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## The Lawyer's "Conscience" and the Limits of Persuasion

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# THE LAWYER'S "CONSCIENCE" AND THE LIMITS OF PERSUASION

*Abbe Smith\**

## I. INTRODUCTION

Like most criminal lawyers, I like to think of myself as a trial lawyer. It's in my interest to do so. Among other things, it makes me a much more popular dinner—and perhaps conference—guest. I confess that I tend to tell trial stories more than, say, a guilty plea story. I tell these trial stories to other criminal defenders (to show that I'm keeping up), to students (to enhance my credibility), and to friends and family (because everybody loves a good story). But the truth is, like most criminal lawyers, I spend much of my time—more time than I like to admit—counseling clients about guilty pleas.

The time I spend on guilty pleas is consistent with the fact that the overwhelming number of criminal cases is resolved by such pleas. According to the most recent Justice Department data, more than ninety-five percent of convictions in both state and federal court are due to guilty pleas.<sup>1</sup> It is also consistent with the fact that the single most important decision in any criminal case is whether to go to trial or plead guilty.<sup>2</sup>

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\* Professor of Law, Georgetown University Law Center, and Co-Director, Georgetown University Law Center Criminal Justice Clinic and the E. Barrett Prettyman Fellowship Program. I want to thank Roy Simon for inviting me to the 2007 Legal Ethics Conference, Suneel Nelson for superb research assistance, and my good friends and co-conspirators Judy Levin, Ilene Seidman, and Ellen Yaroshefsky for helpful conversations. I also want to thank Anthony Amsterdam and Monroe Freedman, two intellectual heroes who are with me every time I defend a client right up to the "edge." This Article is dedicated to the great Catherine (Katie) Roraback, feminist, criminal lawyer, and civil libertarian, who died on October 17, 2007, at 87. She was a friend as well as a role model.

1. In 2004, of approximately 528,480 felony convictions in state courts, 95% were guilty pleas. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2004, at tbl.4.1 (Matthew Durose, July 25, 2007) (unpublished statistics on file with author, also available at [askbjs@usdoj.gov](mailto:askbjs@usdoj.gov)). In the same year, of 92,645 criminal cases prosecuted in federal court, 96% of those convicted pleaded guilty. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 2 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs04.pdf>. In federal court, guilty pleas were registered for 99% of immigration offenders, 97% of drug offenders, and 95% of property offenders. *Id.* at 59. During 2004, only 4% of 83,391 defendants whose cases were resolved exercised their right to a trial. *Id.* Of those who went to trial, the felony trial conviction rate was 80%, while the misdemeanor conviction rate was 64%. *Id.*

2. 1 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (5th ed. 1988).

Of course, as all practicing lawyers know, interviewing and counseling are at the heart of legal representation.<sup>3</sup> This is what lawyers do, even criminal trial lawyers: we talk with and advise clients. Sometimes, after considering the government's case and available defenses, we advise clients to go to trial. More often, we advise them to take a plea.

In counseling our clients we can be as "client-centered"<sup>4</sup> as the next lawyer, graciously acceding to our clients' wishes. This is especially so when the client is making what we regard to be a reasonable choice. But clients are not always reasonable. Sometimes they are inclined to do things that are not only foolhardy or ill-considered, but disastrous. When there is no question that going to trial will be to a client's serious detriment—there will be a quick conviction followed by a harsh sentence—and the client does not seem to recognize this, good defenders usually feel they must do whatever it takes to get through to the client.

Although I have been practicing criminal law for more than twenty-five years, and writing about it for nearly as long, I am still thinking about how best to do this. It turns out very little has been written about how to effectively persuade criminal clients to cut their losses and take a plea. More has been said about what not to do than what one should do. To my mind, the most helpful directive on how to counsel clients to plead guilty or go to trial is also the most inscrutable. It is from Anthony Amsterdam's *Trial Manual 5 for the Defense of Criminal Cases*, probably the best criminal trial manual ever written:

[C]ounsel may and must give the client the benefit of counsel's professional advice on this crucial decision; and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive.

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3. See Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357, 360 (2006) ("Effective client interviewing and counseling constitute the core of legal representation and serve as the basis for the trust and rapport that are essential to a successful attorney-client relationship.").

4. See generally Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (examining the multiple meanings of client-centeredness); Paul R. Tremblay, *Critical Legal Ethics*, 20 GEO. J. LEGAL ETHICS 133, 140 n.36 (2007) (book review) (identifying as the central premise of client-centeredness "that lawyers ought to respect the ultimate choices of their clients, rather than seek to impose their own choices, on questions of legal objectives as well as tactics").

The limits of allowable persuasion are fixed by the lawyer's conscience.<sup>5</sup>

This Article concerns itself with where exactly the line should be drawn by a lawyer of conscience, and whether persuasion bordering on coercion might sometimes be required in zealous criminal defense.

## II. WHAT I MEAN BY COERCION

Simply and forcefully communicating the truth can feel "coercive" to some clients.<sup>6</sup> A bleak trial forecast can feel coercive. The inevitability of a prison sentence can feel coercive. Clients often prefer options other than the ones they have.

The sort of coercion I have in mind goes beyond honest, painful counseling. I mean a range of behaviors, both subtle and not so subtle. On the subtle side is the deliberate use of trust, fear, guilt, sadness, and grief. Not so subtle behaviors include ganging up, hounding, and outright bullying.

A useful illustration of appropriately forceful persuasion is from the 1990 HBO movie *Criminal Justice*.<sup>7</sup> The movie, starring Anthony LaPaglia as a public defender and Forest Whitaker as his client, offers an unusually realistic depiction of a run-of-the-mill crime—a robbery and assault of a drug-using prostitute in a "crack spot" in Brooklyn—and its aftermath.

Whitaker, who has been in trouble before, is identified by the complainant (played by Rosie Perez) in a lineup a few days after the crime. Perez admits to using drugs and doesn't know Whitaker, but is certain that he is the man who attacked her. Whitaker emphatically denies having committed the crime. Though he is desperate to get out of jail—he has a young son at home—he wants to go to trial.

In a scene midway through the movie, LaPaglia informs Whitaker that their motion to suppress identification has been denied. He also tells Whitaker that the prosecutor (played by Jennifer Grey) has made a generous, one-time only, time-limited plea offer of two to six years. LaPaglia thinks Whitaker should seriously consider the offer. If convicted at trial, Whitaker is facing a minimum of ten years in prison, and will likely get more. The crime was brutal: the complainant is

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5. 1 AMSTERDAM, *supra* note 2, § 201, at 339.

6. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1309 (1975) (noting that under the American guilty plea system, "the line between advice and coercion seems virtually nonexistent" because "accurate advice is almost always coercive").

7. CRIMINAL JUSTICE (Home Box Office 1990).

permanently disfigured. The fact that Whitaker has done time before doesn't help.

Whitaker is not concerned about sentencing because he believes he will win at trial. In his view, the case against him rests on the testimony of a crack addict who was attacked by a stranger in a dark hallway after a drug buy. He doubts the complainant will show up for trial. Not only will Whitaker tell the jury that it was not him, but he also has a "good alibi"—his mother will testify that he was home watching a movie on TV at the time of the crime. He is fierce in his refusal to even consider a plea.

What follows is an intense verbal clash in which LaPaglia shoots down his client's alibi, his plan to testify, and his overall assessment of the case. The alibi will be crushed by a couple of cross-examination questions demonstrating the mother's bias. If Whitaker testifies, the prosecutor will lay out his prior record to the jury. Although the complainant is a drug user, she showed up at the grand jury, has already identified Whitaker twice, and will surely do so at trial—wearing a visible slash across her face. LaPaglia matches Whitaker's fierceness in tone, volume, and profanity. Still, Whitaker resists. He does not get it. He lashes out at LaPaglia for suggesting that his mother is lying. He says he would "take probation." Finally, LaPaglia tries to make the difference between the plea and post-trial sentence as concrete as possible to his client. He asks Whitaker how old his son is. Whitaker says, "Three." LaPaglia says the difference between the plea and the sentence after trial is the difference between walking his kid to kindergarten and seeing his kid graduate from high school. He says to his client, "Do you get that?" He then says that he does not know what happened that night, but if Whitaker did the crime he should take the plea.<sup>8</sup> Whitaker says he needs to think.

Many of my students—and at least some post-graduate fellows—are upset by this scene. They think LaPaglia goes too far, that he plays on his client's emotions, that the use of the client's three-year-old son is psychologically coercive.

I think what LaPaglia does is good lawyering. It doesn't come close to being unduly coercive.<sup>9</sup> Certainly, LaPaglia is hard on his client. He

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8. At no time does LaPaglia suggest that he would provide anything less than zealous advocacy if Whitaker refuses the plea. Indeed, LaPaglia assures his client that, if he chooses to go to trial, LaPaglia will do everything in his power to obtain an acquittal. He even lays out his cross-examination strategy.

9. It certainly is not coercive as a matter of law, as courts are loath to undo a guilty plea as involuntary on either due process or ineffectiveness grounds. *See, e.g., Williams v. Chrans*, 945 F.2d 926, 933 (7th Cir. 1991) (citing *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976)) (finding that verbal persuasion, no matter how strong—even where the attorney acknowledges an

does not mince words. But he is an effective counselor. It is his job to convey in a meaningful way the difference between a plea offer and his client's chances at trial under a strict deadline. He does so by reviewing the evidence and contrasting possible outcomes. He uses the perfect measure—his client's son's age—to render the difference between two years and fifteen years palpable.

Any good defender would do what LaPaglia does. No diligent, client-centered lawyer would blithely accept a client's repudiation of an excellent plea offer without intense engagement. Many defenders would go further than LaPaglia.

Another example of "coercion" comes from Professor Albert Alschuler's seminal article on plea bargaining—*The Defense Attorney's Role in Plea Bargaining*.<sup>10</sup> In the article, he discusses the case of *United States ex rel. Brown v. LaVallee*,<sup>11</sup> a capital murder case in New York in which prostitute Roy C. Brown was alleged to have "cut to ribbons" a businessman who had procured his services.<sup>12</sup> Notwithstanding the brutality of the murder, Brown maintained that he acted in self-defense and wanted to go to trial. His attorneys—four experienced court-appointed lawyers—thought this was a mistake. They believed that if Brown went to trial he would be convicted on all charges and sentenced to death.<sup>13</sup>

The lawyers negotiated a plea in which Brown would plead guilty to second degree murder and the capital murder charge would be dropped. In addition, a separate attempted murder case—the facts were similar to the other case but the victim survived—would be dismissed. There was no deal as to the specific sentence. Brown refused the plea and insisted on a jury trial.

For ten months, things remained at an impasse. The lawyer continued to urge the plea. The client continued to reject it. Then, in the hope that someone close to Brown might help persuade him, the lawyers brought Brown's mother in from Texas. The mother, Mrs. Parker, agreed with the lawyers that it was foolish for her son to go to trial and risk a death sentence.<sup>14</sup> She met with her son and had a "stormy and emotional" confrontation.<sup>15</sup> During the confrontation, Mrs. Parker pressed her son to consider her feelings and those of his brothers and

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intention to "coerce"—does not render a guilty plea involuntary). I am more interested in coercion as a matter of ethics than constitutional law.

10. Alschuler, *supra* note 6.

11. 424 F.2d 457 (2d Cir. 1970).

12. *Id.* at 459.

13. *Id.*

14. *Id.*

15. *Id.*

sisters. She told him how hard it would be to come to New York and “claim a body that had been electrocuted, for a mother to have to do something like that.”<sup>16</sup> Although Brown explained that he did not believe a jury would find him guilty of murder, his mother kept pleading with him. She told him he was “going to the electric chair.”<sup>17</sup> When she became “hysterical” and “very upset,”<sup>18</sup> Brown finally gave in. He then wrote out and signed a letter dictated by his lawyers in which he stated his intention to plead guilty. Two days later, after a repeat performance by his mother, he appeared in court and pled guilty.

Prior to sentencing—indeed, soon after his mother went back to Texas—Brown decided he had made a mistake. He wrote to the trial judge asking to withdraw the plea. The judge refused. Although a federal district court found the plea involuntary and granted a new trial, the Court of Appeals for the Second Circuit reversed. Not only did the Second Circuit find the plea “voluntary in every respect,”<sup>19</sup> the court found it to be a “rational choice.”<sup>20</sup> The court discussed Brown’s situation pragmatically:

Brown’s belief that he had a good defense to the charge was ranged against the well-considered advice of his lawyers and the pleading of his mother. All of his closest advisors believed that he would certainly be found guilty by a jury and that he might well be sentenced to death. The lawyers in good faith presented their experienced assessment of Brown’s situation. Brown’s mother forced him to consider the effects which a conviction of murder in the first degree, and perhaps execution, would have on the family.

The realities of the defendant’s situation and the shattering effect of an unsuccessful defense are the very ingredients of a rational choice for one in Brown’s position. In the months [sic] of the prosecutor or trial judge, these statements might have been coercive; coming from [the defense] lawyers and his mother, they were sound advice.<sup>21</sup>

Notwithstanding the “difficult” and “traumatic” decision Brown faced, the court rejected the suggestion that his will was “overborne.”<sup>22</sup>

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16. *Id.*

17. *Id.*

18. *Id.* at 460.

19. *Id.* at 459.

20. *Id.* at 461.

21. *Id.* at 460-61.

22. *Id.* at 461. The court explains:

If [Brown’s] will is defined as a predetermination to contest his guilt, certainly this was overcome: the proposition is self-evident, for almost every claim that a plea was coerced involves an initial determination not to plead guilty. Indeed, almost every guilty plea is preceded by a plea of not guilty. When, however, Brown’s will is assayed at the time he

Alschuler disagrees. He describes the lawyer as making "calculated use of family members to induce pleas of guilty."<sup>23</sup> He accuses the lawyer of engaging in "emotional cajolery."<sup>24</sup>

I believe the trial court should have allowed Brown to change his mind and withdraw his guilty plea prior to sentencing. Where there is no demonstrable prejudice to the Government, trial courts should exercise their discretion to allow an accused—especially when charged with a serious offense—to withdraw a plea and go to trial.<sup>25</sup> However, I have no problem with emotional cajolery by lawyers or, for that matter, mothers.<sup>26</sup> This time-honored method of persuasion is sometimes needed to effectively convey "sound advice."<sup>27</sup>

The only thing that troubles me about the Brown case is the lawyers making the client sign a letter locking in his "intention to plead."<sup>28</sup> Judges, prosecutors, and probation and parole officers make defendants

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had reached a reasoned assessment of all the factors militating for and against a plea, it is apparent that his decision was a free and rational choice.

*Id.*

23. Alschuler, *supra* note 6, at 1192.

24. *Id.* at 1194. Alschuler cites other cases as well.

25. See *Gooding v. United States*, 529 A.2d 301 (D.C. 1987) (en banc) (D.C. Court of Appeals decision holding that judges should liberally allow the withdrawal of a guilty plea prior to sentencing). The defendant in *Gooding* had sought to withdraw the plea shortly after it was entered, alleging it was involuntary. The court found that timing is key: "A swift change of heart is itself a strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the government's legitimate interests." *Id.* at 307.

26. As the daughter of a Jewish mother, and a Jewish mother myself, perhaps I'm accustomed to a certain amount of maternal coercion.

There are, of course, times when mothers—and those who enlist them—cross a line. See, e.g., *KEN KESEY, ONE FLEW OVER THE CUCKOO'S NEST* (1962) (Nurse Ratched's devastating use of Billy Bibbit's mother to curb his defiance); *ONE FLEW OVER THE CUCKOO'S NEST* (United Artists 1975) (film version). Bibbit, the only voluntarily committed patient in the psychiatric ward where the story takes place, is a scrawny, suicidal, stammering teenager with a fixation on his mother. Ratched keeps him in line by humiliating and dominating him, just like his mother. When Bibbit at last asserts himself after his first sexual encounter—and talks of leaving the hospital—Nurse Ratched tells him she has spoken to his mother who is very disappointed in his behavior. Bibbit promptly commits suicide.

27. Alschuler refers to several cases in which lawyers and family members helped persuade the accused to plead guilty. See Alschuler, *supra* note 6, at 1191-94; See, e.g., *United States ex rel. Brown v. LaVallee*, 424 F.2d 457, 459-60 (2d Cir. 1970); *Parrish v. Beto*, 414 F.2d 770, 771 (5th Cir. 1969) (capital case in which defendant's mother, sister-in-law, and attorney successfully persuaded him to plead guilty for a ninety-nine-year sentence); *St. Clair v. Cox*, 312 F. Supp. 168, 170 (W.D. Va. 1970) (capital case in which defendant's attorney, mother, sister, and brother-in-law persuaded him to plead guilty for an eighteen-year sentence); *Denson v. Peyton*, 299 F. Supp. 759, 761-62 (W.D. Va. 1969) (capital case in which defendant's attorney, mother, and sisters persuaded him to plead guilty for a fifty-year sentence); *State v. Maloney*, 434 S.W.2d 487, 490 (Mo. 1968) (capital case in which the defendant's mother tells her son that if a death sentence were imposed "it would kill [the defendant's] grandmother, and she [the mother] would commit suicide," thus prompting the defendant to plead guilty for a life sentence).

28. *Brown*, 424 F.2d at 460.



sign agreements, not their own lawyers. On the other hand, I can understand why, after nearly a year of wrangling, the lawyers might want to firm up their client's hard-won change-of-heart. Continued ambivalence might have led to the unraveling of the plea in court and the loss of the plea option entirely.<sup>29</sup> Although I wouldn't recommend that defenders routinely require clients to sign such letters, it doesn't cross an ethical line.

The lawyer's use of the mother is something all good defenders do—or should do—especially when the stakes are high, disaster is certain, and the lawyer does not seem to hold much sway.<sup>30</sup> All criminal lawyers might take a page from the American Bar Association's 2003 *ABA Guidelines for the Appointment and the Performance of Defense Counsel in Death Penalty Cases*, which repeatedly refer to enlisting family members, friends, clergy, and other prisoners to help persuade the client not to make a self-destructive decision.<sup>31</sup> The commentary to Guideline 10.9.1, "The Duty to Seek an Agreed-Upon Disposition," states:

In addition to persuading the prosecution to negotiate a resolution to

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29. Clients who have not fully committed to a plea often balk during the "plea colloquy" in court. Suddenly, they resist giving up trial rights, dispute the prosecution's statement of facts, and cannot say "Guilty."

30. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guidelines 10.5, 10.9.1, 10.9.2, and commentary (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf> [hereinafter GUIDELINES]; see also Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, CHAMPION, Nov. 1999, at 68, 70 (urging defenders in death penalty cases to enlist family members and others); Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA L. REV. 1157, 1163-64 (2003) (noting that it is helpful for death penalty defense lawyers to enlist additional allies such as a member of the client's family in providing a "reality check about the evidence and the serious risk of execution"). For a "structural-psychological" perspective on plea-bargaining that suggests family involvement can help challenge client "denials" or offset client "overoptimism," see Stephanie Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2522-23 (2004).

31. The commentary to Guideline 10.5, "Relationship with the Client," spells out the importance of enlisting others to counsel the capital client:

Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect overwhelming feelings of guilt or despair rather than a rational decision. . . . One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison.

GUIDELINES, *supra* note 30, at Guideline 10.5, commentary (footnote omitted).

the case, counsel must often persuade the client as well. . . . The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.<sup>32</sup>

Experienced capital defender Kevin Doyle suggests that defenders enlist the following allies: capital experts (someone who will tell the client "horror stories" and convince him that a trial will be disastrous); family members (a parent who will beg the client to take a plea to spare the family); God (telling the client who has found religion that taking a life plea is what God wants because of how much good the client can do teaching God's word in prison).<sup>33</sup> Though Doyle acknowledges that this is "hardball,"<sup>34</sup> he expresses no concern about it being unduly coercive. He worries instead about not being forceful enough: "[I]f you don't pull out all the stops, you will only regret it on the eve of an execution."<sup>35</sup>

### III. A NOTE ON COERCION IN THE CRIMINAL JUSTICE SYSTEM GENERALLY

It goes without saying that the plea bargaining system, which is a dominant force in the American criminal justice system, is often coercive and unfair.<sup>36</sup> The plea regime regularly induces people to give up fundamental trial rights in order to avoid excessively harsh

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32. *Id.* at Guideline 10.9.1, commentary.

33. Doyle, *supra* note 30, at 70. Doyle suggests that if the client shrugs and says "It's in God's hands," remind him what Reverend [Martin Luther] King taught: "Those who shoulder their burdens in God's plan have faith; those who expect God to do everything have only superstition."  
*Id.*

34. *Id.*

35. *Id.*

36. There is a substantial body of legal scholarship critical of the plea bargaining system. A small sample includes Alschuler, *supra* note 6, at 1180 (criticizing the plea bargaining system as an "irrational" system that can lead attorneys to make decisions against their client's best interests); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) (offering reforms to end the practice of plea bargaining); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) (arguing that plea bargaining is "unfair" and a decision not relevant to the goals of criminal proceedings); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 111-12 (1968) (criticizing plea bargaining as failing to objectively evaluate the goals of punishment and treatment); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976) (discussing judicial plea bargaining as a possible plea bargaining system); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) (comparing the modern plea bargain system to the medieval law of torture); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984) (arguing against the widely held belief that plea bargaining is "necessary" or "inevitable"); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) ("[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.").

punishment.<sup>37</sup>

In discussing how lawyers might best operate within this system, I do not mean to endorse it. I am certainly not endorsing the dreaded stereotype of the court-appointed “plea lawyer” who never tries a case and makes a living—often because judges prefer these lawyers to zealous advocates—by steering clients into guilty pleas.<sup>38</sup> I am interested instead in how diligent and zealous lawyers, after fully investigating the case,<sup>39</sup> protect their clients from a corrupt system, and also from the client’s own bad judgment.

Good lawyers receive little guidance about how to counter the worst in the system—prosecutors who routinely overcharge, judges who punish defendants for asserting their right to trial, guidelines sentencing, mandatory minimum sentencing, excessively harsh sentencing for crimes that do not warrant it—and yet provide effective counsel. Lawyers who do what they can to limit their clients’ exposure instead of escorting them to the gallows should know that this is quintessential zealous advocacy. You do not have to go to trial to be a zealous lawyer. Sometimes, it’s better not to.<sup>40</sup>

I do worry that in espousing “coercion” with a client under certain circumstances I might embolden feckless lawyers. These are the lawyers who fail to properly prepare—they hardly meet with their clients, fail to conduct investigation, neglect to file pretrial motions, and so on<sup>41</sup>—and yet press clients to plead guilty based on a quick reading of the police report. They don’t distinguish among clients or cases. They bully their clients for no reason. No doubt they are afraid of going to trial.

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37. See generally *Frontline: The Plea* (PBS television broadcast June 17, 2004) (documentary film critically examining plea bargaining).

38. See Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 856 (1998) (noting the perception among many indigent defendants that “their lawyers are interested only in getting them to plead guilty”).

39. I acknowledge that sometimes full investigation will not be possible because, for example, there are multiple defendants and the first one to offer cooperation will obtain the greatest benefit. Counseling under these circumstances can be very challenging.

40. See Linda Greenhouse, *‘Bad’ Legal Advice and the Death Penalty: Justices to Hear Idaho Case About Rejected Plea Deal in Murder*, N.Y. TIMES, Nov. 6, 2007, at A22 (reporting that the United State Supreme Court will hear an Idaho case, *Arave v. Hoffman*, that addresses whether poor legal advice during plea negotiations in a capital murder case might violate the Sixth Amendment). Relying on the advice of a lawyer who had never tried a murder case the accused in *Hoffman* went to trial for murder, was convicted, and received a death sentence rather than accept a plea for life in prison. *Id.* The lawyer urged a trial under the mistaken belief that the legality of the death penalty was in flux in Idaho and the client would never be executed. *Id.*

41. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (offering examples of appalling defense lawyering); Stephen B. Bright, *Turning Celebrated Principles into Reality*, CHAMPION, Jan./Feb. 2003, at 6 (discussing the failed promise of *Gideon*).

But I think it's important to talk about what many good defenders already do, and to "name" it for others.<sup>42</sup> My own regrets as a lawyer are those cases where I did not press the client enough. Other good lawyers feel the same way.<sup>43</sup> No one stays awake at night worrying about having pressed too hard.<sup>44</sup>

#### IV. A NOTE ON CLIENT-CENTEREDNESS

Much has been written about client-centered representation.<sup>45</sup> But sometimes the ideal of client-centeredness—lawyer "neutrality," lawyer "humility," the "primacy of client decision-making," the customer is always right<sup>46</sup>—sits uncomfortably in the rough and tumble of practice.<sup>47</sup>

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42. See Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 37 (1993) ("There are times when a criminal lawyer, if he or she is a caring and zealous advocate, must lean hard on a client to do the right thing. The clearer the right thing is . . . the stronger the advice.").

43. See, e.g., *Frontline: The Plea*, *supra* note 37 (NYU law professor Claudia Angelos discussing her failed efforts to persuade Patsy Kelly Jarrett, an innocent woman who had served ten years of a life sentence, to plead guilty in exchange for release from prison); see also Doyle, *supra* note 30, at 69-70.

44. It is true, however, that many thoughtful commentators have struggled with exactly how much pressure to put on a client. See, e.g., William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 224 (1991) (fretting that he had let a client make the wrong choice but not wanting to be "paternalist"); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 97 (1995) (urging respect for client autonomy but noting that "it would be very poor lawyering to simply permit a client to proceed to trial on a hopeless case without trying to convince that client to consider plea bargaining").

45. See *supra* note 4 and accompanying text. The most-cited model of client-centered counseling comes from DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); see also DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004). This model has been particularly influential in clinical legal education. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 507-11 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 733 (1987); Michael Meltsner, *Celebrating The Lawyering Process*, 10 CLINICAL L. REV. 327, 328 (2003); Zeidman, *supra* note 38, at 876-82.

46. Kruse, *supra* note 4, at 375-85 (discussing the history and development of the client-centered approach to legal representation); see generally BINDER & PRICE, *supra* note 45 (explaining the lawyer's role under a client-centered approach).

47. To my mind, the best example of the ideal of client-centered representation coming into conflict with the reality of criminal practice is the Theodore Kaczynski (Unabomber) case, in which a brilliant but disturbed capital defendant opposes being depicted as mentally ill in order to mitigate culpability or avoid a death sentence. For an excellent account of the case, see William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52; see also Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998), for a discussion of the lawyering dilemmas in the Unabomber case and the author's own representation of a mentally ill client, and Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417 (2000), also discussing the Unabomber case. For a trenchant, soul-searching discussion of the issues in the case by a federal appeals court judge, see *United States v. Kaczynski*, 239 F.3d 1108,

Moreover, as one recent commentator has noted, client-centered representation means different things to different lawyers, depending on the circumstances.<sup>48</sup>

I believe that, in criminal defense, client-centeredness is spending the time to counsel and ultimately convince a client to hang on to as much liberty as he or she can. As a prominent capital defender put it, client-centered criminal defenders “take off” their watches and earn the client’s trust with “patience,” spending “hours and days with a client to persuade him to . . . make the right decision . . . and to own it fully.”<sup>49</sup> Client-centered defenders do not take a client’s ill-considered, irrational, or immature “no” for an answer. Instead, they lend perspective and guidance. They give the client the wisdom and strength to make a difficult, unpleasant decision.

So-called client-centered lawyers can do damage to their clients by “simply acquiesc[ing]”<sup>50</sup> to their foolish wishes. This is an abdication of professional duty out of a “false sense of respect for [client] autonomy.”<sup>51</sup> It can also be a cover for laziness, for being afraid to really engage with a client, or worse.

Moreover, uncovering a client’s autonomous wishes is more complicated than simply asking the client what he or she wants to do. The words “I ain’t takin’ no plea”<sup>52</sup> can mean many different things: I’m

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1119-28 (9th Cir. 2001) (Reinhardt, J., dissenting).

[W]hat should be the fate of a man, undoubtedly learned and brilliant, who determines, on the basis of a pattern of reasoning that can only be described as perverse, that in order to save society he must commit a series of horrendous crimes? What is the proper response of the legal system when such an individual demands that he be allowed to offer those perverse theories to a jury as his only defense in a capital case—a defense that obviously has no legal merit and certainly has no chance of success? What should the response be when he also insists on serving as his own lawyer, not for the purpose of pursuing a proper legal defense, but in order to ensure that no evidence will be presented that exposes the nature and extent of his mental problems? The district judge faced these questions and, understandably, blinked.

*Id.* at 1119.

48. See Kruse, *supra* note 4, at 369-75. Kruse notes that there is a “growing lack of consensus about what it means to be a client-centered lawyer” and there is now a “plurality of approaches, which expand aspects of the original client-centered approach in different directions.” *Id.* at 371. “Taken together,” Kruse says, these various approaches “define a richly elaborated philosophy of lawyering that strives at once to be client-directed, holistic, respectful of client narrative, client-empowering, and partisan.” *Id.* at 372. I am in the “partisan” camp. See *id.* at 372 (“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.”).

49. Doyle, *supra* note 30, at 70.

50. GUIDELINES, *supra* note 30, at Guideline 10.5, commentary.

51. Doyle, *supra* note 30, at 69.

52. See Abbe Smith, *I Ain’t Takin’ No Plea: The Challenges in Counseling Young People Facing Serious Time*, 59 RUTGERS L. REV. (forthcoming 2008).

scared about what is happening to me; I don't like any of the choices available to me; I don't trust you; I don't trust anyone.

#### V. FROM CAJOLERY TO COERCION: LOOKING FOR TECHNIQUES THAT WORK

The methods diligent lawyers employ to save their clients from disaster run the gamut. Not every method will work with every client. Some clients will require every conceivable method.

I suggest the following:

##### A. *Ganging Up, Double and Triple-Teaming Clients*

Lawyers should bring in other lawyers to help persuade clients to do the right thing—the makeup of which depends only on what might work with the particular client. Age, race, and gender are key factors. Repeated visits may be necessary.

##### B. *Using Family Members*

In capital and non-capital cases, lawyers should bring in family, friends, clergy, anyone who might be able to influence the client.<sup>53</sup> Many capital defenders are specifically trained to reach out to and recruit mothers, no matter how estranged mother and client might be. This can be difficult but is well worth the effort.

##### C. *Relentless Talk: Pestering, Hocking, Hounding*

Lawyers should speak plainly and not mince words. No matter how unpleasant, we must tell our clients the truth. Lawyers should also ask a lot of questions. They should make clients explain their position and spell out why they do not want to plead.

Lawyers must be persistent. In order to effectively counsel clients who are about to do something they will soon regret (and ultimately blame you for), you have to be willing to pester and hock and hound. You have to spend time. You have to be willing to do a lot of talking, find different ways of saying the same thing, and be willing to repeat yourself. Although there might come a time when the pestering and hocking becomes excessive or threatens to damage the lawyer-client

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53. In capital cases involving foreign nationals, some consulates work with defense lawyers to persuade clients to take a plea and avoid the death penalty. These government officials from the client's home country can be very helpful. See INTERNATIONAL JUSTICE PROJECT, BRIDGING THE GAP: EFFECTIVE REPRESENTATION OF FOREIGN NATIONALS IN U.S. CRIMINAL CASES 9-10 (2d ed. 2005), available at <http://www.internationaljusticeproject.org/pdfs/BridgingtheGap2nd.pdf>.

relationship, this is usually a long way down the road. So long as you make plain that in the end it is the client's decision—and you will zealously defend the client at trial if that is what the client wants<sup>54</sup>—there is no need to fear for the relationship. Good lawyers know how to avoid the breaking point.<sup>55</sup>

#### D. Use of Silence

Lawyers should sometimes stop talking, and “just sit and wait out [the] client's angry silences.”<sup>56</sup> Silence can be the best way to get another person to start talking. This can be hard sometimes—most lawyers are not good with silence. But it's important not to get frustrated or give up.<sup>57</sup> As any good psychotherapist will tell you, all kinds of feelings may surface in silence.

If you must speak, say very little. Say to the client, I'm sad about this. And then be quiet.

#### E. Use of Emotion

Lawyers should “[f]ilibuster, plead, argue, cajole. . . . [and] [s]ometimes cry.”<sup>58</sup> They should yell and carry on and get worked up. This decision matters and the lawyer should act like it does. Some counseling sessions are emotionally grueling, leaving both lawyer and client drained. These sessions are far more taxing than actually trying the case—something I often say to the client. It's much more fun for *me* to try the case, I tell these clients. And I am ready to try the case. But it's not good for *you*. That is why I'm killing myself here, talking till I am blue in the face, trying to get you to do the wise thing.

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54. See 1 AMSTERDAM, *supra* note 2, § 201, at 339 (“Of course, s/he must make absolutely clear to the client that if the client insists on pleading not guilty when the lawyer thinks a guilty plea wise, the lawyer will nevertheless defend the client vigorously and will raise every defense that the client legitimately has.”).

55. I noted in previous work that I believe in “arm-bending but not arm-breaking” in client counseling, see Smith, *supra* note 42, at 37 (“Arm-twisting is not arm *breaking*.”), but later admitted that I might be willing to fracture a limb under certain circumstances. See Smith, *supra* note 52. In some cases, my “conscience” would rest easier with my client's arm in a cast rather than regretting that I had not bent hard enough. See Uphoff, *supra* note 44, at 131 (“[H]ow hard counsel can lean turns on the seriousness of the case, the harm facing the defendant, the client's ability to make informed decisions, the certainty of the harm, the client's rationale for his or her decision and the means used to change the defendant's mind.”).

56. Doyle, *supra* note 30, at 70.

57. See *id.*

58. *Id.*

### F. Bullying and Manipulation

By bullying, I mean applying pressure. Forceful language is sometimes necessary, even verbal abuse, even yelling. Badgering, cajoling, needling, riling, inciting—all are methods that might help a client to finally see the light.<sup>59</sup> Again, I seldom worry about exerting too much pressure. I worry instead about failing to exert enough.<sup>60</sup>

By manipulation, I mean a range of techniques that might work to get under the client's skin, get them to lower their defenses, and ultimately get them change their minds.<sup>61</sup> I do not mean threatening to withdraw if the client doesn't go along with the lawyer<sup>62</sup> or suggesting

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59. See Alschuler, *supra* note 6, at 1310 (referring to "badgering" and "cajolery," along with "verbal abuse").

60. See *id.*

[D]efendants may not fully realize the extent of the penalty that our system exacts for an erroneous tactical decision. For these reasons, a Chicago public defender observed, "A lawyer shirks his duty when he does not coerce his client," and this statement suggests a fundamental dilemma for any defense attorney working under the constraints of the guilty-plea system. When a lawyer refuses to "coerce his client," he insures his own failure; the foreseeable result is usually a serious and unnecessary penalty that, somehow, it should have been the lawyer's duty to prevent. When a lawyer does "coerce his client," however, he also insures his failure; he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve. The defense attorney's lot is therefore not a happy one—until he gets used to it.

*Id.*

61. For a thoughtful examination of the role of manipulation in client counseling, see Ellmann, *supra* note 45. Ellmann defines manipulation broadly:

[M]anipulation includes a wide range of behavior. Some of this conduct will be frankly exploitative, while some will be intended to be benign. Some will profoundly and permanently breach a client's right to choose for himself, while some may in the long run vindicate this right. Some, finally, will be unjustifiable, while some may be proven to be essential to the proper practice of law.

*Id.* at 727; see also David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 458 ("[A] lawyer's manipulating a case or client for the client's own good—or, rather, for what the lawyer takes to be the client's own good even though the client does not see it that way. . . is called paternalism."); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15-24 (1975) (discussing paternalism in the lawyer-client relationship); cf. Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 176-81 (1990) (critically discussing David Luban's endorsement of certain kinds of client manipulation in the course of reviewing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988)).

62. See Alschuler, *supra* note 6, at 1310 (arguing that a defense lawyer should never threaten to withdraw because a client declines to take the lawyer's advice regarding a plea, and arguing that professional codes should be revised to "make this action grounds for professional discipline"); 1 AMSTERDAM, *supra* note 2, § 201, at 339 (same); see also ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 cmt., at 201 (3d ed. 1993) (allowing the use of "fair persuasion" to counsel a defendant to accept a plea bargain, but not "undue influence"); PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 6.3(b) (Nat'l Legal Aid & Defender Ass'n, 1995) ("The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to *unduly influence* that decision.")



less than zealous representation at trial. I also do not mean lying to clients.<sup>63</sup>

### G. *Five Stages of Grief*

Many clients have been victimized in myriad ways and can be fairly said to suffer from loss and trauma.<sup>64</sup> Others have a strong sense of their victimhood, whether real or not. (Society, the police, parents, judges, and lawyers are to blame for the client's plight.) They need to move past an unhelpful sense of being the "injured party" in order to make a good judgment.

Helping a client through the five stages of grief—denial, anger, bargaining, sorrow, and acceptance<sup>65</sup>—is an essential part of the guilty plea process. Sometimes clients must grieve in order to let go, acknowledge reality, and accept the least destructive alternative.<sup>66</sup>

### H. *Prohibited Methods*

As noted above, I would rule out only three methods in counseling clients: threatening to withdraw,<sup>67</sup> suggesting less than zealous advocacy at trial, and lying or misrepresenting.<sup>68</sup> I have mixed feelings about enlisting the judge or prosecutor to help persuade the client, but I would not rule it out entirely.

## VI. CONCLUSION

There is no one-size-fits-all approach to client counseling, no single method that works with every client. Some clients are more vulnerable

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(emphasis added). *But see* Uresti v. Lynaugh, 821 F.2d 1099, 1102 (5th Cir. 1987) (finding that counsel may request permission to withdraw if the client insists on making the "foolhardy" choice of going to trial in lieu of pleading guilty).

63. *See generally* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (discussing whether lawyers should be permitted to lie to clients, the things lawyers lie about, and how all this can be regulated).

64. *See generally* Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163 (2007) (discussing the importance of specialized training for students and lawyers representing clients who have experienced trauma).

65. *See generally* ELISABETH KÜBLER-ROSS, ON DEATH AND DYING (1969) (offering research on people coping with terminal illness and arguing that when people confront death they go through a cycle of emotional states in order to cope with grieving); Smith, *supra* note 52.

66. *See* Joe Nocera, *Fastow's Long Walk to Less Time*, N.Y. TIMES, Sept. 30, 2006, at C1 (describing how Enron defendant Andrew Fastow moved through "denial, depression, anger, acceptance and, finally, surrender").

67. *See supra* note 62 and accompanying text.

68. *See supra* note 63 and accompanying text.

than others.<sup>69</sup> Some are more easily manipulated. Some are more stubborn.

Lawyers should be resourceful in the techniques they employ in client counseling. They should be responsive to individual clients, dogged in their efforts, and not easily discouraged. They should be able to be both gentle and tough, depending on what works best. They should not refrain from the most forceful persuasion when to do otherwise would be destructive.

The approach I propose applies to the innocent and guilty alike. Innocent clients face the same dangers at trial and sentencing as guilty clients, sometimes worse.<sup>70</sup> Although no lawyer likes advising innocent people to plead guilty, sometimes this is the wisest course. If refusing a plea would be destructive, lawyers should employ the same degree of persuasion with an avowedly innocent client as with an admittedly guilty one.

Of course, ultimately the decision to plead or not is the client's.<sup>71</sup> No matter how strongly the lawyer may feel, the client has the last word on whether he or she pleads guilty or goes to trial. This fact distinguishes the plea situation from "strategic decisions" where lawyers are generally allowed to override client wishes.<sup>72</sup> It is clearly the client's right to make a bad decision here.<sup>73</sup>

In the end, Amsterdam's "conscience"<sup>74</sup> is a helpful construct. It is a way of asking: *Can I live with myself?* And it turns out, I can. I can coerce with a clear conscience if doing so helps a client ward off disaster or make the better of two bad choices. In a sentencing regime that routinely sends the convicted away for decades—or kills them—so long

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69. I acknowledge that indigent clients are in a more vulnerable position with "coercive" lawyers than clients who have the means to hire and fire lawyers. Clients with money can get rid of lawyers who are too heavy-handed. However, as long as court-appointed lawyers and public defenders make clear that they will advocate zealously if the case goes to trial, their clients will be well served.

70. Although it happens less frequently, the approach I favor applies as well to urging a trial over a plea. Some risk-averse clients jump at a plea that is plainly not in their interest. Good lawyers talk them out of it.

71. See Alschuler, *supra* note 6, at 1310 ("If, after all the badgering, the cajolery, and the verbal abuse is concluded, a defendant still insists that he wishes to stand trial, the attorney's ethical obligation is simply to carry out his client's decision.")

72. See Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 799 (2000) (arguing in favor of greater respect for clients' tactical decisions). *But see id.* at 825 (confessing that he would not let clients make every foolish decision).

73. See *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) ("The wisdom or unwisdom of the defendant's choice does not diminish his right to make it." (quoting *Wright v. Estelle*, 572 F.2d 1071, 1079 (5th Cir. 1978) (Godbold, J., dissenting))).

74. 1 AMSTERDAM, *supra* note 2, § 201, at 339.

as the client makes the final choices, there is nothing wrong with a little coercion.