological factors and willing to use some basic psychological techniques in his lawyering, the criticism that lawyers do not have sufficient expertise to use the psychological techniques of client-centered lawyering is specious. First, the techniques of the client-centered lawyer (as opposed to the underlying theories of human motivation and behavior) are simply not that difficult to understand, as a reading of the second chapter of the Binder and Price text confirms. In my experience, while students may resist some of the psychological jargon of the book, they quickly understand its meaning. Second, good lawyers constantly draw from many disciplines to develop their professional expertise. One of the attractions of practicing law for many people is the opportunity to develop usable knowledge if not mastery in a number of different areas. Usable knowledge in psychology is hardly less accessible in general than it is in economics, history, philosophy, or sociology.

inappropriately with the client's autonomy. But almost any technique, no matter how neutral in theory, can be misused in this fashion.³²⁰ Unless there is something especially powerful about psychological techniques (and we are not talking here about sophisticated techniques of psychological torture or brainwashing), the psychological critique calls into question the lawyer's use of almost any technique to structure reality for the client.³²¹

It is true that clients often come to lawyers in a state of emotional disarray and vulnerability, and that leads some critics to be especially concerned about the client-centered lawyer's use of psychological techniques.³²² This concern is real, but it will not be dissipated by the lawyer's eschewal of empathic listening techniques. The traditional lawyer's paternalistic or judgmental stance towards his client can be manipulative as well, as can the critical lawyer's efforts to reach a non-hierarchical understanding with his client.³²³ Nor would the lawyer's substantial power over his client disappear if all of a sudden the lawyer stopped being "psychological;" the sources of the lawyer's power are considerably more deeply ingrained than that.

The possibility that client-centeredness will lead the lawyer to identify inappropriately with the client and become over-involved in the client's life is really a straw man.³²⁴ A student's tendency to identify with some clients may be more a function of his own need to establish competence and to believe in the justness of his client's cause than of his use of any particular counseling approach. More fundamentally, a major element of the critique of the traditional counseling model is to question the traditional assumptions that lawyers (and law students) make about the lawyer's role. The traditional lawyer may take fewer risks with his client by maintaining more professional distance, but as the earlier discussion demonstrated, the results of that approach are questionable for both client and lawyer.

This article previously addressed William Simon's critique of the focus of client-centered lawyering on the lawyer-client relationship to the exclusion of political and other factors.³²⁵ If Simon is right to caution against a view of lawyering that *only* responds to the human relationship between lawyers and clients, however, his critique fails in its implication that the client's personal

320. Cf. Simon, *supra* note 84, at 548-49 (importance of analyzing specific context and purpose of technique).

321. For example, a lawyer's use of leading questions in an interview may be justifiable to confirm specific data relevant to developing a workable theory of the case. Yet under some circumstances, the lawyer's leading questions can raise serious ethical problems by suggesting to the client how to structure his answers falsely so as to maximize his legal position. See G. BELLOW & B. MOULTON, *supra* note 3, at 976 (quoting from "The Lecture" scene in Robert Traver's *ANATOMY OF A MURDER* (1958)). We would hardly ban the use of leading questions in interviews because they are capable of being misused. We simply recognize that under some circumstances their use may be inappropriate and unethical. The same standard ought to suffice when assessing the lawyer's use of psychological techniques in a client counseling session.

322. See, e.g., Ellmann, *supra* note 16, at 768-70.

323. See *id.* at 770-73 (critical lawyer's manipulation of clients).

324. Alan Stone's rendering of this criticism in *Legal Education on the Couch*, *supra* note 168, is almost apocalyptic in tone. He comes close to blaming a client's suicide attempt on a clinical law student's use of a client-centered lawyering approach. Stone, a psychiatrist who teaches at the Harvard Law School, presumably would not urge psychiatrists to abandon psychotherapy because the patients of some psychiatrists attempt similar acts.

325. See *supra* note 103.

experiencing of external factors does not matter at all.³²⁶ Ultimately, his critique fails to challenge successfully the underpinnings of all but the most caricatured versions of client-centered practice.³²⁷

Because the goals of the lawyer are very different from those of the therapist, the lawyer's use of psychological techniques is considerably less problematic than if the lawyer holds himself out as a psychotherapist.³²⁸ Lawyers who use techniques of client-centered therapy to assist their legal clients remain truer to the original Rogerian understanding of client-centered therapy as the creation of a supportive environment than to its later incarnation as a "deeply personal, unique, and even intimate experience."³²⁹ This might result in a less complete defense of the psychological underpinnings of client-centered practice than some advocates mount, but it at least retains what in my judgment is essential in that practice.

B. Micro-Arguments Against Client-Centeredness

As we have seen, client-centered approaches to lawyering make certain assumptions about the client, lawyer and lawyer-client relationship. These assumptions are not indisputable. Both traditional and Critical Legal Studies critics question some of the underlying premises of client-centered practice. These criticisms are both practical and conceptual in nature.

1. The Client's Perspective

To be successful, any model of lawyering must appeal to the primary constituency of lawyers' services: clients. While clients might find the psychologically supportive atmosphere of the client-centered lawyer's office attractive, other aspects of the practice less clearly serve clients' interests.

For the client who goes to the professional expecting her guidance and advice on the legal matter he has brought to her, the lawyer's emphasis on client autonomy may seem to provide insufficient assistance in the resolution of the problem.³³⁰ Client-centeredness may be inconsistent with clients' role

326. For a criticism of Simon's thesis, and in particular his failure to come to terms with the importance of the individual's internalization of political and social concerns, see Elkins, *supra* note 189, at 193-212.

327. *See id.* *See also* Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 *BUFFALO L. REV.* 177, 235 n.121 (1986).

328. *See supra* notes 177-95 and accompanying text.

329. Stone, *supra* note 168, at 433. It would be interesting to conduct empirical research with clinical teachers to determine whether, given the extensive adoption of the Binder and Price text, their use of the authors' suggested psychological techniques (and hence, derivatively at least, Rogerian techniques) is along the instrumental lines that I suggest in the text or for the purposes of teaching students to establish an intimate, caring relationship with the client. My own goals are decidedly instrumental in nature, a choice possibly influenced though not totally determined by the fact that I supervise students in a criminal defense clinic. Client mistrust of criminal lawyers is extensively documented. *See infra* note 331. James Elkins has suggested that even the lawyer's use of psychology for solely instrumental purposes can cause the lawyer to adopt a more psychologically oriented vision of the world. *See Elkins, supra* note 189, at 173-76.

330. In her study of the practices of different kinds of salaried lawyers, Spangler notes that legal services lawyers often deal with clients facing emergencies. She quotes one such lawyer as saying "'and they're crying during the whole time that you talk to them and they just

expectations.³³¹ Conceivably, clients might suspect lawyers who emphasize client decisionmaking of choosing this approach primarily as a way to avoid malpractice liability.³³² Clients might also be concerned that the lawyer has a financial interest in lengthening the counseling process. If, as some have maintained, the lawyer-client relationship is characterized by pervasive mistrust,³³³ clients could be forgiven for being suspicious of an approach that seems to remove the professional from the advice-giving picture.

Even if one believes that the case is not yet made for significant client mistrust of lawyers, it is undeniable that lawyers and clients have very different interests in the lawyer-client relationship. Clients may see the goal of contemplated legal action as emotional vindication or receiving justice; lawyers are likely to discount such goals and stress the maximization of the client's financial situation.³³⁴ Lawyers and clients have conflicting autonomy, dignity,

say, 'Will you please do what you think is best? You're the lawyer. I don't want to have to do this. You do it.' So you take your cue from them.'" E. SPANGLER, *supra* note 143, at 168.

331. A client may psychologically need the lawyer to make the decision for him. Cf. D. BINDER & S. PRICE, *supra* note 8, at 11-12 (discussing role expectation of client that causes him to see lawyer as either completely dominant or subordinate towards the client rather than as involved in a power-sharing relationship), 197-200 (discussing ways for client-centered lawyers to deal with clients who insist that lawyers give clients their opinion on what to do). Poor clients may, in particular, expect their lawyers to give advice or tell them what to do, in part because many other people may deal with them in that fashion. See H. FREEMAN, *supra* note 187, at 161 (arguing that lawyers for poor clients establish good rapport with them, despite the directive quality of their counseling, because directiveness fits clients' expectations). Sophisticated clients, or simply clients whose utilitarian calculus leads them to conclude that it is more efficient to delegate matters to the lawyer, may also expect lawyers to "handle the matter" without demanding the client's full participation.

332. Cf. Spiegel, *supra* note 281, at 147 (suggesting one consequence of applying informed consent principles to corporate lawyering might be to increase client power as lawyers would be concerned about malpractice liability if they opposed their clients).

333. See, e.g., Burt, *supra* note 165, at 1019-20 (mistrust inherent in lawyer-client relationship, though it often is submerged and goes unrecognized); Simon, *supra* note 61, at 133-35 (ideal lawyer-client relationship will often involve conflict, risk and possible betrayal); Kidder, *Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India*, 9 LAW & SOC'Y REV. 11, 22 (1974) (Indian client-lawyer relationship marked by "deep mutual mistrust"). Clients' mistrust of their lawyers appears to exist especially in criminal defense work. See Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 26 (1966) (client attitude toward lawyer in criminal setting "a precarious admixture of hostility, mistrust, dependence and sycophancy"); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 65 (1967) (relationship between client and criminal defense counsel "mixed-motive game" in which interests partially coincide and partially conflict); J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 105-15 (1972) (defendants' distrust of their public defenders). One extensive study of client attitudes towards lawyers found that such attitudes varied depending on the socioeconomic status of the client and the nature of the legal matter, among other factors. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 206-07, 212-14 (1977).

334. See Sarat & Felstiner, *supra* note 12, at 107-08, 121. The authors note that the differing emphases between lawyer and client result in continual battles between them over what to talk about:

Thus there is a conflict between the client's desire for vindication on what the lawyer perceives to be a peripheral issue and the lawyer's interest in reaching a satisfactory disposition on what for him is a much more important issue. Time and again in our study we observed lawyers attempting to focus their client's attention on the issues the lawyers thought to be major while the clients often concentrated on matters that the lawyers considered secondary.

economic and societal interests.³³⁵ Indeed, the world views of lawyers and clients may be mutually exclusive.³³⁶ These differences could well make clients skeptical of client-centered lawyers insofar as client-centeredness did not comport with clients' own pre-conceptions about the lawyer-client relationship.

If clients mistrust their lawyers, the fundamental underpinnings of client-centered practice may be open to question. The development of a relationship of trust and rapport between lawyer and client would seem to be difficult if not impossible under these circumstances. Of course, the client-centered lawyer, recognizing the background hostility of her client, might be in a better position to break down this mistrust either by confronting it directly or by taking steps designed to make the client's continued mistrust of her less tenable.³³⁷

Client-centered counseling, and the client decisionmaking that underlies it, potentially makes great demands on clients to participate fully in their legal representation. Its advocates may improperly assume that clients are rational decisionmakers who can make correct decisions so long as they are provided with sufficient information.³³⁸ To the extent that assumption is inaccurate, client-centeredness may be inapposite.³³⁹ This concern about hyper-rationality can be exaggerated, however. We should be extremely suspicious of categorical judgments about client irrationality and impaired decisionmaking capacity. The tendency to assume that certain groups of clients are unable to make rational decisions is overinclusive and denies these people their individuality.

Id. at 112. See also Sarat & Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737 (1988) (lawyers in divorce cases focus on problem-solving in present and future; clients seek emotional release and self-justification).

335. See Maute, *supra* note 131, at 1070-80.

336. See *supra* note 222 and accompanying text.

337. Casper's study of the attitudes of criminal defendants in Connecticut in the early 1970's indicates that one of the clients' primary criticisms was that their public defenders told them what to do rather than give them advice, provide information, and offer suggestions as private lawyers did. J. CASPER, *supra* note 333, at 109. This finding supports a client-centered approach. The author speculates that public defenders may not actually tell their clients what to do any more than the private lawyers do, but that the clients simply perceive them to act in this fashion. *Id.* at 117-18. This perception may be more important than the reality, however, and, if anything, reinforces the desirability of public defenders acting in a client-centered manner. Interestingly, Casper concludes that one possible source of conflict between lawyer and client, the lawyer's fee, actually cements a positive relationship by establishing a mechanism of exchange. *Id.* at 118.

Some commentators argue that client-centeredness is particularly appropriate in a criminal context. See Morris, *supra* note 42, at 795-96; Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 71 n.19; cf. Ogletree & Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23, 38-39 (1986) (rejecting view that criminal defendants are not sophisticated enough to understand conflict of interest issues). On the other hand, the nature of the lawyer-client relationship in many non-serious and some serious criminal cases — where lawyer and client may meet for the first time on the day of trial and have little time to consult with each other — may argue against applicability of a fully client-centered approach. *But see infra* note 378.

338. This assumption is consistent with the assumptions about patients that obtain in medical informed consent, as well as those about consumers in the truth-in-lending context. See INFORMED CONSENT, *supra* note 136, at 7.

339. See Ellmann, *supra* note 16, at 752-53 (Binder and Price lawyer's use of rationalistic decisionmaking model could undercut autonomy of clients who would otherwise choose to make decisions in non-rational manner).

Conversely, client-centeredness may be seen as condescending towards clients. Why should not poor clients, the original subjects of client-centered practice, be able to receive advice from their lawyers without immediately acceding to it? Given the harsh treatment many poor people suffer at the hands of governmental and other bureaucracies, would not the lawyer's greater involvement in the client's decisionmaking serve to even the sides somewhat? Despite the many faults of the traditional paradigm, the traditional lawyer who urges his client to take a particular course of action and *follows through on it*³⁴⁰ may function more as the client's champion than the client-centered lawyer whose posture of decisional detachment extends to less than zealous implementation of the client's decision.³⁴¹ The deeply involved critical lawyer — assuming she overcame any serious conflicts with her client — would probably be a more committed advocate still.

2. *The Lawyer's Perspective*

The disadvantages of client-centered approaches from the perspective of the lawyer³⁴² embrace both practical and conceptual difficulties. These constraints suggest both the need for definitional clarity of the concept and close attention to the context in which client-centered approaches are assessed.

Client-centered counseling is time-consuming. For a lawyer to explore the various legal and non-legal alternatives with the client and engage her in the process of identifying and weighing consequences takes considerably more time

340. *But see supra* note 206 and accompanying text.

341. As should be obvious, this and many of the observations in this section are somewhat speculative, and difficult to prove in the absence of empirical data on client attitudes (and even then "proof" of such propositions is likely to be extremely subjective and unstable). Abstract discussions of what clients want frequently ring false. Definitive answers are hard to come by. It is my hope, however, that these speculations are useful in causing us to challenge, or at least make explicit, some of the underlying premises of client-centered practice.

342. The question of the applicability of the client-centeredness model to practicing lawyers is a complex one. One problem is the relative paucity of data on how lawyers actually practice such law-office skills as interviewing and counseling. In recent years a growing number of studies in the legal and sociological literature purporting to describe what lawyers actually do in practice. *See, e.g.*, D. ROSENTHAL, *supra* note 19; Neustadter, *supra* note 327, especially 194-98 (discussing studies); Hosticka, *We Don't Care About What Happened We Only Care About What Is Going To Happen: Lawyer-Client Negotiations Of Reality*, 26 SOC. PROBS. 599 (1979); E. SPANGLER, *supra* note 143; Sarat & Felstiner, *supra* note 12; K. MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); R. NELSON, *PARTNERS WITH POWER* (1988); Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, in *THE SOCIOLOGY OF THE PROFESSIONS*, *supra* note 115. For additional studies, see Morris, *supra* note 42, at 785 n.23. But the extent of this literature is still relatively limited. Even this relatively specialized research domain must be limited still further if the goal is to examine contemporaneous observations of practicing lawyers rather than retrospective reconstructions of practices and attitudes. As one group of researchers noted, observations of actual lawyer-client interchanges are limited by the profession's commitment to preserving confidentiality. *See* Danet, Hoffman & Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 LAW & SOC'Y REV. 905 (1980). Clinical teachers have a ready source of data on how *student* lawyers function, in both real and simulated counseling sessions, but there are great dangers in translating these observations into the world of more experienced practitioners. Moreover, to the extent that clinical teachers first teach client-centered practices before their students engage in actual or simulated lawyering, the students can hardly provide a basis for testing whether the model would otherwise be used.

than simply recommending to the client what she should do.³⁴³ Lawyers in private practice are engaged in a business. If the counseling session is lengthened because of a fuller discussion of alternatives, either the client must pay or the lawyer must absorb the costs of the longer sessions. Many clients will be unwilling or unable to do the former;³⁴⁴ few lawyers would be so committed to client-centered lawyering that they would do the latter.³⁴⁵ Surely it is not by chance that the strongest proponents of client-centered lawyering are clinical teachers who, whatever the significant constraints on their time, typically do not have to worry about the profitability of their law practice.

The practicing lawyer's self-image presents another practical constraint on the adoption of a client-centered lawyering approach. Professional resistance to client-centered approaches is likely to be even stronger than law student resistance to the concept.³⁴⁶ The traditional model of lawyering can be attractive to the lawyer imbued with a view of the professional as an autonomous expert. Such lawyers have a strong tendency to objectify the client³⁴⁷ and would have great difficulty conceiving of the client as having a useful perspective to contribute to the counseling process.³⁴⁸ Lawyers as a professional group are biased towards converting most problems into technical ones that require the exercise of the lawyer's professional judgment.³⁴⁹ For the traditional lawyer, client decisionmaking may seem to be at bottom a debate

343. This proposition, while perhaps not provable absent empirical research designed to compare the practices of client-centered and traditional lawyers, seems intuitively correct. Compare Spiegel, *supra* note 22, at 110 (informed consent approach likely to add time to lawyer-client interactions), with Strauss, *supra* note 55, at 335 (increased collaboration of informed consent unlikely to add much time to lawyer-client sessions). Moreover, even though the description in the text tracks the Binder and Price model of counseling, any counseling process that engages the client in meaningful dialogue about the choices facing her takes more time than counseling that simply has the lawyer tell the client what to do. See, e.g., Pepper, *supra* note 60, at 631-32 (lawyer-client dialogue on moral issues time-consuming and therefore expensive).

344. In one of the relatively few studies of practicing lawyers actually engaged in interviewing and counseling, Gary Neustadter studied the styles and practices of a number of bankruptcy lawyers. He argues that client-centered approaches may compromise the financial pressures affecting financially-strapped clients, creating a strong tendency towards lawyer-dominating behavior. See Neustadter, *supra* note 327, at 178-79. Clients contemplating bankruptcy would likely be especially vulnerable to such financial pressures.

345. Neustadter notes that bankruptcy courts set maximum fees schedules for lawyers. Thus, the bankruptcy lawyer required to spend an extensive amount of time interviewing and counseling clients cannot pass the costs on to the client even if he wishes. *Id.* at 237-38. Neustadter also makes a more obvious point: to the extent that the client-centered lawyer explicitly raises the possibility of foregoing legal action or at least the legal action that the lawyer offers, the lawyer has a strong economic incentive to avoid a full discussion of these possibilities. *Id.* at 239-40.

346. See *supra* note 245. As David Gottlieb and Claudio Grossman have pointed out, many lawyers (and, I would add, especially litigators) have a strong desire to win the legal matter entrusted to them. Insofar as such lawyers believe that client-centeredness makes winning less likely, they might resist the concept, even if empirical support for the view that traditional counseling maximized the chances of winning was limited.

347. See, e.g., Wasserstrom, *supra* note 77, at 21 n.5 (citing sociologist Erving Goffman for the observation that professionals see clients not as people but as objectified problems). Cf. *id.* at 17 (professionals believe that clients are generally unable to evaluate professional performance). See also Simon, *supra* note 61, at 55 (tendency for Positivist lawyers to turn clients into abstractions).

348. See *supra* note 17.

349. See Spiegel, *supra* note 22, at 144 & n.24; G. HAZARD, *supra* note 282, at 49.

over means and not ends. Doctors' resistance to adoption of informed consent practices provides a warning to those who would advocate a normative client-centeredness divorced from the actual experiences of practicing lawyers.

Conceptually, a significant limitation on client-centeredness inheres in the nature of professional work itself. As a number of commentators observe, lawyers³⁵⁰ and other professionals³⁵¹ tend to define client problems into particular categories. While each client may believe that his problems are unique, the stock-in-trade of the professional is to see client problems in terms of categories and apply to the client's problem the techniques found to be successful in previous cases. In some cases, such standardization relates to fairly mundane office procedures;³⁵² in other cases, the lawyer specializes and thus tends to see client problems (and perhaps more significantly solutions) as calling for relatively straightforward solutions.³⁵³ Lawyer channeling of client concerns may also reflect a fundamental lack of sympathy for the client's perspective.³⁵⁴ As one legal services lawyer whom Spangler interviewed put it:

[W]e preach client autonomy, but in reality, it's a little impractical when the client isn't educated or doesn't know the system so she can make choices. After the 450th case, where all the clients make the same kind of decision, you've been through it, you feel that you might as well make the decision for the next client, because you're so familiar with the experience. When you

350. See, e.g., Neustadter, *supra* note 327, at 240 (bankruptcy lawyers in study tend to view work as relatively routine and fitting within particular categories); Cain, *supra* note 342, at 109, 111, 116-18 (lawyers translate client concerns into legal discourse); Hosticka, *supra* note 342, at 607 (lawyers control the definition of the client's problem); Bellow, *supra* note 86 (legal aid lawyers define client problems narrowly); Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 124-28 (1979).

351. See, e.g., Sarat, Abel & Felstiner, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631, 645 (1980-81) ("[T]he essence of professional jobs is to define the needs of the consumer of professional services. Generally, this leads to a definition that calls for the professional to provide such services.") (citation omitted); E. FREIDSON, PROFESSIONAL DOMINANCE, *supra* note 117, at 105 (doctor-patient relationship intrinsically problematic because professional necessarily develops routinized ways of dealing with problems that the patient thinks of as unique and critically important).

352. See Hosticka, *supra* note 342, at 602 (secretary categorized client's legal problem and scheduled the client for an appointment on the day those problems were being addressed).

353. See Neustadter, *supra* note 327, at 199-209 (comparing Lawyer A, who believes that Chapter 13 bankruptcy is superior to Chapter 7 as the best approach for his clients, with Lawyer B, who believes that Chapter 7 is superior to Chapter 13). The authors of another recent study of bankruptcy clients and their lawyers note the ease with which bankruptcy lawyers appear able to influence their clients to choose either Chapter 7 or 13. Sullivan, Warren & Westbrook, *Laws, Models and Real People: Choice of Chapter in Personal Bankruptcy*, 13 LAW & SOC. INQUIRY 661, 698 (1988). They observe that the technical nature of bankruptcy and the many advantages and disadvantages of each option make it "a simple matter of emphasis to make one sound much more appealing." *Id.* The bankruptcy statute is unusual in that Congress, concerned that bankruptcy lawyers were unduly influencing client choices, amended the statute in 1984 to require that the lawyer submit an affidavit with his bankruptcy filing indicating that she had informed the client about both chapters. The authors conclude, however, that knowledgeable practitioners treat this provision as a joke. *Id.* For a wonderful description of the way in which one bankruptcy judge influenced lawyers to submit Chapter 13 as opposed to Chapter 7 petitions, see *id.* at 696.

354. See Macaulay, *supra* note 350, at 138-43 (many lawyers for consumers in study lack sympathy for clients and implicitly decide to forego aggressive litigation efforts on their behalf).

take the time to explain all the options, the client still ends up asking you what he should do. I wish all clients were as attractive as their causes.³⁵⁵

Lawyer resistance to client-centeredness can be seen not simply as a result of the inherent conservatism of lawyers but quintessentially as part of the way that the professional sees her world. Ironically, the professional-as-technician image seems inconsistent with the view of the professional as a person who is trained to, and in fact does, exercise good and nuanced judgment.³⁵⁶ To be sure, the professional's demand for regularization of task is balanced by her ability to know when a situation *is* truly unique (at least in her experience) and act upon that knowledge.³⁵⁷ But few lawyers approach their work lives day in and day out with an eye towards constantly remaking their worlds. Under such circumstances, lawyers may find too demanding a client-centered practice that calls for openness to new solutions and a continuing need to justify to clients (and themselves) the approaches to be considered.

Client-centered lawyering stresses the desirability of the lawyer's neutrality towards the client's ends.³⁵⁸ But such neutrality is inevitably false;³⁵⁹ as sentient and feeling beings, lawyers cannot help but have opinions about what their clients should do, and cannot help but have those opinions affect how they relate to clients. By denying the impossibility of neutrality, client-centered lawyers fool themselves and ultimately misserve their clients. The client-centered lawyer's neutrality also presents the risk that she will improperly see her client's ends or goals as fixed, immutable, and uninfluenced by the lawyer's actions.³⁶⁰ Both the traditional and critical lawyer often seek overtly to influence their clients and bend client goals to fit the lawyer's purposes. Client-centered lawyers, so the argument goes, do the same thing, but covertly.

355. E. SPANGLER, *supra* note 143, at 167.

356. See Kronman, *supra* note 5, at 846 (practice of law requires and tends to encourage positive character traits, most especially the exercise of good judgment). See also Luban, *supra* note 9, at 721 (describing Brandeis's view that lawyers are uniquely in a position to do justice because they combine abstract reasoning, empirical keenness, decisionmaking under time constraints, tolerance and judiciousness). In some hands, the description of what professionals (or practitioners) do can sound positively poetic:

Through countless acts of attention and inattention, naming, sensemaking, boundary setting, and control, [practitioners] make and maintain the worlds matched to their professional knowledge and know-how. They are in transaction with their practice worlds, framing the problems that arise in practice situations and shaping the situations to fit the frames, framing their roles and constructing practice situations to make their role-frames operational. They have, in short, a particular, professional way of seeing their world and a way of constructing and maintaining the world as they see it. When practitioners respond to the indeterminate zones of practice by holding a reflective conversation with the materials of their situations, they remake a part of their practice world and thereby reveal the usually tacit processes of worldmaking that underlie all of their practice.

D. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* 36 (1987).

357. Nor do I mean that the act of categorization or translation of client concerns into legal categories is always devoid of creativity. Compare the descriptions of the lawyers in Cain's study, Cain, *supra* note 342, with those in Hosticka's study, Hosticka, *supra* note 342.

358. See Gifford, *supra* note 15, at 820-21.

359. Simon, *supra* note 61, at 51; Gordon, *supra* note 112, at 26, 29; Lehman, *supra* note 278, at 1091.

360. See Gordon, *supra* note 112, at 72-73.

Because they are less honest with themselves about their desire for influence, they are more dangerous.

To assert that lawyers cannot be entirely neutral and objective towards their clients — a proposition with which I agree — is not, however, to demonstrate that there are no distinctions between the various ways in which lawyers might talk with clients about the choices clients face. The traditional and critical lawyers are more likely to dominate the client because they make no effort to be neutral.³⁶¹ Not seeing neutrality as a positive good, they will likely be less sensitive to the risks for clients entailed in their strong statements of opinion. So long as client-centered lawyers understand that express neutrality towards their clients' ends is a goal they will never quite achieve, and that their neutrality must be tied to a commitment to facilitate client decision-making, their posture towards clients raises considerably fewer problems than the alternative approaches.³⁶²

3. *The Lawyer-Client Relationship*

Many of the aspects of the lawyer-client relationship affected by a client-centered approach to lawyering have been addressed in previous sections. There are three aspects of the critique of client-centeredness that remain, however: that client-centeredness, far from promoting dialogue between lawyer and client, actually stifles it; that it fosters a false dichotomy between the roles of lawyer and client;³⁶³ and that it is politically naive.

361. I am using non-neutrality here in the specific sense of the lawyer taking a position on what the client should do and advocating that position to the client. This is clearly the stance that William Simon advocates in his discussion of critical lawyering. See Simon, *supra* note 60. For traditional lawyers, the picture is slightly more complicated, because one staple of adversarial representation (more or less equivalent to Simon's ideology of advocacy) is that the lawyer does not judge the client's ends but simply does her bidding. Yet my sense of the traditional approach is that while the lawyer might ultimately display such an attitude, he would be prepared to use highly interventionist means with the client before reaching that point.

362. Although I argue for the goal of relative lawyer neutrality with respect to client choice, I do not maintain that such an approach is valueless. William Simon properly criticizes those who fail to see that the lawyer's attitude of not imposing her middle-class values on her client, for example, may itself be a middle-class value. See Simon, *supra* note 61, at 137 n.244. But given the choice among the various values that the lawyer could express, I simply do not find the willingness to strive toward neutrality, when coupled with a commitment to fostering client decisionmaking, to be as suspect as Simon does. To be sure, neutrality is not necessarily appropriate in all kinds of law practices; the political practice that Simon, Gabel and Harris and others envision, see *supra* note 95 and accompanying text, as well as some forms of public interest practice, see D. LUBAN, *supra* note 63, Ch. 14, may well allow for and even demand greater lawyer involvement in the client's goals. But such involvement must be debated between lawyer and client, and the client, as the initiator of the relationship, should be able to opt in or out of such an approach to representation. (In public interest practice, of course, the lawyer or public interest organization itself may be the true initiator of the relationship. Nevertheless, the lawyers in such cases need to understand the extent to which the control that they might ordinarily expect to exercise in the case may be diminished because of its specialized nature.)

363. See Gifford, *supra* note 15, at 822 (Binder and Price model is overly structured and "linear" and discourages conversational exchange); Tremblay, *supra* note 16, at 529 n.65 (false dichotomy of lawyer and client choice; interaction between lawyers and clients under Binder and Price model mechanical). These criticisms are of the Binder and Price model in particular, rather than of client-centeredness in general. Thomas Shaffer's brand of client-centeredness does not seem as susceptible to these criticisms in light of his emphasis on the importance of moral conversation between lawyer and client. See *supra* notes 272, 286. However, Shaffer's approach is problematic for other reasons. See *supra* note 286.

As I argued previously, it is just as possible to argue that client-centeredness in general and the Binder and Price model in particular encourages dialogue between lawyer and client. As with the dispute over whether the Binder and Price lawyer provides her client with an opportunity to reassess her values or merely accepts them as given,³⁶⁴ the quality of lawyer-client dialogue may depend more on the way in which the practitioner implements the model than on any inherent characteristic of the model itself.³⁶⁵

The Binder and Price lawyer *must* conduct a dialogue with the client if she is adequately to explore options and identify and assist the client with weighing consequences. But this dialogue may not be a dialogue between equals. As John Leubsdorf wrote, "It is difficult to conduct a dialogue between equals, however, when one monopolizes the legal knowledge and the other's interests are at stake."³⁶⁶ If true dialogue entails mutual openness to risk and even mistrust,³⁶⁷ the client-centered lawyer's goal of neutrality towards his client may preclude the development of meaningful dialogue.³⁶⁸ But those who promote the value of dialogue between professional and layperson³⁶⁹ rarely define the term or indicate the point at which dialogue becomes meaningful. The criticism that client-centeredness is non-dialogic is ill-defined and must be considered ultimately unpersuasive.

The same may be said for the criticism that the model falsely dichotomizes lawyer and client choice. Failure to consider the different interests of lawyers and clients in the lawyer-client relationship is bound to lead to confusion over the appropriate roles of both. To understand the interests at stake, it is necessary to consider the actions of lawyers and clients as if they are taken separately. But it fundamentally misreads the model to assume that

364. See *supra* note 303.

365. Certainly, observations of numerous student counseling simulation sessions could lead one to conclude that the dialogue between Binder and Price lawyers and their clients is often stilted and formal. To the extent that this observation is accurate, the fault is not necessarily the students'. Apart from the difficulty of learning the counseling skill (and the possibility that the students' teachers are not very effective in teaching it), the structure of the Binder and Price text, with its provision of transcript excerpts of lawyer-client interactions, may lend itself to students' wooden interpretations (though, as noted previously, see *supra* note 44, the transcripts can be an effective learning tool). Nevertheless, my own experience suggests that such a stilted approach is not an inevitable consequence of the model's use. Empirical research assessing practicing attorneys' use of the Binder and Price model might well yield interesting insights on this point.

366. Leubsdorf, *supra* note 125, at 1050. See also *supra* note 174.

367. This is Robert Burt's view of the role of dialogue, as reflected in R. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS*, *supra* note 107, and Burt, *Conflict and Trust Between Attorney and Client*, *supra* note 165.

368. In his vision of a more fully realized political legal practice, William Simon's critical lawyer and client conduct their own form of dialogue. But it is not clear that the dialogue is any more meaningful than that between the client-centered lawyer and his client. The critical lawyer and client, in Simon's conception, are likely to spend much of their time trying to persuade each other of the virtue of their own political and moral visions. (Robert Burt's lawyer and client are likely to spend most of their time talking about betrayal.) Compared to the client-centered lawyer, the critical lawyer may be a better talker but a worse listener.

369. Jay Katz is the primary advocate for the importance of doctor-patient dialogue. See J. KATZ, *supra* note 18.

lawyers and clients make decisions in a vacuum and without consideration of the other's interests.³⁷⁰

I have already noted William Simon's criticism that client-centeredness is deficient in failing to take account of the differences between clients who are rich and poor, powerful and powerless.³⁷¹ Advocates for client-centeredness may make implicit assumptions about the kind of client they envision — the poor client who is the staple of most clinical programs — but their rhetoric implies and their students may assume that the decisionmaking model applies to all clients under all circumstances. A client-centered lawyer who believes that he is not exercising power over his client may be guilty of naïveté. But a client-centered lawyer aware of the potential for lawyer dominance can seek ways to minimize the exercise of that power. Of course, recognizing that clients, and the kinds of cases or matters that they bring to the lawyer, differ does not resolve the thorny question of when the lawyer should or should not defer to the client. Almost any effort to draw lines is risky.³⁷² Still, the rationales supporting client-centeredness differ depending on whether one considers individual or organizational clients, or powerful or powerless clients, and proponents of client-centeredness must consider the effect of such differences on the model they espouse.³⁷³

370. Part V, *infra*, discusses the process of generating alternatives from the lawyer's and client's respective perspectives. In a sense my adaptation of the Binder and Price model is subject to the same criticism of perpetuating a lawyer-client dichotomy as the basic model. The purpose of my separation of lawyer and client interests is, however, not to suggest an unbridgeable chasm between the two but to clarify what the different perspectives contribute to the overall goals of the mutual relationship.

371. See *supra* note 103 and accompanying text.

372. As one example of the problem, see Morris, *supra* note 42, at 795-97. Morris considers a domestic violence case in which a client faces criminal charges for past abuse and is also involved in civil litigation over child custody and visitation. He argues that client-centeredness, and especially deference to a client's goals, is justified in the former case because of the seriousness of the potential consequences to the client, the constitutional protections available to criminal defendants, and the inchoate nature of the potential harm to the public. Morris countenances less deference to the client in the related civil matter because, he maintains, the client's liberty interest is less severely affected, the constitutional protections are fewer and the burden of proof lower, and the potential harm to third parties, the client's children, is greater and more definable. But Morris's distinction is insupportable on its own terms. For example, the distinction fails to take into account that many people might conclude that permanent loss of custody over one's children is more serious than a six-month jail term. The assertedly low level of constitutional protection for parents seeking to maintain custody over their children may in large part reflect society's and the legal system's historical disparagement of family-related interests. Morris's distinction serves to perpetuate that mistreatment. And it is too facile to say both that the client's children are not affected in the criminal case (surely there is a difference for the children between the client returning to the home or going to jail) and that they are so affected in the custody case as to warrant overriding the client's interests. Assuming adequate representation of the child's interests and the person or entity seeking custody in lieu of the client — and, perhaps, even absent such assumptions — there is no legitimate reason to permit lawyer dominance in the one case and lawyer deference in the other.

My response to Morris's example is undoubtedly affected by the fact that the Criminal Justice Clinic in which I teach meets jointly in a weekly seminar with the Women and the Law Clinic, in which students, among other things, represent women charged with abuse and neglect of their children. The interests and needs of many of these clients are at least as powerful and intensely felt as those of our criminal clients.

373. Thus, the personal autonomy justification for client-centeredness, see *supra* Part III.A.1., may be unavailable when the client is a partnership or corporation as opposed to an individual. Cf. Spiegel, *supra* note 281, at 145; Rhode, *supra* note 164, at 608 (criticizing bar's

V. CLIENT-CENTEREDNESS REFINED

A. *The Context Defined*

As a result of the above analysis, it is now possible to array the arguments for and against client-centeredness and refine our thinking about the concept. We can also suggest some factors that ought to be considered by the lawyer contemplating whether to adopt such a method of client-counseling. After briefly reviewing these arguments and factors, the article contends that the Binder and Price model for the most part meets the criteria for a revised client-centeredness. I argue, however, that the Binder and Price model is insufficiently client-centered³⁷⁴ in one key respect: the lawyer's counseling of the client on the basic alternatives the client faces in the context of the legal representation.

To review, client decisionmaking in the lawyer-client relationship is supported most clearly by the importance we place on individual autonomy. Client-centered lawyers who adopt means designed to facilitate their clients' capacities to make choices promote their clients' autonomy by allowing them to control their fate. A commitment to autonomy requires lawyers to refrain from telling many clients what to do or, in many circumstances, even advising them what to do. Lawyers for powerful clients, however, especially clients with whom they have a long-standing relationship, can certainly err on the side of using non-coercive persuasion without fearing that the clients' autonomy will be undercut.

Client-centeredness as political empowerment is most attractive when used on behalf of politically and economically powerless people. A client-centered counseling approach for this group also has the virtue of being most faithful to the historical origins of the concept. Though generalizations about what counseling approach most benefits particular categories of clients are troublesome, the significant possibility of lawyer domination of poor clients militates in favor of the relative lawyer neutrality that client-centered counseling contemplates. Sensitivity to the plentiful opportunities for lawyer domination of clients not conventionally thought of as powerless argues in favor of a wide berth for client-centered approaches.

Client-centeredness developed in response not only to concerns about empowerment of poor people but also as an outgrowth of non-directive therapeutic approaches in psychology. But lawyering is not therapy, and advocates for client-centered counseling ignore the distinction at their peril. Insofar as

traditional equation of responsibilities of lawyers for individuals and institutions). *But see* Fried, *supra* note 61, at 1075-76 (arguing that corporations are entitled to protection of autonomy as well). It would be overly narrow, however, to conclude that only individuals should be entitled to a client-centered form of representation. A small not-for-profit corporation whose goal is to conduct grass-roots organizing may be an organization in form but could just as easily be reconceived as a collection of individuals with mutual interests entitled to expression and client-centered support. Nevertheless, determinations of who is the client in the corporate or organizational context are likely to be more complicated than in the individual setting and thus necessarily affect the manner in which a client-centered approach is implemented.

374. Interestingly, as limited as the criticisms of the Binder and Price model are, I found no published criticisms that suggest the model is insufficiently client-centered. *But see supra* notes 301-03 and accompanying text (Ellmann's criticism of Binder and Price model as undercutting client autonomy).

client-centeredness emphasizes the creation of a supportive atmosphere for the client, its use in most circumstances is unexceptionable. Client decisionmaking gains further support from developments in the professions generally, informed consent, and feminism.

Despite the inadequate (though improving) state of empirical research on lawyers and clients, certain themes emerge from the consideration of the relationship between client-centered approaches and the interests of individual lawyers and clients. For many clients, client-centeredness offers the advantage of a potentially supportive relationship with the lawyer that facilitates the client's expression of the concerns that brought him to the lawyer in the first place. Client-centeredness enables the client to tell her story in her own terms. It is the lawyering model most likely to maximize the client's capacity to make her own decisions and thereby exercise some control over her life. It also promotes greater client understanding of the available choices because the lawyer must communicate information in a manner understandable to the client if the latter's choice is to be an informed one. The demands that client-centeredness makes on clients — to participate fully in their case or legal matter; to engage in a rational process of identifying alternatives and weighing consequences; and to make a decision without the comforting advice of the lawyer — are consistent with the notion that individuals should take responsibility for decisions with the potential to greatly affect their lives. Because most decisions clients face implicate their own values rather than issues of technical professional expertise, placing the decisionmaking authority with the client enhances the chances that the client's values will find expression in the choice that is made.

The client-centered approach offers substantial attractions to lawyers as well. It allows them to treat their clients as equals, thus diminishing the distance between their professional and personal lives. It provides lawyers with the opportunity to share decisionmaking authority with the client rather than requiring them to bear full responsibility for often weighty and awesome decisions. The professional's need for regularization and the potentially time-consuming nature of client-centered counseling are less reasons to reject client-centeredness outright than they are practical limitations on its adoption.

Finally, client-centeredness promotes conversation between lawyers and clients. While the dialogue is not quite as intimate as the kind of conversation that occurs between friends, it is potentially more meaningful than many of the interactions in our daily lives. With dialogue comes the possibility that both lawyer and client will affect each other, not because one exercises excessive power but because both are committed to equal participation in the important goal of assisting the client to make a decision that is most in keeping with his hopes and aspirations.

This brief review suggests that client-centered counseling is or ought to apply to a wide variety of lawyer-client relationships. The case for client-centeredness is most compelling where lawyer and client are from different socioeconomic backgrounds, especially if the client is a member of a powerless

group; where the client is not economically, socially or politically powerful;³⁷⁵ where the lawyer and client do not know each other well;³⁷⁶ and where there is sufficient time to allow for reciprocal exploration of alternatives and consequences.³⁷⁷ Despite efforts to suggest that client-centeredness may be applicable in some categories of cases and not others,³⁷⁸ almost any such distinction is likely to misconstrue the interests at stake in cases or legal practices with which the author is unfamiliar.³⁷⁹ Nevertheless, considerations in overtly political representation and in class action litigation differ sufficiently from other kinds of practice to suggest that the argument for client-

375. As I define client-centeredness, however, some elements clearly apply even to powerful clients. If one focuses less on the lawyer's neutrality with respect to her client's ends (and concomitant willingness to pursue those ends even if she disapproves of them), and more on the desirability of the lawyer engaging the client in a decisionmaking process that allows the client to identify, articulate, and act on his goals, client-centeredness may well promote morality and justice by allowing the client explicitly to consider these concepts in his decisionmaking calculus. That lawyers for such clients may resist approaching their powerful clients in this manner — in part because of their relative powerlessness with respect to such clients, combined with clients' increased tendency to switch lawyers in the search for superior service and representation — does not mean that a client-centeredness model is inherently inapplicable.

376. This criterion requires some elaboration. Insofar as a client-centered counseling approach seeks to promote rapport between lawyer and client, it seems that the approach would tend to flourish where the parties knew each other well. Also, as various analyses of the differences between in-house corporate counsel and corporate law firm lawyers reflect, *see, e.g., J. DONNELL, supra* note 233, at 111-12, more intimate knowledge of a business client's operations may provide enhanced opportunities for interchange between lawyer and client. But the need for the lawyer to present choices to his client in a reasonably neutral manner — which I argue is the essence of the client-centered approach, especially as defined by Binder and Price — is greater when the lawyer and client are relative strangers. If the client knows the lawyer well, he is apt to be in a better position to evaluate the lawyer's advice in the context of the inevitable biases that any advice-giver brings to the counseling session. That evaluation process would tend to decrease the possibility of the lawyer overwhelming the client's will. For her part, the lawyer would be in a better position to evaluate whether the client was an independent decisionmaker, both in general and in the particular matter at hand. *See J. FREUND, supra* note 25, at 269, 272-73 (in corporate law context, the lawyer should generally not give the client his opinion about what to do when discussing a go/no-go decision unless lawyer and client have close ties and lawyer knows that client relies on his judgment).

377. Adequate time to conduct a client-centered counseling session means not only providing sufficient time in the session itself but arranging it, if possible, so that it does not occur on the courthouse steps. One reason that client-centeredness may seem intuitively inapplicable to the criminal defense setting is that so much of what passes for client counseling occurs on the day of the client's court appearance in the hallway outside the courtroom under conditions of extreme pressure to make a quick decision.

378. *See supra* note 372.

379. One might be tempted to suggest that client-centeredness should be deemed inapplicable to high-volume, relatively routinized legal practices where the available choices for clients seem fairly limited and the financial and time pressures on the lawyer are intense. But whether or not lawyers with these types of practices choose to practice in a client-centered manner, it seems to me that such lawyers and their clients would most benefit from adoption of that approach. The studies on the directiveness of legal services, personal injury and bankruptcy lawyers demonstrate a disturbing tendency for lawyers both to dominate their clients and miss important legal issues because of preconceptions that they bring to the counseling session. *See supra* notes 352-55 and accompanying text. If one believes that poor and near-poor clients are most likely to benefit from a client-centered approach then it is precisely in these kinds of practices that advocacy for client-centeredness must be strongest.

centeredness is not nearly as compelling in such settings, although it is not necessarily inappropriate.³⁸⁰

These rationales and arguments fully support a client-centered counseling model along the lines that Binder and Price advocate. The Binder and Price model promotes client autonomy even though it severely limits the lawyer's advice-giving role. If the model is revised by allowing the lawyer to offer his opinion to the client whom he believes is an independent decisionmaker, rather than waiting for such a client to ask for his opinion, the protection of client autonomy is adequate.³⁸¹ The model's use of psychological technique is, for the most part, restrained and avoids some of the pitfalls of more frankly psychological client-counseling models.³⁸² Binder and Price do not purport to place client-centeredness in a political context, nor do they attempt to distinguish kinds of clients who might differ in other than psychological characteristics. But as the previous discussion suggested, it is possible to apply the model in a way that accounts for these concerns.

There will be many situations in which lawyers committed in general to using the model will find that they must adapt it to their specific needs. Sometimes even the client-centered lawyer will need to shed his neutrality, give his opinion, or risk rapport with the client. Moreover, a healthy respect for client autonomy requires that we allow for circumstances in which a client can opt out of a client-centered approach.³⁸³ But commitment to the model's use

380. For political cases, see *supra* note 95. For the role of the lawyer in class actions, and its relationship to issues of client control, see D. LUBAN, *supra* note 63, Ch. 15. There is a growing literature on the conflicts between lawyers and clients in the class-action context. See, e.g., Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Burt, *Pennhurst: A Parable*, in IN THE INTERESTS OF CHILDREN 265 (R. Mnookin ed. 1985); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982). In class action litigation, the lawyer and client approach each other on a much different footing from their counterparts in more traditional cases. The lawyer has strong autonomy interests of her own in bringing the lawsuit in the first place, and, indeed, may reverse the usual paradigm of legal representation by first finding the legal problem and then finding the client(s). Under these circumstances, the lawyer and client could negotiate over their respective roles in the litigation; presumably the lawyer would have a greater than usual role in decisionmaking that would otherwise be reserved to the client. The result might not be client-centeredness in the usual sense of the term, but the lawyer would still need to respect the client's autonomy by keeping the client informed about developments and being sensitive to those areas where lawyer and client interests might diverge. This would allow the participants to make other arrangements for client representation, or the client could withdraw from the suit if necessary.

381. One way for the lawyer to test her judgment that the client is an independent decisionmaker is to ask the client whether he wants to receive her opinion. Although this can be part of a cat-and-mouse game between lawyer and client, it might be appropriate if the lawyer has any doubts concerning the client's preferences.

382. See generally Simon, *supra* note 84.

383. To recognize that opting out is a possibility is not the same as being able to state precisely the circumstances under which it should be permitted. For some people, delegation of decisionmaking responsibility to another enhances autonomy; for others it severely compromises it. See generally Shapiro, *supra* note 140. Some commentators suggest that particularly sophisticated clients who seek only technical advice should be permitted to do so and hence avoid a thorough client-centered approach. But there may be circumstances in which even these clients might require counseling on broader grounds. Cf. Redmount, *supra* note 143, at 47. In Spiegel, *supra* note 22, at 82-85, Mark Spiegel contends that clients should not be able to opt out of client decisionmaking pre-emptively at the beginning of the representation, but must negotiate decisionmaking authority as the particular decision arises. He tends to see the loss of client autonomy as minor when compared to the risks that the client will not know enough at the

requires the lawyer to use her judgment so that her variations are self-conscious and thoughtful ones.³⁸⁴ Lawyer intervention and influence over clients is considerably easier to accept if it comes only after the lawyer exhausts other alternatives.³⁸⁵ As Binder and Price themselves recognize, slavish adherence to their counseling model would be inappropriate.³⁸⁶ Premature rejection of the model is inappropriate as well.

Ultimately, the primary contributions of the model are its strong emphasis on the need for the lawyer to pay more than lip service to the ideology of client choice and its concrete description of techniques designed to effectuate that ideology and the attitude that animates it. The importance of technique is critical because it allows the examination of the complex questions of client choice and lawyer behavior in a specific, non-abstract context. If the theory is sound and the technique suspect, we might conclude that the technique needs refinement. Alternatively, we could conclude that the difficulties of technique suggest conceptual flaws in the theoretical underpinnings of the model itself and therefore call for its reassessment.

My concern with the technique of client-centered counseling and its relationship to the concept's core values leads me to examine the Binder and Price model from a perspective that differs from that of the client-centeredness discussion that has proceeded thus far. In particular, assuming that the article has demonstrated that in many circumstances client-centered counseling is a viable approach to legal counseling, do the techniques of the Binder and Price model foster client-centeredness in all respects? I conclude that in one aspect of the counseling process, the lawyer's initial discussion with the client about the

beginning of the relationship to make an intelligent waiver of his informed consent rights. Of course, if lawyer and client have a longstanding relationship, the client could conceivably make an intelligent waiver early in a particular case because the lawyer would be aware of the client's decisionmaking preferences and capabilities from past experience.

384. See E. Milstein, *What is Good Judgment?*, Speech Delivered to the 1984 Clinical Teachers' Conference, Duke University (May 1984); Kronman, *supra* note 5, at 846 (good judgment is the key component of being a good lawyer); Freund, *supra* note 25, at 253-54 (same). My former clinical colleague Elliott Milstein, now dean at The American University's Washington College of Law, has preached for years the importance of teaching clinical students the need to develop good judgment in their lawyering, as well as assisting them to discover the criteria that determine what constitutes such judgment.

385. For example, even though client decisionmaking is considerably more difficult to accomplish on the courthouse steps, it is not impossible. I have watched clinical students counsel clients (and have counseled clients myself) according to the Binder and Price model even when operating within fairly stringent time constraints. The counseling session may not last long, but it is still possible to give the client as much choice as possible under the circumstances. Absent some commitment to applying the model if at all possible, however, the lawyer will likely overpredict the circumstances where client decisionmaking is inappropriate.

The approach that I suggest here is analogous to the courts' and legislatures' use of least restrictive alternative analysis in examining statutes and practices that impinge upon a person's liberty. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). That is, even though a state's purpose is legitimate, it cannot use means to achieve that purpose that broadly stifle individual liberty if less restrictive or less drastic means are available. In the counseling context, I suggest that lawyers vary from the client-decisionmaking model only when they can demonstrate that the more interventionist approach is the least restrictive under the circumstances (such as extreme time constraints, a client's inability to make a decision, etc.). To clarify, I am not saying that lawyers would be legally required to be client-centered, only that they should adopt an attitude that presumes the applicability of client-centered approaches.

386. D. BINDER & S. PRICE, *supra* note 8, at vi.

client's alternatives, the Binder and Price model is too law- (and lawyer-) centered. As I argue in the next section, the model, by focusing in the "alternative" stage almost exclusively on lawyer-perceived choices, unnecessarily undercuts the powerful client-centeredness message that the authors otherwise wish to convey. In the following sections, I attempt to demonstrate that such an approach is not inevitable and that, with the changes suggested, the Binder and Price model can not only become even more client-centered but can respond to some of the remaining critiques of lawyer neutrality lodged against the client-centeredness model.

B. The Binder and Price Model and the Discussion of Client Alternatives

The reader will recall³⁸⁷ that in the Binder and Price counseling model the lawyer first tells the client what alternatives she sees for him; solicits the client's input on any alternatives he sees; identifies and discusses the consequences of the different options, predicting at least the legal consequences; and assists the client in weighing the different consequences in order to enable the client to make the choice most likely to maximize his satisfaction. In the litigation context, the focus of their model, the authors state that the alternatives for the client will usually be variations on the basic choices of litigation, settlement, and abandonment of the matter or doing nothing.³⁸⁸ Binder and Price call for the lawyer to present these basic alternatives or choices to the client before getting the client's input. They distinguish this approach from two other possible approaches to discussing the client's alternatives: (1) the client first tells the lawyer what alternatives he sees *before* the lawyer identifies the alternatives for the client, and (2) the lawyer first tells the client what factors she considered before arriving at the alternatives she intends to discuss.³⁸⁹

The primary difficulty with Binder and Price's preferred method of discussing client alternatives is that it perpetuates the lawyer dominance that the model otherwise seeks to avoid. It does this by focusing on the client's alternatives in a manner that unduly emphasizes the lawyer's perspective that the most important decision for the client is likely to be whether to litigate or settle.³⁹⁰ This perspective has important negative consequences for both clients and lawyers.

Clients faced with a decisionmaking structure that emphasizes the litigate/settlement choice may find themselves shunted into particular conceptual boxes that make sense for the lawyer but not for the client.³⁹¹ For the lawyer, whether to litigate, settle or do nothing may seem to be the principal choice facing the client, but clients are apt to care more about substantive outcomes

387. See *supra* text accompanying notes 23-28.

388. See D. BINDER & S. PRICE, *supra* note 8, at 135-37, 158. For the sake of simplicity, I will refer to this as the litigation/settlement choice, but in doing so I do not mean to exclude the do nothing option.

389. *Id.* at 158-59.

390. The lawyer may have a strong economic incentive to stress the litigation or settlement choices rather than the do nothing choice, which presumably entails the client deciding not to retain the lawyer. The lawyer is more likely to emphasize the do nothing choice if in his judgment the case is not worth much financially or does not present a viable cause of action.

391. See Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISPUTE RESOLUTION 25, 33-34 (limitations of traditional lawyer-generated categories).

than the procedural question of whether, in the abstract, settlement or litigation is the best way to achieve those outcomes. The Binder and Price focus on the litigation/settlement choice privileges the lawyer's tendency to focus on the means of addressing the client's problem rather than on the client's ends.³⁹² When the client says explicitly "I want to sue," the statement is likely to be shorthand for the client's true goals, which are more complicated and contradictory than his seemingly straightforward statement suggests.³⁹³ This client in fact may be thinking something like the following:

I have some deeply felt interests, beliefs and needs that I want to meet or satisfy and, based on what I know about the law (which may be very little), I assume that I have to sue in order to obtain that satisfaction. But it is the satisfaction that I want, not necessarily the litigation. If the lawyer can show me another way to get what I want, I would certainly consider it.

The client might also be thinking as follows:

What do I know about what lawyers really do? My main goal is to get this lawyer to represent me. Probably the best way to get her on my side is to come across as very aggressive. If I say that I want to sue the bastard the lawyer will sit up and take notice.

In either case, the lawyer cannot assume that the client's statement of his goal as wanting to sue reflects his true desires.

Because clients and lawyers see the world in fundamentally different ways,³⁹⁴ the early and immediate focus on the lawyer's perspective runs the risk that the client's unique perspective will get submerged. The client's imagination is stifled because he believes that the lawyer must have some specialized knowledge that allows him intuitively to know the rules of the game, such that the client's views are really quite superfluous.³⁹⁵ The lawyer and even the client may believe that the client is making a free, unconstrained

392. I use the terms means and ends here in a different sense from the manner they are used in discussions of lawyers' ethical responsibilities in decisionmaking. See *supra* note 223 and accompanying text. By calling the litigation/settlement decision one over means and not ends I do not suggest that the lawyer is entitled to make this decision for the client. Far from it. I suggest that for many clients the litigation/settlement decision is essentially meaningless when divorced from its particular context. The choice only becomes meaningful for the client when it is mapped against the primary goals that the client identifies (with the assistance of the lawyer) for the legal relationship.

393. See Redmount, *supra* note 187, at 187 (the client's statement to the lawyer of "I want a divorce" could mean many things); Lehman, *supra* note 278, at 1080-81 ("I want a divorce" at most means a client's prediction of what seems most likely to give him "interior state of comfort or satisfaction that all of us ultimately seek."); cf. Macaulay, *supra* note 350, at 124-25 (many consumer clients come to lawyers predisposed to sue; lawyers counsel them by pointing out the practical constraints).

394. See *supra* note 221 (different stories that lawyers and clients present); Kidder, *supra* note 333, at 26-27 (lawyer-client negotiation over relevant facts to present in litigation).

395. Even though the Binder and Price model provides that the lawyer should follow her listing of alternatives by asking the client if she sees any alternatives that the lawyer missed, see D. BINDER & S. PRICE, *supra* note 8, at 158, the inquiry has a pro forma quality to it, coming as it does after the lawyer has already laid out the alternatives for the client. In my observations of student simulations, lawyers and clients see the inquiry as so much surplusage.

choice to litigate, settle or do nothing. In fact, the lawyer's use of a legalistic decisionmaking structure shapes the client's choices in not-so-subtle ways.³⁹⁶

The Binder and Price lawyer's primary focus on the legal alternatives of litigation or settlement also affects the lawyer. The alternative-generation portion of the model stifles the lawyer's creativity because it encourages her to adopt reflexively the standard approaches of the legal profession and to miss the possibilities offered by the client's fresh perspective. The lawyer's world view is shaped by the legalistic paradigm presented in the first year of law school and reinforced throughout her career.³⁹⁷ A lawyer trapped in that paradigm can easily lose the ability to see the world from the lay perspective and possibly become less effective as a result.³⁹⁸

In contrast, a more effective, client-centered method for discussing alternatives is for the lawyer to brainstorm³⁹⁹ with the client about the client's goals and the choices that the client sees available to him *before* discussing the lawyer-generated choices of litigation, settlement or doing nothing.⁴⁰⁰ After the lawyer and client have brainstormed about the client-oriented choices, they consider the above lawyer-generated choices.⁴⁰¹ But unlike the Binder and

396. My concern here is related, though not identical, to Stephen Ellmann's concern, discussed *supra* note 301, that the Binder and Price lawyer's use of a rationalistic decisionmaking model denies the client the right to make an autonomous choice to use a different decisionmaking approach. As discussed more fully below, my adaptation of the Binder and Price model allows greater play for the client's input in shaping alternatives, which could include more input into the choice of decisionmaking models.

397. For an extended discussion of lawyers' legalistic ideology and its effects, see J. SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* (2d ed. 1986).

398. For example, one practical consequence of this phenomenon could be the lawyer's failure to predict adequately lay jurors' reactions to her client's case.

399. In brainstorming, the participants throw out ideas without first subjecting them to evaluation or criticism. This suspension of evaluation frees up the participants' creativity by preventing them from screening out potentially useful ideas because of a premature rush to judgment. See Gifford, *supra* note 15, at 828 n.81 and accompanying text (citing R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* 62-65 (1981)).

400. There is a distinction between the client's goals, which represent the objectives of the legal representation as he perceives them, and the choices or alternatives the client contemplates, which represent the client's understanding of the means by which his goals could be effectuated. Lawrence Grossberg, commenting on an earlier version of this article, queried whether the client's perspective would not have been explored in the initial client interview, so that the focus on that perspective in the discussion of alternatives in the counseling session would be redundant or, alternatively, already contemplated in the Binder and Price model. With respect to redundancy, there may be differences between consideration of client goals and client-perceived alternatives. Presumably the lawyer will identify the client's goals in the first interviewing session and consider those goals when thinking about the client's alternatives. While the lawyer might want to check with the client in the counseling session to confirm that the client's goals have not changed, the brainstorming about client goals conceivably could be fairly short in duration. The client-perceived alternatives, however, may not surface until the counseling session because the lawyer could well decide that it is too early to have such a discussion at the interview stage of interaction. Often the lawyer's goal in representing a client is to forestall the client's premature closure of alternatives, especially before the lawyer conducts any investigation or research. Thus, I do not believe that the first part of the counseling session in my approach would merely recapitulate the client interview. In any event, the critical aspect of my approach to the counseling session is that the client's perspective, whether limited to client-perceived alternatives or broadened to include client goals, should precede the specific introduction of the lawyer's perspective.

401. As I discuss below, however, even the lawyer's alternatives of litigation or settlement (or doing nothing) are unduly constricting.

Price approach, such a consideration would have a clear context, and, as shown below, allow the client to assess the lawyer-generated choices in appropriately instrumental terms.

While not identical to it, the approach I suggest is analogous to Binder and Price's description of the counseling approach they reject, in which the lawyer first asks the client about the choices he sees before discussing the lawyer-conceived alternatives.⁴⁰² The reason for the authors' rejection is worth quoting in full:

Not all lawyers, however, begin by articulating the alternatives they see as available and then inquiring if the client sees additional possibilities. Some lawyers begin, particularly with initial decisions about entering litigation, by asking the client what he/she feels or thinks ought to be done. When the client has spoken, the lawyer then articulates other options. In short, some lawyers reverse the process we have suggested. *While this approach may reduce the possibility that the client may feel restricted by the lawyer's options*, often we find this tack is counterproductive in terms of building client confidence and rapport. When the lawyer begins with a question such as, 'What do you think we should do?', the client sometimes has a negative reaction. 'What the hell are you asking me for? It's your help I'm paying for.' The question sometimes creates a feeling that the lawyer is incompetent. Furthermore, if the lawyer subsequently mentions additional choices, the client may feel the lawyer is 'playing games.' The internal reaction is something like the following: 'You started by asking me

402. As noted above, Binder and Price also describe an approach in which the lawyer might first tell the client what led him to recommend the alternatives that he was prepared to present. I agree with the authors that such an approach is likely to be ineffective because it does not respond to the client's need to begin the focus on possible outcomes rather than on the lawyer's reasoning. See D. BINDER & S. PRICE, *supra* note 8, at 159.

In his treatment of the discussion of alternatives in his informed consent model, Mark Spiegel appears to take a position somewhere between Binder and Price and my own. He writes:

First, the lawyer should have an obligation to identify for [the] client the alternative courses of action. In some cases this will be easy — to sue or not to sue — but, in many cases, the set of options will be larger. Whether a particular option should be communicated by the lawyer depends on a combination of professional expertise and client standards of materiality. Professional expertise determines the range of possible options; the client's needs determine whether a particular option should be communicated.

Spiegel, *supra* note 22, at 134 (citations omitted). I part company with Spiegel in two and possibly three respects. First, I believe he is still too prone to see the choice available to clients as whether to litigate or settle. Second, and more fundamentally, by stating that the lawyer's professional expertise determines the range of available choices for the client, rather than the combination of lawyer and client expertise that I advocate, the Spiegel model may perpetuate the lawyer dominance that I criticize in the Binder and Price model. Third, I am not sure he and I agree on the scope of the lawyer's power to withhold communication of options from the client. While the lawyer would have the duty, at least, to refrain from communicating illegal options to the client, Spiegel's formulation can be read to suggest a paternalistic cast that I find troubling.

what I thought, but now you're telling me that perhaps I'm wrong. Why didn't you just tell me what you thought in the first place?⁴⁰³

This lengthy quotation not only clarifies the differences in approaches, but, in my judgment, demonstrates the limitations of the Binder and Price model's client-centeredness.

If the lawyer were not really interested in the client's perspective, then the authors' criticisms about hostile client reactions to the lawyer's question to the client might have some validity. But presumably the lawyer would not simply ask the client for her input in order to placate her but rather because she truly values the client's perspective. If so, she should be able to communicate that attitude to the client and minimize the chances that the client will feel patronized in the manner that Binder and Price suggest. In fact, a good Binder and Price counselor using the adaptation I suggest could easily provide the client with a preparatory explanation⁴⁰⁴ in which the lawyer explains why she is asking the client for her input. This would go some way towards assuaging the client's concerns about her role in the decisionmaking process.⁴⁰⁵

More significantly, the quotation demonstrates the Binder and Price model's bias towards the lawyer's perspective, at least in the alternative-generation and discussion stage. The advantages to this approach are that it is efficient and can reassure the client that his problem fits within categories that the lawyer (and by extension the legal system) deems significant. But the disadvantages are that by starting with the lawyer-perceived options, the lawyer limits the field of vision for the client, pretends that the legal options are important ends in and of themselves, and contributes to the professional mystification that persuades clients that the lawyer knows best.

I do not argue that the lawyer's perspective is irrelevant here. The pros and cons of litigation and settlement, as well as other alternatives that the lawyer is likely to see, must enter into the client's decisionmaking calculus. What ultimately is called for is a merging of lawyer and client perspectives so that the final product, the client's decision, is most likely to maximize the client's satisfaction.⁴⁰⁶

403. D. BINDER & S. PRICE, *supra* note 8, at 158-59 (emphasis added). At the UCLA-Warwick Second International Clinical Conference (Sept. 18-19, 1989), David Binder indicated that he now agrees with the approach of discussing client goals prior to the lawyer's statement of alternatives.

404. See D. BINDER & S. PRICE, *supra* note 8, at 64-69, 157, 188.

405. Another criticism of the authors' speculation about the client's resistance to talking about the alternatives he perceives before the lawyer does so is that the same client resistance could be posited for the lawyer's refusal to give the client his opinion on which alternative the client should choose, which is a staple of the Binder and Price counseling model.

406. A word of caution is in order here over the terms lawyer-choice and client-choice. As noted previously, see *supra* note 363, Paul Tremblay criticizes the Binder and Price model for creating a false dichotomy between lawyer and client choice. My variation on the Binder and Price model is open to the same criticism, as some commentators on an earlier version of this article noted. I use lawyer-choice and client-choice as shorthand descriptions of choices that emanate from either the lawyer's or client's perspective. For purposes of simplicity, I assume that choices from the client's perspective are those that speak in terms of real-world consequences, while choices from the lawyer's perspective are those that relate to the legal world (hence the importance here of such legal solutions as litigation or settlement). Both lawyer and client can contribute to each other's perspective; the lawyer can assist the client in identifying real-world choices and the client can do the same with legal-world choices (though the client may

It would be useful, of course, to have empirical data available to test some of the assumptions about whether clients make better decisions (or are provided more useful information with which to make such decisions) under the Binder and Price model or my variation on it. In the absence of such data, however, I will describe how the different approaches might work in the context of a simulated counseling exercise that I have used with students in an interviewing, counseling and negotiation course. Through a brief analysis of the problem, the student efforts to conduct Binder and Price counseling sessions, and the different conceptualization of the problem under my proposed approach, I hope to provide a context in which some of the implications of client-centered counseling can be assessed.⁴⁰⁷

C. *The Fisher Simulation*

The Fisher simulation is the second counseling simulation that I teach in my interviewing, counseling and negotiation course.⁴⁰⁸ The client Fisher owns five acres of land that he developed with a small shopping center that brings him a modest income. Several years ago, the client became interested in the purchase of twenty acres of land, contiguous to his property. Hunter owns the twenty-acre parcel. At first, Fisher sought to buy the property outright, but the price apparently was too high. After a series of negotiations between Fisher and Newman, an agent for Hunter, Fisher purchased an option to buy Hunter's land within five years. By the terms of the option, the client had to pay a sum of money by November 1 of each year to keep the option in effect. Last November 1, the client's bookkeeper was late in mailing in the payment. Shortly thereafter, Hunter wrote a letter to the client in which he returned the late payment and stated that he considered the option no longer in effect. It is at this point in the story that the client comes to see the lawyer.

The client told the lawyer these things in the first interview, but the lawyer and the client have not had any significant discussion about the client's

have less to add concerning choices like litigation or settlement). There is undeniably an artificiality to this division. But as I argue below, I see these steps as way stations along the road to a more fully interactive decisionmaking process.

407. Actually, the discussion in the text reverses the manner in which I originally approached the problem of Binder and Price's client-centeredness. I did not set out to challenge the Binder and Price theory of alternative-generation and then design a simulation to test out my theory. Nor did I look at the model and immediately conclude that it was insufficiently client-centered. Rather, I observed students counseling clients in simulations and was struck by the fact that they did not seem to get at the heart of what alternatives would serve the client and why. It was out of this observation that I experimented with variations on the Binder and Price model. I suspect that many clinical teachers, who have a rich store of data on student lawyering, generate their "theories-in-use", see D. SCHÖN, *supra* note 356, at 134-35, in this inductive fashion. For a discussion along similar lines of how practitioners make use of theory, see *id.* at 22, 25 (practitioner use of "tacit knowledge" and "knowing-in-action"); Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

408. The course is similar in design to the one described in Bastress & Harbaugh, *Examining Lawyers' Skills*, in GUIDELINES FOR CLINICAL LEGAL EDUCATION: REPORT OF THE AALS—ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 223-37 (1980). I last taught the course in 1986. The simulation described in the text comes about halfway through the course, after the students have conducted four interview simulations and one fairly uncomplicated counseling session. The Fisher simulation, which I inherited from Joe Harbaugh when he last taught the course, apparently was originally a problem in the ABA Client Counseling Competition. I am indebted to Arnie Siegel for this last point.

goals.⁴⁰⁹ Based on the state of the law, the client has a reasonably good chance to prevail on the issue of the continued viability of the option contract (or alternatively that the client breached the contract but termination of the deal would be a disproportionate response). The lawyer and client are also both aware, however, that between the signing of the option contract and the present time the value of the land that is the subject of the option increased greatly. It seems apparent that the seller Hunter is using Fisher's arguable technical breach as an excuse to get out of the contract, or at the very least extract more money from Fisher.

There is a remarkable similarity in the way that the student lawyers discuss the client's alternatives. With some minor variations, the students approach the problem in essentially the following manner.⁴¹⁰ They begin the counseling proper with a discussion of the alternatives that the lawyer sees for the client. The student tells the client that he has several options. The client can litigate over the option contract (some students, though not many, break this down into different causes of action, such as specific performance, declaratory judgment, or damages action); negotiate with the seller Hunter; or do nothing. A few students add the option of filing the lawsuit first and then negotiating with Hunter, while others distinguish between settlement between the principals and settlement between the lawyers or between lawyer and the agent Newman. Following the suggested Binder and Price format, some students ask the client if he sees any alternatives. The client is primed by his instructions to suggest several additional alternatives that all relate to reforming the deal in some manner, such as buying a smaller portion of the land outright or paying more money to keep the option contract in force. Students will typically then include these alternatives at the top of their page of options that they see for the client, although it is not clear what relationship they bear to the original division of litigate/settle/do nothing.

The client tells the lawyer that his primary goal is to restore the status quo represented by the option contract. From this listing of alternatives, the counselor then goes on to explore with the client the consequences of each of these alternatives. The client is instructed to say that he is fearful of litigation but that he has heard that Hunter is a "tough bird" with whom it would be difficult to negotiate. From there, the students, with varying degrees of skill,

409. By way of clarification, the law student does not actually interview the client, but receives a fact pattern with information supposedly gleaned from the first interview. The lawyer also receives a copy of the option contract at issue and some legal research leads that she might pursue to determine the validity of the option contract and the parties' respective rights. Prior to the counseling session, the lawyer is unaware of the details of the original negotiation between Fisher and Newman, but the client is given information about the negotiation should the lawyer inquire.

410. In any class, one-half of the students perform the lawyer role in the Fisher simulation. I have examined the counseling plans of thirty students over four years (including one year when a colleague taught the course but collected counseling plans at my request). Of these thirty, twenty-five can fairly be described as using the litigation/settlement/do nothing approach to alternative-generation, with minor variations. Of the remaining students, several included an option of "purchase the land now" but no other "non-legal" options. Of all the students, only one student really explored the different business options up front, though he did so under the unsatisfactory structure of "specific performance (lawsuit)" and "informal settlement with Hunter."

engage the client in a process in which lawyer and client weigh the alternatives and at least some of the clients make a decision.

The trouble with the above approach to this counseling simulation is that it misses the point of the problem. The client is presented with a first-level choice about means — whether to sue or settle — before his goals are really discussed. The client must fit his concerns into the legal alternatives devised by the lawyer.⁴¹¹ It is not that all the considerations cannot come to the fore in this process, but rather that there is a discontinuity between the lawyer's set of choices and the client's real world concerns of getting the option contract back on track, which is what the client wants most, or reforming the deal in some manner. Application of the Binder and Price structure here does not facilitate the goal of maximizing client satisfaction. As a result of this discontinuity, the counseling process comes across as stilted and the client is more likely to make a decision about what the lawyer sees as the ultimate issue with less than complete information, on incomplete grounds, and, perhaps, for the wrong reasons. One can imagine the client responding to the above description of his alternatives by saying or thinking "I don't want to negotiate with Hunter because I am afraid of him" or "I don't want to litigate because I am concerned about having to testify." Obviously, these client concerns need to be addressed, but if the client first hears that he must decide whether to sue or settle, the client may not have a context in which to confront these fears in a balanced manner.⁴¹²

My adaptation to the Binder and Price model would remove the above constraints to the client's decisionmaking process. First, the lawyer and client would discuss the client's goals for the transaction or matter without reference to the constraints, real or imagined, of the legal system. This part of the discussion is in the nature of a brainstorming session. The lawyer can and should do some of this exploration prior to the counseling session with the client,⁴¹³ but can benefit from the client's participation in the session itself. The primary goal of brainstorming is to get the ideas on the table without attempting to evaluate them. The critical aspect of this part of the process is for the client and lawyer to think of the alternatives as the client perceives and experiences them. The alternatives may look odd or "non-legal" at first and may be unrealistic. But at this stage of the process the lawyer and client should not be concerned with evaluation of the alternatives.

In the context of the Fisher problem, the client's expression of alternatives might include getting the option contract back as it was before the client's bookkeeper missed the payment; buying the land outright at the contract price;

411. There is another negative consequence of the approach the students adopt. The description of the settlement alternative tends to be almost vacuous, with little consideration of the likely outlines of a possible settlement, the parties' incentive for settlement, and settlement timetables. This phenomenon may be a function of student inexperience in the real world. But it also reflects a premature focus on the settlement choice that is essentially meaningless until the client's goals are more fully articulated.

412. Binder and Price indicate that the lawyer should encourage the client to refrain from making a decision until all the alternatives and consequences are discussed. See D. BINDER & S. PRICE, *supra* note 8, at 189. But the presentation of those first alternatives to the client is likely to shape the way the client listens to the rest of the presentation.

413. See *supra* notes 147, 148 and accompanying text.

buying a smaller portion of the land; paying more for the land; and getting his money back, among other possibilities. At this point, the lawyer and client are not focusing on how realistic these choices are or how to effectuate them. They *are* looking at the choices from the standpoint of transactions rather than litigation or settlement, because this client likely sees the world in terms of transactions. Indeed, the lawyer or client might even come up with some more creative approaches such as a joint venture with Hunter or a joint venture with another buyer.

It facilitates the client's understanding of the counseling process to render the above process graphically.⁴¹⁴ The choices from the client's perspective are listed along a horizontal axis as follows:

Get land on same basis (status quo)	Get money back	Get land on new basis			Take loss
		Buy now	Buy less	Pay more	

The lawyer cannot leave the discussion of alternatives there of course. We have yet to bring the lawyer's expertise and special competence to bear on the problem. At this point, the lawyer goes back to the choices that I earlier described as unduly constraining and that my students listed as their starting point. That is, we list the choices as litigation (broken down into sub-categories corresponding to the different causes of action); file suit and open settlement discussions; attempt settlement discussions in advance of or instead of filing suit; do nothing; and seek out available forms of formal or informal alternative dispute resolution options.⁴¹⁵ Once the lawyer and client exhaust discussion of these legal alternatives the lawyer lists them down a vertical axis as follows:

414. The graphic presentation can also be valuable as a tool to teach the model to students.

415. One of the messages worth communicating to students here is that one can be creative in looking at legal alternatives as well as client-perceived alternatives, and sometimes non-litigation alternatives, including alternative dispute resolution devices, are superior to litigation for the achievement of the client's goals. Of the thirty student plans I examined, only two mentioned alternative dispute resolution or arbitration, while several others listed the option of the client approaching Hunter directly.

Litigation:
Spec. Perf.
Dec. Judg.
Damages
Restitution
Litigate & Settle
Settle informally
Alternative Dispute Resolution
Do nothing

The next and last step for this portion of the session is to merge these two analyses together. There are many ways to accomplish this, but one way I experimented with is to create a matrix where the "client choices" appear on the horizontal axis across the top and the "lawyer choices" appear vertically. Then lawyer and client look at each box created by the matrix. The matrix displays which of the possible legal alternatives allows the client to get what he wants in the most efficient manner (or in the manner that maximizes the client's position as the client defines it). Graphically, the matrix for the Fisher problem might look as follows:

[Text continued on following page]

CLIENT CHOICES

	Get land on same basis (status quo)	Get money back	Get land on new basis			Take loss	
			Buy now	Buy less	Pay more		
L A W Y E R	Litigation						
	Dec. Judg. Spec. Perf. Damages Restitution						
	C H O I C E S	File litig. & seek settlement					
		Settle informally					
		Alternative Dispute Resolution					
	Do nothing						

For example, if the client says that what he really wants is to get the option contract back as it was, we look at the matrix and analyze this client choice in light of all the possible legal possibilities identified. With this particular example, the lawyer would look at the litigation box and say it is possible that the client could sue and get the option contract restored. Later, the lawyer would assess and communicate to the client what the lawyer thinks his chances are, a determination informed by the lawyer's knowledge of the substantive law and the formal and informal workings of the legal system. At this stage, however, it is unnecessary to go into detail because all the lawyer is trying to do is to see whether restoration of the option is a *possibility* under the litigation choice. Continuing along the vertical axis of the matrix, the lawyer examines the option of filing suit and then negotiating. Again at this stage the lawyer would say that restoration of the option is a possible result of this strategy.

We then get to the legal option of negotiation in lieu of filing suit. The lawyer realizes that there is virtually no chance (theoretically, probably a slight chance) that the client could have the status quo with respect to the option contract restored simply as a result of calling up the seller.⁴¹⁶ Otherwise, there

416. Unlike the initial part of the alternative-generation process, where the lawyer and client make no attempt to assess the likelihood of the possibilities identified, it is necessary and appropriate for the lawyer and client to evaluate whether the client's goals can be achieved through any particular alternative. The process described in the text inevitably leads to winnowing out some of the proposed choices as unrealistic. The lawyer, who is likely to take the lead in conducting this part of the process, would explain, of course, her basis for concluding that a particular alternative would not allow the client to achieve his goal.

would have been no reason for the seller to construe the late payment as grounds for a breach. The lawyer realizes and, more importantly, can make the client realize, that if they wish to negotiate they will have to give up something in order to get something.

The above analysis is then repeated for each client choice. Insofar as the client expresses a willingness to pay more money for the land if he must, the lawyer can observe that such a goal is not a likely result of the litigation option, because the court's options are more limited. The court can make the aggrieved party whole through some form of specific performance, restitution or damages but cannot renegotiate the deal for the parties. But it is obviously possible to obtain this result through negotiation. To be sure, the lawyer still has a great deal of work to do with respect to developing a negotiating strategy and gaining much greater specificity from the client about the parameters of his negotiating authority. But the client can examine the legal alternatives not in a vacuum but from the following perspective: can this legal alternative (settle, litigate, or some combination of them) get me what I really want? Is this an effective means to achieve the end that I desire? Once the choices are mapped out in this fashion, the lawyer and client can then examine in more depth the consequences of the different choices and begin the process of weighing the alternatives.

The result of this process is a concrete presentation that allows the client to make sense of the choices he faces. This approach offers several advantages over the strict Binder and Price model. First, it restores the balance between lawyer and client in the counseling process. The client is actively involved in the generation of alternatives. It responds to the client who comes to the lawyer and says "I want to do something, or I want to avoid having something done to me, and I want you to tell me whether it can be done and how." Under this approach, the focus becomes the *what* in the first part of the process, the part in which the client's alternatives are generated, and the *how* in the second part, when the lawyer's alternatives are presented. The approach avoids over-emphasis on the lawyer's perspective by providing for a more expansive consideration of choices beyond that between litigation and settlement. The client does not have to focus on an alternative before he has heard anything else on the things that he might fear most, such as, in the Fisher problem, testifying in court or engaging in an open-ended negotiation process with Hunter. These concerns must be addressed eventually, but only in the context of what the client seeks to accomplish. So rather than the client saying, as he might in the Binder and Price model, "You say litigation is a choice, but I don't want to litigate. I just don't think that I could go through that process, it's too lengthy," the client is more likely to say, "Well, what I really want is to get the option contract back. The only way that you've told me that it looks that I can get it back is to litigate. And so, while I am not crazy about litigation, it seems that if that's what I want it looks like litigation is the only way to get it." If, as has been argued throughout this article, the essence of client-centered counseling is fostering the client's capacity to make his own choices in his own way, the proposed adaptation to the Binder and Price model is superior to the original

model because it enhances the client's role and perspective in decisionmaking.⁴¹⁷

Another advantage of this approach is that it enables the client to engage more self-consciously in the process of weighing alternatives that will proceed in earnest later in the counseling session. Because the very process of generating and discussing alternatives focuses on the utilitarian side of the various legal choices, the client and the lawyer must articulate the rationales for the different choices that the lawyer has presented. The weighing process is difficult to implement well, and because it is critical to the client's ultimate decision, some redundancy between the alternative generation phase and the weighing phase can be advantageous.

The revised Binder and Price approach also could be useful in assisting the lawyer in the process of counseling her client about negotiation options and strategy. As Donald Gifford observes, when the lawyer counsels the client on negotiation strategy and goals, it is especially easy for her to dominate her client in the process.⁴¹⁸ The client's active involvement in the alternative-generation process provides him with the opportunity to understand the basis for the negotiation posture that the lawyer recommends.⁴¹⁹

As with any model, this approach to the discussion of client alternatives has some potential disadvantages. By generating multiple alternatives for the client, it may provide him with an overload of information; people can only process so much information at one time.⁴²⁰ The model may needlessly complicate the decisionmaking process by suggesting that clients' legal problems are less routine than they really are. For run of the mill problems, the more effective decisions may be the "standard solutions" rather than esoteric

417. The greater role for the client in the alternative-generation process is also likely to increase the likelihood that the client will be able to tell her own story in her own way or at least have the opportunity to tell the lawyer that such a goal is important to her. *See supra* note 221. In addition, the give-and-take between lawyer and client at this stage is likely to promote more meaningful dialogue between the two. *See supra* Part III.B.3.

One consequence of the adaptation's focus on the client's alternatives first is to highlight the differences between client-centered legal counseling and medical informed consent. *See supra* notes 142-48 and accompanying text. It makes considerably less sense in many contexts for a physician to approach his patient by asking her first about the alternatives she has considered than for Fisher's lawyer to start the counseling session by asking the client about the alternatives he sees. This is not to say that there are not other parts of the physician's counseling session that could look very "client-centered." This observation merely emphasizes the differences between much medical and legal knowledge.

418. Gifford, *supra* note 15, at 839-43.

419. My suggestion that the lawyer and client brainstorm about alternatives is similar to Gifford's suggestion, along the lines suggested by Fisher and Ury and Carrie Menkel-Meadow, that lawyers and clients brainstorm about negotiation goals and strategy. *See id.* at 849-50 & nn. 169-70. The approach I suggest also seems likely to ameliorate some of the problems with the initial description of the negotiation option that were referred to *supra* note 411. As lawyer and client discuss the client goals and the ways in which different alternatives can meet them, the lawyer can develop from the start a fuller understanding of the client's substantive negotiation goals and, to some extent, possible negotiation strategies.

420. *See* Ellmann, *supra* note 16, at 730 (citing I. JANIS & L. MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE AND COMMITMENT* 11 (1977) (people can usually only process seven plus or minus two categories of information at one time)). *But cf.* Sammons, *supra* note 73, at 82 ("[T]he good lawyer produc[es] the maximum amount of complexity that can be confronted and tolerated by the client in making decisions.").

ones suggested by non-expert clients.⁴²¹ The lengthier the alternative-generation process, the lengthier and, therefore, the more expensive the counseling session. To the extent that the client's ultimate decision is identical to the one that he would have made under a more traditional approach, the client might bridle at the excessive time and cost involved. Those who view the Binder and Price counseling model as impractical are likely to see my adaptation as even more so.

The selection of the Fisher problem as a test of my model may skew the analysis because of the richness of the choices apparently available to the client. In cases where the client's choices are likely to be less varied the model can be criticized as superfluous.⁴²² Alternatively, some cases are so specialized that freewheeling brainstorming about alternatives may be inappropriate.⁴²³

My variation of the Binder and Price model has not been tested empirically, either with lawyers or students. Impressionistic feedback from my students about the model's utility has generally been positive, but is so unreliable as to be essentially meaningless.⁴²⁴ Moreover, the legalistic focus of the Binder

421. See Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167, 175-76 (1989). Nathanson does not deny the role of creativity in the consideration of alternatives for non-standard problems, though the process he describes focuses exclusively on the lawyer's role in generating alternatives. *Id.*

422. In criminal litigation, for example, a defendant's options would probably be more limited, although there is a danger of underestimating the number of choices that defendants have, especially with respect to dispositions. In my judgment, the model is most likely to be useful in litigation and mixed litigation/planning contexts. In pure planning contexts, where the choices devised by the lawyer might not look that different from those conceived by the client, the model may also be less successful. The model might not be incorrect in such settings, but it might not be particularly useful nor provide much insight into the alternative-generation process.

The choice of the Fisher simulation as a test of my model has other consequences. For example, the Fisher problem does not present a sharp conflict between the client's long- and short-term goals (though arguably the client's long-term goal of securing the Hunter property is at odds with the short-term goal of conserving his cash on hand). In many cases it may be appropriate for the lawyer and client to attempt to distinguish goals along these lines so that the client can see the ways in which some of his goals work at cross-purposes. In criminal cases, for example, some clients express the long-term goal of vindication and the short-term goal of getting the case over with. The lawyer may assist the client in goal clarification by clearly delineating these goals as long- and short-term and pointing out how an alternative that serves the long-term goal of vindication (e.g., trial) may be inconsistent with the client's short-term goal (if a possible plea agreement could be reached earlier).

423. See, e.g., K. MANN, *supra* note 342, Ch. 6 (white collar criminal defense attorneys utilize various techniques to avoid learning too much about their clients' situation, fearing that in some cases too much information limits their freedom of action). In addition, to the extent that the client's legal problem is highly technical, the client may have few alternatives to propose and the lawyer may risk rapport (and arguably waste valuable time) by forcing the client to articulate goals and alternatives first. If a relatively inexperienced businesswoman seeks to incorporate her business, for example, the client may have little to add regarding the different facets of how to set up the corporation (though the lawyer would explore with the client what her goals were in part to see whether incorporation was consistent with them). My response to this criticism is twofold. First, there may be some kinds of cases where the technical nature of the issues makes my adaptation infeasible, in which case it should not be used. Second, insofar as lawyers, especially traditional lawyers, are likely to overstate the technical nature of their work, recourse to the model will at least serve to minimize the lawyer's inappropriate retreat into the technical side of counseling.

424. To test the model adequately, one would have to compare the counseling practices of students using the standard Binder and Price approach with those of students employing my variation. One would then have to develop clear criteria to determine what constituted a successful counseling session.

and Price model which I have observed may be more a function of students' lack of counseling competence than inherent defects in the model. If that is so, lawyers in practice may already be doing something along the lines I suggest without the need for the elaborate process that I set out.⁴²⁵

By expanding the Binder and Price alternative-generation process in the manner that I suggest, my approach may not meet the needs of clients who express a desire to be guided by the lawyer in the selection of alternatives.⁴²⁶ It would certainly not meet the needs of traditional clients who want their lawyers to make decisions for them, nor of lawyers who deeply wish to comply with such desires. Moreover, the approach runs the risk of encouraging clients to think and talk about all manner of irrelevant matters, thereby increasing the lawyer's frustration and possibly the client's if the lawyer later must patiently inform the client why some of his proposed alternatives are impossible or at least implausible. But the premise of this article is that clients can and should make their own decisions, and that lawyers who do not adopt client-centered approaches are likely to underestimate the contributions of their clients. Under such circumstances, the cost of increased client participation seems well worth incurring.

These potential criticisms of my Binder and Price adaptation are in the nature of practical limitations on the model. One response is that my goal is not merely to describe what lawyers and clients now do but to suggest the need for reform of the lawyer-client relationship. In this sense, my critique of the Binder and Price model is meant not to repudiate it but to extend the dialogue that the text has obviously generated. Yet accepting the basic premises of the Binder and Price model creates a different kind of problem. At some level legal counseling addresses ineffable subjects and requires not only the exercise of nuanced judgment, but attention to non-cognitive matters. Some would argue that such skills cannot be taught. Both the Binder and Price model and my adaptation are susceptible to the criticism that they are too structured, too rational. My only response to *this* criticism is that clinical education is based on the assumption that tasks such as client counseling can be broken down into smaller components and analyzed. Learning a structured counseling model may not be enough to transform students into wise counselors, but it is a start.

425. Cf., e.g., J. HARBAUGH & B. BRITZKE, *supra* note 11, at 20-21 (presenting counseling chart in which alternatives generated by the lawyer include mix of legal and business alternatives).

426. Stephen Ellmann, in commenting on an earlier version of this article, questioned whether the discussion of alternatives between lawyer and client is equivalent to the lawyer and client discussion of consequences in the Binder and Price model. I see these processes as distinct. In my approach, when the lawyer and client brainstorm about the client's alternatives and examine whether legal choices can effectuate them, they are not assessing the consequences of those choices. In the Fisher simulation, the client might raise the alternative of buying the land immediately. The lawyer would note this possibility and then examine the legal options with the client to see which of those options, if any, could be used to implement this goal. At this stage, the lawyer and client would not discuss whether it was a good idea to buy the land, nor whether the client had thought through such consequences as whether he could afford to pay cash now, how he felt about Hunter, etc. But when the lawyer and client did discuss such issues, the client would have in the back of his mind that the key decision is whether he wants to seek to buy the land, not whether he should litigate or settle.

VI. CONCLUSION

For clinical teachers, the attractions of client-centeredness are many, both as ideology and as technique. As the unexamined life is not worth living, the unexamined concept is not worth employing. This article has attempted to contribute to the examination, or more properly the re-examination, of client-centered counseling. Its conclusions are necessarily tentative, as perhaps all conclusions about such a complex human endeavor as lawyering must be.

Reappraisal of the theories underlying client-centeredness is a necessary but not sufficient condition of our re-examination of the concept. We cannot assume that simply because we preach client-centeredness that the models we employ necessarily implement client-centered approaches. The Binder and Price model has enjoyed extraordinary success as an orienting model for law students. Like any model of human behavior, it is not perfect. It is hoped that the modest suggestions offered in this article for modification of the Binder and Price model will serve to continue the dialogue among clinical teachers, students, lawyers and clients over how we can best assist clients to make the kinds of choices that we know they are capable of making.