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FORTRESS IN THE SAND: THE PLURAL VALUES OF CLIENT- CENTERED REPRESENTATION

KATHERINE R. KRUSE*

This article examines the history, development and theory of the client-centered approach to lawyering, which has become the most prevalent theory of lawyering taught in law school clinics. It examines the basic tenets of client-centered representation as a problem-solving approach and shows how critique and modification of the approach has spawned a diversity of lawyering models that share the basic tenets of client-centered representation but are in tension with its preferred methodology of lawyer neutrality. The article draws on moral philosophical theories of autonomy to help explain this tension, showing that theories of positive freedom support a range of autonomy-enhancing intervention into the decision making of others. It then proposes that client-centered representation be understood as encompassing a plurality of approaches consistent with these autonomy-enhancing interventions, and that understanding client-centered representation in this way can help to guide the exercise of contextualized professional judgment. It proposes a taxonomy of five approaches—holistic representation, narrative integrity, client empowerment, partisan advocacy and client-directed lawyering—and shows how these plural approaches can be used as analytical tools to aid lawyers in deciding when or how forcefully to intervene in client decision making.

As a theory of lawyering, client-centered representation has en-

* Associate Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. I want to thank my now-graduated but fondly-remembered research assistant Kirk Reynolds, and the following people who provided valuable and thought-provoking comments on previous drafts of this article: Annette Appell, Susan Carle, Bob Dinerstein, Steve Ellmann, Isabelle Gunning, Binny Miller, Ngai Pindell, Meredith Ross, Ann Shallick, Bill Simon, and Paul Tremblay. I also want to thank the participants at the New York Clinic Theory Workshop at New York Law School, at which I presented an earlier draft of this article; and participants at the UCLA/IALS Sixth International Conference on Clinical Scholarship at Lake Arrowhead, California, for which this article was written. I give special thanks to my colleagues at the Thomas & Mack Legal Clinic, who hosted a brown-bag discussion at which I aired an early version of these ideas, and who have provided patient and helpful feedback to me in numerous less formal conversations about client-centered representation. I also thank the financial supporters of the William S. Boyd School of Law, whose generous donations funded a research leave during which this article was written. Finally, I want to acknowledge the enormous intellectual debt that I and the many other clinical scholars whose work is discussed in this article owe to David Binder for framing the basic approach to lawyering within which we think, practice and teach.

joyed unparalleled success. Introduced by David Binder and Susan Price in 1977 in a groundbreaking interviewing and counseling textbook,¹ the client-centered approach helped fill a curricular void in the growing clinical legal education movement,² and quickly emerged as the leading model of client counseling taught in American law schools.³ Over twenty-five years and two editions later,⁴ the client-centered approach remains the predominant model for teaching lawyering skills.⁵ Indeed, the client-centered approach has so thoroughly permeated skills training and clinical legal education, it is not an exag-

¹ DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

² Michael Meltsner, *Celebrating The Lawyering Process*, 10 CLIN. L. REV. 327, 328 (2003) (describing the pedagogical environment in which the Binder & Price book was introduced); Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millenium: The Third Wave*, 7 CLIN. L. REV. 1, 16-17 (2000) (describing the Binder & Price textbook as part of a developing clinical scholarship that focused on lawyering skills and clinical pedagogy in what they call the "second wave" of the clinical education movement).

³ As early as 1984, a survey of law schools indicated that Binder & Price's book was used in the vast majority of schools participating in the Client Counseling Competition. Alan H. Frank & Janet Boettcher Krause, *Book Review*, 18 CREIGHTON L. REV. 1427, 1427, n.1 (1985). In 1987, Donald Gifford described the "near universal acceptance" of the client-centered model, citing a conversation with publishers indicating that the textbook was used in 94 law schools. Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 815, n.21 (1987). By 1990, Robert Dinerstein was describing the "extraordinary influence of the [client-centered] model within clinical education circles." Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 (1990).

⁴ In 1991, the authors published a successor textbook, adding Paul Bergman as a third author. DAVID A. BINDER, PAUL BERGMAN, & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991) [hereinafter BINDER ET AL., 1991 edition]. In 2004, with the addition of Paul R. Tremblay as a fourth author, the second edition of *Lawyers as Counselors: A Client-Centered Approach* was published. DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004) [hereinafter, BINDER, ET AL., 2004 edition].

⁵ Although the Binder textbooks now compete in a more crowded market, the predominance of the client-centered approach is illustrated by its inclusion in other lawyering skills textbooks, often as the preferred model for representation. See e.g. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 57 (1990) (surveying a range of "helping theories" drawn from psychotherapy and explicitly stating that the assumptions of their model for interviewing, counseling and negotiating most closely resemble the "person-centered" approach of Rogerian psychotherapy); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 15-16 (2003) (specifically adopting a client-centered approach); DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 51-52 (2002) (specifically adopting a client-centered approach). Even approaches that critique or depart from the client-centered approach use it as the benchmark against which to measure themselves. See, e.g., ROBERT F. COCHRAN, JR., JOHN M. A. DIPIPPA, MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 4-6 (1999).

geration to say that client-centered representation is one of the most influential doctrines in legal education today.

Despite its popularity and influence—or perhaps because of it—there is a growing lack of consensus about what it means to be a client-centered lawyer.⁶ As the client-centered approach has grown from its earliest articulation by Binder and Price to its current status as well-established bedrock of clinical legal education, it has evolved naturally into what might be called a plurality of approaches, which expand aspects of the original client-centered approach in different directions. Client-centered representation has been perhaps most commonly associated with an approach to legal counseling that seeks to minimize lawyer influence on client decision-making, relying on strategies of lawyer neutrality.⁷ However, some proponents of client-centered representation seek to increase client participation in the legal representation, and thus value lawyer-client collaboration over lawyer neutrality.⁸ Some client-centered theorists have made connections between client-centered representation, client voice, and narrative theory, placing central value on the importance of preserving or translating a client's story into legal terms.⁹ Other proponents of a client-centered approach view it as primarily concerned with effective problem-solving, and favor holistic lawyering approaches that reach beyond the boundaries of the client's legal case to address a broader range of connected issues in the client's life.¹⁰ Still others focus on the notion of client empowerment, and favor approaches that facilitate a

⁶ See CHAVKIN, *supra* note 5, at 51 (noting that “the meaning of the term “client-centered” has changed over time and . . . different people mean different things when they use the term”).

⁷ See Dinerstein, *supra* note 3, at 507, n.22 (defending the use of the phrase “client decisionmaking” to most accurately describe Binder & Price's client-centered approach because that terminology emphasizes the crucial distinction that the client rather than the lawyer is the actual decisionmaker); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 523 (describing “client-centeredness” as the “conviction that the client, and not the lawyer, should remain the primary decisionmaker”).

⁸ See KRIEGER, ET AL., *supra* note 5, at 16-18; Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Meaning*, 44 BUFF. L. REV. 71, 84-88 (1996).

⁹ See, e.g. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 553 (1994); Clark Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

¹⁰ See, e.g. David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLIN. L. REV. 245, 267-68, and n.79 (2003) (analogizing client-centered lawyering to holistic medicine and defining client-centered representation as “recognizing the uniqueness of the individual being represented and understanding that the legal problems for which the individual is seeking assistance occur within a constellation of unique goals and needs”).

client's ability to make decisions by creating a more equal relationship between the client and the lawyer.¹¹ Finally, some claim a traditional zealous advocacy model as the essence of client-centered representation, equating it with the unmitigated advancement of a client's legal interests.¹² The representational values inherent in these different approaches can each lay claim to being a core value of client-centered representation. Taken together they define a richly elaborated philosophy of lawyering that strives at once to be client-directed, holistic, respectful of client narrative, client-empowering, and partisan.

However, the core values of client-centered representation can sometimes come into conflict in situations of actual practice, posing dilemmas for client-centered lawyers about whether—or how forcefully—to intervene into client decision-making. For example, in representing a battered woman who is poised on the brink of leaving an abusive relationship, the goals of client empowerment may push a lawyer into deeper connection with the client or broader involvement in her life than neutral methods of client-directed lawyering would sanction.¹³ When representing an immigrant seeking legal status in the United States, the partisan protection of a client's legal interests may conflict with the goal of gaining full information that would help the lawyer engage in holistic problem-solving, because knowing too much may impair the lawyer's ability to act ethically as an advocate.¹⁴ The desire to give voice to a client's narrative may confound a lawyer's partisan advocacy if the client's story undermines rather than supports a client's goals.¹⁵ These and other situations of value conflict are familiar to clinical law professors, who encounter them repeatedly

¹¹ V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLIN. L. REV. 83, (2002); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client* 64 FORDHAM L. REV. 1655 (1996).

¹² Abbe Smith, for example, has recently characterized Monroe Freedman as the original client-centered lawyer. Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J. L. & POL'Y 83, 88 (2003).

¹³ See, e.g. Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071, 1094-98 (1995) (arguing for an affective style of lawyering for domestic violence survivors that fosters connection between lawyers and clients through mutuality, care, interdisciplinary expertise, and the breakdown of the distinction between personal and professional relationships).

¹⁴ Stephen Ellmann, *Truth and Consequences*, 69 FORDHAM L. REV. 895 (2000) (using a hypothetical immigration case to explore the tensions between partisan advocacy and knowing the "whole truth" about a client).

¹⁵ Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L. J. 971 (1992) (recounting a clinic case in which the students' zeal to put the theory of client narrative into practice in the defense of a misdemeanor led the judge to conclude that the client was mentally ill and that her children should be removed from her custody).

in discussions with students struggling to understand what it means to be client-centered in the rich contexts of actual practice that clinical legal education affords.

My aim in this article is to provide a set of analytical tools that helps bring the insights of autonomy theory to bear on the professional judgment that client-centered lawyers exercise. I suggest that the teaching and practice of the client-centered approach, especially in the difficult cases that bring its core values into conflict, can benefit from a more searching theoretical examination of personal autonomy than proponents of client-centered representation have heretofore undertaken. Although appeals to client autonomy provide the most powerful theoretical support for the client-centered approach, autonomy has always been an under-theorized concept within the client-centered interviewing and counseling literature. Consequently, the question of what respect for client autonomy might mean for the dilemmas of when or how forcefully to intervene in client decision-making has not been fully explored.

The client-centered approach has traditionally relied on techniques of lawyer neutrality to ensure autonomous client decision-making, and the lawyer's maintenance of an "appearance of neutrality" remains a staple of client-centered interviewing and counseling techniques. But the emphasis on lawyer neutrality has been critiqued on numerous fronts, and the maintenance of neutrality is in tension with other important goals of client-centered representation. Some critics of client-centered representation have responded to the inadequacies of a counseling model built on lawyer neutrality by proposing alternative models of lawyering that allow for more wide-ranging and arguably more nuanced interaction between lawyers and clients.¹⁶ However, though these models share an affinity with client-centered representation for allowing clients to direct legal representation, they are sometimes based on an explicit rejection of the goal of client autonomy, either inside or outside the lawyer-client relationship.¹⁷

¹⁶ The most prominent example is the "lawyer as friend" model developed by Thomas Shaffer and Robert Cochran. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* (1994). Robert Cochran has refined the "lawyer as friend" model into an approach to interviewing and counseling. ROBERT F. COCHRAN, JR., JOHN M.A. DIPPIA & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999).

¹⁷ For example, Shaffer and Cochran explicitly differentiate the "lawyer as friend," who places client goodness at the center of the representation, from the client-centered "lawyer as hired gun," who preferences client autonomy. SHAFFER & COCHRAN, *supra* note 16, at 42-44. The client autonomy that the "lawyer as hired gun" is bent on promoting is repeatedly denigrated by Shaffer and Cochran as a "lonely" virtue. *See, e.g. id.* at 24. Likewise, Katherine Hunt Federle rejects autonomy as the basis for her client-empowerment model for representing children, because of its tendency toward all-or-nothing client control that

In this article, I argue that it is not necessary to reject the goal of client autonomy to gain a foothold for the more collaborative, holistic, client-empowering, and problem-solving lawyering approaches that client-centered representation has spawned, because many of these approaches can be understood within the ideal of promoting client autonomy. As more sophisticated accounts of autonomy recognize, non-intervention into the decision making of another person is an important component of respecting her autonomy, but some kinds of intervention can also be autonomy-enhancing. However, finding a way to bring the abstractions of theory to bear in the rich and variable contexts of practice is not an easy task. One of the most basic insights of the client-centered approach is that clients come to lawyers, not to get answers to routine legal questions, but to get help solving problems that are deeply embedded within particular contexts. Attention to this particularity of context naturally undermines attempts to articulate an abstract model of lawyering that is both satisfying in its theoretical simplicity, and rich enough to guide professional judgment in the variable contexts of practice.

To make the theory of autonomy both relevant and useful to practice, I propose that we think of client-centered representation as a taxonomy of five approaches to lawyering defined by the plural representational values embedded in client-centered representation and grounded in conceptions of autonomy. Because they are defined by both theory and practice, the plurality of client-centered approaches I propose can provide a vocabulary for fostering more explicit discussion and coherent thinking about the choices lawyers make in the exercise of their contextualized professional judgment.

In Part I of this article, I review the history and development of the client-centered approach to interviewing and counseling, describing its basic elements, and showing how lawyering theorists writing from perspectives embedded in practice have built on these basic elements to critique and expand client-centered representation in a variety of different directions. The critique and expansion of client-centered representation puts the hallmark interviewing and counseling technique of lawyer neutrality under significant strain, as client-centered lawyers attempt to achieve other goals of client-centered representation, such as collaborative decision-making, holistic problem-solving and client empowerment. In Part II, I turn to ambiguities in the concept of personal autonomy, drawing on the work of philosophers who have sought to define it, demonstrating both the value and the limits of non-intervention as a strategy for enhancing autonomy

can be too easily rejected when the client lacks the capacity for decision-making that autonomy requires. See Federle, *supra* note 11, at 1656.

under theories that explore what it means to lead an autonomous life.

In Part III, I propose a taxonomy of client-centered lawyering approaches, which locates the plural representational values inherent in client-centered representation—holistic problem-solving, narrative integrity, client empowerment, partisan advocacy, client-directed lawyering—in relationship to different philosophical notions of what it means to promote or enhance someone else's autonomy. I then employ this taxonomy to elucidate a client-centered analysis of some "problem cases" for client-centered representation, showing how autonomy theory can play a critical role in guiding and informing professional judgment in practice.

I conclude that helpful as it is, autonomy theory cannot answer all the questions about when a lawyer is justified in intervening in client decision-making. Some interventions that lawyers can and should make arise from professional duties that lawyers owe in their roles as officers of the legal system or as agents of justice. A purely client-centered approach takes no account of these competing duties, and autonomy theory does not itself provide a basis for coordinating the enhancement of a client's autonomy with the needs and interests of others. The choice to put the client at the center of the representation appropriately preferences the lawyer's duties to the clients, but it does not erase the limits that a lawyer's other professional duties place on client-centered representation. However, a more sophisticated understanding of client-centered representation as involving more than merely "hired gun" lawyering can both occupy some of the ground often ceded to a lawyer's non-client centered duties, and create a richer backdrop against which a more nuanced discussion of these competing duties can occur.

I. A MIGHTY FORTRESS: THE HISTORY AND DEVELOPMENT OF THE CLIENT-CENTERED APPROACH TO LEGAL INTERVIEWING AND COUNSELING

The client-centered approach to legal interviewing and counseling was born when David Binder, a law professor disturbed by the lawyer domination he had observed in over ten years of practice,¹⁸ entered into an interdisciplinary collaboration with psychologist Susan

¹⁸ See comments of David Binder, in the transcript of the American University Washington College of Law Colloquium, *Critical Moments in the Conceptualization of Lawyering: Reflections Upon the Quarter Century Since the Publication of Bellow & Moulton's The Lawyering Process* 89 (Feb. 21, 2003) [hereinafter *Critical Moments Colloquium transcript*] (" . . . I practiced for ten years before I came to teach and I watched lawyer domination in all kinds of settings . . . and I thought that wasn't a very good idea for the various reasons pointed out in the book.")

Price.¹⁹ The 1977 result of this collaboration, *Legal Interviewing and Counseling: A Client-Centered Approach*, advanced and defended a specific client-directed approach to lawyering,²⁰ and laid out a set of psychologically-based techniques to motivate client participation in the legal interviewing and counseling process.²¹ Because it was based in psychological theory, the client-centered approach drew heavily on psychologically-based techniques of non-directive therapy, which coalesce around the lawyer's maintaining an appearance of neutrality, in defining its interviewing and counseling techniques.

Although presented under the rubric of interviewing and counseling, the client-centered approach offered something much more momentous: an alternative vision of lawyering that conceptualized legal representation primarily in problem-solving terms and redefined the boundaries of decision-making authority in the lawyer-client relationship. It is within the context of this alternative vision of lawyering that the signature methodology of the client-centered approach—its emphasis on the lawyer's maintenance of an appearance of neutrality—must be understood.

Ultimately, I argue, the client-centered approach's re-conceptualization of lawyering as problem-solving exists in deep tension with its psychologically-based interviewing and counseling techniques. The strain on lawyer neutrality is highlighted by the proliferation of approaches that have critiqued, expanded, refined and modified the client-centered approach in the years subsequent to its introduction. However, the seeds of discontent with lawyer neutrality have been latent in the client-centered approach from its inception.

A. *Binder and Price's Client-Centered Approach*

The cornerstone for the client-centered approach to lawyering is the *conceptualization of legal representation as problem-solving*.²² As one version of the client-centered approach text put it: "Clients come to lawyers seeking help in solving problems"; and lawyers' "principal societal role is to help clients resolve problems, not merely to identify

¹⁹ *Id.* at 103.

²⁰ BINDER & PRICE, *supra* note 1, at 147-50.

²¹ *Id.* at 6-11.

²² The problem-solving orientation in the client-centered approach is evident from the opening sentence of the book: "This book concerns the way in which lawyers might interact with clients in order to help clients solve problems." BINDER & PRICE, *supra* note 1, at 1. Its later versions made the point more explicitly, stating, "no matter who the client, what the substantive legal issues or whether the situation involves litigation or planning, your principal role as a lawyer will always be the same—to help clients achieve effective solutions to their problems." BINDER, ET AL. (1991 edition), *supra* note 4, at 2; BINDER, ET AL. (2004 edition), *supra* note 4, at 2.

and apply legal rules.”²³ From this conceptualization of lawyering as problem-solving, the client-centered approach can be said to lay four important cornerstones as the foundation for its interviewing and counseling techniques: (1) it draws attention to the critical importance of non-legal aspects of a client’s situation; (2) it cabins the lawyer’s role in the representation within limitations set by a sharply circumscribed view of the lawyer’s professional expertise; (3) it insists on the primacy of client decision-making; and (4) it places a high value on lawyers’ understanding their clients’ perspectives, emotions and values.

First, within its general problem-solving orientation, the client-centered approach focuses on *the importance of non-legal considerations*.²⁴ As the authors point out, when legal representation is viewed as problem-solving rather than legal issue-spotting, the non-legal aspects of a client’s problem—the economic, social, psychological, moral, political and religious consequences—tend to predominate.²⁵ As proponents of the client-centered approach insist, a lawyer’s failure to confront the interrelationship of a client’s legal issues with the non-legal aspects of a client’s problem will at best only partially address the client’s problem; and at worse may leave the client worse off than before the legal representation began.²⁶

Humility about the *limitations of legal expertise* forms a second cornerstone of the client-centered approach. As its proponents point out, while lawyers have a superior data base for identifying and predicting legal consequences, clients have greater knowledge and ability to identify and predict the non-legal consequences of various alternative courses of action.²⁷ Because the non-legal consequences are as important, if not more important, to achieving a satisfactory solution to the client’s problem, the client’s expertise is seen as ultimately more important than the lawyer’s. Moreover, the client-centered approach recognizes the concern that lawyers’ over-reliance on their legal expertise may actually distort the problem-solving process by filtering out the non-legal considerations that will impact a client’s life, and approaching legal representation as the routine application of legal doctrine in variable factual settings.²⁸ To provide competent representation, the client-centered approach insists, lawyers must overcome their professional tendency to treat clients as bundles of le-

²³ BINDER, ET AL. (1991 edition), *supra* note 4, at 2, 5.

²⁴ BINDER & PRICE, *supra* note 1, at 14-15; 22-23.

²⁵ BINDER, ET AL. (1991 edition), *supra* note 4, at 5-15.

²⁶ BINDER & PRICE, *supra* note 1, at 10.

²⁷ *Id.* at 140-46.

²⁸ *Id.* at 57-58.

gal rights and interests walking around inside a body, and put the client as a whole person at the center of the representation.²⁹

Third, at the heart of the client-centered approach is a detailed argument for the *primacy of client decision-making*. As Binder and Price observed, clients are generally faced with a variety of alternative courses of action, each of which has both legal and non-legal consequences.³⁰ The determination of which alternative will best satisfy a client, they argue, can be made only within the context of the client's unique values, which the client may have difficulty articulating and quantifying with precision.³¹ As a result, the data necessary to making the best decision—the client's real values—will often be unknown to the lawyer, and may ultimately be unknowable by anyone but the client.³² Consequently, the client-centered approach concludes, in many decisions relating to legal representation, “the lawyer should leave the final decision to the client to make on the basis of the client's own intuitive weighing process.”³³

Finally, given the prominence of non-legal considerations to the problem-solving process, the client-centered approach is characterized by a concern for the *importance of the lawyer understanding the clients' perspectives, emotions and values*. To keep the client at the center of the representation in advising the client or making legal decisions, the lawyer's actions must respond to the client's perceptions and feelings, and reflect the client's values. The client's perspectives, emotions and values are thus necessary information for a client-centered lawyer to gather, and its interviewing techniques rely in large part on the client-centered psychotherapeutic techniques of Carl Rogers to coax clients into sharing this kind of information.³⁴ The client-

²⁹ As a later version of the client-centered approach textbook colorfully points out, “too often lawyers conceive of clients' problems as though legal issues are at the problems' center, much as Ptolemy viewed the Solar System as though the Earth were at the center of the universe.” BINDER, ET AL. (1991 edition), *supra* note 4, at 5.

³⁰ BINDER & PRICE, *supra* note 1, at 135-40.

³¹ *Id.* at 149. Later versions added moral, political and religious consequences to the list of non-legal considerations that come into play in legal decision-making. BINDER, ET AL. (1991 edition), *supra* note 4, at 9.

³² BINDER & PRICE, *supra* note 1, at 149.

³³ *Id.* at 150. The authors note that there are some exceptions. In particular, lawyers should make decisions for clients who are either unable or unwilling to reach a decision on their own. *Id.* at 153. However, before making a decision for a client, a lawyer should first take steps to “attempt to motivate unwilling or incapacitated clients to make their own decisions,” which the authors lay out in a separate chapter. *Id.* at 154. When making a decision for a client, a lawyer should take steps to ensure that the decision “accord as much as possible with the client's values.” *Id.*

³⁴ Rogers is specifically invoked with regard to the facilitating technique of “empathic understanding.” *Id.* at 15, n.12. The relationship of client-centered lawyering to Rogerian client-centered therapy has been explored in detail in other writings. See, e.g. BASTRESS & HARBAUGH, *supra* note 5, at 26-32; SHAFFER & COCHRAN, *supra* note 16, at 15-29; Diner-

centered approach employed Rogerian methods as “facilitators” to elicit as complete a picture as possible of the client’s view of his or her situation, in an effort to combat what the authors call the problem of lawyers’ “premature diagnosis” of their clients’ problems in purely legal terms.³⁵ Client-centered interviewing techniques address the problem of premature diagnosis by allowing clients to tell their stories in the way that emphasizes what is important to them;³⁶ forcing lawyers to listen first, before delving into the details of facts made relevant by a client’s potential legal claims;³⁷ and encouraging lawyers to individualize their representation based on the client’s needs and values.³⁸

The client-centered approach’s signature methodology of lawyer neutrality grows out of a combination of these concerns. Binder and Price note that clients “are remarkably sensitive to, and easily swayed by, what they guess their lawyer thinks is best for them.”³⁹ When a client makes a decision based on what the client “surmises the lawyer thinks is best,” the authors argued, the lawyer has illegitimately usurped what should be client decision-making.⁴⁰ To avoid influencing a client’s decision, even subtly, lawyers are urged to take their clients through the process of articulating as many consequences as possible, while at the same time preventing the client from getting the impression that the lawyer has a preference about which alternative the client should choose.⁴¹

Perhaps the most controversial aspect of Binder and Price’s original articulation of the approach was its insistence that when counseling a client, lawyers should withhold advice.⁴² If the client asked for

stein, *supra* note 3, at 538-44; William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 511-16 (1980).

³⁵ BINDER & PRICE, *supra* note 1, at 54-57. As the authors put it, “lawyers often fail to take into account that what the client has described at the beginning of the interview is only the tip of the iceberg, or perhaps even the wrong iceberg.” *Id.* at 55.

³⁶ *Id.* at 53.

³⁷ *Id.* at 57.

³⁸ *Id.* at 57-58.

³⁹ *Id.* at 166.

⁴⁰ *Id.*

⁴¹ *Id.* For example, the authors specifically recommend against lawyers imposing a “rigid structure” on the conversation, at least initially allowing the client to “jump back and forth between alternatives and pros and cons.” *Id.* at 171. One reason to avoid imposing too much structure, they caution, is that “if the lawyer begins to focus exclusively on one alternative or on one set of positive or negative consequences, the client may get the impression that the lawyer has some unexpressed bias either for or against a particular alternative.” *Id.*

⁴² *Id.* at 186. See Frank & Krause, *supra* note 3, at 1434 (characterizing the insistence that lawyers withhold advice as one of the most controversial components of the book); Dinerstein, *supra* note 3, at 509 (characterizing proscription against advice-giving as controversial). See also Gifford, *supra* note 3, at 821-22 (describing the proscription against

the lawyer's opinion, the authors suggested that the lawyer should instead provide an explanation, based on their argument for the primacy of client decision-making, for "why the client is in the best position to evaluate the pros and cons, and also that it is the client who must live with the decision."⁴³ The position that lawyers should try not to offer advice to clients was concededly overstated, and later versions of the client-centered approach qualified its extremity.⁴⁴ However, although later versions of the client-centered approach acknowledge a greater role for lawyer advice-giving,⁴⁵ the client-centered approach continues to be associated with attempts to minimize the lawyer's influence on client decision-making through the lawyer's "appearance of neutrality."⁴⁶

The maintenance of a lawyer's appearance of neutrality is put under considerable strain by forces arising from the project of legal representation generally and the problem-solving orientation of client-centered representation specifically. As we will later see, this tension has generated critiques of lawyer neutrality and spawned a diversity of lawyering models that share some of the basic tenets of client-centered representation, but deviate from its methods.⁴⁷ However, before turning to those tensions, we will first examine some of the factors that led to the almost immediate success of the client-centered approach within the social, academic and political context into which it was introduced.

advice-giving as overly simplistic and unrealistic).

⁴³ BINDER & PRICE, *supra* note 1, at 187. A special chapter is devoted to the issue of counseling "difficult clients," a category that includes extremely indecisive clients, clients who insist upon obtaining the lawyer's opinion, clients who have reached a decision without considering other alternatives, and clients who "in the lawyer's judgment are making extremely detrimental decisions." *Id.* at 192. In dealing with such clients, the authors sometimes recommend that the lawyer deviate from the general proscription against lawyer advice. *Id.* at 192-210.

⁴⁴ The authors concede in the introduction to the 1991 edition that their earlier book "perhaps in over-reaction to the tendency of many lawyers to tell their clients what to do," understated the benefits of lawyer advice-giving. BINDER, ET AL. (1991 edition), *supra* note 4, at iv. David Binder has since suggested that the extremity of this view was a deliberate overstatement designed to counteract the strong tendencies toward lawyer domination. See *Critical Moments Colloquium* transcript, *supra* note 18, at 13-15.

⁴⁵ Based on the observation that "many clients will not feel comfortable making a decision until they hear your advice," the 1991 edition of the client-centered textbook listed "The Lawyer Provides Advice Based on the Client's Values" as one of the "attributes" of the client-centered approach. BINDER, ET AL. (1991 edition), *supra* note 4, at 21.

⁴⁶ BINDER, ET AL. (1991 edition), *supra* note 4, at 356 (cautioning lawyers to express their personal opinions in "a way that does not overwhelm a client's will"). See also *id.* at 358 (suggesting that in confronting clients about "arguably immoral" choices, lawyers should acknowledge the legitimacy of the client's view, avoid using the term "moral," and indicate that the final choice is the client's to make).

⁴⁷ See *infra* section IC.

B. *The Historical Context of the Client-Centered Approach*

When David Binder and Susan Price introduced their legal interviewing and counseling textbook in 1977, client-centered representation was an idea whose time had come. It coincided with a larger movement to demystify professional expertise and reallocate power between professionals and clients. It provided a methodology to address some of the perversities of paternalistic lawyering that were gaining attention in the field of legal ethics. It fell in line with what was then a new area of social psychological investigation focusing on participant satisfaction and procedural justice. And it fell into the hands of an eager and growing audience of clinical law professors, who saw its value within the new curricula they were developing for use in live-client clinics, and immediately put it to use.

First, client-centered arguments for the primacy of client decision-making and the limits of professional expertise fell in line with theoretical and empirical critiques of traditional legal professionalism.⁴⁸ In the mid-1970s, an assault on traditional notions of professionalism that began in medicine was being turned toward law as legal scholars began to explore how the medical model of “informed consent” could be applied to the legal profession.⁴⁹ Under traditional conceptions of professionalism, a client’s problems are considered to be routine or technical in nature, and professionals are assumed to be disinterested and well-situated to act in their clients’ interests with minimal input from their clients.⁵⁰ In 1974, Douglas Rosenthal published the results of an empirical study of personal injury cases, which challenged the prevailing view of professionalism, and concluded that lawyers who adopted a “client-participatory” model of representation got quantifiably better results for their legal claims, compared with lawyers operating under the “traditional” model.⁵¹

⁴⁸ Dinerstein, *supra* note 3, at 530.

⁴⁹ *Id.* at 529-30 (describing this socio-historical context); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (analyzing the informed consent doctrine in the medical field, and calling for its application to the lawyer-client relationship); Tremblay, *supra* note 7, (making an explicit parallel between Binder and Price’s client-centered approach and the “informed consent” debate).

⁵⁰ DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE?* 7-13 (1974).

⁵¹ *Id.* at 38-41. There is no question that the Rosenthal study has had enormous, if questionable, influence. See Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years after The Lawyering Process*, 10 CLIN. L. REV. 349, 370 (2003) (describing the Rosenthal study as “one of the most influential empirical studies” in clinical education and scholarship); Dinerstein, *supra* note 3, at 544 (describing the “numerous legal commentators” who rely solely on the Rosenthal study for the argument that client participation produces “better results”). However, as Neumann and Krieger have pointed out, this limited study of 57 personal injury cases at one point in time cannot prove that participation will always lead to better results, and there has been no replication of the

Second, the client-centered approach responded implicitly to a growing body of scholarship in legal ethics that questioned the moral and ethical dimensions of lawyer paternalism.⁵² Under particular fire were the deleterious effects of lawyers' tendency to treat their clients impersonally as bundles of legal issues, and to use the law instrumentally to pursue these disembodied interests, without exploring a client's actual values.⁵³ According to critics, the depersonalization of legal representation resulted in an abdication of moral responsibility by both clients and lawyers.⁵⁴ It also led to distortions in the way lawyers understood their clients' problems, based on assumptions that clients always valued most what was in their legal interests to achieve.⁵⁵ The client-centered approach's differentiation of the legal and non-legal dimensions of a client's problem, and its attention to the client's feelings, values and perspectives provided techniques for combating the perversities of this impersonal and decontextualized lawyering.⁵⁶

The introduction of the client-centered approach also dovetailed with the pioneering "procedural justice" studies in the field of social psychology, which linked active participation in legal procedures with participant satisfaction. In 1975, John Thibaut and Laurens Walker published a series of controlled experiments, which led them to conclude that procedures that allow disputants more "control over the process" are more likely to be perceived as fair and to produce dispu-

Rosenthal study in other contexts. Neumann & Krieger, *supra*, at 370-72.

⁵² In 1975, moral philosopher Richard Wasserstrom published a pioneering article in the field of legal ethics presenting two fundamental criticisms of lawyers, one of which was the morally objectionable nature of the lawyer-client relationship, "in which the lawyer dominates, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion." Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RTS. 3 (1975). See also David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

⁵³ See Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979). For a related critique, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 52-55.

⁵⁴ See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 79-81 (1980).

⁵⁵ Lehman, *supra* note 53, at 1087-89; Simon, *supra* note 53, at 53-54.

⁵⁶ Some of the techniques of client-centered interviewing were endorsed, though not by name, in this literature. See, e.g. Lehman, *supra* note 53 at 188-89. (suggesting that lawyers could avoid "the possibility that a client will be overborne by information about tax consequences" of estate planning by getting the client to "expand in as much detail as possible" about what the client wants to do prior to pointing out the consequences). This tactic quite closely mirrors the client-centered approach to problem identification, both in its technique and its purpose. See BINDER & PRICE, *supra* note 1, at 57-58. However, the critics of instrumental and depersonalized legal representation did not always embrace the client-centered approach. See Simon, *supra* note 34 (arguing that the apolitical trend toward humanistic theories of lawyering and psychologically-based lawyering techniques is insufficient to address social justice concerns).

tant satisfaction, even when the substance of the result is adverse to the participant.⁵⁷ Although the Thibaut and Walker studies were focused on comparing adversary with inquisitorial dispute resolution systems, the social-psychological focus on disputant participation and satisfaction was only a short step away from attentiveness to client participation and satisfaction within the lawyer-client relationship itself.⁵⁸

Finally, the growing clinical education movement in American law schools was in search of a pedagogy in the mid-1970's, and the client-centered approach offered an attractive way both to teach practical lawyering skills and to instill professional values close to the hearts of early clinical professors. Although clinical legal education programs were around for most of the twentieth century, they saw a surge beginning in the 1960s, largely as a result of an influx of federal government subsidies from the Council on Legal Education and Professional Responsibility (CLEPR) and Department of Education grants.⁵⁹ Part of what solidified the growing clinical legal education movement during this period was the development of a clinical teaching methodology built around helping students learn from the experience of acting in professional role as they represented clients in actual cases.⁶⁰ Binder and Price's interviewing and counseling textbook was among the first published teaching materials to be offered to the growing number of clinicians who were entering the legal academy during this surge in clinical legal education.⁶¹

⁵⁷ JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). These studies were later supplemented by studies of participant satisfaction with actual legal proceedings, spawning a vast literature on the social-psychological components of procedural justice. See A. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

⁵⁸ The connections between procedural justice and client-centered representation have not been fully explored, and the Binder and Price volume makes no mention of the studies. However, some of the connections between psychology and law in this thread of client-centered representation have been picked up in the therapeutic jurisprudence movement, which claims heir to the procedural justice studies by examining more broadly the role of law as a therapeutic agent. See generally *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruck J. Winick, eds. 1996). The implications of therapeutic jurisprudence for legal counseling—in particular the ways in which lawyers can use the lawyer-client relationship to increase the client's psychological well-being—have been explored through the lens of therapeutic jurisprudence. See, e.g. Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills*, 17 ST. THOMAS L. REV. 429 (2005); Mary Berkheiser, *Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics*, 5 PSYCHOL. PUB. POL'Y & LAW 800 (1999).

⁵⁹ Barry et al., *supra* note 2, at 5-12, 18-21. The authors describe the growth of clinical legal education in two "waves." During the "second wave" which spanned the 1960's to the 1990's, "clinical legal education solidified and expanded its foothold in the academy." *Id.* at 12.

⁶⁰ *Id.* at 16-17.

⁶¹ See Meltsner, *supra* note 2, at 327-28.

Binder and Price's 1977 volume, *Legal Interviewing and Counseling: A Client-Centered Approach*, quickly gained in popularity in the growing clinical movement for a number of reasons. For one thing, it was easy to use. As one reviewer noted, "[w]hat sets Binder and Price's volume apart from its competitors is its concise and relatively jargon-free exposition of a legal interviewing and counseling model."⁶² Moreover, whether or not it was a good model for lawyering in other contexts, the client-centered approach was well-suited for clinical teaching, in which law students who had not yet developed professional expertise nonetheless took primary responsibility for representation of clients "in role" as lawyers.⁶³

But perhaps most importantly, the client-centered approach expressed a set of values about the lawyer-client relationship that resonated with many early clinical professors.⁶⁴ For clinical professors, lawyering skills may have formed the framework for clinical teaching, but skills were only part of their teaching agenda, inseparable from instilling values of professional commitment to confronting the problems of poverty and social injustice in which clinic clients were enmeshed.⁶⁵ The client-centered approach offered a pedagogical opportunity to explore these social justice values within the microcosm of the lawyer-client relationship, and within the tasks of interviewing and counseling individual clients in which clinic students were engaged.⁶⁶ For some of these early clinical professors, a model of legal representation built around understanding clients' lives and respecting clients' values held out the hope of reframing social justice advocacy in ways that were both responsive to clients' situations and effective in identifying, from the bottom up, the structures of subordination that needed to be challenged for social change to be effective.⁶⁷ The focus

⁶² Frank & Krause, *supra* note 3, at 1427.

⁶³ Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLIN. L. REV. 405, 424 (2002); Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103,135 (2001).

⁶⁴ Dinerstein, *supra* note 3, at 518-21.

⁶⁵ Susan Bryant & Elliott S. Milstein, *Reflections on the 25th Anniversary of The Lawyering Process: An Introduction to the Symposium*, 10 CLIN. L. REV. 1, 6-8 (2003) (describing the authors' own commitments as early clinical professors fresh from poverty law practice).

⁶⁶ Chavkin, *supra* note 10, at 254 (discussing the inseparability of lawyering skills from the value of client-centeredness); Minna Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 CLINICAL L. REV. 95 (1998) (discussing the relationship between client-centered "micro-theory" and critical "macro-theory").

⁶⁷ Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1740-41 (1993) (describing the aspirations of the early clinical educational model to expose students to "deeply contextualized understanding" of who clients are and how legal systems affect their lives). Gary Bellow, one of the founders of modern clinical legal edu-

on client-centered representation as an interviewing and counseling technique allowed those social justice goals to be advanced within an ostensibly apolitical framework of “skills training,” making them less controversial and more palatable for introduction into the legal academy.⁶⁸

This combination of coherence with cutting edge theoretical movements of its time and pragmatic appeal helped to quickly establish the client-centered approach as the leading model for teaching legal interviewing and counseling in American law schools. However, as the client-centered approach has gained in popularity, it has encountered practical tensions between its signature methodology of maintaining a lawyer’s “appearance of neutrality” and implementing other goals of legal representation, including goals that are specifically important to a client-centered approach. These tensions have been played out in a large body of clinical scholarship, some of which critiques the client-centered approach explicitly, some of which explores how it might be implemented more effectively, and some of which spins other models of representation off the basic client-centered approach.

C. *Lawyer Neutrality and Its Discontents*

The client-centered approach’s reliance on the “appearance of neutrality” has been problematic for several pragmatic reasons relating to its disutility in practice. First, the roots of lawyer neutrality in psychotherapy have been criticized as ill-suited or inappropriate to the different goals and challenges of legal representation. Second, the efficacy of maintaining an “appearance of neutrality” has come under question based on skepticism about whether lawyers can really avoid influencing their clients. Third, lawyer neutrality is in tension with other aspects of the client-centered approach, such as the impulse to include clients in strategic representation decisions and to address their legal issues in the wider context of and in coordination with their non-legal problems.

cation, described the problems in legal services of routine processing of cases, lawyer dominance, and narrowly defined client concerns. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108 (Aug. 1977). The connection between this legal services critique and the embrace of client-centered representation in clinical education has led some to conclude that the client-centered model is perhaps most appropriate for settings involving relatively powerless clients. Dinerstein, *supra*, note 3, at 522-23 (discussing but not fully endorsing this view); O’Leary, *supra*, note 63, at 107; Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718-19 (1987).

⁶⁸ See Steven Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 330-31 (2001) (noting the disjuncture between the social justice mission of clinical legal educators and the “selling” of clinical education in the “modest terms” of skills training).

1. *The inadequacy of the psychotherapy-legal representation analogy*

The client-centered approach's reliance on the lawyer's maintenance of an "appearance of neutrality" toward the client is grounded, at least in part, in the client-centered psychotherapeutic approach of Carl Rogers, from which it borrows its facilitators of "empathic responses" and "non-judgmental understanding."⁶⁹ Rogers's employment of non-judgmental empathy was part of a larger project of "nondirective" therapy, in which the therapist's unconditional acceptance of all of the client's feelings, both positive and negative, is directed toward a larger goal of helping the client fully accept herself, so that she can progress toward integration and self-actualization.⁷⁰

The importation of psychotherapeutic methodology has been criticized as inappropriate to the context of legal representation.⁷¹ Because the goal of therapy is internal to the client, the therapist's largely facilitative role makes sense. Legal representation, on the other hand, is directed toward goals that are external to the client. It demands decision and action; and it necessitates that the lawyer mediate between what the client says, what facts drawn from other sources suggest, and what the law allows or requires.⁷² In the context of legal representation, the lawyer thus operates at a higher level of personal and professional engagement, rendering the "appearance of neutrality" especially artificial and inappropriate.

In response to the uneasy fit between psychotherapy and legal representation, some critics have called for a lawyer-client relationship characterized by more authenticity, directness and personal connection between the lawyer and the client. Stephen Ellmann has launched the most sustained and theoretically grounded critique of neutrality, laid out in a series of articles describing the perverse effects of neutrality on respect for client autonomy, and proposing alternative visions of lawyering based on higher levels of connection.⁷³ In an early and influential article, he argued that the lawyer's employment of empathic responses for encouraging client divulgence are subtly manipulative and actually undermine client autonomy by creating an emotional dependency based on the client's misapprehension that the

⁶⁹ See *supra* notes 34-38 and accompanying text.

⁷⁰ CARL R. ROGERS, *COUNSELING AND PSYCHOTHERAPY* ch. 5 (1942), reprinted in *THE CARL ROGERS READER* 72-73 (Howard Kirshenbaum & Valerie Land Henderson, eds. 1989).

⁷¹ Simon, *supra* note 34; Stephen Ellmann, *Empathy and Approval*, 43 *HASTINGS L.J.* 991, 1011-15 (1992); Dinerstein, *supra* note 3, at 570-74; Hurder, *supra* note 8, at 86-87.

⁷² *Id.* at 88; Dinerstein, *supra* note 3, at 540-41; Simon, *supra* note 34, at 501-02.

⁷³ Ellmann, *supra* note 67; Ellmann, *supra* note 71; Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 *GEO. L.J.* 2665 (1993).

lawyer truly approves of the client's views.⁷⁴ The better approach, according to Ellmann, would be for lawyers to express their approval honestly and explicitly.⁷⁵ And if the lawyer disapproves of the client's goals, Ellmann argues, lawyers should engage in "moral dialogue" with the client, in which the lawyer's moral reservations could be presented directly in an attempt to dissuade a client from action of which the lawyer disapproves.⁷⁶

2. *The lawyer as culturally situated and non-neutral*

Some have questioned whether the goal of neutrality—attempting to avoid the lawyer's influence on client decision-making—is even attainable. Binder and Price concede that maintaining the "appearance of neutrality" will often be difficult, because lawyers will often develop a strong opinion about what decision they believe is right for a client to make long before the client is ready to reach a decision.⁷⁷ It is difficult, and perhaps impossible, for a lawyer to go through the process of legal representation—with its features of decision, action, and mediation between the client's view of events and that of other participants in the legal system—without the lawyer's own construction of the client and the circumstances and events surrounding the legal matter coming into play. As William Simon has illustrated with a vivid example from his own experience, even a lawyer attempting to communicate information in a neutral manner will necessarily shape the client's decision-making process by virtue of the way that the lawyer structures, orders, and emphasizes information in counseling a client.⁷⁸ Doing so is simply part of legal representation.

⁷⁴ Ellmann, *supra* note 67.

⁷⁵ Ellmann, *supra* note 71.

⁷⁶ Ellmann expresses this view in an article co-authored with others. See Robert Dinerstein, Stephen Ellmann, Isabelle Gunning, & Ann Shalleck, *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLIN. L. REV. 755, 787-804 (2004). Ellmann's formulation of a client-centered moral dialogue in this article will be discussed in more detail, *infra* in Part IIIC2.

⁷⁷ Although they stress the importance of a lawyer maintaining a demeanor that at all times remains "congruent with the [lawyer's] verbal assurances of neutrality, BINDER & PRICE, *supra* note 1, at 172, Binder and Price recognize that lawyers are not usually in fact neutral, having probably formed a "strong impression about what is an appropriate course of action long before the client does." *Id.* at 191.

⁷⁸ William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MARYLAND L. REV. 213, 217 (1991). This essay, which has enjoyed wide-spread use in clinical teaching, describes the author's representation of the housekeeper of one of the partners in his firm on misdemeanor charges. Simon shows how his client's decision about whether to accept a plea bargain changed based on differences in the way the pros and cons of her options were explained to her by Simon, then an inexperienced but enthusiastic advocate willing to take the case to trial to ensure that justice was done, and a more seasoned criminal defense attorney with a more cynical and perhaps more pragmatic approach. *Id.* at 214-16.

The question thus becomes, not *whether* the lawyer influences the client's decision-making, but *how* and *why* the lawyer wields that influence. The client-centered approach's arguments in favor of lawyer neutrality are built in part on an underlying disquiet that lawyers are never totally disinterested in representation decisions.⁷⁹ As later versions of the client-centered textbooks have made increasingly explicit, the lawyer is in a contractual business relationship with the client and may experience differences of opinion due to the lawyer's own financial interests;⁸⁰ and is a professional with interests in professional autonomy, identity and reputation at stake in the legal representation.⁸¹ The lawyer's personal investment in the representation may give the lawyer strong incentives to direct the representation, which the goal of neutrality helps to hold in check.

However, as Michelle Jacobs noted in a groundbreaking cross-cultural critique of the client-centered approach, even ostensibly neutral interviewing and counseling techniques may themselves be grounded in culturally-based assumptions about how people communicate, which have the effect of marginalizing or pathologizing the behavior of many minority clients as "difficult" or "atypical."⁸² As a growing number of "cross-cultural" lawyering theorists have since pointed out, to be able to understand clients across boundaries of cultural difference, lawyers must carefully examine the cultural assumptions that shape their own attitudes and beliefs, and discover the ways in which they are in fact *not* neutral.⁸³ The lawyer's inattentiveness to

⁷⁹ BINDER, ET AL. (1991 edition), *supra* note 4, at 265 (stating, "even if you could become fully conversant with a client's value and preference structure, you perhaps ought not be trusted to make important decisions because of potential conflicts of interest"). See also Spiegel, *supra* note 49, at 87-89 (describing the problem of professional disloyalty to clients).

⁸⁰ BINDER, ET AL. (1991 edition), *supra* note 4, at 265 (noting the potential conflicts between the client's desires and the lawyer's concerns about future malpractice suits or the financial or time investment involved in pursuing certain legal strategies).

⁸¹ BINDER, ET AL. (2004 edition), *supra* note 4, at 293-97 (discussing lawyer-client conflicts over moral beliefs, risk-aversion and standards of professional practice); Spiegel, *supra* note 49, at 113-20 (discussing the lawyer's interests in professional autonomy, professional identity, craft and ethical behavior, all of which are legitimate, but which could conflict with a client's interests).

⁸² Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Representation*, 27 GOLDEN GATE U. L. REV. 345 (1997). As Jacobs queried: "if the majority of clinic clients were the exception to the rule, does the problem lie with the clients or in the formulation of the rule?" *Id.* at 355.

⁸³ Carwena Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLIN. L. REV. 369 (2005). See also Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLIN. L. REV. 1 (1997) [hereinafter, Aiken, *Striving to Teach*]; Jane H. Aiken, *Provocateurs for Justice*, 7 CLIN. L. REV. 287 (2001) [hereinafter, Aiken, *Provocateurs*]; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001); Dinerstein, et al., *supra* note 76; Kimberly O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLIN. L. REV. 65 (1997).

cultural differences can make the lawyer too quick to judge a client based on cultural assumptions,⁸⁴ or create a sense of falsely identity with a client in ways that erase differences between the lawyer and client.⁸⁵

To become more cross-culturally aware, some theorists encourage lawyers to develop “habits” of self-examination, like cataloguing sameness and difference between the lawyer and the client;⁸⁶ consciously identifying the different but overlapping perspectives of the client, the lawyer, and the legal decision-maker;⁸⁷ imagining “parallel universe” explanations for what may seem like irrational client behavior;⁸⁸ and deconstructing the ways in which the lawyer’s own attitudes may be shaped by being an “insider” in various circles of power and privilege.⁸⁹ The insights of the cross-cultural lawyering theorists have implications beyond the context of representing clients with racial, socio-economic or cultural differences from the lawyer. Cultural difference is almost always present in lawyer-client relationships due simply to the fact that lawyers have been professionally trained and socialized into a legal culture that clients typically do not share.

The lesson that the cross-cultural lawyering theorists teach is not that the influence of culture—including legal culture—is necessarily bad; but that it is both inescapable and easily overlooked. It takes conscious effort to see how one’s attitudes, values, interests and culture affect one’s interactions with others. Attempting to attain neutrality may lead simply to denial of the influences that lawyers

⁸⁴ Aiken, *Striving to Teach*, *supra* note 83, at 27 (describing how clinical law students often explain their clients’ behavior, like missing an appointment with the student, through judgments colored by the students’ own biases).

⁸⁵ See Dinerstein, et al., *supra* note 76, at 766-73. See also Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLIN. L. REV. 135, 146 (2002) (describing how a lawyer’s expressions of solidarity and approval can interfere with a client’s willingness to fully divulge his or her views to the lawyer).

⁸⁶ Bryant, *supra* note 83, at 64-67 (exploring degrees of separation and connection between the lawyer and client); O’Leary, *supra* note 83, at 76-88 (exploring different perspectives of those who will be affected by the representation decisions). In addition, cross-cultural lawyering theorists urge lawyers to cognitively understand how cultural differences can lead to their incorrect attribution of belief and values to their clients, or to erroneous assessments of their clients’ credibility. Bryant, *supra* note 83, at 42-48; Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLIN. L. REV. 373 (2002).

⁸⁷ Bryant, *supra* note 83, at 68-70 (discussing the habit of thinking in terms of the “three rings” of client, lawyer and legal decision-maker).

⁸⁸ *Id.* at 70-72 (laying out the “parallel universe” technique for questioning assumptions); Aiken, *Provocateurs*, *supra* note 83, at 298-306 (exploring ways to challenge paradigmatic, prescriptive and causal assumptions about clients). The client-centered approach has only recently addressed the issues of cultural difference between lawyers and clients specifically. BINDER, ET AL. (2004 edition), *supra* note 4, at 32-40.

⁸⁹ Aiken, *Striving to Teach*, *supra* note 83, at 10-22.

inevitably bring to bear in representing clients, when instead lawyers need to be critically examining and consciously choosing the manner in which they wield power in the lawyer-client relationship.

3. *Tension between lawyer neutrality and other goals of the client-centered approach*

The client-centered approach's emphasis on lawyer neutrality has also been put under strain by its tension with other aspects of the client-centered approach, including the conceptualization of legal representation as problem-solving, the attention to the interrelationship between legal and non-legal aspects of a client's problem, and the focus on client participation in the representation. Attention to these other aspects of client-centered representation has created pressures both to include clients in strategic decisions that would traditionally be left to lawyers; and to involve lawyers in traditionally "non-legal" aspects of representation. Implementing either client involvement in legal strategizing or increased lawyer involvement in non-legal matters requires more interactive collaboration between lawyers and clients, and pushes the limits of lawyer neutrality beyond the boundaries set by the client-centered approach.

a. *Involving the client in legal strategizing*

The original version of client-centered counseling focused on the limits of lawyer expertise and consigned lawyers to a largely facilitative role in helping clients make decisions relating to representation by providing necessary legal information, but leaving decision-making to clients with minimal lawyer influence. Though later versions of the approach recognized a greater role for lawyer advice-giving, they preserved lawyer neutrality by conceptualizing lawyers and clients as occupying complementary "spheres of expertise" within which each was thought to be the appropriate decision-maker.⁹⁰ The primacy of client decision-making is still defended in these later versions by arguing that most decisions ultimately turn on non-legal considerations, in which lawyers hold little or no expertise compared to their clients.⁹¹ However, when a decision involves "lawyering skills," and when it is not likely to "substantially impact" a client's legal or nonlegal concerns, the lawyer was thought to be the better decision-maker.⁹²

⁹⁰ BINDER, ET AL. (1991 edition), *supra* note 4, at 266-71.

⁹¹ *Id.* at 10-15 (giving five reasons for the prominence of nonlegal concerns in legal decision-making).

⁹² In deciding whether a decision should be made in consultation with the client, a lawyer should focus on the likely impact of the decision on an individual client, and give clients the opportunity to make any decision that "is likely to have a *substantial legal or nonlegal impact.*" *Id.* at 268 (emphasis in the original). In applying this "substantial im-

The conception of lawyer-client “spheres of expertise” has itself come under fire for consigning clients to the realm of non-legal concerns and isolating their decision-making in that non-legal realm, instead of including them in more fully participatory lawyer-client collaboration.⁹³ For example, Alex Hurder has argued that rather than assuming that clients want a neutral and non-judgmental lawyer, legal representation should be based on a vision of “equality and collaboration” between lawyers and clients.⁹⁴ To pursue a lawyer-client relationship that is truly equal, he argues, lawyers must abandon the “appearance of neutrality” in a relationship in which both wield and negotiate power covertly, and more forthrightly negotiate and re-negotiate the terms of the lawyer-client relationship in a process of joint decision-making throughout the representation.⁹⁵

The critique of the client-centered approach as not participatory and collaborative enough also grows from an assessment that the categories of “legal” and “non-legal” expertise do not appropriately demarcate the decisions that clients are entitled to make in the relationship. Exemplary of this view, Binny Miller criticizes the client-centered approach for categorizing the development of case theory—which she defines as an “explanatory statement linking the case to the client’s experience of the world,”⁹⁶—as a trial skills decision that relies on lawyer expertise and thus falls outside the decision-making authority of the client.⁹⁷ Drawing on narrative theory, Miller views the development of case theory as a cyclical and interactive process, in which legal doctrine provides guidance and constraint on client storytelling, and in which the client’s perspective informs choices about how to employ, expand or challenge legal doctrine.⁹⁸

pact” standard, the authors note that hiring an attorney indicates a client’s “tacit willingness” to delegate certain decisions to the lawyer, such as “how you cross examine, write briefs, or phrase contingency clauses.” *Id.* at 270. Nevertheless, the authors caution that lawyers should consider the extent to which “lawyering skills” decisions might “substantially impact” a client’s nonlegal concerns in individual cases. *Id.* at 270.

⁹³ See Shalleck, *supra* note 67, at 1744-46 (critiquing the “rigid demarcation between the legal world and the nonlegal world” and the resulting marginalization and confinement of clients into the nonlegal realm); Hurder, *supra* note 8, at 77-78 (noting that both the traditional and client-centered approaches to lawyering “divide decisions into those in which only the client has a legitimate interest and those in which only the lawyer has a legitimate interest”).

⁹⁴ *Id.* at 77.

⁹⁵ Hurder argued that clients possess the power to affect legal and strategic decisions in the representation in a number of ways, including the withholding of information or action needed to carry out the representation, and would exercise that power covertly if not permitted to negotiate it directly. *Id.* at 80-81.

⁹⁶ Miller, *supra* note 9, at 553.

⁹⁷ *Id.* at 511-14.

⁹⁸ *Id.* at 563-67. See also Binny Miller, *Teaching Case Theory*, 9 CLIN. L. REV. 293, 297-307 (developing a conception of case theory as a “storyline,” in which legal doctrine

What is needed, according to these critics is a vision of lawyer-client collaboration that does away with “spheres of expertise” and engages lawyers and clients in a more interactive process.⁹⁹ Merely moving tasks such as case theory development from the “lawyer decides” to the “client decides” column is an inadequate response. Under these more interactive visions of lawyer-client collaboration, the lawyer cannot maintain an “appearance of neutrality” that washes away the lawyer’s perspective, because that perspective is integral to the collaborative project. Rather, the lawyer must engage her perspective in a process of give-and-take with the client.

b. Involving the lawyer in non-legal problem-solving

A significant movement that has formed in the wake of the client-centered approach attempts to refine and develop the idea of lawyers as problem-solvers, and to seek ways to structure legal representation so that both the legal and non-legal aspects of a client’s problem can be addressed in coordination. As previously noted, the conceptualization of legal representation as problem-solving has always been a central component of the client-centered approach. However, while applauding the client-centered approach’s emphasis on problem-solving, some critics have disparaged its rigidly structured scheme of identifying alternatives and consequences as too confining for creative and holistic problem-solving to emerge.¹⁰⁰ As these critics point out, because client-centered problem-solving begins with the client’s stated objectives, and emphasizes lawyer neutrality toward those objectives, the client-centered approach to problem solving can obscure important factors such as the client’s personal connections and responsibilities toward others; the larger context of the systems within which the client operates; and the connections between the client’s individual problems and the social justice issues at stake in the representation.¹⁰¹

To stimulate more creative and holistic problem-solving, critics have suggested a variety of ways to broaden the lawyer’s and the cli-

neither provides an elemental framework for the facts, nor disappears into unconstrained storytelling).

⁹⁹ Miller, *supra* note 9, at 527-29 (discussing the many forms that lawyer-client collaboration can take, in which the contributions of both lawyer and client to the development of a legal narrative are valued); Shalleck, *supra* note 67, at 1749 (describing the possibilities of building a lawyer-client relationship that “is not built across separate spheres—legal and nonlegal—but within a single sphere of overlapping practices”).

¹⁰⁰ See, e.g. Linda Morton, *Teaching Creative Problem-Solving A Paradigmatic Approach*, 34 CAL. W. L. REV. 375 (1998); O’Leary, *supra* note 83, at 72-76; Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 604-05 (1994).

¹⁰¹ Morton, *supra* note 100, at 379-83; O’Leary, *supra* note 83, at 76-88.

ent's thinking about a problem situation. For example, Kimberly O'Leary has suggested that lawyers employ a "difference analysis" to focus not only on the client's interests, but also on the interests, values and perspectives of other stakeholders who may be affected by the legal representation.¹⁰² Janet Weinstein and Linda Morton have examined the physiological and psychological processes of creativity, and proposed strategies to "jump-start" connections between ideas that might otherwise go overlooked in the largely left-brain analytical approach to identifying alternatives and consequences.¹⁰³

The way that legal services are delivered can also affect the lawyer's ability to understand and address a client's legal and non-legal needs in a coordinated fashion, and to make connections between individual problems and issues of systemic injustice. For example, Antoinette Sedillo-Lopez has noted the deleterious effects of subject-matter specialization in legal representation, and proposed that delivery of legal services be organized around client communities.¹⁰⁴ David Chavkin has similarly suggested that lawyers consider their clients holistically by developing a "theory of the client" to guide representation rather than a "theory of the case."¹⁰⁵

In a separate but related trend, proponents of multidisciplinary practice have proposed that lawyers can best address a client's interconnected legal and non-legal needs through collaboration with other professionals, such as psychologists, medical professionals and social workers.¹⁰⁶ Such collaborations provide the benefits of "one-stop shopping" for clients who might otherwise forego services rather than engage in the exhausting, time-consuming, and expensive process of going from one agency to another to address the multiple facets of

¹⁰² *Id.* at 82-85.

¹⁰³ Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLIN. L. REV. 835 (2003).

¹⁰⁴ Antoinette Sedillo-Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLIN. L. REV. 307 (2001). Some of the benefits Sedillo-Lopez identifies are coordination between individual case representation and larger "impact litigation" projects that address larger issues of systemic injustice; learning to hear client stories more completely, rather than "editing out" what is not relevant to the subject-matter specialty; creative problem-solving for individual clients; and the ability to confront the larger connections and overwhelming nature of the problems that challenge the lives of people living in poverty. *Id.* at 318-25.

¹⁰⁵ See CHAVKIN, *supra* note 5, at 39-40.

¹⁰⁶ See, e.g., Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Concerns*, 73 U. COLO. L. REV. 787 (2002); Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999).

their complex and interrelated problems.¹⁰⁷ Moreover, as Kim Diana Connolly has noted, lawyers “often need to examine [a legal problem] from the perspective of multiple disciplines” to see its full dimensions.¹⁰⁸ Collaborative work between professions can bring different problem-solving methodologies and approaches to bear, enlarging the perspectives of each professional collaborator, and permitting a wider range of client problems to be addressed.¹⁰⁹

These expansions of problem-solving—through techniques designed to elicit holistic and creative solutions, the organization of representation around clients rather than legal specialties, and collaboration with professionals from other disciplines—all continue the trend away from the narrow, doctrinal pigeon-holing of clients’ problems that the client-centered approach began.¹¹⁰ However, rather than deferring non-legal problem-solving to the client, the techniques proposed in the more holistic problem-solving approaches entail a greater level of lawyer engagement in areas in which lawyers may have little or no professional expertise. Like the involvement of clients in legal strategizing, the engagement of lawyers in non-legal problem-solving strains the limits of lawyer neutrality, because it requires a more active engagement between the lawyer and the client.

4. *Tensions between lawyer neutrality and representational goals in related lawyering models*

In addition to being in tension with the collaborative and problem-solving aspects of legal representation that are central and specific to the client-centered approach, the maintenance of lawyer neutrality is also inconsistent with the implementation of two other models of lawyering that share an affinity for putting the client at the center of legal representation, and are sometimes associated with the client-centered approach: (1) critical lawyering against social and political subordination; and (2) zealous partisan advocacy.

a. *Critical lawyering against social and political subordination*

The interaction between lawyers and clients and the blurring of boundaries between legal and non-legal advocacy reaches its zenith in critical lawyering theory,¹¹¹ which contextualizes the client-centered

¹⁰⁷ Brustin, *supra* note 106, at 792.

¹⁰⁸ Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL’Y 11, 13 (2003).

¹⁰⁹ See Katherine R. Kruse, *Lawyers Should be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J. OF L. & POL’Y 49 (2004).

¹¹⁰ See *supra* notes 27-29 and accompanying text.

¹¹¹ Ascanio Piomelli, has recently chosen the phrase “collaborative lawyering” to most accurately capture this school of lawyering theory, which has also been called (among

approach's insights about representation as problem-solving, the importance of client participation, and the limitations of lawyer expertise, within a larger project of social justice lawyering that is self-consciously political and client-empowering.¹¹² The themes of critical lawyering theory, most particularly the theme of client empowerment, have also taken strong hold in the area of representing women who have suffered domestic abuse.¹¹³

Although critical lawyering is often distinguished from client-centered representation,¹¹⁴ its intellectual roots are grounded in the insights of the client-centered approach.¹¹⁵ The critical lawyering movement grew out of some of the same critiques of legal services and public interest lawyering that provided fertile ground for acceptance of the client-centered approach.¹¹⁶ Unlike the client-centered approach, which views client objectives as fairly static, critical lawyering theory incorporates postmodern insights about the fluid and unformed nature of the client's objectives, emphasizing that lawyers can have either disabling or empowering effects in helping to shape client narratives and understandings of the world.¹¹⁷

Critical lawyering theorists argue that attempting to force clients into existing legal doctrinal categories may ignore the reality of their lives and reinforce and reproduce patterns of oppression that subordinate them.¹¹⁸ With politically and socially disempowered clients, legal doctrine is particularly likely to be cut off from their lived reality and in need of the authentic voices or stories of clients to effec-

other things) critical lawyering, reconstructive poverty law, rebellious lawyering, and the theoretics of practice. Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427, 441 (2000). While I agree with Piomelli that the term "collaborative" captures much of the essence of this school of lawyering, I use the term "critical lawyering" in this article to avoid confusion with other approaches that have adopted the name. COCHRAN, ET AL., *supra* note 5.

¹¹² These theorists include Lucie White, Gerald Lopez, and Anthony Alfieri. For a comprehensive discussion of their work, see Piomelli, *supra* note 111.

¹¹³ See Enos & Kanter, *supra* note 11; Margulies, *supra* note 13; Linda G. Mills, *The Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997).

¹¹⁴ See, e.g., Miller, *supra* note 9, at 503-29 (discussing client-centered theory and critical lawyering theory separately); Shalleck, *supra* note 67, at 1742-52 (same).

¹¹⁵ Piomelli, *supra* note 111, at 436-38 (discussing the client-centered model as a "theoretical antecedent" to the collaborative lawyering movement of the 1980s and 1990s).

¹¹⁶ See *supra* note 67.

¹¹⁷ Shalleck, *supra* note 67, at 1033-34.

¹¹⁸ See, e.g. Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 48 (1990) (characterizing client's decision to speak out at administrative hearing to determine an alleged overpayment of welfare benefits as indicating a willingness to "ignore[] the doctrinal pigeonholes that would fragment her voice").

tuates reform.¹¹⁹ Lawyering that proceeds along the path carved by legal doctrine, which informs the lawyer's "pre-understanding" of the client's situation, may simply replicate oppressive patterns enacted in the law.¹²⁰ To avoid the potentially disabling effects of legal representation, lawyers are encouraged to enter into their clients' worlds as non-experts, and take an active but largely supportive role in facilitating a client's own problem-solving efforts.¹²¹ According to Gerald Lopez, one of its leading proponents, the goal of critical lawyering is to "fundamentally reorient *all* the work engaged in by lawyers" around the tasks of "teaching self-help and lay lawyering" so that "people subordinated by political and social life can learn to recognize and value and extend their own problem-solving know-how."¹²²

The services that lawyers provide to help empower clients or client communities may be ancillary or parallel to litigation efforts, supportive of litigation, or may have little relationship to legally-focused efforts. As Gerald Lopez has suggested, lawyers can empower clients by educating them about the way law shapes and restricts their lives, and the problem-solving opportunities that legal strategy provides.¹²³ Or, as Lucie White has suggested, lawyers can create space in the "margins" of a lawsuit for clients to "speak and act out their grievances and aspirations" in ways that are not feasible as part of the lawsuit itself.¹²⁴ As others, including Peter Margulies have argued, lawyers can themselves provide some of the solidarity and connection that will help build up their clients' views of themselves as capable and self-sufficient problem-solvers.¹²⁵ Under any of these methodologies,

¹¹⁹ See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992).

¹²⁰ See Alfieri, *supra* note 9.

¹²¹ See generally GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (envisioning forms of practice in which lawyers and clients collaborate with each other and other community groups or professionals to employ a range of persuasive legal and non-legal strategies to effectively address structural issues as well as individual problems).

¹²² *Id.* at 70. See also Enos & Kanter, *supra* note 11, at 94 (differentiating client-empowering advocacy from other lawyering approaches in the domestic violence arena by its emphasis on "provid[ing] the client with the opportunity to form her own relationship with other helping professionals, and support[ing] her in maintaining these relationships, rather than representing the client in all of her dealings with others).

¹²³ LOPEZ, *supra* note 121, at 50 (discussing the overlap between professional and lay practice, and how lawyers can bring legal expertise to the process of collaboration).

¹²⁴ Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 REV. L. & SOC. CHANGE 535, 563 (1987-88).

¹²⁵ Margulies, *supra* note 13, at 1096 (describing the importance in lawyers' own relationships with clients, of "connecting across boundaries of the professional and personal," and of empowering the client by "surrender[ing] the neutral, nonjudgmental stance" of professionalism). See also LOPEZ, *supra* note 121, at 80 (asserting that by "committing himself to share both power and responsibility" in the representation of a client he creates

the lawyer will take a distinctively more active and interactive role in helping to shape client objectives than the client-centered approach's "appearance of neutrality" would dictate.

b. Zealous partisan advocacy

Defenders of traditional zealous partisan advocacy have recently begun to reclaim the appellation of "client-centered representation" as their own—and for good reason.¹²⁶ The traditional model of devotion to a client's legal rights and interests is fundamentally client-centered, in the sense that it places fidelity to clients at the center of the lawyer's professional duties.¹²⁷ The traditional model insists, for example, that when other professional duties, such as candor to the tribunal, conflict with duties owed to the client, the lawyer's loyalty to the client must prevail.¹²⁸ According to its primary proponents, Monroe Freedman and Abbe Smith, the "ethic of zeal" is "pervasive in lawyers' professional responsibilities"; it "infuses all the lawyer's other ethical obligations with 'entire devotion to the interest of the client.'"¹²⁹

However, there are also tensions between the problem-solving focus of the client-centered approach and the no-holds-barred legal advocacy of zealous partisanship. For one thing, to be the kind of wholehearted partisan that zealous advocacy promotes, the lawyer becomes personally invested in the client in ways that make neutrality difficult to maintain.¹³⁰ As Abbe Smith writes, fidelity demands that lawyers "advocate with heart, soul and zeal," and that they act with "passion, not restraint."¹³¹ This personal investment in the representation may both demand and sustain a higher level of intervention with client de-

an environment whereby a client "confirms that he can grow more self-sufficient than before *by virtue* of his contact with a lawyer") (emphasis in the original).

¹²⁶ Smith, *supra* note 12. In a tribute to Monroe Freedman that opens this essay, Abbe Smith described him as the original "client-centered lawyer," *id* at 88, precisely because in Freedman's view the lawyer's duties towards clients of "zeal and confidentiality trump most other rules." *Id.* at 89. According to Smith, Freedman was an early advocate of "client-centered lawyering" and has been credited by some with coining the phrase. *Id.* at 88, n.20.

¹²⁷ See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 *MERCER L. REV.* 443, 517 (1999) ("Fidelity is the governing virtue for a criminal defense practice.")

¹²⁸ MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 160-61 (3d ed. 2004) (discussing Freedman's "perjury trilemma").

¹²⁹ *Id.* at 71.

¹³⁰ Smith & Montross, *supra* note 127, at 517-18 ("the relationship between the lawyer and client is at the heart of a criminal defense practice. For many criminal defense lawyers, the connection between lawyer and client answers both the 'why' question and the 'how' question").

¹³¹ *Id.*

cision-making than the client-centered approach would sanction.¹³² For example, Smith suggests that a “caring and zealous advocate” must sometimes engage in arm-twisting, and “lean hard on a client” to make the decision that will best protect the client’s legal interests, rather than allow the client make a decision that the client might later regret.¹³³

Moreover, by virtue of its focus on the client’s legal interests, the zealous advocacy model can come to exemplify exactly what the original advocates of client-centered representation didn’t like about traditional lawyering: that it permits the lawyer’s zealous pursuit of the client’s legal interests to eclipse the client’s actual values, interest and needs. When pursued in the absence of a consciousness of the client as a whole person, zealous partisan advocacy can simply re-create the client as a walking bundle of legal rights and interests and fail to address the client’s problem as the client understands it.¹³⁴

D. Difficult Cases and the Question of When to Intervene

As this survey of the history and development of the client-centered approach demonstrates, the “appearance of neutrality” is an unstable construct within client-centered representation. In light of the realities of legal representation and the differences between legal representation and psychotherapy, both the attainability and desirability of lawyer neutrality are questionable. Moreover, maintaining lawyer neutrality is in tension with implementing the larger problem-solving goals of the client-centered approach, which require interactive collaboration between lawyers and clients in both legal and non-legal spheres. Finally, the ideal of non-intervention into client decision-making tends to break down in the face of other client-focused representational goals such as lawyering against social subordination, or zealously protecting a client’s legal interests.

The conflicting and competing goals of legal representation that push the limits of lawyer neutrality place client-centered lawyers in situations of uncertainty about whether or to what extent it is appro-

¹³² Smith questions: “What is wrong with lawyers guiding or influencing or even exercising power over clients? Is all power intrinsically evil? Why do we see it as a question of power and not a question of responsibility?” Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. CIV. RTS.-CIV. LIB. L. REV. 1, 36 (1993).

¹³³ *Id.* at 37.

¹³⁴ Proponents of zealous advocacy recognize this problem, and concede that a lawyer denies a client’s autonomy by assuming without consultation that “the client wants to maximize his material and tactical position in every way that is legally permissible, regardless of non-legal considerations.” FREEDMAN & SMITH, *supra* note 128, at 60. *See also*, Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1978).

priate to intervene in client decision-making. The client-centered approach has always recognized that there are “difficult cases” for client decision-making, when clients are unable or unwilling to make their own decisions; or when clients seem poised to make decisions that the lawyer views as either imprudent or immoral.¹³⁵ The client-centered approach has responded by sanctioning more interventionist lawyering techniques when such situations arise; but by defining these situations narrowly to prevent lawyer intervention in all but the most extreme cases.¹³⁶

By limiting lawyer intervention to a strategy of last resort, the client-centered approach misses the opportunity to theorize the more subtle, interactive, collaborative and client-empowering interventions that have arisen in its wake. In the following section, I look to theories of personal autonomy for guidance in demarcating with more subtlety the boundaries of appropriate lawyer intervention into client decision-making.

II. SHIFTING SANDS: CLIENT-CENTERED REPRESENTATION AND THE AMBIGUITIES OF PERSONAL AUTONOMY

As appealing as the client-centered approach was at its inception, and as influential as it has become in legal education, it was and has remained an under-theorized model.¹³⁷ To the extent that the client-centered approach has been theoretically defended, it has been on the ground that taking a client-centered approach enhances or promotes client autonomy. However, there has been little effort to explore the concept of autonomy theoretically or to incorporate the insights of autonomy theorists into the implementation of a client-centered approach to lawyering. This section examines the importance of auton-

¹³⁵ The earliest version of the client-centered approach had a special chapter devoted to counseling “difficult clients.” BINDER & PRICE, *supra* note 1, at 192-210 (Chapter Ten: Counseling Difficult Clients). These clients were defined as:

1. Clients who are extremely indecisive.
2. Clients who insist upon obtaining the lawyer’s opinion of what should be done.
3. Clients who have already reached a decision and are not interested in considering alternatives.
4. Clients who, in the lawyer’s judgment, are making extremely detrimental decisions.

Id. at 192. Later versions added sections on intervening in client decision-making when the client has “arguably immoral preferences.” BINDER, ET AL. (1991 edition), *supra* note 4, at 281-84 and 356-59. See also BINDER, ET AL. (2004 edition), *supra* note 4, at 292-95 (discussing intervention when clients want to make “decisions that contravene your moral beliefs”).

¹³⁶ For example, imprudent clients are defined as clients who want to make “extremely detrimental” decisions, or clients whose decisions are based on “mispredicting” the outcome.

¹³⁷ See Dinerstein, *supra* note 3, at 511.

omy as a theoretical underpinning for the client-centered approach, and examines the meaning that philosophers have given to the notion of personal autonomy.

A. *Client-Centered Representation and Client Autonomy*

Although autonomy is scarcely mentioned in Binder and Price's original client-centered approach textbook—indeed, the word “autonomy” appears nowhere in the volume—respect for client autonomy has emerged as the most salient argument in favor of the client-centered approach.¹³⁸ In the most comprehensive theoretical treatment of the client-centered approach, Robert Dinerstein in a 1990 article surveyed a broad array of philosophical, political, socio-historical, psychological, ethical and utilitarian arguments that could be used to justify a client-centered approach.¹³⁹ Dinerstein concluded that the client-centered approach “is supported most clearly by the importance we place on individual autonomy.”¹⁴⁰ The focus on client autonomy was underscored by other early theoretical critiques or explorations of the client-centered approach, which built on notions of autonomy to expand and critique the client-centered approach.¹⁴¹ The scholarly work of Steve Ellmann is perhaps most responsible for moving the client-centered approach out of the realm of psychotherapy and re-situating it within the theoretical framework of respecting client autonomy.¹⁴²

Respect for client autonomy is an intuitively appealing notion, both because of the central role that individual autonomy plays within

¹³⁸ *Id.* at 512-13; Ellmann, *supra* note 67, at 759-60.

¹³⁹ Dinerstein, *supra* note 3, at 504. Dinerstein also examined the “political” argument that client-centered representation helps empower poor or politically subordinated clients, and found that it provided limited support for a client-centered approach in some contexts. *Id.* at 505. Because of the differences between the goals of lawyering and therapy, he cautioned against over-reliance on the “psychological” argument that imports Rogerian psychotherapeutic techniques into legal representation. *Id.* at 584-85. Finally, he found the “ethical argument” (that professional disciplinary standards require a client-centered approach) and the “utilitarian argument” (that client centered representation produces better results for clients) to be without significant support. *Id.* at 505.

¹⁴⁰ *Id.* at 584. The other strong support came from what Dinerstein called the “socio-historical” argument that contextualized client-centered lawyering within the larger movement to demystify professional expertise. *Id.* at 505. However that movement, particularly the development of the informed consent doctrine, is similarly grounded in concerns for individual autonomy. *Id.* at 530-31.

¹⁴¹ See e.g. Ellmann, *supra* note 67; Tremblay, *supra* note 7.

¹⁴² Ellmann's critique of the neutral interviewing and counseling methods assume that respecting and enhancing client autonomy is the central goal of legal representation, and criticizes the “appearance of neutrality” as being not fully consistent with that goal. Ellmann, *supra* note 67. However, he does not advocate a wholesale return to lawyer paternalism. Instead, he advocates a limited role for lawyer engagement and influence within the larger framework of a basically client-centered approach.

the American political system and because of the role that legal representation plays within that system. The value of autonomy is often invoked as a matter of shared faith, rather than established by argument, perhaps because commitment to autonomy is so central to the liberal tradition in American political culture and theory.¹⁴³ Liberal political theory places primary importance on the promotion of autonomy, defined as the ability of individuals to develop and pursue their own conceptions of the good without state interference, within limits set to ensure that they do not unduly interfere with the liberty of others.¹⁴⁴ This notion of individual autonomy also provides one of the most compelling theoretical justifications for partisan legal representation, which is seen as supporting the goals of liberalism by enabling clients to pursue their conceptions of the good within and up to the parameters set by law.¹⁴⁵

The idea that lawyers should avoid paternalism in the lawyer-client relationship thus has a self-evident appeal, because it links a lawyer's conduct of the legal representation to the purposes that justify the representation itself. Given the importance of autonomy within the political traditions of the American legal system, it is the maintenance of lawyer paternalism, rather than the promotion of client autonomy, that appears to require justification.¹⁴⁶ Indeed, it would be somewhat peculiar if legal representation achieved its goal of promoting client autonomy by means that subverted that autonomy within the lawyer-client relationship itself.¹⁴⁷

The most obvious and prevalent justification for lawyer paternal-

¹⁴³ See e.g. Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N. C. L. REV. 315, 336-37 (1987). (describing autonomy as one of the central, highest, and most universally acclaimed values in American society); Dinerstein, *supra* note 3, at 514-15 (noting that “[f]ew scholars dispute the importance of autonomy as a value; but rather dispute “the extent to which other values, such as the moral autonomy of the lawyer or third parties, may limit the exercise of [client] autonomy”).

¹⁴⁴ Luban, *supra* note 52, at 462-64.

¹⁴⁵ In what remains the most cogent defense of lawyers' neutral and partisan role, Stephen Pepper has argued that to promote individual autonomy in a “highly legalized society,” clients need the assistance of lawyers to provide “access to the law.” Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, Some Problems, and Some Possibilities*, 1986 AMER. BAR FOUNDATION RESEARCH J. 613, 617. As Pepper argues, because the law is highly technical, “meaningful access to the law requires the assistance of a lawyer.” *Id.* For lawyers to deny access to the law based on moral grounds would be to screen valid legal claims based on lawyers' beliefs about what is moral or immoral, substituting the rule of law with “rule by an oligarchy of lawyers.” *Id.* See also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

¹⁴⁶ Luban, *supra* note 52, at 460.

¹⁴⁷ Wasserstrom, *supra* note 52, at 15-16. Tremblay, *supra* note 7, at 523.

ism is that the lawyer's professional expertise places the lawyer in a better position than the client to make decisions relating to the representation and to promote the client's autonomy through those decisions.¹⁴⁸ The "traditional model" of legal representation falls in line with this justification for professional paternalism, creating a "means-objectives" division of decision-making authority in the lawyer-client relationship, in which the client tells the lawyer what objective the client wishes to pursue, and the lawyer applies her legal expertise to decide the strategic means by which to attain the client's objective.¹⁴⁹

Binder and Price's arguments in favor of client decision-making attack the strongest justification for lawyer paternalism at its core. Binder and Price flatly refute the claim of professional expertise by arguing that many, if not most, decisions relating to legal representation ultimately turned on questions of the client's values rather than the lawyer's knowledge and expertise.¹⁵⁰ Moreover, although the original Binder and Price version of the client-centered approach did not explicitly discuss client autonomy, its arguments in favor of client decision-making rest on implicit appeals to the value of client autonomy. Binder and Price asserted that clients who participated fully in their representation and made their own decisions would be better satisfied with the outcomes, because the outcomes would best accord with their values,¹⁵¹ and having made the decisions themselves, they would better be able to live with the results.¹⁵² These appeals to the instrumental value of client decision-making are in accord with utilitarian arguments for respecting autonomy.¹⁵³ The effect of Binder and Price's assault on traditional conceptions of lawyer expertise, and their claims about the links between client decision making and client satisfaction, can thus be seen as implicit refutations of lawyer paternalism and appeals to client autonomy as a central value within the

¹⁴⁸ *Id.* Strauss, *supra* note 143, at 321; Wasserstrom, *supra* note 52, at 16-18.

¹⁴⁹ Dinerstein, *supra* note 3, at 504; Strauss, *supra* note 143, at 318. This division of decision-making authority is most currently reflected in ABA Model Rule 1.2(a), which states 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 R. PROF'L CONDUCT R. 1.2(a) (2002).

¹⁵⁰ See *supra* notes 24-33.

¹⁵¹ BINDER & PRICE, *supra* note 1, at 148-49.

¹⁵² *Id.* at 153. See also *id.* at 48 ("[t]he 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*") (emphasis in the original); *id.* at 149 ("lawyers are usually not able to decide which alternative, on balance, will provide *maximum client satisfaction*") (emphasis in the original).

¹⁵³ Strauss, *supra* note 143, at 338 (utilitarian argument in favor of autonomy is based on the notion that autonomy "best assures that individual preferences will be maximized"). See also Tremblay, *supra* note 7, at 524-25 (discussing the "utilitarian and empirical" arguments that support client centered representation).

lawyer-client relationship.

However, the client-centered approach never followed up its implicit appeals to client autonomy with an effort to define what client autonomy means. Later versions of the client-centered approach textbooks incorporate increasingly explicit references to client autonomy, appealing to “respect for client autonomy” as an independent and equally compelling reason to adopt a client-centered approach.¹⁵⁴ However, the references to client autonomy in these later versions seem more of an afterthought than a serious attempt to define client autonomy or ground the client-centered approach in autonomy theory.¹⁵⁵ As a result, the client-centered approach offers little guidance for the exercise of a lawyer’s professional judgment in the difficult cases in which paternalistic intervention seems justified by considerations like protecting a client’s legal interests, or weighing a client’s stated objectives against his satisfaction in the long run.¹⁵⁶ The next section lays the groundwork for a more detailed discussion of client

¹⁵⁴ See e.g. BINDER, ET AL. (1991 edition), *supra* note 4, at 23. After detailing the reasons why a client-centered approach is likely to lead to greater client satisfaction, the authors continue: “Moreover, active client participation *respects the autonomy* of the person who “owns” the problem. A client does not lose *the right to make decisions* which are likely to have a substantial impact on his or her life for having sought legal assistance.” *Id.* (emphasis added). See also BINDER, ET AL. (2004 edition), *supra* note 4, at 4-5. This edition lists three justifications for adopting a client-centered approach, the first of which is that “clients are autonomous ‘owners’ of their problems.” *Id.* at 4.

¹⁵⁵ In some places in the 1991 edition, client autonomy is conflated with client satisfaction, the text moving seamlessly between them as if they were equivalent concepts. See e.g. BINDER ET AL. (1991 edition), *supra* note 4, at 261 (“Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*”) (emphasis in the original). In other places, the authors write about “autonomy” as though it is not a justification for their approach at all, but a quality or capacity for independent decision-making that clients may or may not possess. See *id.* at 18, n.10, 21. The problems of conflating autonomy with client satisfaction or capacity are largely cured in the 2004 version, which lists client autonomy as a distinct justification for client-centered representation, separate from its benefits in terms of client satisfaction, and distinct from the observation that “most clients are quite capable of actively participation in the effort to resolve important problems . . . [and] want to participate in counseling.” BINDER ET AL. (2004 edition), *supra* note 4, at 6-8.

¹⁵⁶ By far the most detailed and sophisticated theoretical treatment of client autonomy and lawyer paternalism has come from outside the client-centered camp, in a 1981 article by legal ethicist David Luban. Luban, *supra* note 52. Luban created a taxonomy of wants, interests and values, and explored the justification for overriding each kind of motivation in favor of the others. *Id.* at 467-74. He concluded that wants, interests and values operate in a rough hierarchy, such that a lawyer is almost always justified in overriding a client’s wants based on the client’s interests or values, but never justified in overriding a client’s values based on a client’s interests. *Id.* at 474. His taxonomy also suggested a methodology for distinguishing between wants and values, for the purposes of deciding whether a paternalistic intervention in the name of a client’s interests is justified. In his view, if a client can give a reason for a decision that is contrary to his or her interests, and that reason passes a minimal test of rationality, then the lawyer should respect the client’s decision as an expression of the client’s values. *Id.* at 477.

autonomy by surveying the work of moral philosophers as they conceptualize what it means to lead an autonomous life.¹⁵⁷

B. *Moral Philosophy and Personal Autonomy*

The word autonomy quite literally means “self-rule.”¹⁵⁸ What it means to be self-governing has been understood to encompass both the “negative” freedom from interference by others, and the “positive” freedom to be able to fully actualize oneself according to values one has chosen.¹⁵⁹ Philosophers have articulated a range of possibilities for defining positive freedom above and beyond protection from interference by others. These conceptions of positive liberty spring from the basic insight that acting autonomously is not the equivalent of always being left alone to do what you want to do.¹⁶⁰ Rather, positive freedom is the freedom to grow, discover, evolve, and flourish in one’s own way; to define and become the kind of person one wants to be over the course of one’s lifetime. Under this notion of positive freedom, one’s autonomy may be constrained by a variety of factors, both internal and external to oneself, and intervention may be justified to counteract those constraints on autonomy. However, as we will see, notions of positive freedom are both controversial and in tension with ideals of negative freedom from interference by others.

1. *Positive freedom and constraints on autonomy*

Positive freedom, according to philosophers who have sought to define it, involves the capacity and opportunity to make choices about the kind of person one wants to be, and to actualize those choices in the world.¹⁶¹ Exemplary of this approach, Joseph Raz defines the ideal of personal autonomy in the metaphor of “authorship” of one’s own life.¹⁶² To help others achieve “true freedom”—to enhance their

¹⁵⁷ The ideas about autonomy presented in this section are not intended as a comprehensive review of the philosophical literature on the subject, nor an explication of any one philosopher’s views. Rather, they are my own construction based on ideas set forth by a select group of philosophers chosen because they have attracted my attention over the years, and have held it because they discuss autonomy and paternalism in terms that I find compelling. This group includes Isaiah Berlin, Gerald Dworkin, David Luban, Thomas Nagle, Joseph Raz, and Bernard Williams. Though I draw on the work of these theorists, I should not be understood as adopting their views in every way. To keep the flow of the text moving, I have tried to consign my discussion of points of divergence to footnotes.

¹⁵⁸ GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 12-13 (1988) (describing the etymology as *autos* (self) and *nomos* (rule or law)).

¹⁵⁹ See generally Isaiah Berlin, *Two Concepts of Liberty*, in ISIAH BERLIN, *LIBERTY* 166 (Henry Hardy, ed. 2002) (distinguishing negative and positive liberty).

¹⁶⁰ As Gerald Dworkin put it, autonomy is not identical to liberty. DWORKIN, *supra* note 158, at 14.

¹⁶¹ Berlin, *supra* note 159, at 178.

¹⁶² JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1988). To be the author of one’s

autonomy—may thus involve more than merely leaving them alone, depending on what is constraining them from the larger project of self-authorship. As the following sections will show, it may require changing the world to expand their range of choices; trenching on their immediately desired actions in favor of their higher-order desires; or intervening in their present choices to preserve their future freedom.

a. External constraints on autonomous choice

One kind of constraint on autonomy is external, caused by social or environmental circumstances that give one insufficient opportunity to exercise autonomous choice. Joseph Raz uses two hypothetical examples to illustrate how one can be free to choose, but provided with such limited choices in the world that freedom is rendered virtually meaningless.¹⁶³ In one, which he calls the “Man in the Pit,” a person falls into a pit and lives out the rest of his days with choices “confined to whether to eat now or a little later, whether to sleep now or a little later, whether to scratch his left ear or not.”¹⁶⁴ In the second, which he calls the “Hounded Woman,” a person is deserted on an island with a “fierce carnivorous animal which perpetually hunts for her,” and consequently she “never has a chance to do or even to think of anything other than how to escape from the beast.”¹⁶⁵ According to Raz, neither of these persons “enjoys an autonomous life” because “though they both have choices, neither has an adequate range of options to choose from.”¹⁶⁶ To assist persons’ autonomous choice under such conditions would require changing the environmental forces that limit their options: getting them out of the proverbial pit, or taming the carnivorous beast.

b. Internal constraints on autonomous choice

A second kind of constraint on autonomy is internal, relating to the influences within a person that keep him from exercising autonomous choice. The idea that there could be internal constraints on autonomy is most often explained with reference to a kind of split-level conception of the self, in which one’s higher, deeper, or more fundamental desires are capable of coming into conflict with one’s lower,

own life, according to Raz, three conditions must be present: (1) one must have the mental abilities to “form intentions of a sufficiently complex kind, and plan their execution”; (2) one must “actually use those faculties to choose what life to have”; and (3) one’s choice must be “free from coercion and manipulation by others.” *Id.* at 372-73.

¹⁶³ *Id.* at 373-74.

¹⁶⁴ *Id.* at 374.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

less integral, or more fleeting desires.¹⁶⁷ One's "true self" is defined by one's higher-order desires, which might also be understood as defining one's values, one's character, or the kind of person one wants to be.¹⁶⁸ Enhancing someone else's autonomy under this view could be equated with helping him or her form these second-order desires, or to act in accordance with them.

An example sometimes used by philosophers to illustrate the phenomenon of conflicting desires in the split-level self is the story of Odysseus who, knowing that he will be tempted by the call of the Sirens to steer his ship into the rocks, commands his crew to tie him to the mast of his ship.¹⁶⁹ As Gerald Dworkin explains, Odysseus does this because "[h]e has a preference about his preferences, a desire not to have or to act upon various desires"; and because he views those lower-order desires as "no part of him, but alien to him."¹⁷⁰ According to Dworkin, when we respect the higher-order desires with which Odysseus identifies, we thus "promote, not hinder, his efforts to define the contours of his life."¹⁷¹

The conflict between higher-order desires and lower-order desires is often associated with the idea, deeply embedded in Western moral philosophy, that one can be free to act, but still be a slave to one's passions.¹⁷² In the struggle between reason and passion, ration-

¹⁶⁷ The idea of "first-order" and "second-order" levels of desire plays a pivotal role in the work of Gerald Dworkin. See DWORKIN, *supra* note 158, at 15-16. Joseph Raz also makes use of the idea of human goals being "nested within hierarchical structures" to explicate his account of autonomy. RAZ, *supra* note 162, at 292.

¹⁶⁸ Dworkin refers to one's second-order preferences as "the choice of the kind of person one wants to become." DWORKIN, *supra* note 158, at 18. Bernard Williams talks about one's character in a similar vein, of being comprised by a nexus of "ground projects" that give meaning and direction to one's life. Bernard Williams, *Persons, Character and Morality*, in MORAL LUCK 1, 13 (1981). Luban talks about values as "those reasons with which the agent most closely identifies—those that form the core of his personality, that make him who he is." Luban, *supra* note 52, at 470.

¹⁶⁹ DWORKIN, *supra* note 158, at 15.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The example of Odysseus admits of other interpretations as well. It can be used to illustrate "time-differentiated" problems, discussed *infra* in Part IIB1c, insofar as what Odysseus wants at one time conflicts with what he wants at another time. It also illustrates interference based on an agent's *consent* to having his choice restrained, because Odysseus specifically requests his crew to ignore his later pleas to be released from his self-imposed bonds. See Luban, *supra* note 52, at 463. However, I find Dworkin's analysis, based on "higher" and "lower" levels of desire to be a more appealing interpretation of the story for its use in autonomy theory, because it provides a criterion by which to choose between respecting Odysseus's antecedent pleas to be restrained and his later contrary pleas to be released from his self-imposed restraints.

¹⁷² Luban, *supra* note 52, at 461. Luban illustrates this struggle with a vivid anecdote from the life of seventeenth-century philosopher Benedict Spinoza who, outraged at the lynching of a pair of brothers in a Holland prison, was thwarted in his efforts to confront the mob who lynched them when his landlord, Van der Spyck, locked Spinoza in the house. *Id.* Due to this act of paternalism, writes Luban, "we owe Van der Spyck for Spinoza's

ality is seen as the road to “true freedom,” and persons who are making irrational decisions based on the unreflective passions of the moment are seen as not fully autonomous. However, resolving questions of autonomous choice by considering what it would be most rational for an agent to want are almost always rejected by autonomy theorists, largely because the relationship between reason and higher-order desires is not as clear-cut as the classic story in Western philosophy would suggest.¹⁷³ More sophisticated views would attempt to help an agent rationalize her own hierarchy of desires based on the values that are more central to her own conception of what it means to live a good life, remaining agnostic about whether those values are themselves rationally defensible.¹⁷⁴

Moreover, and somewhat problematically, although interference with one’s higher-order desires can come from the fleeting passions of the moment, one’s autonomy might also be frustrated by deeper-seated pathology. As Raz argues, a person can fail to lead an autonomous life by being fundamentally alienated or estranged from his or her own goals and achievements; being “driven by forces which he disowns but cannot control,” so that he “hates and detests the desires which motivate him or the aims that he is pursuing.”¹⁷⁵ For such a person, Raz suggests, “[t]he life he has is not his own.”¹⁷⁶ While such an extreme condition of alienation would be clearly pathological, Raz suggests that “in one degree or another [these feelings of alienation] are a part of the life of many,” and that persons are less autonomous to the extent that they are alienated from the goals that drive their actions, and more autonomous to the extent that they identify with and are loyal to their life goals.¹⁷⁷ To further complicate matters, a person may be prevented by internal forces, like self-deception, from realizing how alienated he truly is.¹⁷⁸

Ethics, a book which argues strikingly that living under the sway of our passions is the true source of human bondage.” *Id.*

¹⁷³ Part of the reason for this, as Luban has discussed in another context, is that “our emotions are not just a complement to moral reasoning, they are a component of it; . . . [and] the classical opposition of reason and passion is a misleading half-truth.” David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 899 (1999). Moreover, we are passionately connected to the set of higher-order desires that make up our system of values and help to “form the core” of our personality. Luban, *supra* note 52, at 470. See also Williams, *supra* note 168, at 13 (discussing the emotional connection we have to the nexus of “ground projects” that give meaning to our lives).

¹⁷⁴ Simon, *supra* note 78, at 223 (describing “refined autonomy” as attempting to understand a client’s particular concerns); Luban, *supra* note 52, at 472-73 (discussing conflict between an agent’s values).

¹⁷⁵ RAZ, *supra* note 162, at 382.

¹⁷⁶ *Id.* at 382.

¹⁷⁷ *Id.* at 382-83.

¹⁷⁸ *Id.*

To enhance a person's autonomy when it is threatened by internal constraints thus may require a range of interventions. It may involve restraining him from acting in accordance with the fleeting desires of the moment, until rational self-direction is restored. And it may require more. To clarify deeper or more sustained conflicts among values, or between values and desires, may require providing her with opportunities for critical self-reflection on her higher-order desires.¹⁷⁹ This process of critical self-reflection can help an agent identify or sort out which values are more fundamental or important to her, or what factors are persistently frustrating her efforts to live according to her own higher order values.

The question of how forcefully one should confront another to assist him in critical self-reflection, or value clarification, is a difficult one for autonomy theorists. On the one hand, the process of critical reflection has a social dimension and need not be done completely outside the influence of others to be respectful of autonomy.¹⁸⁰ However, respect for autonomous choice creates certain boundaries that distinguish proper and improper ways of influencing another person's value choices. Dworkin calls these boundaries the "conditions of procedural independence."¹⁸¹ According to Dworkin these conditions, also referred to as "side-constraints," would exclude techniques of control, such as "hypnotic suggestion, manipulation, coercive persuasion, and subliminal influence."¹⁸² As Stephen Ellmann has argued, they would undoubtedly allow techniques like persuasion.¹⁸³ In the intermediate zone of confrontation, such as challenging pathologies like self-deception that impede the process of critical self-reflection, it is less clear what it means to go too far.

c. Changes over time: present and future "selves"

A third kind of constraint on autonomy plays on the differences in time-oriented perspectives on freedom. The idea that the autonomous life is a process that includes decision-making over time creates the problem that the exercise of one's freedom at one point in time may constrain the exercise of one's freedom at another. In other

¹⁷⁹ DWORKIN, *supra* note 158, at 17-18 (talking about the importance of the opportunity for "critical reflection" on one's second-order preferences under conditions that do not violate standards of "procedural independence").

¹⁸⁰ *Id.* at 18. See also RAZ, *supra* note 162, at 307-20 (arguing for the stronger thesis that the formation of comprehensive goals that define one's well-being is only comprehensible within the constructs of social forms).

¹⁸¹ DWORKIN, *supra* note 158, at 18.

¹⁸² *Id.*

¹⁸³ Ellmann discusses a continuum from lawyer influence or persuasion, which he views as benign, to impermissible coercion or manipulation. Ellmann, *supra* note 67, at 721-33.

words, one's "present self" may impinge on the freedom of one's "future self."

Of course, it is morally uncontroversial that choices one makes in the present may limit the choices that are available to one in the future. Promises, plans, attachments, commitments, and the multitude of choices we make about what to do with our lives inevitably extinguish possibilities for action that are inconsistent with those choices. Indeed, the process of becoming the "author of one's own life" could be said to depend on the ability to commit oneself to endeavors that give one's life meaning over time. Without these commitments and choices, one's life could hardly be said to be "authored" at all.¹⁸⁴

However some extreme cases, in which the choices of one's "present self" undermine the ability of one's "future self" to continue the process of self-authorship, seem illegitimate from an autonomy perspective. For example, even a strong libertarian like John Stuart Mill argued that personal liberty should not include a man's freedom to sell himself into slavery: one is not "free not to be free."¹⁸⁵

Moreover, one's values may change over time. In the leading philosophical example of time-differentiated "selves," Derek Parfit posits an example that illustrates the problem of respecting the autonomous choices of a person whose values change over time.¹⁸⁶ In Parfit's example, a Russian nobleman stands to inherit a substantial estate when he is older.¹⁸⁷ In the idealism of his youth, he resolves to give the land to the peasants. However, he also foresees that as he ages he might grow more conservative, so he signs a document to automatically transfer the land to the peasants, which can be revoked only with his wife's consent. He then asks his wife to promise not to revoke the document, even if his ideals change in the future.

Parfit's Russian nobleman example highlights problems that cannot be resolved by appealing to the idea of higher-order desires, or one's "true" self. Keeping our promise not to unbind Odysseus is at all times consistent with helping him become the kind of person he wants to be, even when he hears the Sirens' call and momentarily loses sight of his ideals.¹⁸⁸ It is more problematic for the Russian nobleman to attempt to constrain his "future self" against the prospect

¹⁸⁴ Williams, *supra* note 168, at 18 (without deep partial attachments, "there will not be enough substance or conviction in a man's life to compel his allegiance to life itself").

¹⁸⁵ JOHN STUART MILL, ON LIBERTY 164 (David Bromwich & George Kateb, eds. 2003).

¹⁸⁶ Derek Parfit, *Later Selves and Moral Principles*, in PHILOSOPHY AND PERSONAL RELATIONS: AN ANGLO-FRENCH STUDY 137 (Alan Montefiore, ed. 1973).

¹⁸⁷ *Id.* at 145.

¹⁸⁸ This is the appeal for me of Dworkin's interpretation of the Odysseus example. See *supra* note 171.

of his own changing values, and for his wife to keep her promise to uphold his youthful ideals against his later conservatism. Unlike Odysseus, the values and ideals with which the Russian nobleman identifies simply evolve over time. The capacity to evolve in this way seems an integral part of the project of self-authorship, and interference with it thus seems to undermine, rather than support autonomy.

2. *The Importance of negative liberty*

Despite the various interventions that the notion of positive liberty would support, negative liberty—or non-intervention—still plays an important role in autonomy theory. The conceptions of “true autonomy” inherent in positive liberty are loaded, or as David Luban has put it, “loaded, indeed, and cocked and dangerous.”¹⁸⁹ The problem is that it is difficult to establish a standard for intervening into the choices another person is making without importing the very kind of paternalistic judgments that autonomy theorists seek to avoid. The further one gets away from assisting someone in actualizing his stated desires, the more risk one runs that one is simply imposing one’s own idea of what is good for him.

a. *Epistemological problems*

The epistemological problems inherent in figuring out what someone else “really wants” provide one really good reason to support an approach based on “negative liberty.” There is a real difference—an important difference—between helping someone achieve what *she* really wants or values, and imposing what *you think she should* really want or value on her. This distinction marks off the boundary between enhancing her autonomy and paternalistically intervening into her decision-making.¹⁹⁰ Helping someone achieve what

¹⁸⁹ Luban, *supra* note 52, at 466.

¹⁹⁰ This is not an uncontroversial statement, because it draws the boundaries between enhancing autonomy and acting paternalistically in a different place than some of the theorists on whom I rely. In particular, David Luban defines intervention based on overriding a person’s wants in favor of his or her values as a form of justified paternalistic intervention. Luban, *supra* note 52, at 472. However, it seems to me that what justifies the intervention is that it is consistent with respecting the person’s autonomy—defined as protecting the person’s capacity and opportunity to become the kind of person that she wants to be. The difference in my view on this point may be a product of the broader definition of autonomy I invoke. Luban’s later writing, for example, clarifies that his justified paternalism rests on respecting a person’s dignity, which he differentiates theoretically from respecting a person’s autonomy. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815. Luban defines respect for dignity as a respect for a person’s “being,” and respect for autonomy as respect for a person’s “willing.” *Id.* at 826. This distinction is necessitated by Luban’s recognition that our values are not always appropriately understood as having been rationally chosen by us, but may be things that “choose us” instead. *Id.* Luban’s account of value formation

she really wants is autonomy-supporting, and if the more sophisticated accounts of autonomy are correct, it can sometimes be more autonomy-supporting to intervene than to let her do what she wants to do in the moment. Imposing your views of what she should want on her is paternalistic; it is a usurpation of her ability to be the “author of her own life.” The problem is that in practice, it’s often hard to tell the difference.¹⁹¹

While our inability to know the “real values” of someone else should give us pause, it need not lead to paralysis. For example, the client-centered approach’s original proscription against lawyer advice-giving was based on a kind of epistemological skepticism that a client’s values are ultimately *unknowable* to the lawyer.¹⁹² This claim may in some sense be true, but it is based on a rigorous standard of epistemic certainty that rarely governs our day-to-day activities. In common interpersonal interaction, it is more accurate to say that the better we know someone, the more confident we can feel in making judgments about what he “really wants,” whether or not we can ever truly know the desires of another.

b. Non-rational values and commitments

Negative liberty is also defensible, as Isaiah Berlin has famously argued, because interventions in the name of positive liberty are invariably based on the problematic assumption that human ends can, in principle, be rationally harmonized.¹⁹³ Berlin is known for his moral

is characteristically eloquent and enlightening, and like much of his work it strikes me as intuitively correct. It also adds depth to the views articulated in his earlier article, which tended to envision non-rational value choices in more shallow and caricatured terms. Luban, *supra* note 52, at 474-75 (discussing “aprudentialists” who simply want to live spontaneously without regard for rationality); and at 478 (using the example of a Hell’s Angel giving reasons for preferring not to wear a motorcycle helmet). However, I understand respect for autonomy as being broader than merely respecting a client’s “willing,” and view it as encompassing respect for a client’s project of “becoming” the kind of person the client wants to be. Respect for a client’s “becoming” would include respecting the client’s freedom to evolve according to her own values, whether those values were chosen or merely acknowledged by her as central to her own understanding of what it means for her to flourish as a human being—those things that, in Luban’s terms—“chose her.”

¹⁹¹ This epistemological problem is the source, I believe, of Simon’s observation that the methodologies for a lawyer employing a “refined autonomy” approach to legal interviewing and counseling would differ little from the methodologies of a “refined paternalist.” Simon, *supra* note 78, at 224.

¹⁹² See *supra* notes 31-33 and accompanying text. The inscrutability of another’s ends has also played a part in the rejection of the ideal of client-centered lawyering, understood in its more traditional sense of “hired gun” lawyering. See Simon, *supra* note 53, at 52-59.

¹⁹³ Berlin, *supra* note 159, at 200. The problem, according to Berlin, is that there is no universal pattern that can achieve this harmony, and attempts to intervene in the liberty of individuals in the name of such an elusive good end up as forms of despotism. *Id.* at 212-14.

view that values are ultimately incommensurable and cannot be harmonized, and the political defense of liberalism that follows from this moral view.¹⁹⁴ While Berlin was making a point about political theory, it has implications for respecting autonomy in the interpersonal realm as well. Theories of positive liberty have at their core a faith in the ability and desirability of persons' developing a rationally coherent set of values to guide their behavior. This faith in rationalization explains why sophisticated views of autonomy preference higher-order desires over lower-order desires, and depend on rationalist strategies of "critical reflection" to create the hierarchy between them.¹⁹⁵

This rationalist notion of self-actualization, however, ignores the power and value in the lives of many people of choosing not to employ rationalist strategies to order their lives. For example, instead of subjecting one's desires to critical reflection and rationalization, one might choose to submit one's will to the guidance of the traditions of one's community, the authority of one's leader, or faith in one's God.¹⁹⁶ Or one might value one's relationships with family, friends, community or society in ways that make one willing to sacrifice or forego the full realization of one's ideals to preserve those connections. When confronted with a lack of adequate choices in the world, one might choose not to fight against the injustices that narrow one's options, but to avoid disappointment or frustration by adjusting one's expectations to fit the conditions of world.¹⁹⁷ Obedience, submission, faith, and resignation are antithetical to rationalist notions of autonomy.¹⁹⁸ However, they are strategies through which many people have sought to lead deeply satisfying and fulfilling lives, and they seem deserving of respect and non-intervention for that reason alone. As David Luban points out, our values deserve respect whether or not they are rational, simply because they are important components of who we are.¹⁹⁹

¹⁹⁴ Berlin's essay on negative and positive liberty is devoted in large measure to the dangers of the political misuse of theories of positive liberty. According to Berlin, some of the most illiberal regimes in history have been perpetrated by leaders seduced by the vision of a rational universe in which "the ends of all rational beings must fit into a single, universal, harmonious pattern," which can best be discerned by a ruling elite. *Id.* at 214.

¹⁹⁵ See *supra* notes 168-183 and accompanying text.

¹⁹⁶ William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 243 (1998).

¹⁹⁷ Berlin, *supra* note 159, at 182. Isaiah Berlin describes this "retreat to the inner citadel" as the strategy of "ascetics . . . stoics, Buddhist sages, men of various religions or of none," who have achieved freedom through self-transformation. *Id.*

¹⁹⁸ As Dworkin puts it, there is something counterintuitive about the idea that one becomes more autonomous by simply changing the kind of person one wants to be. DWOR-
KIN, *supra* note 158, at 16.

¹⁹⁹ Luban, *supra* note 52, at 471. Luban speculates, correctly I believe, that the dual nature of personal values as both rationally determined and constitutive of identity ac-

C. How Autonomy Theory Can Inform Client-Centered Practice

The difficulties of translating all of the theoretical variations on what it means to “truly autonomous” into a theory of lawyering should be becoming apparent. A theory of respecting autonomy based on negative liberty—leaving people to decide things free of interference from others—helps justify a rather simple model based on trying to minimize lawyer influence on a client’s decision-making process. However, as we have seen, attempting to build a lawyering theory around neutrality and non-interference is problematic. On the other hand, once we recognize the notion of positive liberty—helping people become the kind of persons they want to be—appeals to client autonomy can justify a fairly wide range of lawyering activities from changing the world in solidarity with one’s clients so that more options are available to them; to restraining a client temporarily; to confronting a client’s inner pathologies of alienation or self-deception; to keeping open options that the client does not value now but undoubtedly will value in the future. These interventions based on positive liberty are in tension with the notion of negative liberty, much in the same way that the impulses of problem-solving, holistic representation, client empowerment and other client-centered values are in tension with the techniques of neutral interviewing and counseling.

This leaves client-centered lawyers in a quandary. If you accede that lawyer intervention into client decision-making is sometimes autonomy-enhancing—as sophisticated accounts of autonomy would insist—then you need assistance in navigating the complex boundary-drawing that attends appropriate lawyer intervention in particular situations of practice. However, the notion of client autonomy, which might ostensibly reconcile these varied approaches, appears ambiguous enough to support something close to the full range of lawyering interventions that have arisen through critique of the client-centered approach’s reliance on the “appearance of neutrality.”

One response at this point would be to present a unified theory of client autonomy that would reconcile the competing tensions between positive and negative liberty on a theoretical level. This would require

counts for much of our ambivalence toward paternalistic intervention. *Id.* at 470. As Luban explains, because values are based in reason, we “feel entitled to judge a person as having the *wrong* values” and hence feel tempted “to act paternalistically toward someone whose values are weirdly different from our own.” *Id.* On the other hand, because we recognize that “values are definitive of the person who holds them” we find paternalistic intervention offensive. *Id.* Luban views this kind of respect as being outside of autonomy theory, and based instead in a respect for human dignity. See Luban, *supra* note 190. However, as explained *supra* in note 190, largely because of the broader notion of autonomy I invoke, I differ from Luban in this view and would place it within the scope of respect for a person’s autonomy.

using autonomy theory to coordinate the competing representational values at the core of client-centered representation—holistic lawyering, narrative integrity, client empowerment, partisan advocacy and client direction—into a single approach that explained the appropriate boundaries between them in terms of the single underlying value of client autonomy. This would be a worthy philosophical project. However, rather than using theory to resolve the ambiguities and tensions in client autonomy on the level of theory, I take a different tack. I suggest, for largely pragmatic reasons, that we view client-centered representation through the lens of value pluralism, as if its collection of core values are ultimately irreconcilable. The articulation of client-centered representation as a plurality of lawyering approaches is defended, explained and applied in the next section.

III. A PLURALITY OF CLIENT-CENTERED APPROACHES

This section proposes that we understand client-centered representation in terms of five sometimes complementary and sometimes competing approaches to representation: holistic representation, narrative integrity, client empowerment, partisan advocacy, and client-directed representation. These different approaches fragment the single value of client autonomy into a plurality of values that attend client-centered legal representation, which I have been calling “representational values.” This section defines each approach, explains how autonomy theory can inform its application, and shows how the set of plural approaches might be used as a vocabulary to help articulate the choices that a client-centered lawyer makes in the “difficult cases” for client-centered representation. First, however, this section defends the pragmatic choice to view client-centered representation as encompassing a plurality of lawyering approaches, drawing on recent scholarship in legal ethics about value pluralism and the disutility of high moral theory as an aid to contextualized professional judgment.

A. *Value Pluralism and Contextualized Professional Judgment*

It is increasingly appealing to some legal ethicists to draw on the moral theory of value pluralism to understand a lawyer’s professional obligations.²⁰⁰ As a moral theory, value pluralism is controversial because it explicitly rejects the idea—deeply embedded in Western En-

²⁰⁰ W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7 (1999) [hereinafter Wendel, *Public Values*]; W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000) [hereinafter Wendel, *Value Pluralism*]. See also Nathan Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75 (2000).

lightenment philosophy—that there exists an objective or unitary measure of value by which all moral decisions can be made.²⁰¹ Value pluralists insist instead that moral values (things like loyalty, fairness, honesty, kindness, etc.) are inherently in tension with one another and ultimately incommensurable.²⁰² They reject the idea that conflicting values can be coordinated at a higher level of theory that explains the ostensibly conflicting values in terms of the same basic good. As a consequence, value pluralists maintain, situations will predictably arise in which one value must be traded off against another.²⁰³ Because they reject a unitary standard or measure for resolving value conflicts, value pluralists concede that there may be more than one correct way to resolve moral conflicts, and that different people might correctly resolve them differently.²⁰⁴

By invoking value pluralism, legal ethicists make a similar claim that a lawyer's professional duties are based on values that are in inherent conflict with one another, and irreducible to a single value that determines a lawyer's ethical responsibilities in all cases.²⁰⁵ The claim that the core values of the legal profession are plural by their very nature gains plausibility from the fact that a lawyer's duties—to clients, to do justice, and to uphold the integrity of the legal system—are owed to different entities or arise from different sources.²⁰⁶ In this

²⁰¹ Most moral theory attempts to articulate an underlying principle or measure of value that will coordinate moral judgment in all cases. For example, the moral theory of utilitarianism holds that competing values can be reconciled by converting them into a unitary fungible measure, which allows them to be calculated with a kind of mathematical precision into an answer about what will result in the “greatest good for the greatest number” in any given situation. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789). Another type of objective and unitary system of resolving value conflicts relies on the application of reason. Because we, as human beings, share a capacity for reason that transcends our subjective differences, it is thought that we can use reason to access moral principles that are universally binding. See, e.g., IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSIC OF MORALS* (1785). For a more comprehensive survey of ethical monism, see Wendel, *Value Pluralism*, *supra* note 200, at 132-41.

²⁰² *Id.* at 141-52. See also Berlin, *supra* note 159, at 216 (discussing the pluralism that results from the fact that “human goals are many, not all of them commensurable, and in perpetual rivalry with one another”); Thomas Nagle, *The Fragmentation of Value*, in *MORAL QUESTIONS* 128 (1979) (discussing the fragmentation that arises from different sources of value); Bernard Williams, *Conflicts of Values*, in *MORAL LUCK* 71 (1981).

²⁰³ STUART HAMPSHIRE, *MORALITY AND CONFLICT* 152 (1983) (“My claim is that morality has its sources in conflict, in the divided soul and between contrary claims, and that there is no rational path that leads from these conflicts to harmony and to an assured solution, and to the normal and natural conclusion.”)

²⁰⁴ *Id.* at 151.

²⁰⁵ Wendel, *Public Values*, *supra* note 200, at 7-8. Wendel examines extensively, but ultimately rejects, three values proposed by legal ethicists as capable of coordinating a lawyer's competing professional duties: the principle of undivided loyalty to clients, the duty to seek justice, and an ethic of care that asks lawyers to consider the effect of their actions on human relationships. *Id.* at 37, et seq.

²⁰⁶ MODEL RULES OF PROF'L CONDUCT, Preamble par. [1] (2002) (“A lawyer, as a mem-

section, I defend the use of value pluralism in the much less plausible context of guiding professional judgment in determining a lawyer's duties to a single entity: the client.

I choose to invoke value pluralism, not because I think it is the most theoretically elegant—or even the most theoretically accurate—way to describe a lawyer's duties to her clients, but because I think it provides lawyers in practice with the most useful theoretical tool with which to approach the challenge of contextualized professional judgment. I do not make the strong value pluralist claim that the representational values at the core of client-centered representation can never be theoretically resolved or coordinated. The fact that I ground the values I discuss in the single higher-order value of client autonomy suggests that they are not actually incommensurable, and that autonomy theory can perform a coordinating function in reconciling them. I make instead the pragmatic claim that we will access theory in a way that is most useful to legal practice if we think of client-centered values as if they were plural.

In defense of my deployment of value pluralism as an aid to contextualized professional judgment, I point to the differences between what is valuable to theory and what is useful in practice. From the perspective of theory, the qualities of simplicity and elegance gain importance in the project of explaining and justifying ethical judgments. From the perspective of practice, what is needed is guidance for choice in situations of diversity and complexity.

When viewed from the perspective of practice, some of the flaws of value pluralism as a moral theory turn out to be virtues; and some of the virtues of moral theory turn out to be liabilities. For example, one moral theoretical critique of value pluralism is that it is an inaccurate, incomplete or incoherent picture of moral reality.²⁰⁷ Although right answers are difficult to discover, critics argue, answers can be found.²⁰⁸ According to this criticism, value pluralists have been seduced by an illusion of incommensurability, when what they really confront is moral complexity. The whole point of moral theory is to coordinate and explain moral complexity, and value pluralists are criticized as having given up too quickly on this task. However, whether or not value pluralism is correct as a statement of ultimate moral truth, it expresses something palpably accurate about the way we *experience* value conflict, and the phenomenological accuracy of value

ber of the legal profession, is a representative of clients, an office of the legal system and a public citizen having special responsibility for the quality of justice.”)

²⁰⁷ Wendel, *Value Pluralism*, *supra* note 200, at 152.

²⁰⁸ *See id.* at 132-63 (discussing the claim of value incomparability and surveying the various ways in which the claim of incomparability has been critiqued as mistaken).

pluralism makes it pragmatically useful. When we are faced with a situation in which different values pull us in different directions, it feels to us like an irreconcilable conflict. The fact that the conflict can be resolved at some higher level of theoretical inquiry is not an entirely satisfying answer from the point of view of someone who must take action in the face of conflict, and value pluralism's insistence that value conflicts do not admit of one right answer captures this phenomenon as we tend to experience it.²⁰⁹ A lawyer faced with a conflict in professional values needs analytical tools that help articulate the conflicting values as the lawyer sees them, and value pluralism offers those tools.

Moreover, the virtues of elegance and simplicity that theory promotes tend to wash away the nuances of real life complexity in ways that make theory inaccessible as a guide to practical judgment. To work out ideas at the level of high theory requires abstraction and oversimplification. The higher one goes in theory to coordinate and explain conflicting values, the more capaciously the higher coordinating values tend to be defined.²¹⁰ Moreover, the articulation of higher values or first principles is contested within the field of moral theory itself. Although each theorist or school of thought—utilitarianism, rights theory, etc.—strives to attain internal consistency, it cannot explain to a practitioner on the ground why she should look to it and not another school of thought to resolve her dilemma.²¹¹ As a result, from the perspective of practice, appeals to higher coordinating values like “autonomy” end up being invoked as largely empty mantras to justify the result one wants to reach, rather than utilized as guides in helping one reach those results.

These observations about the disjunction between what is important to theory and what is useful in practice resonate in a larger movement, more clearly articulated in medical ethics, which responds to the practical disutility of high moral theory by eschewing theoretical resolution of problematic moral issues in favor of strategies for contextualized case-based moral reasoning.²¹² Some in legal ethics are urging a

²⁰⁹ In fact, one great failure of unified ethical theories is their inability to adequately account for the phenomenon of “moral dilemmas” or “tragic choices” in which a moral agent feels regret in the face of a choice between two evils at having violated a moral duty regardless of which option he chooses. HAMPSHIRE, *supra* note 203, at 28-29; Williams, *supra* note 202, at 74-75.

²¹⁰ See Wendel, *Value Pluralism*, *supra* note 200, at 153-54.

²¹¹ See John D. Arras, *Principles and Particularity: The Role of Cases in Bioethics*, 69 IND. L.J. 983, 989 (1994).

²¹² For discussion of the recent history and methodology of this trend in medical ethical decision-making, see *Symposium, Emerging Paradigms in Bioethics*, 69 IND. L.J. 945 (1994). In the field of medical ethics, the strategies for contextualized ethical decision-making include at least two methodologies. One, called principlism, employs “mid-level

turn to methodologies developed in the field of medical ethics, particularly to the methodology of case-by-case reasoning known as casuistry.²¹³ The revival of casuistry in legal and medical ethics is based partly on the insight that direct appeal to the abstractions of moral theory are not particularly useful to practical ethical decision-making.²¹⁴

While I do not join the new casuists wholeheartedly, the plural approaches to lawyering presented in the next section are proposed in the tradition of the new casuistry as a heuristic device to provide a bridge between autonomy theory and client-centered practice.²¹⁵ The

principles” to serve as a framework within which specific ethical problems can be manageably discussed without attempting to resolve them into a larger moral system. Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 504-08 (1999); Arras, *supra* note 211, at 986. Tom Beauchamp and James Childress are acknowledged as the leading proponents of the principlist approach. *Id.* See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (1st ed. 1979). See also Tom L. Beauchamp, *Principles and Other Emerging Paradigms in Bioethics* 69 IND. L.J. 955, 956 (1994). The other, called casuistry, seeks to revive the medieval tradition of analogical ethical reasoning from “paradigm cases,” in which there is ethical agreement, to cases that are more ethically problematic, by using maxims, taxonomies, and the accumulated wisdom of judgments in other cases. See generally ALBERT R. JONSON & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

²¹³ Paul Tremblay has been the leading proponent of the medical ethical model of casuistry as an approach for legal ethics. See Tremblay, *supra* note 212; Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659 (2002); Paul R. Tremblay, *The Role of Casuistry in Legal Ethics*, 1 CLIN. L. REV. 493 (1994). Casuistry has also been discussed by Bradley Wendel. Wendel, *Public Values*, *supra* note 200, at 107-19.

²¹⁴ For a good survey of the failings of moral theory as a guide to practical ethical judgment, see Tremblay, *supra* note 212, 498-502; Arras, *supra* note 211, at 988-90.

²¹⁵ The taxonomy I propose is more similar to the medical ethical approach described *supra* in note 212 as “principlism,” than it is to approach described in that note as “casuistry.” While I share some of the concerns that animate the new casuistry movement, I do not share the more anti-theoretical conclusions of some—aimed at the “tyranny of principles”—that all moral theory should (or does) proceed incrementally from moral judgments in particular contexts, and become systematized only as the insights from these cases accumulate precedential weight. In the most extreme view, the “wellspring” of morality is the moral certainty that one feels in making moral judgments in particular cases, and theory operates merely to coordinate the insights from these judgments inductively, from the “bottom up.” See Tremblay, *supra* note 212, at 514-17. The appeal of this view appears to be the moral certainty and consensus that coalesces around “paradigm cases,” despite differences in the theoretical explanations and justifications that moral theories offer for the moral judgments in those cases. *Id.* at 515. A less extreme view is that theory and practice operate in a kind of dialectic in which each informs the other. See Wendel, *Public Values*, *supra* note 200, at 118 (describing casuistry as a dialectic between practice and theory); Tremblay, *supra* note 212, at 516 (invoking Rawls’ conception of “reflective equilibrium”). Bioethical theorists appear to be converging around this less extreme view. As John Arras points out, the principlists in medical ethics have recognized the value of case-based judgments as the material on which theory is based and against which it is tested. Arras, *supra* note 211, at 992-93. At the same time, the casuists in medical ethics have recognized the necessity of appeals to principle in proceeding analogically from one case to another. *Id.* at 1002-03. Moreover, in invoking casuistry, some theorists describe it broadly to include

representational value that each approach expresses is grounded in practice, but autonomy theory helps to define the parameters of its appropriate deployment. By articulating client-centered representation as a collection of distinct and plural approaches, I cannot pretend to provide right answers in any particular situation. However, I do hope to provide a tool by which client-centered lawyers can access theory to inform practice by allowing theory to illuminate and guide the exercise of professional judgment.

B. The Plural Approaches of Client-Centered Representation

This section presents a taxonomy of five client-centered lawyering approaches built around the core values of client-centered representation. Each approach—holistic representation, narrative integrity, client empowerment, partisan advocacy and client-directed lawyering—begins with a representational value and supposes an approach to lawyering that would pursue that value exclusively. Each approach is “client-centered” in that it puts the client at the center of the representation instead of something else: the client’s legal issues, the lawyer’s construction of the client, the client’s stated wishes, the interests of third parties, and the client’s best interests. Each model is also “client-centered” in that it is supported by a reasonable conception of what it means to respect client autonomy. The approaches are concededly artificial. They are intended not as full-blown alternative models of lawyering, but as component parts of a well-rounded client-centered practice. Indeed, adopting or pursuing any one of these approaches to the exclusion of the others would create a caricature of client-centered lawyering.

When faced with a difficult case in the context of actual practice, this value pluralist approach to client-centered representation would change the kinds of questions that lawyers ask themselves. The question “What would a client-centered lawyer do?” is replaced by a series of questions: What would a holistic lawyer do?; What does narrative integrity require?; What would a client-empowering lawyer do?; What would a partisan advocate do?; and What does client-directed lawyering require? If the answers to these questions pull in different directions, autonomy theory can help illuminate which value has the greatest pull.

The plural approaches of client-centered representation that I propose are laid out in the following table and explained more fully

approaches that look quite similar to what medical ethicists call “principlism.” See, e.g. HUGO ADAM BEDAU, MAKING MORTAL CHOICES: THREE EXERCISES IN MORAL CASUISTRY vii (1997); MARK G. KUCZEWSKI, FRAGMENTATION AND CONSENSUS: COMMUNITARIAN AND CASUIST BIOETHICS 3-6; 60-62 (1997).

below:

PLURAL APPROACHES TO CLIENT-CENTERED REPRESENTATION

LAWYERING APPROACH	<i>Client is at the center</i>		Autonomy Concern
	<i>instead of:</i>	<i>to prevent:</i>	
HOLISTIC	Client's Legal Issues	Lawyer misdiagnosis or narrow legal framing of client's problem	Removal of external constraints to self- actualization caused by lack of options in the world
NARRATIVE INTEGRITY	Lawyer's Construction of the Client	Lawyer distortion of client narrative in legal storytelling	Preservation of client's project of self-authorship
CLIENT- EMPOWERMENT	Client's Stated Wishes	Client misdiagnosis of what the client "really wants"	Removal of internal constraints to client self- actualization caused by client's attitudes, beliefs or unrealistic expectations
PARTISAN	Third Parties	Loss of client's legal rights and interests	Preservation of freedom for the client's "future self"
CLIENT- DIRECTED	Client's Best Interests	Lawyer paternalism	Negative liberty— client's right to be "left alone"

1. Holistic approach

The Holistic Approach to client-centered lawyering places the client as "whole person" at the center of the representation, in place of the client's legal issues. It picks up on the problem-solving theme of the original client-centered approach, expressed in the idea that clients come to lawyers with problems that need to be solved, not legal questions that need to be answered. The primary concern of the Holistic Approach is to avoid the sometimes distorting effects caused by lawyers who, viewing the client's legal issues as the center of the cli-

ent's problem, fail to take into account the importance of the non-legal considerations with which the client's legal issues are intertwined. Such lawyers, as the client-centered approach points out, are in danger of misdiagnosing the client's problems by imposing the structure of legal doctrine on the problem without understanding the full scope of the client's situation.

Taking a Holistic Approach, a lawyer will combat the tendencies to view a client's problems too narrowly by attending to the interconnected set of legal and non-legal concerns that the client's situation presents, rather than just the client's legal issues. Hence, a lawyer operating under a Holistic Approach will seek to work outside and around the law to achieve the client's goals by non-legal means. Holistic lawyering may sometimes occur through a lawyer representing a client on multiple and interconnected legal problems. For example, representing a client in a child custody dispute may require a lawyer to address other legal issues, such as getting the client immigration status or resolving a landlord-tenant dispute so that the client has an adequate home for the children. Holistic lawyering may also occur outside the parameters of purely legal strategies—such as helping a client find a job or qualify for assistance—and may sometimes be achieved best through coordinated efforts with other professionals like social workers.

Taking a Holistic Approach may enhance the client's autonomy in some ways and threaten it in others. A lawyer taking a Holistic Approach will be actively involved in a broader range of areas in a client's life. Clients may welcome this broader involvement, or they may resist it as too intrusive, putting the drive toward holistic representation in tension with the goals of client-directed representation. Some clients may not want to confront all the problems that are interconnected with their legal concerns, or they may be willing to address other problems, but wish the lawyer to contain his efforts to solving the legal problem. Lawyers who venture into holistic problem-solving may need to go beyond the boundaries of their specifically legal expertise, and this will necessitate a greater level of interactive collaboration, in which the client may or may not wish to engage. Or, the lawyer may introduce members of other professions, like psychologists or social workers, to help address other aspects of the client's situation; and the involvement of these other professionals may be appreciated or resented by the client. Moreover, the wide-ranging information needed to address interconnected problems holistically in multiple spheres of a client's life may threaten the constraints of legal advocacy. A lawyer who knows too much about her client's situation may be precluded by ethical rules from pursuing certain kinds of relief

on behalf of the client.

In terms of autonomy theory, taking a Holistic Approach is most consistent with respecting client autonomy in situations in which the client's autonomy is constrained by lack of options in the world. Like Raz's Man in the Pit or Hounded Woman, sometimes the options that the law offers fail to provide adequate solutions to a client's problems. Where the client is presented with legal options that either do not respond or respond inadequately to the client's problem, the Holistic Approach suggests that lawyers need to work to expand those options. And this need to expand the options that the law presents for solving a client's problem provides the strongest pull for the Holistic Approach.

2. *Narrative integrity approach*

The Narrative Integrity Approach to client-centered lawyering places the client at the center of the representation instead of the lawyer's construction of the client. It focuses on preserving the integrity of the client's own narrative or voice, and seeks to structure the representation as much as possible around the way the client views the world. The primary concern of the Narrative Integrity Approach is to prevent the lawyer from distorting the legal representation by recreating the client's narrative within legal doctrinal categories that fail to capture the client's perspective.

The promotion of Narrative Integrity in legal representation is grounded in autonomy concerns of negative liberty. It accords with the reasons why we believe it is important to allow others to live according to their own values, even if those values seem strange or irrational to us: because living according to our values is central to the way we define our identity in the world. Respect for a client's Narrative Integrity speaks to a specific kind of harm that comes from silencing the client's voice, which strikes at the heart of autonomy's project of self-authorship.

Somewhat paradoxically, though grounded in concerns for negative liberty, respect for a client's Narrative Integrity may impel a lawyer past neutrality into a more interactive and collaborative process of legal representation. Legal storytelling is formed by an interaction between the client's story, stories that are embedded in legal doctrine, and "stock stories" that express basic conditions of justice. To maintain the client's voice in the legal representation may require the client to participate more actively in decisions and processes that are traditionally thought of as distinctively legal and strategic in nature, such as the formulation of case theory.

Autonomy theory helps us understand that the value of Narrative

Integrity in legal representation may be most important in situations in which the client's legal story is integrally connected with the client's sense of self—where the projects of legal storytelling and the autonomy concern of self-authorship are intertwined. In some cases, where the client's pursuit of an autonomous life depends simply on achieving a result through legal channels, there may be little connection between how the client would tell his own story and how the client's story should be told in the law. For example, a client who has been charged with drunk driving may simply want to get his driver's license back so that he can keep his job. Likewise, in some cases, the client's sense of self might be better preserved by keeping the client's own story private, rather than submitting it to public scrutiny. But sometimes legal representation is itself an avenue for a client's self-expression in ways that connect the client's project of self-authorship with the telling of her legal story, such as a client who is challenging discriminatory treatment in the workplace. In such cases, the pull of Narrative Integrity is especially strong.

3. *Client-empowerment approach*

The Client-Empowerment Approach of client-centered lawyering is based on the idea that the legal representation needs to move the client in the direction of self-sufficiency and self-actualization. Its primary concern is that a client's stated wishes may not accurately reflect the client's true desires, and that lawyers who too quickly accept the client's stated wishes as "marching orders" will end up working in ways that are at odds with the client's real needs and interests. Hence it puts the client's real, true, or more fully realized interests and values at the center of legal representation, in place of what the client may initially say (or think) that he or she wants.

The ideal of client empowerment has been particularly attractive to lawyers working with communities of poor clients or with battered women, where the experience of political or social subordination is seen as having created passive or accommodating patterns of thinking and behaving, which may need to be confronted or changed before a client has the capacity to make truly autonomous choices. The strategies for assisting clients in such situations go beyond the lawyer merely spelling out the alternatives and consequences of different courses of action, and include facilitating the client's connection and solidarity with others, and helping the client sort through the multiple and conflicting narratives that may describe her situation.

The Client-Empowerment Approach is most consistent with respecting autonomy in situations in which internal obstacles constrain an individual's actualization of his higher-order desires. It addresses

the situation of clients who, like Odysseus, are blinded by the passions of the moment to their longer-term interest or deeper values. It also addresses the situation of clients who are alienated from themselves, or in the grip of self-deception. Because these individuals face internal obstacles to self-actualization, merely leaving them alone does not help them achieve full autonomy. However, attention to the way in which one intervenes to address internal constraints on the exercise of another's autonomy, captured in the notion of "side-constraints" or what Dworkin calls "procedural independence," is particularly important. Paternalistic intervention—acting for a client on the basis of what the lawyer thinks is in her best interest—also deprives her of autonomy. Respecting her autonomy requires strategies that facilitate her internal growth, and there are limits to how forcefully one can intervene to facilitate the internal growth of another.

The pull of the Client-Empowerment Approach is thus the strongest when the client's autonomy is constrained by internal obstacles arising out of his own attitudes, perspectives or beliefs. But the concern for paternalism is also the strongest in these kinds of situations, placing limits on the strategies that it is appropriate to employ.

4. *Partisan approach*

The Partisan Approach puts the client in the center of the representation in place of the interests and needs of third parties. It privileges the client's legal rights and interests, and emphasizes the protection of those rights over the rights of others. The primary concern in the Partisan Approach is that the client may give up a legal entitlement: waive a right, forego an available remedy, miss a deadline, or enter into an agreement that will limit actions the client may want to take in the future.

The autonomy concern most clearly at work in the Partisan Approach is the protection of a client's future freedom. Legal rights and interests are almost always future-directed, and giving them up often entails making commitments that limit a client's freedom to act in the future. A lawyer who truly values her client's autonomy may feel justified in intervening more forcefully to try to persuade, or even prevent, a client's "present self" from squandering the legal freedom of the client's "future self." However, autonomy theorists recognize that giving up one's freedom in the future is not *per se* a bad thing. Indeed, the project of self-authorship consists in making commitments that limit future freedom. A lawyer's attempts to interfere with a client's choice to act against her legal interests may thus impair her autonomy as well as enhance it.

Autonomy theory helps us understand and differentiate the situa-

tions in which intervention in the name of protecting a client's future freedom is autonomy-enhancing rather than autonomy-impairing. Autonomy theorists recognize the importance of future freedom in two kinds of cases: (1) cases of extreme interference with future freedom, like Mill's example of selling oneself into slavery; (2) cases in which one's values will so predictably change over time, like Parfit's Russian nobleman, that allowing one to cut off one's future options may interfere in the project of self-authorship as one's values evolve over time.

In light of these considerations, it comes as no surprise that many of the proponents of strong intervention to protect a client's future freedom would come from the realm of criminal defense, where the freedom at stake—freedom from incarceration—is particularly acute. However, intervention to protect future freedom may also be particularly appropriate to situations like divorce, where the client is undergoing a transition between phases of life, and may be either undervaluing or overvaluing interests that will take on different importance as the transition becomes complete.²¹⁶ It is in these kinds of situations where extreme deprivation of future freedom is at stake, or where a client is making irrevocable choices at a time of life transition, that protection of future freedom has a strong pull against a client's current desire to give up a legal right or interest.

5. *Client-directed approach*

The Client-Directed Approach picks up on the concern about lawyer domination inherent in more traditional visions of lawyering. Rather than concerning itself strictly with the distortions that arise from interpreting the client's problem through legal doctrinal categories, the Client-Directed Approach is concerned more broadly about the ways in which a lawyer may influence a client's decision based on what the lawyer believes is best for the client. The problem that the Client-Directed Approach addresses is less that the lawyer will be narrow-mindedly legal in his approach; and more that the lawyer will develop his own view of what would be prudent or wise for the client to do—either legally or in non-legal matters—and impermissibly interject that view into the client's decision-making.

The Client-Directed Approach is evident in the client-centered approach's skepticism about lawyer expertise on the non-legal matters

²¹⁶ Autin Sarat and William Felstiner's study of divorce lawyers' conversations with their clients, in which they observed lawyers intervening to persuade their clients to protect long-term future interests, provides an interesting example. AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 42-49 (1995).

that are most vitally important to the client. As we have seen the original client-centered approach attempted to capture the deference that lawyers should pay clients based on the limits of lawyer expertise through techniques based on lawyer neutrality. However, as the cross-cultural lawyering theorists remind us, the perhaps more critical method to protect the goal of client-directed representation is not lawyer neutrality, but the practice of lawyer self-awareness. Without self-awareness of the values and assumptions one brings to an interaction, as well as the influence one is exercising in the interaction, it is difficult—perhaps impossible—to ascertain when one is intervening appropriately. Lawyers exert a unique and personal presence in the lawyer-client relationship, and their own attitudes, interests, beliefs and assumptions inevitably shape legal representation. The practice of self-awareness encourages lawyers to adopt an attitude of vigilance toward the ways in which their personal interests may be affecting the representation, and to evaluate the appropriateness of that influence.

The Client-Directed Approach has roots in the autonomy-based ideal of negative freedom from the interference of others. It is appropriately cognizant of the epistemological problems of knowing another person's values. It is also sensitive to Isaiah Berlin's concern that the most egregious abuses of power over others may come from benevolent attempts to do what one is certain will be right for them. The pull of the Client-Directed Approach is particularly strong under conditions where the reasons for valuing negative liberty are particularly strong: where the lawyer is less certain that she truly understands the client's values; or where the client has made clear that despite the fact that her decision may seem imprudent, it is based on values that are important to her.

In the next section, I will turn to the question of practical application, and demonstrate the possibilities that these approaches hold for assisting the theory of client autonomy to inform client-centered practice on some of the thorniest issues that confront client-centered representation.

C. The Plural Approaches in Action: "Problem Cases" for Client-Centered Representation

This section employs the approaches of lawyering explained above to two scenarios that pose "problem cases" for client-centered representation: (1) counseling a client who seems poised to make an imprudent decision; (2) engaging a client in a "moral dialogue" designed to persuade the client not to undertake action that the lawyer views as immoral. These discussions show how the plural approaches can help articulate the value conflicts that inhere in figuring out what

is autonomy-enhancing in each case. They also demonstrate the limits of the client-centered approach.

1. *Imprudent decisions: “dislodging the litigation narrative”*

One troubled area for client-centered representation is dealing with the client who makes a decision that the lawyer considers imprudent. Even the originally deferential version of the client-centered approach suggested that lawyer intervention into client decision-making was appropriate if the client was poised to make an “extremely detrimental” decision.²¹⁷ A client about to make a decision with severe and lasting consequences, who is “overwrought” by a “temporary emotional state,” is an obvious candidate for autonomy-enhancing intervention, and Binder and Price initially described intervention into imprudent client decision-making in those terms.²¹⁸

Moving to less clear territory, Rob Rubinson has explored the intricacies of counseling a client bent on litigation to meaningfully consider what might often be the more prudent option of mediation.²¹⁹ Because Rubinson’s description and analysis of mediation counseling implicates a more problematic intervention, it provides interesting material for application of the plural client-centered lawyering approaches.

To give a client a meaningful option to pursue mediation, Rubinson argues, lawyers need to do more than present mediation as a possible alternative: they need to “dislodge the litigation narrative” of blame and vindication that has already shaped the way the client perceives the situation of conflict.²²⁰ According to Rubinson, mediation cannot resolve a dispute told in terms of a “litigation narrative,” because mediation is built on an utterly different narrative structure.²²¹ In mediation, conflict is perceived as a situational norm, rather than a disruption of the moral order or the fault of one of the parties.²²² Instead of attempting to find the truth of “what happened,” and thereby assigning vindication or blame, the narrative of mediation engages dis-

²¹⁷ BINDER & PRICE, *supra* note 1, at 203-210.

²¹⁸ *Id.* at 207. “Extremely detrimental” was defined as “substantial economic, social, or psychological harm in return for very little gain.” *Id.* at 203. Even with such clients, Binder and Price recommend only minimal intervention, such as suggesting that the client delay decision, or persuading the client to change his or her mind. *Id.* at 207-09.

²¹⁹ Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLIN. L. REV. 833 (2004).

²²⁰ *Id.* at 861-62. Drawing on the work of Anthony Amsterdam, Rubinson describes litigation narratives as “morality tales” in which the culpable actions of a corrupt agent have disrupted the “steady state” of the world, and the law is invoked to vindicate the “good” party and condemn the “bad” party. *Id.* at 843-46.

²²¹ *Id.* at 854.

²²² *Id.* at 856.

puting parties in a collaborative effort to resolve or transform the conflict through pragmatic problem-solving.²²³ To open up the problem-solving process to a mediated solution therefore involves deliberate confrontation and sustained efforts to re-frame the way the client sees the problem.²²⁴

After defending the need to change the narrative structure within which the client views his situation, Rubinson asks the next hard question for a client-centered lawyer: How do the lawyer's deliberate efforts to "dislodge" the client's litigation narrative comport with client-centered representation?²²⁵ Rubinson's own answer is that by "exploding the myth" of dispute at the center of the litigation narrative, the lawyer is exposing the client to a greater range of options for effective problem-solving.²²⁶

The vocabulary of plural client-centered approaches of lawyering helps explain both why Rubinson's question is a good one for a client-centered lawyer to ask, and why his answer is the best one a client-centered lawyer can give. Rubinson's question, whether it is really client-centered for a lawyer to "dislodge the litigation narrative," picks up on the fact that the kind of interventions involved in "dislodging the litigation narrative" trench on some basic client-centered values. A lawyer's attempts to challenge and change the client's narrative threaten the values that animate the Narrative Integrity Approach, of preserving the client's narrative voice in the representation. The "dislodging" strategies are a particularly invasive kind of intervention because the lawyer seeks to solve the client's problem by changing the client's conception of the problem itself. Moreover, in encouraging the client away from the assertion of legal claims or defenses in favor of informal resolution, the lawyer may be jeopardizing the client's legal interests and sacrificing the client's future legal freedom, the protection of which lies at the heart of the Partisan Approach to lawyering.

However, Rubinson's answer, that "exploding the myth" of dispute at the center of litigation narrative expands the client's options, is

²²³ *Id.* at 857.

²²⁴ Rubinson offers a "toolkit" of methods for helping a client re-frame the situation and talk about mediation options. This toolkit includes strategies of "holding conflict at a distance" by talking about the client's conflict situation in non-judgmental terms; referring to idioms in folk wisdom (like "there are two sides to every story" or "if we don't hang together we shall all surely hang alone") that reflect the cultural norms embedded within mediation; sharing "war stories" of unsuccessful litigation and successful mediation; using the "vocabulary" of mediation; and explicitly helping the client "consider the opposite" by asking the client to view the conflict from the perspective of opposing parties. *Id.* at 866-73.

²²⁵ *Id.* at 865.

²²⁶ *Id.* at 865-66.

also supported by client-centered values. The goals of the Holistic Approach, which is concerned with expanding the client's options in the world, will be served if the client's problem is ultimately addressed more effectively by breaking it out of the boxes ensconced in litigation narratives. Rubinson's suggestion that mediation may be a more prudent choice for clients raises the concern that litigation is often an expensive alternative, with a payoff that may not fully satisfy the client's underlying interests and needs. If litigation is viewed as an inadequate option that will not really solve the client's problem, it might be autonomy-enhancing for a client-centered lawyer to look outside of the most obvious legal solutions and expand the client's range of problem-solving choices by doing what the lawyer can to put mediation on the table.

The goals of Client Empowerment may also be met by dislodging a client's litigation narrative. Rubinson's contention that highly moralized litigation narratives are based on an inaccurate conception of conflict suggests that the client's expectations of the vindication that the law can deliver may be internally impeding the client from "overcoming conflict" at a more fundamental emotional and psychological level. If so, it may better meet the goals of Client Empowerment for the lawyer to confront the internal barrier to client self-actualization caused by the client's misdiagnosis of the power of litigation. The creation of mediation as an option may be seen as a way of helping the client address the disabling effects that her highly moralized view of the situation is having on her growth as a human being.

Rubinson's analysis of litigation and mediation narratives thus brings to the surface an abstractly irreconcilable conflict between competing client-centered values. Some representational values would counsel against dislodging the client's litigation narrative. A purely Client-Directed Approach would defer to the client's construction of her problem; and an approach based purely on Narrative Integrity would look for ways to tell the client's story of moral blame and vindication in legal terms. A purely Partisan Approach would seek to protect a client's future freedom by conceding nothing that might damage a client's legal rights or interests. Other representational values would push a lawyer to intervene. A purely Holistic Approach would seek to expand the client's options in the world, even if that meant dislodging the client's litigation narrative to make way for mediation; and a purely Client-Empowering Approach would look to how the client's perspective on her situation was itself getting in the way of solving her problem. Viewed purely in the abstract, it is difficult to answer the question whether "dislodging the client's litigation narrative" is autonomy-enhancing or not.

The answers come more easily by balancing the values represented by the plural client-centered approaches in the context of particular cases in light of the autonomy considerations that support each of them. The balancing of the different approaches would be different, for example: (1) in a dispute between long-term neighbors about whether one has the right to cut through the land of another; (2) in a dispute between a gay couple and a county that prohibited them from being licensed as a foster home based on a state law banning the license on grounds of their sexual orientation; and (3) in a dispute between a high school student and a school district over whether the student should be allowed to sport a purple Mohawk hairstyle in violation of school dress code regulations. What would differ in these different circumstances would be the weight or pull of the autonomy considerations attending each lawyering approach.

The pull of Holistic Approach is likely to be stronger, for example, in the example of the neighbors disputing the easement, where their long-term shared interest in peaceful cohabitation is a weighty non-legal concern that makes the deployment of narratives of blame and vindication more likely to aggravate than to solve their problem. The pull of the Narrative Integrity Approach is likely to be stronger in the case of the gay parents, whose interest in litigation may consist largely, though not exclusively, in being able to share the power of their personal story on its own terms in an effort to confront a law they view as unjust. Attempting to dislodge their litigation narrative may cut deeply into their values and sense of purpose in pursuing the litigation. The high school student's interest in challenging the school regulation that infringes his ability to express himself through an unconventional hairstyle may create a similarly strong pull from the Narrative Integrity Approach. However, the concern for protecting his future freedom that being able to complete his high school education represents may create a stronger pull from the Partisan Approach to dislodge his litigation narrative and help him mediate the dispute.

Understanding the pull of these various approaches in terms of their autonomy considerations does not provide definite answers to the conflicts between approaches in any of these cases. Each case could undoubtedly be elaborated in more factual detail in ways that would change and shift the balance between the different approaches. That kind of variability is endemic to the factual richness of context. Moreover, different client-centered lawyers might resolve the conflicts in different ways. Different lawyers may simply place more value on different approaches than others and feel the pull of the different approaches more or less strongly. This variability is also simply part of what it means to exercise professional judgment, which by its nature

cannot be reduced to a math equation. However, the plural approaches help provide a common vocabulary within which the value conflicts can be discussed. And understanding the relationship between each approach and the circumstances under which it is particularly likely to be autonomy-enhancing can help make autonomy theory part of that attorney-client discussion.

2. *Immoral decisions: the client-centered moral dialogue*

When a lawyer confronts a client poised to make a decision that the lawyer considers to be immoral, the issue of intervention becomes even thornier for client-centered representation than when the client wishes to pursue an imprudent choice. “One of the persistently difficult questions in the area of counseling,” some of the leading theorists of client-centered representation have recently noted, is whether, or under what circumstances, a lawyer should engage a client in moral dialogue.²²⁷ By moral dialogue, they mean a “counseling conversation[] in which you invoke morality, rather than solely law or the client’s pragmatic self-interest, in an effort to persuade a client to make a particular decision.”²²⁸ Because moral dialogue is especially intrusive and arguably outside of the lawyer’s professional expertise, it has been particularly suspect from the perspective of client-centered representation.²²⁹

Proponents of moral dialogue display a somewhat schizophrenic attitude toward its use. On the one hand, they recognize the concern that the lawyer may overreach and impose his values on the client; and they attempt to address that concern by putting limits on its use. Some suggest that moral dialogue is inappropriate in certain types of cases, or that its intensity should be modulated with clients who are less educated, less legally sophisticated, or especially vulnerable.²³⁰ Others suggest that moral dialogue should be approached with an attitude of humility and openness to the suggestion that it is the client who is right and the lawyer who is mistaken about the morality or

²²⁷ Dinerstein, et al., *supra* note 76, at 787-88.

²²⁸ *Id.* at 794.

²²⁹ Moral dialogue was not even mentioned in the original Binder & Price textbook. Later versions included minimal discussion. BINDER, ET AL. (1991 edition), *supra* note 4, at 282-84; BINDER, ET AL. (2004 edition), *supra* note 4, at 293-95.

²³⁰ Stephen L. Pepper, *Lawyer’s Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 194-96 (1999) (suggesting that moral dialogue may be inappropriate in situations in which the client is less educated and more dependent on the lawyer, or where the client lacks legal sophistication); Robert F. Cochran, Jr., *Crime, Confession and the Counselor-at-Law: Lessons from Dostoevsky*, 35 HOUS. L. REV. 327, 393-94 (1998) (discussing the balance of power between the lawyer and the client as an important factor to consider in deciding how to modulate the intensity of a moral conversation).

justice of the client's position.²³¹ On the other hand, the techniques that proponents suggest for actually engaging in moral dialogue sometimes look anything but humble and open;²³² and often endorse the idea that to better persuade the client, the lawyer should engage in a kind of subterfuge that hides the lawyer's moral concerns.²³³

The schizophrenic quality of most versions of moral dialogue—and the main problem from the perspective of client-centered representation—arises from the reasons that justify them in the first place. The justifications for moral dialogue are most often based, not in promoting the client's autonomy, but in respecting the autonomy of third parties who stand to be harmed by what the client proposes to do,²³⁴ or in respecting the lawyer's moral autonomy not to be forced to act in ways that contravene his moral values.²³⁵ The point of moral dialogue, under either of these justifications, is to change the client's mind. And, as Robert Dinerstein has noted, if the very point of moral dialogue is to persuade a client to follow the lawyer's moral advice, that objective can be difficult to achieve while at the same time attempting to respect the client's autonomy.²³⁶

However, by examining the issue of moral dialogue within the context of the plural approaches of client-centered lawyering, we can see that certain kinds of moral dialogue can be justified within client-centered representation under either Client-Empowering or Holistic lawyering approaches. To understand moral dialogue as essentially Client-Empowering is to understand it as an elaborate process of helping the client clarify her own values. In this view, the client's moral values are seen part of the structure of higher-order desires that

²³¹ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 174 (1988); SHAFFER & COCHRAN, *supra* note 16, at 50-54. See also Pepper, *supra* note 230, at 203 (lawyer must be aware that the client's view of morality and justice deserve respect and may be more correct than the lawyer's).

²³² See, e.g. *id.* at 203-04 (suggesting that lawyers might say "Yes, the law allows that," to a client, but use a tone of voice or body language that conveys that it would be "a terrible thing to do").

²³³ *Id.* at 204 (noting that "terms like moral, immoral, just and unjust may be off-putting to many clients, and therefore might be best avoided when the lawyer senses that to be the case"); BINDER, ET AL., (2004 edition), *supra* note 4, at 392 (suggesting that in moral dialogues, lawyers "avoid the use of the term 'moral' . . . [because] [i]ts use may exacerbate tensions rather than promote client openness").

²³⁴ LUBAN, *supra* note 231, at 173-74 (describing client counseling as a form of moral activism that can involve anything from matter-of-fact discussion of the consequences of the client's actions on others, to threats of withdrawal or betrayal of a client's projects).

²³⁵ In more recent versions of the client-centered approach textbook, moral dialogues are justified by reference to the lawyer's autonomy. BINDER, ET AL. (1991 edition), *supra* note 4, at 282 ("[y]ou do not completely surrender your autonomy by becoming a lawyer"); BINDER, ET AL. (2004 ed.), *supra* note 4, at 391 ("you too are an autonomous individual whose values and broader social concerns deserve respect").

²³⁶ Dinerstein, *supra* note 3, at 562.

help define the kind of person that the client wants to be, and helping a client act in accordance with her own moral values is appropriately autonomy-enhancing. Moreover, the situations that bring clients to lawyers are seen as often involving anger, hurt, greed or fear, any of which may pose temptations for a client to act in ways that are inconsistent with her own deeper values. The purpose of a Client-Empowering moral dialogue is to enhance the client's autonomy by re-connecting the client with her own values or higher-order desires, which are seen as being temporarily swept away by the force of more immediate but less fundamental internal forces, much like Odysseus who hears the song of the Sirens and temporarily loses sight of the goals of his voyage.

Under the Holistic Approach, the concern is not necessarily that the client has been blinded to his own moral concerns. The danger is that by discussing the legal options too narrowly, without assessing their moral dimensions, a lawyer may distort or pre-empt the client's moral decision-making by overlooking options that would permit the client to act in accordance with his values.²³⁷ Understood as an aspect of Holistic lawyering, moral dialogue is an attempt to fit the client's proposed action into the larger context of non-legal concerns within which his legal problems are nested. It assumes that, all things considered, the client would prefer to solve his problem by means that do not work injustice or harm to others. The fact that an available legal option would cause such harm is seen as a reason to look outside the law to expand his range of options.

Under either the Client-Empowering or the Holistic versions of moral dialogue, it is the failure to engage the client on moral issues, not the moral dialogue itself, which would undermine the client's autonomy.²³⁸ However, the epistemological uncertainty and respect for even irrational value choices that give weight to negative liberty are especially strong in situations where a lawyer decides to confront a client about the morality of the client's legal options or proposed course of action. Attempting to persuade the client based simply on the lawyer's own judgment of the morality or justice of the situation, without reference to the client's own values, is not defensible within the confines of client-centered representation. To the extent that the lawyer and client share moral values, the lawyer's moral judgment of the situation can be seen as a window into the way that the client would prefer to author his life,²³⁹ but the practice of self-awareness is

²³⁷ Stephen Pepper, *supra* note 230, at 188-90.

²³⁸ Proponents of the lawyer's role as a partisan advocate tend to agree. *See id.* at 191; Monroe Freedman, *supra* note 134, at 200-01.

²³⁹ "Shared values" is a criterion for dialogue that is often mentioned. Dinerstein, et al.,

crucial in this regard.²⁴⁰ The Partisan Approach of client-centered lawyering may also set limits on client-centered moral counseling. Where the moral course of action would have extremely detrimental effects on the client's future freedom, the Partisan Approach might caution restraint in counseling the client to "do the right thing," or in too readily acceding to a client's desire to forego a legal option based on moral concerns.²⁴¹

In a recent article, Stephen Ellmann, along with co-authors, discusses the propriety and methodology of moral dialogue from within a client-centered framework, and illustrates the discussion with a transcript of an imagined moral dialogue between a lawyer and a client that provides a rich contextualized example for discussing how the plural client-centered approaches might help explain the lawyer's choices.²⁴² In Ellmann's imagined dialogue, a divorce client tells his lawyer that, despite his previously expressed wishes to avoid a trial and his belief that his two young children would be better off in the custody of their mother, he wants to press for custody as a tactic to extract a financial settlement that will punish his wife for having the affair that has ended their marriage. In response, the lawyer engages in what Ellmann characterizes as "a bluntly phrased, emotionally laden near-monologue," which deliberately employs persuasive techniques like repetition, folk wisdom, and metaphor to convince the cli-

supra note 76, at 796-97; Cochran, *supra* note 230, at 394-95.

²⁴⁰ Some criteria that have been proposed as guides for when and how to engage in moral dialogue seem to work against a client-centered approach. For example, it is suggested that the "case for a moral dialogue will be stronger the greater the moral issue at stake"; and the "clearer your conviction about what is morally required in the situation, the more willing you should be to intervene." Dinerstein, et al., *supra* note 76, at 706. However, these criteria of high moral stakes and clear convictions on the part of the lawyer would seem to work against the lawyer's ability to step back from and assess whether his or her own moral judgment was coloring the assessment of the client's values. Given the fact that the lawyer, like the client, has a strong interest in acting according to her own moral values, the lawyer must remain vigilant lest the lawyer's own moral concerns overtake the project of ascertaining the client's values. In response to this kind of concern, I have argued elsewhere that a lawyer's moral commitments should be viewed as a source of "moral conflicts of interest," that can impair legal representation. Katherine R. Kruse, *Lawyers, Justice and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005).

²⁴¹ It is this balancing of Partisan concerns against Client-Empowerment goals that distinguishes other client-empowering models of moral dialogue, such as Shaffer & Cochran's "lawyer as friend" model, which prioritizes client goodness over client autonomy. SHAFER & COCHRAN, *supra* note 16, at 47. Shaffer & Cochran view moral dialogue as a central activity of lawyering, with the goal of helping clients "freely make right choices." *Id.* at 48. This commitment to the client's goodness as the primary or overriding value in the lawyer-client relationship has caused Cochran to take the controversial view, from a partisan perspective, that in helping their clients become good persons, lawyers should counsel them to confess to criminal charges. *See generally* Cochran, *supra* note 230.

²⁴² Dinerstein, et al., *supra* note 76, at 788-93. Although this article was co-authored, the portion on moral dialogue was written by Stephen Ellmann.

ent that he does not want to engage in this tactic.²⁴³ In short, as Ellmann notes, the lawyer employs a “strategy of sustained pressure to dissuade the client” from using a custody battle as a strategic device to gain ground in the financial settlement of his divorce.²⁴⁴

The lawyer in Ellmann’s dialogue can be understood as taking a Client-Empowering Approach, based on his apparent belief that the client is operating under the temporary sway of anger and revenge, which is blinding the client to his more fundamental values. By describing a nearly obsessive focus on his pain and anger about the affair, which has kept him up all night, the client has certainly given the lawyer reason to believe that his desire to play hardball on the custody issue may be the product of temporary influences that are inhibiting the operation of his deeper values.²⁴⁵ Indeed, the lawyer suggests to the client that he views the conversation as “just a bump in the road and that we’ll look back on it someday and smile.”²⁴⁶ If the lawyer is correct in this assessment, it would be autonomy-enhancing for the lawyer to intervene in the client’s decision making by rather forcefully and persuasively attempting to get the client back in touch with his deeper and more sustained desires about the kind of person he wants to be.

However, although the goals of Client Empowerment may justify this lawyer’s departure from the techniques of neutral counseling, they do not absolve him from the practice of self-awareness, and there is reason to think that the lawyer in Ellmann’s dialogue has fallen short in that regard.²⁴⁷ It clear that the lawyer has articulated his own values to himself, and thought carefully about how those values inform what he will or will not do in legal representation. At the end of

²⁴³ *Id.* at 800. The client indicates a tentative willingness to reconsider, saying, “Maybe I need to give this some more thought.” However, when the client asks whether the lawyer will pursue the hardball strategy should the client decide he wants to take it, the lawyer declines to reassure him, saying “right now, my answer would be that I’d have to resign from your case if you insist on going this route.” *Id.* at 793.

²⁴⁴ *Id.* at 803.

²⁴⁵ At the beginning of the dialogue, the client recounts that he has been “lying awake at night, re-running all the things [he and his wife] said to each other, and wondering how I could have missed the clues [that she was having an affair]”; and “when I’m not thinking about that I’m dreaming of having a chance to show this guy what a wreck he’s made of my life—or maybe just punch him out.” *Id.* at 788-89. Moreover, the lawyer has had earlier conversations, in which the client “told [the lawyer] very clearly” that he didn’t want to go to trial “because it would only make things harder for everyone”; and in which the client expressed that he “felt pretty clear that the kids would need to be primarily with their mom.” *Id.* at 790.

²⁴⁶ *Id.* at 793.

²⁴⁷ The authors ultimately fault the lawyer for “not listening better . . . to understand what the client actually wants to do, and to determine whether the client does have a moral basis for doing it.” *Id.* at 801.

the dialogue, the lawyer expresses to his client that he is one among many lawyers he knows who just won't play hardball in child custody matters—even though it is not illegal to do so—because they believe that “though in most negotiations and on most issues it's fair to play a very hard game of hardball, that isn't true when kids are at stake.”²⁴⁸ However, although the lawyer seems to know himself well, his confidence that his client shares these underlying values is less clearly grounded. He may be buttressed in his belief that his own values mirror those of his client's by the fact that he and his client have a lot in common (we are told that they are “both white, Protestant and fairly well off”); and that know each other socially (“both are avid golfers and members of the same country club”).²⁴⁹ These similarities in social background may mask a divergence in values that the lawyer has uncritically overlooked until the issue of playing hardball arose.

The autonomy concerns for protecting the client's future freedom at the heart of the Partisan Approach might also provide some basis for acting more strongly to protect the client's future parental rights that the lawyer in this case is overlooking. Although any financial settlement into which he would enter would affect his future legal interests, this client does not face an extreme deprivation of freedom—analagous to Mills's example of selling oneself into slavery. We are told, in fact, that the client is “fairly well off,” and that he has been providing two-thirds of the family's income prior to his separation from his wife. However, because the client is in transition between his married life and the new identity he will forge for himself after his divorce, it is possible that his values will change over time in ways that counsel toward keeping his options open, as in Parfit's example of the Russian nobleman. His identity as a father might be particularly susceptible to this kind of change. If so, it may be autonomy-enhancing under a Partisan Approach for the lawyer to work to keep the client's future custodial rights open to provide him the legal freedom to parent his children effectively.

An interesting unexplored detail in the dialogue illustrates this point. The client suggests to the lawyer at one point that “it's not as if I'd have no chance of getting custody if I did make a fight of it,” informing the lawyer that his wife “had her problems as a mother.” These problems include the fact that she had a nervous break-down requiring twice-a-week therapy when their youngest child was one

²⁴⁸ *Id.* If this is indeed the case, then it probably would have served both the lawyer and client better if the lawyer had articulated this limitation at the beginning of the representation, rather than waiting for it to come to a head after the client had invested a lot into the representation.

²⁴⁹ *Id.* at 788.

year old; and that “for awhile she had a drinking problem.”²⁵⁰ The lawyer appears to view this information only as possible ammunition for a punitive custody fight, rather than as a real concern for the safety of the children, and fails to explore it more fully with the client. However, it is possible that the client’s anger at his wife’s affair was opening his eyes to more seriously dysfunctional behavior about which he had previously been in denial; and that he was in the process of reassessing his initial assumption that it would be best for the children to live primarily with their mother. This recognition that his wife was not in fact a very good mother may signal a shift in his identity as a parent, impelling him to take a more active role in the upbringing of his children than he exercised as a married man.

On the other hand, any actions that this client will take as part of the divorce negotiation are quite likely to affect his relationship with his ex-wife and his children over time, making them a substantial non-legal concern. The lawyer is thus being appropriately autonomy-enhancing by favoring a Holistic Approach and suggesting to the client that he take into consideration the long-term effects of his behavior during the divorce on those relationships. By viewing the client’s situation in terms of its interrelated legal and relational aspects, the lawyer can address the client’s legal issues within the larger context of the client’s life situation.

D. *The Limits of Autonomy*

As well as Ellmann’s imagined moral dialogue demonstrates the possibilities of conceptualizing moral dialogue within the framework of client-centered representation, it also demonstrates some of the limitations of a client-centered approach, even broadly conceptualized through plural approaches to enhancing client autonomy. Most notably, the lawyer in Ellmann’s example makes repeated and perhaps unreflective choices about how to talk to his client about what the law allows and requires, none of which are determined by client-centered lawyering. Yet these choices have theoretical and jurisprudential implications, whether the lawyer realizes those implications or not.²⁵¹

²⁵⁰ *Id.* at 791.

²⁵¹ I owe this insight to the persistence of William Simon’s exploration of the jurisprudential theories implicit in lawyering in numerous articles written over many years. See, e.g., Simon, *supra* note 34; Simon, *supra* note 53; William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994). The jurisprudential choices inherent in legal counseling have also been discussed in a body of legal ethics literature that has not yet made its way into the skills literature on legal interviewing and counseling. See e.g. Stephen Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and*

The various instances of “law talk” in which Ellmann’s lawyer engages illustrate the choices that the lawyer has made about how to regard the law. For example, it is clear that even prior to this conversation, the lawyer has done little to inform the client about options that go all the way up to the arguable limits of the law, thus making an implicit choice not to treat the law purely instrumentally. The client comes up with the hardball negotiation strategy on his own, after having talked with a friend who has recently gone through a divorce.²⁵² It is not until the very end of the conversation that the lawyer admits to the client that what the client is asking him to do is not, strictly speaking, illegal.²⁵³

The lawyer also presents the law as providing “clear limits” on the client’s options, though it is actually unclear whether the lawyer is referring to the letter of the law or to its spirit. For example, at one point, the client presses the lawyer on how it can be, if marriage is a partnership, that one of the partners can cheat and still be entitled to an equal share. Although this intuition plausibly expresses something that the client perceives to be unjust, the lawyer responds by explaining that divorce law is different from commercial law, and that the law makes it “very clear” that marital fault is not relevant to financial settlement.²⁵⁴ This statement may refer to a particular statutory provision or governing case that excludes marital fault from determinations of property division; or it may be a more general statement that the introduction of “no-fault” divorces indicates a shift away from determinations of fault. Either way, the lawyer has made a choice to view or portray the law either narrowly or broadly, which has implications for how the lawyer views his role in upholding the law’s integrity.

The lawyer then moves on to interpret the law by reference to the actions of officials who are likely to enforce it, and to use those interpretations as definitive declarations of what any divorce settlement offer must include. The client pulls the information out of the lawyer that it is indeed possible to deviate from a 50-50 split of assets if the parties agree to it, because, the lawyer explains, “courts assume that, at least within a certain range, the divorcing couple knows best.”²⁵⁵ But the lawyer quickly follows this information up with the assessment that the law requires that whoever has custody of the children “has to have enough money to support the kids, and the courts are

Ethics of Lawyering, 104 YALE L.J. 1545 (1995); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

²⁵² Dinerstein et al., *supra* note 76, at 791.

²⁵³ *Id.* at 793.

²⁵⁴ *Id.* at 789-90.

²⁵⁵ *Id.* at 790.

pretty vigilant about that.”²⁵⁶ Consequently, the lawyer advises, in a way that the authors concede is inaccurate, “we have to include in our offer enough money for her to take care of the kids.”²⁵⁷

The lawyer’s stance toward the law in this imagined dialogue, perhaps unreflectively informed by the choices he has made about the kind of divorce lawyer that he wants to be, shifts between announcing the letter of the law, explaining or justifying its purposes, and predicting how it will be enforced by local court officials. The lawyer’s choices in talking about the law in these ways are not cognizable within even the more broadly defined plural approaches to client-centered lawyering. That is because the choices about how lawyers are to regard the law are not defined solely by the lawyer’s duties to enhance the client’s autonomy. They arise from a balancing of professional duties that lawyers owe to clients and duties that arise from other roles that lawyers play: as officers of the legal system, and as citizens with special responsibilities to promote justice.²⁵⁸

The inability of client-centered representation to address a lawyer’s jurisprudential choices in talking about the law points to a limitation that is rarely discussed within clinical legal education: that despite its wide acceptance, client-centered representation is not self-justifying. Just how a lawyer’s client-centered duties are to be weighed against professional duties arising from other sources are enduring questions at the center of many (if not most) debates in legal ethics. And as legal ethicists have argued, the choice to make a lawyer’s duties to clients central to a lawyer’s professional role rests on assumed or implicit political and jurisprudential commitments, which when articulated may be theoretically unsatisfactory or indefensible.²⁵⁹ The theoretical work of defining or defending client-centered representation in relationship to a lawyer’s other professional duties must be done, but it cannot be done solely by reference to what it means to promote or enhance a client’s autonomy.

The observation that client-centered representation itself needs theoretical justification points to a gap between the world of clinical education and legal practice, in which client-centered representation is largely accepted; and the world of legal ethics, in which client-cen-

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 790. The authors call this particular piece of legal advice “inaccurate.” *Id.* at 803.

²⁵⁸ MODEL RULES OF PROF’L CONDUCT, Preamble par. [1] (2002). As previously discussed, this collection of competing sources of duty is part of the impetus behind the exploration of value pluralism in the context of legal ethics. See *supra* notes 205-206 and accompanying text.

²⁵⁹ See generally LUBAN, *supra* note 231; WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS (1998).

tered representation is largely condemned or treated with scorn.²⁶⁰ However, perhaps contributing to the gap between practical and theoretical conceptions of client-centered representation, the debates within legal ethics are often carried out in terms that reduce client-centered representation to a kind of caricatured “hired gun” lawyering,²⁶¹ in which lawyers are impelled by the pursuit of client objectives all the way to the limits of what the law arguably allows.²⁶² While this simplification assists the elegance of theory, it renders clients and the lawyers who represent them unfamiliar—almost unrecognizable—to lawyers seeking to engage in thoughtful ethical reflection in the contexts of practice in which they are embedded.²⁶³

Exploring with more complexity what it means to promote or enhance a client’s autonomy opens up the possibility that the underlying political and jurisprudential commitments that client-centered representation entails can be articulated with more depth and nuance. Changing the contours of one’s client-centered duties requires changes to the boundaries between those duties and competing duties to the legal system and to promote justice. More nuanced political and jurisprudential analysis of these changed boundaries, in turn, holds out the hope of making theory more adept at informing contextualized professional judgment beyond a commitment to client-centered representation.

²⁶⁰ As Norman Spaulding has recently noted, “[i]t has become quite unfashionable [in legal ethics] to defend vigorous, client-centered lawyering.” Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 *COLO. L. REV.* 1, 1 (2003).

²⁶¹ See Crystal, *supra* note 200, at 86 (discussing client-centered representation as “hired gun” lawyering); SHAFFER & COCHRAN, *supra* note 16, at 15-29 (equating client-centered representation with being a “hired gun”).

²⁶² See, e.g. SIMON, *supra* note 259, at 7 (“the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim”); LUBAN, *supra* note 231, at 12 (“the lawyer must, within the established constraints on professional behavior, maximize the likelihood that a client’s objectives will be achieved”). As one recent article claimed, lawyers “commonly do, and indeed are often required to do, things in their professional capacities which, if done by ordinary people in ordinary circumstances would be straightforwardly immoral”; namely “to lie, to cheat and to abuse.” Daniel Markovitz, *Legal Ethics from the Lawyer’s Point of View*, 15 *YALE J.L. & HUM.* 209, 212, 219 (2003).

²⁶³ See Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 *Wis. L. REV.* 1529; Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer’s Point of View*, 16 *YALE J. L. & HUM.* 45 (2004).