

## chapter 5

### *Fifty Shades of Manipulation*

It ranks among the most powerful scenes in the history of American television. Don Draper, the star of the series *Mad Men*, is charged with producing an advertising campaign for Kodak, which has just invented a new slide projector, with continuous viewing. It operates like a wheel. Using the device to display scenes from a once-happy family (as it happens, his own, which is now broken), Draper tells his potential clients<sup>1</sup>:

*In Greek, "nostalgia" literally means, "the pain from an old wound." It's a twinge in your heart, far more powerful than memory alone. This device isn't a spaceship. It's a time machine. It goes backwards, forwards. It takes us to a place where we ache to go again. It's not called the Wheel. It's called a Carousel. It lets us travel the way a child travels. Around and around, and back home again . . . to a place where we know we are loved.<sup>2</sup>*

The Kodak clients are sold; they cancel their meetings with other companies. Now consider the following cases:

1. A parent tries to convince an adult child to visit him in a remote town in Nebraska, saying, "After all, I'm your father, and I raised you for all those years, and it wasn't always a lot of fun for me – and who knows whether I'm going to live a lot longer?"
2. An automobile company advertises its new vehicle by showing a sleek, attractive couple exiting from it before going to a glamorous party.
3. In an effort to discourage people from smoking, a government requires cigarette packages to contain graphic, frightening, even gruesome health warnings, depicting people with life-threatening illnesses.<sup>3</sup>

<sup>1</sup> See Mad Men Quotes, Internet Movie Database, available at [www.imdb.com/title/tt1105057/quotes](http://www.imdb.com/title/tt1105057/quotes).

<sup>2</sup> Revealingly, nostalgia actually means "longing for a return home," rather than "pain from an old wound."

<sup>3</sup> On the FDA's effort to require graphic warnings on packages, see *R. J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36 (D.D.C. 2011), *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012). For the government's own graphic campaign, see CDC, *Tips for Former Smokers*, available at [www.cdc.gov/tobacco/](http://www.cdc.gov/tobacco/)

4. In a campaign advertisement, a political candidate displays highly unflattering photographs of his opponent, set against the background of frightening music, suitable for a horror movie. An announcer reads quotations that, while accurate and not misleading, are taken out of context to make the opponent look at once ridiculous and scary.
5. In an effort to convince consumers to switch to its new, high-cost credit card, a company emphasizes its very low “teaser rate,” by which consumers can enjoy low-cost borrowing for a short period. In its advertisement, it depicts happy, elegant, energized people, displaying their card and their new purchases.
6. To reduce pollution (including greenhouse gas emissions), a city requires public utilities to offer clean energy sources as the default providers, subject to opt-out if customers want to save money.

Both public and private law are pervasively concerned with the problem of coercion, arising from the literal use of force. Under the U.S. Constitution, the Due Process Clause is designed to impose procedural safeguards in the event of actual or threatened coercion on the part of government. If private actors plan to resort to force, both criminal law and the law of tort will stand in their way. There are also legal constraints on lying and deception.<sup>4</sup> The First Amendment protects commercial advertising, but it does not ban regulation of false or deceptive commercial speech.<sup>5</sup> The Federal Trade Commission is explicitly authorized to control “unfair and deceptive” trade practices.<sup>6</sup>

But what of manipulation, undertaken by either private or public institutions? There is surprisingly little sustained analysis of the topic, at least within social science and law.<sup>7</sup> To be sure, there is a great deal of work

campaign/tips/resources/videos/. For evidence of success from graphic warnings, see Press Release, CDC, *Report Finds Global Smokers Consider Quitting Due to Graphic Health Warnings on Packages* (May 26, 2011), available at [www.cdc.gov/media/releases/2011/p0526\\_cigarettewarnings.html](http://www.cdc.gov/media/releases/2011/p0526_cigarettewarnings.html).

<sup>4</sup> Within Anglo-American law, deceit has long been tortious. See *Derry v. Peek*, L.R. 14 App. Cas. 337 (1889); John Hannigan, *Measure of Damages in Tort for Deceit*, 18 B.U. L. Rev. 681 (1938). An extensive body of law deals with the related issue of misrepresentation. See John Cartwright, *Misrepresentation, Mistake and Non-disclosure* (3d ed. 2012). On the ethical issues associated with lying, see Sissela Bok, *Lying* (2011).

<sup>5</sup> See *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>6</sup> 15 U.S.C. §57a (a)(1)(B).

<sup>7</sup> The most valuable treatment involves the analogous problem of deception. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. Rev. 657 (1985); *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. Cal. L. Rev. 549 (1991). As we shall see, manipulation is a different concept, and it is much harder to define and police. Craswell’s superb discussions nonetheless bear on the question of regulating manipulation and indeed help show why regulation is so difficult.

on lies and deception,<sup>8</sup> and we can identify an overlap among lying, deceiving, and manipulating. We could even see manipulation as a master concept that includes lying and deceiving, or understand the three to be on some kind of continuum. Certainly this is so if our master principle is autonomy; if so, the three violate that principle, though for somewhat different reasons. (I shall have something to say about the extent to which this is so.) But in ordinary usage, it is reasonable to think that the concept of manipulation is distinctive, certainly in the sense that it can occur (as in the mythical Kodak commercial) without lies or deception (at least in their standard forms).

What does manipulation entail, and what is wrong with it? How, if at all, should the law respond to it – for example, in the context of consumer protection or in constraining government itself? When is influence manipulative, or unacceptably so? Are nudges manipulative, and ethically objectionable for that reason?

It should be clear that an action does not count as manipulative merely because it is an effort to influence people's behavior. If you are a passenger in a car, and you warn the driver that he is about to get into a crash, you are not engaged in manipulation. The same is true if you remind someone that a bill is due. A calorie label and an energy efficiency label are classic nudges, but they are not ordinarily counted as forms of manipulation. So long as a private or public institution is informing people, or "just providing the facts," it is hard to complain of manipulation.<sup>9</sup> There is also a large difference between persuading people and manipulating them. With (nonmanipulative) persuasion, people are given facts and reasons, presented in a sufficiently fair and neutral way; manipulation is something different.

It is often thought that when people are being manipulated, they are treated as "puppets on a string."<sup>10</sup> Almost no one wants to be someone else's puppet (at least without consent), and in some respects, it is

<sup>8</sup> See Craswell, *Interpreting Deceptive Advertising* (1985), for the seminal discussion.

<sup>9</sup> A qualification is necessary. If a disclosure requirement focuses on one of many aspects of a situation, and fixes people's attention on that aspect, a charge of manipulation would not be unreasonable. Consider the controversy over the idea that sellers should have to disclose that food has genetically modified organisms (GMOs). See Charles Noussair et al., *Do Consumers Really Refuse to Buy Genetically Modified Food?*, 114 *Econ. J.* 102 (2004). For those who object to compulsory labeling about GMOs, there is a plausible claim that labels are a form of manipulation, activating public concern where there is no objective reason for that concern. Of course those in the private sector might engage in similar forms of manipulation, drawing people's attention to a feature of a product that, while real, appears far more important than it actually is.

<sup>10</sup> See T. M. Wilkinson, *Nudging and Manipulation*, 61 *Political Studies* 341, 342 (2013).

especially bad to be a puppet of government. Many of the worst governments in history have attempted to turn their citizens into puppets.<sup>11</sup> If we keep the puppet metaphor in mind, the idea of “manipulation” can be applied to many kinds of behavior; but it is not entirely clear that it is a unitary concept, or that we can identify necessary and sufficient conditions.<sup>12</sup> Manipulation takes multiple forms. It has at least fifty shades, and it is reasonable to wonder if they are tightly identified with one another.

The principal goal of this chapter is to make progress in understanding what manipulation is and what is wrong with it. If we can make progress on those tasks, we should be better equipped to assess a wide range of problems in ethics, policy, and law. For example, plausible objections might be made to acts of government that can be counted as manipulative; such objections might not treat citizens with respect. There are also free speech questions. When the government compels speech, is there a difference between mandating a purely factual disclosure and mandating one that has arguably manipulative features? Are there circumstances in which manipulative speech, on the part of government, raises constitutional problems<sup>13</sup> or otherwise runs afoul of existing law<sup>14</sup>? When is advertising manipulative, and if it is, what, if anything, should be done about it? How, if at all, should government respond to manipulative behavior by the private sector – for example, in the context of financial products (such as credit cards or mortgages)? In the United States, an understanding of manipulation bears directly on the work of the Consumer Financial Protection Bureau (CFPB) and might help to orient some of its work,<sup>15</sup> which is unquestionably concerned with the problem.

<sup>11</sup> See Frank Westerman, *Engineers of the Soul: The Grandiose Propaganda of Stalin's Russia* (2012); Susan Bachrach, *State of Deception: The Power of Nazi Propaganda* (2009).

<sup>12</sup> For a number of instructive treatments, see *Manipulation: Theory and Practice* (Christian Coons and Michael Weber eds., 2014).

<sup>13</sup> A possible “yes” answer is provided in *Wickard v. Filburn*, 317 U.S. 111 (1942), though the Court ruled “no” on the particular facts, where the Secretary of Agriculture gave an arguably manipulative speech on behalf of a referendum: “There is no evidence that any voter put upon the Secretary's words the interpretation that impressed the court below or was in any way misled. There is no showing that the speech influenced the outcome of the referendum.” *Id.* at 116.

<sup>14</sup> Labor law has an important pocket of doctrine that raises this question, though the fundamental problem is coercion (in the form of threats) rather than manipulation. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>15</sup> See the discussion of potential regulation of payday loans in Alan Zibel, *CFPB Sets Sights on Payday Loans*, *Wall St. J.*, Jan. 4, 2015, available at [www.wsj.com/articles/cfpb-sets-sights-on-payday-loans-1420410479](http://www.wsj.com/articles/cfpb-sets-sights-on-payday-loans-1420410479).

## A Definition

Unfortunately, it is not easy to give a simple definition of manipulation, and I shall spend some time explaining why. The best account, I suggest, counts an effort to influence people's choices as manipulative *to the extent that it does not sufficiently engage or appeal to their capacity for reflection and deliberation*. The word "sufficiently" leaves a degree of ambiguity and openness, and properly so. It is not possible to know whether manipulation is involved without asking about the sufficiency of people's capacity to deliberate on the question at hand.<sup>16</sup> We can imagine clear cases of manipulation (subliminal advertising<sup>17</sup>), cases that clearly fall outside of the category (a warning about deer crossings in a remote area), and cases that can be taken as borderline (a vivid account of the advantages of a particular mortgage or a redesign of a website to attract customers to the most expensive products).<sup>18</sup>

If this is our account of manipulation, or indeed if we adopt any vaguely similar account, it should be clear that most nudges do not fall within the category. At least in general, information disclosure does not manipulate people; it is an effort to appeal to their deliberative capacities. The same is true of reminders, which may counteract the unfortunate effects of selective attention or procrastination. Warnings might cross the line into manipulation, and I shall devote some attention to that topic, but most do not; they simply give people an understanding of risks. It is hardly clear that the charge of manipulation is fairly made against an accurate statement about existing social norms: "most people pay their taxes on time" or "most people who attend this college do not abuse alcohol" or "most people in your community use less energy than you do." I shall bring the discussion of manipulation in direct contact with various nudges at multiple points.

It is important to emphasize that countless choices are at least partly a product of variables that do not involve reflective deliberation – and choosers tend to be unaware of that fact. Do you really know about all

<sup>16</sup> Compare the related discussion in Anne Barnhill, *What Is Manipulation?* in *Manipulation: Theory and Practice* 50, 72 (Christian Coons and Michael Weber eds., 2014).

<sup>17</sup> See Augustus Bullock, *The Secret Sales Pitch: An Overview of Subliminal Advertising* (2004).

<sup>18</sup> Importantly, the word "sufficiently" applies to the degree of reflection and deliberation that are involved; it does not speak to the issue of justification. For example, would-be kidnappers might be manipulated (in the sense that their deliberative capacities are bypassed) by police officers who are trying to stop a kidnapping, and a terrorist might similarly be subject to (justified) manipulation.

the variables that have affected your decisions this week? The cold weather? A delicious lunch? The fact that a friend was very kind to you, or perhaps a bit cruel? The success of your favorite sports teams? A minor headache? A smile from a salesperson, or a frown? The color of the wrapper that contains the candy bar? The music that is playing in the background? The fact that the salesperson is male or female? The fact that a product was at eye level or on the right-hand side?

It is also true that manipulation can occur when manipulators overload, and do not bypass, people's deliberative capacities. You can easily imagine long, complex forms, requiring calculations that strain people's abilities, and that are devised to do exactly that. In a way, complexity targets people's capacity to deliberate, but it can be manipulative if it breeds confusion.

The problem of manipulation arises when choosers can justly complain that because of the intentional actions of a manipulator, they have not, in a sense, *had a fair chance to make a decision on their own*.<sup>19</sup> Often the distinguishing mark of manipulation is a justified sense of *betrayal*: Having found out what happened, or having reflected on it a bit, people think that they have not been treated properly.

Of course there are degrees of manipulation, as some forms of influence attempt to bypass deliberation altogether (such as subliminal advertising), and other forms merely try to influence it by triggering certain forms of automatic processing (e.g., through framing a problem so as to provoke the desired response). Some forms of manipulation can claim explicit or implicit consent. Romantic partners sometimes manipulate one another, and it can be fine, even fun (though sometimes of course not so much). Some forms of manipulation are modest and relatively benign. In the Kodak commercial, the goal is to connect the product with a set of evocative associations – childhood, a carousel, and a magical ability to recapture, and make permanent, a lost past. Is that kind of thing

<sup>19</sup> There is, however, a set of cases that complicate the definition I offer here, and that suggest that it does not exhaust the category of manipulation. Suppose that people's judgments are properly and legitimately automatic and not a product of deliberation. (Immediate attractions to certain foods or persons are plausible examples.) We can imagine efforts to alter those automatic judgments through rational arguments that cannot be characterized as manipulative. But we can also imagine efforts to alter those judgments that do not involve rational arguments at all. A friend, or an outsider, might attempt to use associations, or vivid pictures of some kind, to create a relevant change. The question is: Mightn't such cases involve manipulation, even if they do not involve judgments that ought to involve reflection and deliberation? That question raises the possibility that nondeliberative efforts to alter properly nondeliberative judgments might also be counted as manipulative. But discussion of this possibility would take me beyond my focus here. I am grateful to Anne Barnhill for raising this point, and see her discussion in *What Is Manipulation?* (2014).

objectionable? Maybe so, but it's part of daily life, and it would be pretty fussy to wish it away.

Manipulation often occurs through such associations, which are a pervasive feature of political campaigns. Those who run for office are skilled in the art of manipulation, so understood, and increasingly the science too. Perhaps the most famous, or infamous, example of associative political advertising is Lyndon Johnson's genuinely terrifying "mushroom cloud" advertisement in his 1964 campaign against Barry Goldwater, ending, "The stakes are too high for you to stay home." If you look at any campaign, in any democratic nation, you will find politicians attempting to associate their opponents with something scary, ridiculous, foolish, or ugly, perhaps with effective music and graphics. Often they will be engaging in a form of manipulation – though we might question whether voters, once informed of the strategy, would feel betrayed, or would instead think something like "that's politics" or "all's fair in love and war, and in electoral campaigns."

Of course, the concept of manipulation extends far beyond the use of associations. Manipulators, inside and outside governments, often describe choices so as to make certain outcomes vivid and appealing (such as purchases of lottery tickets, which can lead to a life of ease and leisure), or vivid and unappealing (such as failures to buy life insurance, which can lead to a life of poverty and distress for survivors) – even though a more neutral frame would present the whole problem in a less tendentious manner, leaving the chooser in a more objective position to weigh the relevant variables (and in that sense more free).

#### Autonomy, Dignity, and Welfare

A central problem with manipulation is that it can violate people's autonomy (by making them instruments of another's will) and offend their dignity (by failing to treat them with respect). The manipulator is leading the chooser *to make a choice without sufficiently assessing, on the chooser's own terms, its costs and its benefits*. For this reason, the most strongly felt moral objections to manipulation involve dignity. The objections reflect a sense that people are not being treated respectfully. Their own capacities and their agency – to assess, to weigh, to judge – are not being given appropriate deference. For those who mount these objections, a central question is whether choosers have given appropriate consent to the act of manipulation, or whether the manipulator has properly inferred consent under the circumstances.

From the point of view of welfare, the objection to manipulation is much less straightforward. Some people can benefit (a great deal) from being manipulated. Consider a smoker or an alcoholic who desperately wants to quit, or someone on a terrific date who really wants to stay out late (but needs some cajoling). Within limits, being manipulated can be a lot of fun. In some forms, manipulation is a form of play, undertaken with a smile and a wink. (A speculation: Those who are intensely opposed to manipulation, in all its shades and forms, lack a sense of humor.) But in other forms, it is not fun at all, even deadly serious (consider efforts to manipulate kidnappers or terrorists). On welfarist grounds, there is no simple evaluation of manipulation, at least if we embrace the foregoing definition.

The foundation of the welfarist concern, I suggest, is the view, associated with Mill and Friedrich Hayek,<sup>20</sup> that the chooser, and not the manipulator, knows what is in his best interest. Of course Mill's principal concern, and Hayek's too, is with coercion, but the welfarist objection to manipulation stems from the same source: a belief that choosers know best. It follows that the anti-manipulation principle is strongly derivative of Mill's Harm Principle; it suggests that choosers ought to be able to make their own decisions, and that the role of others should be restricted to informing them or attempting to persuade them (without manipulation).

If choosers know best, then the welfare-increasing approach is to avoid manipulation and to engage (or boost) the chooser's deliberative capacities. But the manipulator refuses to do that. The skeptic wonders: *Why not?* A tempting answer is that the manipulator is promoting his own interests, and not those of the chooser. The use of manipulation, rather than (say) information or persuasion, creates a risk that the manipulator does not have the chooser's interests in mind. For that reason, manipulation undermines the welfare of the chooser. The welfarist analysis of manipulation closely parallels the welfarist analysis of fraud and deceit. In a sense, the manipulator can even be seen as a kind of thief, taking something from the chooser without real consent. In some cases, that is indeed the right way to assess an act of manipulation; it helps to illuminate recent initiatives in the area of consumer financial protection.

From the standpoint of the legal system, the problem is that as defined here, manipulation can plausibly be said to be pervasive. In a free society, it is inevitable. It can be found on television, on the Internet, in every

<sup>20</sup> Friedrich Hayek, *The Market and Other Orders*, in *The Collected Works of F. A. Hayek* 384 (Bruce Caldwell ed., 2013).

political campaign, in countless markets, in friendships, and in family life. Even if we insist (as we should) that manipulation cannot occur without intentional manipulators,<sup>21</sup> the scope of the practice is very wide. It would be odd and perhaps pointless to condemn practices that people encounter daily, and with which they live while mounting little or no objection. Indeed, it would be fussy and stern – even a bit inhuman – to try to excise it.

Because of the pervasiveness of manipulation, and because it often does little or no harm, the legal system usually does not attempt to prevent it. In this respect, the prohibition on manipulation is best seen as akin to a family of values that prominently includes civility and considerateness<sup>22</sup> – approved or mandated by social norms that lack legal sanctions. At least in general, the costs of regulating manipulation would far exceed the benefits. But as we shall see, the proper evaluation of acts of manipulation depends a great deal on context, including the expectations associated with particular roles. In some contexts, regulators do aim at manipulation, at least implicitly.<sup>23</sup>

Everyone knows that a car company wants to sell cars, and under existing conventions, it is acceptable to produce advertisements that do not exactly target people's deliberative capacities (at least if falsehoods are not involved). Something similar can be said about political campaigns. To be sure, there remains a question whether deliberative capacities are "sufficiently" engaged; in the political context, they are not usually on hold. But we can easily find cases in which the sufficiency requirement is not met. The ethical objection gains strength under two conditions: (1) when the manipulator's goals are self-interested or venal and (2) when the act of manipulation is successful in subverting or bypassing the chooser's deliberative capacities.

When both conditions are met, there is good reason for an ethical taboo on manipulation and perhaps even legal constraints. Some commercial

<sup>21</sup> Nature can, in a sense, manipulate people; cold weather and snow, for example, can affect people without sufficiently triggering deliberation. But it seems useful to limit the category to intentional efforts; in ordinary language, intentionality appears to be a defining characteristic of the concept of manipulation.

<sup>22</sup> See Edna Ullmann-Margalit, *Considerateness* (2011), available at <http://ratio.huji.ac.il/sites/default/files/publications/dp584.pdf>.

<sup>23</sup> An example involves a 2014 rule requiring integrated mortgage disclosures, 12 C.F.R. § 1024.1026 (2015), available at [http://files.consumerfinance.gov/f/201311\\_cfpb\\_final-rule\\_integrated-mortgage-disclosures.pdf](http://files.consumerfinance.gov/f/201311_cfpb_final-rule_integrated-mortgage-disclosures.pdf). A useful but skeptical catalog of CFPB actions, some aimed at manipulative behavior, can be found in Adam Smith and Todd Graziano, *Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection* (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2408083](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408083).

advertisements, and some financial products, are so plainly manipulative that legal responses are required. Of course governments generally should not interfere with political campaigns, because their own interests are at stake, but some campaigns are so manipulative that they deserve ethical condemnation for that reason. As we shall see, there is also reason for heightened concern, from the standpoint of the free speech principle, when the government compels speech in order to manipulate those who encounter it (such as smokers); in cases of this kind, the government should face an elevated burden of justification.

### Insulting Deliberation

A great deal of effort has been devoted to the definition of manipulation, almost exclusively within the philosophical literature.<sup>24</sup> Many of the efforts focus on the effects of manipulation in counteracting or undermining people's ability to engage in rational deliberation. On one account, for example, manipulation "is a kind of influence that bypasses or subverts the target's rational capacities."<sup>25</sup> Wilkinson urges that manipulation "subverts and insults a person's autonomous decision making," in a way that treats its objects as "tools and fools."<sup>26</sup> He thinks that "manipulation is intentionally and successfully influencing someone using methods that pervert choice."<sup>27</sup>

Recall, for example, efforts to enlist attractive people to sell cars, or to use frightening music and ugly photos to attack a political opponent. We might think that in such cases, customers and voters are being insulted in the sense that the relevant speaker is not giving them anything like a straightforward account of the virtues of the car or the vices of the opponent, but is instead using associations of various kinds to press the chooser in the manipulator's preferred direction. On a plausible view, manipulation is involved to the extent that deliberation is insufficient. Here again, it is important to notice that we should speak of degrees of manipulation, rather than a simple on-off switch.

In a related account, Ruth Faden and Tom Beauchamp define psychological manipulation as "any intentional act that successfully influences a person to belief or behavior by causing changes in mental processes *other than those involved in understanding*."<sup>28</sup> Joseph Raz suggests that

<sup>24</sup> An excellent overview is *Manipulation* (Christian Coons and Michael Weber eds., 2014).

<sup>25</sup> Coons and Weber, *Introduction*, in *id.* at 11.

<sup>26</sup> Wilkinson, *Nudging and Manipulation* (2013), at 345. <sup>27</sup> *Id.* at 347.

<sup>28</sup> Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* 354–368 (1986).

“Manipulation, unlike coercion, does not interfere with a person’s options. Instead it perverts the way that person reaches decisions, forms preferences or adopts goals.”<sup>29</sup>

Of course the idea of “perverting” choice, or people’s way of reaching decisions or forming preferences, is not self-defining; it can be understood to refer to methods that do not appeal to, or produce, the right degree or kind of reflective deliberation. If so, an objection to manipulation is that it “infringes upon the autonomy of the victim by subverting and insulting their decision-making powers.”<sup>30</sup> The objection also offers one account of what is wrong with lies, which attempt to alter behavior not by engaging people on the merits and asking them to decide accordingly, but by enlisting falsehoods, usually in the service of the liar’s goals (an idea that also points the way to a welfarist account of what usually makes lies wrong<sup>31</sup>). A lie is disrespectful to its victims, not least if it attempts to exert influence without asking people to make a deliberative choice in light of relevant facts. But when lies are not involved, and when the underlying actions appear to be manipulative, the challenge is to concretize the ideas of “subverting” and “insulting.”

It is tempting to adopt a simple definition, to this effect: *A statement or action is manipulative to the extent that it does not engage or appeal to people’s capacity for reflective and deliberative choice.* The problem with this definition is that it is far too broad, sweeping up much action that is a standard part of daily life, and that it is rarely taken as manipulative. Suppose, for example, that a good friend frames an option in the most attractive light, with a cheerful voice, and a seductive smile; or that the Department of Transportation embarks on a vivid, even graphic public education campaign to reduce texting while driving; or that a politician argues in favor of same-sex marriage in a way that points, in an emotionally evocative way, to the lived experience of specific same-sex couples. In all of these cases, we might have long debates about whether the relevant statements are appealing to people’s capacity for reflective and deliberative choice. And even if we conclude that they are not, we should not therefore be committed to the view that manipulation is involved.

To warrant that conclusion, the word “sufficiently” is required, to add the suggestion that people have been in some sense tricked or fooled, or at

<sup>29</sup> Joseph Raz, *The Morality of Freedom* 377–379 (1986).

<sup>30</sup> See Wilkinson, *Nudging and Manipulation* (2013).

<sup>31</sup> Of course some lies are justified; the intentions of the liar might matter (e.g., to spare someone’s feelings), and the consequences might be exculpatory (to prevent serious harm). See Bok, *Lying* (2011).

least that their deliberative capacities have not been adequately engaged. In this sense, there is a connection between the idea of manipulation and the idea of deceit; we can even see the former as a lighter or softer version of the latter. With an act of deceit, people almost inevitably feel betrayed and outraged once they are informed of the truth. (I bracket cases in which the deception turns out to be necessary to prevent harm or to provide benefits; consider surprise parties.) The same is true of manipulation. Once the full context is revealed, those who have been manipulated tend to feel used. They ask: *Why wasn't I allowed to decide for myself?*

In an illuminating discussion, with strong implications for policy and law and the legitimacy of nudging, the philosopher Anne Barnhill defines manipulation as “directly influencing someone’s beliefs, desires, or emotions, such that she falls short of ideals for belief, desire, or emotion in ways typically not in her self-interest or likely not in her self-interest in the present context.”<sup>32</sup> Notwithstanding its ambiguity and need for specification, the idea of “falling short of ideals” is helpful, and it should be seen as an effort to capture the same idea as the word “sufficiently.”

Note that the standard here is best taken as objective, not subjective. The question is whether someone has, in fact, sufficiently engaged a chooser’s deliberative capacities – not whether the chooser so believes. But there is a possible problem with Barnhill’s definition, which is that it might be taken to exclude, from the category of manipulation, influences that are in the interest of the chooser. Some acts of manipulation count as such even if they leave the chooser better off. You might be manipulated to purchase a car that you end up loving, or to go on a vacation that turns out to be a lot of fun, or to start a diet that really is in your interest. We might say that such acts are justified – but they are manipulative all the same.

To understand manipulation in my general way, it should not be necessary to make controversial claims about the nature of choice or the role of emotions. We should agree that many of our decisions are based on unconscious processing, or System 1, and that we often lack a full sense of the wellsprings of our own choices. That might not be a problem in general – but it might make a big difference whether actions are determined by our own impulses or drives, or instead by factors intentionally designed by other people to influence us. It might well be a problem if a manipulator imposes some kind of influence that unduly undermines or bypasses our powers of reflection and deliberation. It is also possible to

<sup>32</sup> Barnhill, *What Is Manipulation?* (2014), at 50, 72. Barnhill builds on Robert Noggle, *Manipulative Actions: A Conceptual and Moral Analysis*, 34 *Am. Phil. Q.* 57 (1995).

acknowledge that emotions might themselves be judgments of value<sup>33</sup> while also emphasizing that manipulators attempt to influence people's choices without promoting much in the way of reflective thinking about the values at stake. In ordinary language, the idea of manipulation is invoked by people who are not committed to controversial views about psychological or philosophical questions. It is probably best to understand that idea in a way that brackets the most serious controversies.

### Manipulating System 1

Recall that in the social science literature, System 1 is the automatic, intuitive system, prone to biases and to the use of heuristics, while System 2 is more deliberative, calculative, and reflective. Manipulators often target System 1, and they attempt to bypass or undermine System 2. We need not venture contested claims about the nature of the two systems in order to find it helpful to suggest that many actions count as manipulative because they appeal to System 1, and because System 2 is being subverted, tricked, undermined, or insufficiently involved or informed. Consider the case of subliminal advertising, which should be deemed manipulative because it operates "behind the back" of the person involved, without appealing to his conscious awareness. People's decisions are affected in a way that entirely bypasses their own deliberative capacities.

If this is the defining problem with subliminal advertising, we can understand why involuntary hypnosis would also count as manipulative. But most people do not favor subliminal advertising (for evidence, see Chapter 6), and to say the least, the idea of involuntary hypnosis lacks much appeal. The question is whether admittedly taboo practices can shed light on actions that are more familiar or that might be able to command broader support. It is also true that some forms of manipulation involve overloading System 2 and do not implicate System 1 at all.

### Testing Cases

Consider some cases that test the boundaries of the concept of manipulation.

1. Public officials try to persuade people to engage in certain behavior with the help of relative risk information: "If you do not do X, your chances of death from heart disease will triple!"<sup>34</sup> Their goal is unquestionably to

<sup>33</sup> See Martha Nussbaum, *Upheavals of Thought* (2003).

<sup>34</sup> Wilkinson, *Nudging and Manipulation* (2013) at 347, uses this example.

nudge, and they use relative risk information for that purpose. The information is accurate, but it can be misleading. Suppose that for the relevant population, the chance of death from heart disease is very small—say, one in 100,000—and people are far more influenced by the idea of “tripling the risk” than they would be if they learned what is also true, which is that if they do not do X, they could increase a 1/100,000 risk to a 3/100,000 risk (to say the least, a modest increase). If the goal is to change behavior, the relative risk frame is far more attention-grabbing, and probably far more effective, than the absolute risk frame. A tripling of a risk sounds alarming, but if people learn that the increase is by merely 2/100,000, they might not be much concerned. It is certainly reasonable to take the choice of the relative risk frame (which suggests a large impact on health) as an effort to frighten people and to activate System 1—and thus to manipulate them (at least in a mild sense).

It is true that any description of a risk requires some choices. People who describe risks cannot avoid some kind of framing, and framing is a nudge. But framing, as such, need not entail manipulation. There is a good argument that the use of the relative risk frame does not sufficiently engage, or show a great deal of respect for, people’s deliberative capacities; it might even be an effort to aim specifically at System 1. As we shall see, that conclusion does not mean that the use of the relative risk frame is necessarily out of bounds. This is hardly the most egregious case of manipulation, and if it saves a number of lives across a large population, it might be justified. But it can be counted as manipulative.

2. Public officials are alert to the power of loss aversion, and hence they use the “loss frame,” so as to trigger people’s concern about the risks associated with obesity and excessive energy consumption. They might deliberately choose to emphasize, in some kind of information campaign, how much people would *lose from not using* energy conservation techniques, rather than how much people would *gain from using* such techniques.<sup>35</sup> That choice embodies a kind of nudge. Is the use of loss aversion, with its predictably large effects, a form of manipulation?

The answer is not obvious, but there is a good argument that it is not, because deliberative capacities remain sufficiently involved. Even with a loss frame, people remain fully capable of assessing overall effects. But it must be acknowledged that the deliberate use of loss aversion might be an effort to trigger the negative *feelings* that are distinctly associated with losses. Loss aversion might well trigger System 1. To that extent, reasonable

<sup>35</sup> See Elliott Aronson, *The Social Animal* 124–125 (6th ed. 1996).

people could deem it to be manipulative – and could argue that any frame should aspire to neutrality. One way to move toward that aspiration would be to use both loss and gain frames in the same communication. Consider here the fact that while the U.S. government allows companies to say that their products are “90 percent fat-free,” it also requires them to disclose that if so, they are “10 percent fat.” An evident goal of the requirement is to prevent a form of manipulation that might come from a selective frame.

Here too, it is a separate question whether the use of loss aversion raises serious ethical objections. Within the universe of arguably manipulative statements, those that enlist loss aversion hardly count as the most troublesome, and in the case under discussion, the government’s objectives are entirely laudable. If the use of loss aversion produces large gains (in terms of health or economic benefits), we would not have grounds for strong objections.

But it is easy to identify cases in which the use of loss aversion is venal or self-interested, and in which the surrounding context makes it an unambiguous example of manipulation.<sup>36</sup> Consider the efforts of banks, in the aftermath of a new regulation from the Federal Reserve Board (discussed in the Introduction), to enlist loss aversion to encourage customers to opt in to costly overdraft protection programs by saying, “Don’t lose your ATM and Debit Card Overdraft Protection” and “STAY PROTECTED with [ ] ATM and Debit Card Overdraft Coverage.”<sup>37</sup> In such cases, banks are making a clear effort to trigger a degree of alarm, and hence it is reasonable to claim that customers were being manipulated, and to their detriment. The example suggests that the ethical evaluation of arguable acts of manipulation turns into partly on the *extent* of the manipulation and partly on its purposes and its effects – a point to which I will return.

3. Alert to the behavioral science on social influences, a planner might consider the following approaches:

- a. Inform people that most people in their community *are engaging in undesirable behavior* (drug use, alcohol abuse, delinquent payment of taxes, and environmentally harmful acts)
- b. Inform people that most/many people in their community *are engaging in desirable behavior*
- c. Inform people that most/many people in their community *believe that people should engage in certain behavior*

<sup>36</sup> See generally Lauren E. Willis, *When Defaults Fail: Slippery Defaults*, 80 U. Chi. L. Rev. 1155 (2012).

<sup>37</sup> *Id.* at 1192.

All of these approaches are nudges, and they can have substantial effects. The first two rely on “descriptive norms,” that is, norms about what people actually do.<sup>38</sup> The third approach relies on “injunctive norms,” that is, norms about what people think that people should do. As an empirical matter, it turns out that descriptive norms are ordinarily more powerful.<sup>39</sup> If choice architects want to change people’s behavior, then they should emphasize that most or many people actually do the right thing. But if most/many people do the wrong thing, so that any descriptive norm would be harmful (or a lie), it can be helpful to invoke injunctive norms.<sup>40</sup>

Suppose that public officials are keenly aware of these findings and use them to nudge people in the preferred direction. Are they engaged in manipulation? The word “sufficiently” becomes relevant here as well. Without doing much violence to ordinary language, some people might think it that it is manipulative for public officials to choose the formulation that will have the largest impact. At least this is so if social influences work as they do because of their impact on the automatic system, and if they bypass deliberative processing.<sup>41</sup> But as an empirical matter, this is far from clear; information about what other people do, or what other people think, can be part of reflective deliberation, and hardly opposed to it. So long as officials are being truthful, it would strain the boundaries of the concept to accuse them of manipulation: When they are informed about what most people do, people’s powers of deliberation are sufficiently engaged.

4. We have seen that default rules often stick, in part because of the force of inertia, in part because of the power of suggestion. Suppose that a public official is aware of that fact and decides to reconsider a series of default rules in order to exploit the stickiness of defaults. Seeking to save money, she might decide in favor of a double-sided default for printers. Seeking to reduce pollution, she might promote, or even require, a default rule in favor of green energy. Seeking to increase savings, she might promote, or even require, automatic enrollment in retirement plans.

Are these initiatives manipulative? One reason that default rules are effective is that they carry an element of suggestion, a kind of informational

<sup>38</sup> See generally Robert Cialdini, *Crafting Normative Messages to Protect the Environment*, 12 *Current Directions in Psychological Science* 105 (2003).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; Wesley Schultz et al., *The Constructive, Destructive, and Reconstructive Power of Social Norms*, 18 *Psych. Sci.* 429 (2007).

<sup>41</sup> For relevant (but not decisive) findings, see generally Caroline J. Charpentier et al., *The Brain’s Temporal Dynamics from a Collective Decision to Individual Action*, 34 *J. Neuroscience* 5816 (2014).

signal, suggesting what it makes best sense for people to do. To the extent that people are affected by that signal, there is nothing manipulative about default rules. Such rules appeal to deliberative capacities insofar as they convey information about what planners think people ought to be doing. But insofar as default rules stick because of inertia, the analysis is more complicated: Without making a conscious choice, people end up enrolled in some kind of program or plan. In a sense, the official might be thought to be exploiting System 1, which is prone to inertia and procrastination. The question is whether automatic enrollment fails “sufficiently” to engage reflection and deliberation.

In answering that question, it is surely relevant that an opt-in default is likely to stick as well, and for the same reasons – which means that the question is whether *any* default rule counts as a form of manipulation. The answer to that question is plain: Life cannot be navigated without default rules, and so long as the official is not hiding or suppressing anything (and is thus respecting transparency), the choice of one or another should not be characterized as manipulative. Note that people do reject default rules that they genuinely dislike, so long as opt-out is easy – an empirical point in favor of the conclusion that such rules should not be counted as manipulative.

But some objectives do think that if default rules stick because of inertia, it is legitimate to ask whether people are, in a sense, being manipulated. The problem is deepened if we think that the particular default rule serves the interests of the choice architect rather than the chooser. To the extent that the risk of manipulation is real, it is particularly important to make it clear to people, in a way that is salient and timely, that they are permitted to opt out if they like. It may also be important to consider the use of active choosing as an approach that ensures the actual expression of agency, rather than to mere opportunity to choose (see Chapter 6).

*A potpourri.* There is no question that much of modern advertising is directed at System 1, with attractive people, bold colors, and distinctive aesthetics. (Consider advertisements for Viagra.) Often the goal is to trigger a distinctive affect and more specifically to enlist the “affect heuristic,” in accordance with which people use their emotional reactions to good, services, or activities as a kind of heuristic for a full consideration of the variables at stake.<sup>42</sup> Instead of considering those variables, which might be hard, people ask a much easier question: *How do I feel about that?*

<sup>42</sup> See Paul Slovic *The Feeling of Risk: New Perspectives on Risk Perception* 3–20 (2010).

Insofar as choice architects are enlisting the affect heuristic, they are putting the question of manipulation in stark relief.

Much of website design is an effort to trigger attention and to put it in exactly the right places.<sup>43</sup> Cell phone companies, restaurants, and clothing stores use music and colors in a way that is designed to “frame” products in a distinctive manner. Doctors, friends, and family members (including spouses) sometimes do something quite similar. Is romance an exercise in manipulation? Some of the time, the answer is surely yes, though the question of “sufficiently” raises special challenges in that context.

Acting as advocates, lawyers may be engaged in manipulation; that is part of their job, certainly in front of a jury, and even during processes of negotiation. (Good negotiators know how to use loss aversion, and also anchoring, and they really work.) The same can be said about those who run for public office, who standardly enlist the affect heuristic. Politicians know that many voters will not carefully scrutinize a wide range of a candidate’s policy positions. They don’t have time to do that, and they might not enjoy the effort. They will ask instead: *Do we like him?* Something similar is true for some aspects of the provision of medical care, when doctors want patients to choose particular options and enlist behaviorally informed techniques to influence, nudge, or perhaps manipulate them to do so. Doctors might use a smile or a frown, whether or not consciously, to influence patients to feel upbeat about some treatments and negative about others.

Or consider certain uses of social media, which unquestionably involve nudging, and which can cross the line into manipulation. A vivid example is Facebook’s successful attempt to affect (manipulate) the emotions of 689,003 people through the display of positive or negative stories, to see how those stories affected people’s moods. As it happens, emotions are quite contagious; sadness breeds sadness, anger foments anger, and joy produces more joy. (Living with a happy person can make you happy.) For that reason, Facebook’s efforts to filter stories did, in fact, influence the emotions of users, as measured by the affect associated with their own subsequent posts.<sup>44</sup> A great deal of conduct, however familiar, can be counted as manipulative in the relevant sense.

<sup>43</sup> Steve Krug, *Don’t Make Me Think Revisited: A Common Sense Approach to Web and Mobile Usability* 10–19 (2014).

<sup>44</sup> See Adam Kramer et al., *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks*, 111 *Proc. of the Nat’l Acad. of Sci.* 8788 (2014).