The Lawyer as Caregiver: Child Client's Competence in Context

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INTRODUCTION

I am the father of a two-year-old girl. In my more lucid moments, I want to let my daughter, Sarah, explore the world. Still, I try to stay no more than a quick dive across the room away from Sarah during her explorations.

When Sarah is twelve-years-old, my feelings will probably not be much different. In my lucid moments, I will probably want Sarah to make her own decisions and her own mistakes. I am sure, however, that I will not be able to entirely suppress the impulse to dive across the room.

At first blush, the role of the lawyer for children seems radically different from that of the parent.1 Some commentators argue that the

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lawyer by definition is an agent. As an agent, a lawyer is responsible to another person—the principal or the client. The client, as principal, controls the lawyer, as agent, by expressing preferences upon which the agent acts. Under this view, if the principal expresses no preferences, the agent has no basis for action. Similarly, if the agent believes that the principal is incompetent to make a decision, the agent's proper course is withdrawal.

In cases involving children, such as custody, abuse and neglect, and delinquency proceedings, lawyers confront the issue of competence regularly. As a result, lawyers representing children in such proceedings must confront questions about the legitimacy of the lawyer's role. This Article addresses how lawyers representing children should define competence, and what the lawyer's role should be when a child client appears to be incompetent.

Competence, defined broadly as a person's ability and right to make decisions, is always a difficult issue. Specific conditions—mental retardation, Alzheimer's disease, or psychoses stemming from schizophrenia or manic depressive illness—fuel concerns about the competence of people with mental disabilities and senior citizens.


2. See Guggenheim, supra note 1, at 86-87.


With regard to children, however, the issue of competence raises special problems. The law deems minors to be incompetent in many contexts. In legal proceedings such as custody and child welfare the law tends to view children below a certain age, say, twelve, as incapable of making decisions about their lives.

These legal images of incapacity are so powerful because society cannot separate its view of a child's competence from the perception that the child will eventually grow into an adult. The law stresses protecting the options of the adult that the child will be in five, ten, or fifteen years. While society entrusts the adult to look after her own future, it views the child as prone to particular kinds of mistakes, most prominently a preference for short-term over long-term thinking, which justify the assumption of a caregiving role by adults.

The contextual view of lawyering for children advanced in this Article holds that lawyers for children must be caregivers as well as agents. Central to this contextual perspective is the recognition that a parent and a lawyer for children face a similar dilemma. They both must respect the child's voice—her sharing of experience and insight, in-

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This Article's argument is consistent with the view that child clients who express a preference are also presumptively competent. That presumption should inform, but not preclude, client-lawyer conversation about the reasons underlying client preferences, and the consequences of client decisions.


6. The law requires, for example, that a next friend or guardian ad litem represent the interests of a minor child in custody and child welfare proceedings. See Kingsley v. Kingsley, 623 So. 2d 780, 784 (Fla. Dist. Ct. App. 1993).


cluding the pain of not being taken seriously by adults. Indeed, parents and lawyers must recognize that a child's finding her voice is an essential element of her well-being. Making mistakes is a central element in a child's finding her voice. However, in interpreting a child's voice, parents and lawyers must also consider a child's need for education and connection with others. In some contexts meeting these needs requires the child's lawyer to intervene, and thus prevent her client from making mistakes.

Lawyers use competence and capacity to indicate when intervention is appropriate. The concept of competence endures stress because of the heavy lifting lawyers require of it. Because no two situations are identical, a clear test for determining the competence of a child to make decisions does not exist. Nevertheless, the determination is often critical to the child's future. Yet, unlike other articles that urge the law to go beyond the "competency construct," this Article argues that competence embodies a concern for voices and persons that we should not abandon. To do justice to the concept of a child's com-


9. See Fitzgerald, supra note 3, at 97-98.

10. See Federle, Reconceiving Rights, supra note 3, at 985; Federle, Resolving Custody Disputes, supra note 3, at 1527-34; Jan E. Rein, Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct, 62 Fordham L. Rev. 1101, 1107 (1994).
petency in legal proceedings, however, the law must recognize the diverse contexts in which competency arises.

Contextually addressing competency has several implications. First, lawyers must acknowledge that competency is contingent. Lawyers do not discover competency; they make it. A lawyer representing children can enhance or injure competency. The lawyer's openness to input from various sources—the child, the child's family and peers, and social service professionals—as well as the lawyer's sensitivity to issues of class, race, disability, and gender contribute to creating competence.

Because competence is contingent, it varies with the decision the client confronts. The consequences of the decision, and judgments about norms shared in the lawyer's "interpretive community," each affect the lawyer's estimation of the child's competence. For these reasons, examining competence in context entails a substantive assessment of the client's decision.

Integrating substance and process informs the lawyer's role if she determines that the child is incompetent. The contextual approach gives the lawyer discretion about how to proceed. She can take a substantive position, mediate between the parties, act as a fact finder for the court, or adopt a combination of these approaches. Proponents of the lawyer-as-agent perspective, which this Article calls the restrictive view, express profound concern about such flexibility in lawyer's roles. Taking a substantive position on behalf of a concededly incompetent client raises serious doubts about the legitimacy of the lawyer's function. One lawyers' group recently cited such doubts as a justifica-

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11. This conception of competency resembles nuanced conceptions of the client's goals in an attorney-client relationship. Also, client goals do not come ready-made, but instead are a product of dialogue and interaction between attorney and client. See Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 128-34 (1993).

12. Of course, the lawyer also has an obligation to assess critically each of these perspectives, particularly the social service professional's assertion of expertise. See Chambers, supra note 3, at 484; Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727, 760-68 (1988).

13. See infra notes 80-83 and accompanying text. For an analysis of race in constructing competence in special education, see Theresa Glennon, Race, Education, and the Construction of a Disabled Class, 1995 Wis. L. Rev. (forthcoming).

14. See generally Stanley Fish, Is There A Text In This Class? (1980) (discussing the importance of "interpretive community"). Of course, shared norms in any interpretive community may subordinate persons or groups within that community. Cf. Drucilla Cornell, "Convention" and Critique, 7 Cardozo L. Rev. 679 (1986) (critiquing Fish); David Luban, Fish v. Fish or, Some Realism About Idealism, 7 Cardozo L. Rev. 693 (1986) (same); Steven L. Winter, Bull Durham and the Uses of Theory, 42 Stan. L. Rev. 639 (1990) (same). Because of this risk of subordination, those assessing competency should follow substantive presumptions, and receive training, designed to reduce invidious biases in competency assessments.
tion for barring the lawyer from taking a substantive position. The restrictive view would limit the lawyer to a fact-finding role on behalf of a child client whom the lawyer determines to be incompetent.

The contextual approach responds to this concern not by limiting the lawyer’s role, but by offering substantive guidance based on values expressed in case law and statutes. Three substantive factors should aid the lawyer: (1) continuity of caregiving, assessed with reference to the status quo before the commencement of legal proceedings; (2) parents’ commitment of time to their child’s education; and (3) preventing violence against the child or other family members.

Addressing competence in context is a challenging task. To assist in this inquiry, part I of this Article examines the competency problem in greater depth. It identifies three central values: education, connection, and voice. Part II considers established theories of decisional competence and the attorney-child client relationship and identifies problems with these theories. Part III outlines a contextual approach to assessing competency which minimizes these problems, and details six factors important to assessing capacity in a contextual approach. Part IV describes the lawyer’s role in enhancing capacity through involving child clients in the lawyer’s consultation with social service professionals, seeking input from peers and family, and receiving training on the risk of bias in custody decision making. Finally, part V examines critically the restrictive view’s endorsement of a fact finder only approach to lawyering for incompetent children, and suggests a contextual model for lawyers facing this challenge.

I. THE PROBLEM: CAPACITY AND ITS DISCONTENTS

Capacity is a difficult issue because the law hopes that by defining capacity correctly it can solve a bewildering array of problems. Yet, in dealing with capacity problems as they affect children, the law tends to rely on presumptions opposite to the presumptions it utilizes in dealing with problems as they affect adults. Consider how the law weighs tensions between autonomy and welfare. With respect to adults, the black letter law is that autonomy is paramount. For instance, an adult may refuse a life-saving operation, citing autonomy concerns, even though on most measures the operation is necessary for that person’s welfare. The law, however, applies the opposite approach to children, particularly young children. Welfare is paramount, and an oper-

15. See Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings §§ 2.7, 2.12 (Am. Academy of Matrimonial Lawyers 1995) [hereinafter Academy Standards]. The Reporter for the Academy Standards, Prof. Martin Guggenheim, has been the most trenchant critic of the movement toward appointment of counsel for children in custody and child welfare cases. See Guggenheim, supra note 1, at 125.

ation will be forced on an unwilling subject regardless of her expressed wishes.\footnote{17}

The law's attitude toward children as clients follows this pattern, even though in many cases the law empowers children as rights bearers by offering them attorneys. Paradoxically, the law is wary of extending to children the autonomy it typically associates with rights bearers.\footnote{18} When a court appoints an attorney for a child in a custody dispute or abuse and neglect proceeding, for example, the court does not ask the child if she \textit{wants} an attorney. Similarly, a child's authority to discharge a court-appointed attorney is unclear.\footnote{19}

This wariness about autonomy extends to particular issues confronted by lawyers for children. Suppose, for example, that a twelve-year-old child in a custody dispute informs his appointed lawyer that he wants his father to have custody because his father will not make him do homework. Apart from certain situations involving senior citizens\footnote{20} and people with mental disabilities—two groups that to some extent are marginalized in our society—a lawyer's training would militate against intervening for an adult client's own good regarding homework or any other issue. Yet, it seems justifiable to intervene in the case of a child client, even though many attorneys would still be reluctant to engage in such intervention.

How can society explain or justify this disparate treatment of adults and children? One factor is that separating autonomy and welfare engenders a false dichotomy. The two concerns are interrelated. For example, a child subject to domestic violence, or living in a home in which others are so subject, loses autonomy even if she tells a lawyer she "wants" to stay in that home. Exposure to domestic violence narrows life chances: it heightens the risk of homelessness as an adult, and of either victimization by others or victimization of others.\footnote{21}

Three values inform a contextual approach to the competency of children as clients: education, connection, and voice. By considering these crucial values, autonomy and welfare may be integrated and together used to determine a child's competence.


\footnote{18} See Federle, \textit{Resolving Custody Disputes, supra} note 3, at 1527-34.

\footnote{19} See \textit{id.} at 1523-24.

\footnote{20} See Margulies, \textit{Access, Connection, and Voice, supra} note 4, at 1076-80 (discussing capacity of senior citizens).

A lawyer for children must consider that children are still in the formative years of an education in life and values. Education here refers to both cognition and judgment. Childhood connotes the development of cognition—the ability to process information. Equally important, childhood involves the accumulation of experience. Experience informs cognition and shapes judgment by enriching stark choices with lived and felt memory. While cognition, according to some studies, develops by the early teens, experience and judgment lag behind. A lawyer coping with her client's still-developing experience and judgment must know when to intervene and when to step back.

The case for intervention stems from the concern that children, lacking experience and judgment, may not adequately assess the consequences of decisions. For example, children, compared with adults, weigh short-term consequences more heavily than long-term ramifications. A useful analogy here is Saul Steinberg's famous cartoon map depicting a New Yorker's view of the world. In the cartoon, New York City is the dominant piece of geography. The Hudson River is the dominant body of water. The rest of the United States, the Pacific Ocean, and the rest of the world recede into obscurity. For children, short-term consequences are like New York City in the Steinberg cartoon, dwarfing everything else.

Children's inexperience with long-term concerns affects their choices. The tendency to discount long-term effects may make children more likely than adults to engage in high-risk behavior, where short-term gains, like "thrills and chills," or short-term losses, like ostracism from one's peer group for declining to take a risk, are salient. The tendency to discount long-term effects also may make children more likely to reject courses of action with beneficial long-term consequences but adverse short-term impacts. For example, teenagers may be more willing to drink and drive, while less willing to accept medical treatment, such as a leg brace, that may be embarrassing in peer group interactions.

22. Feminist accounts of epistemology stress experience. See Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1642 (1991). So do prudentialist accounts of judgement which view experience as promoting moderation and tempering radicalism. See Kronman, supra note 11, at 222-25. But see Margulies, Progressive Lawyering, supra note 8, at 1146 (arguing that Kronman's account does not hold true for marginalized groups with no stake in the status quo).

23. See Scott et al., supra note 7, at 224-26. These studies, however, took place under laboratory conditions which do not capture the nuances of real-world decision-making. Id. at 226.

24. Id. at 227-28.

25. Id. at 233-34.
Society's concern with gaps in children's risk perceptions also strikes a normative note. Society views children as a crucible of hope for the future. Laws regarding children consider the child as a future adult. The law assumes that once children have acquired the experience which comes with legal majority, their decisions about risk will better balance short-term and long-term concerns. Similarly, an adult will be better able to distinguish between values which help guide one's life, and the whims, caprices, and addictions which obscure those values. Preserving the child's opportunity for such growth is a primary social good.

At this point, the lawyer encounters a paradox: while society, by intervening in a child's decisions, can preserve a child's opportunity to grow, children also grow by making mistakes. The freedom to make mistakes is a crucial element in acquiring experience. Much concrete knowledge about consequences, for example, only accrues though experiencing those consequences directly. Children have little incentive to learn anything for themselves unless adults allow them to take some risks.

Harmonizing these two goals—considering the child's skewed perceptions of risk while allowing the child to make her own mistakes—is a central component of the contextual approach to lawyering for children. A lawyer who appreciates the educational value of mistakes may frequently view a child client's decision as mistaken, but nonetheless feel bound by that decision. Some mistakes, however, are irreversible, making future education impossible. A lawyer representing children should try to prevent these mistakes, distinguishing them from the mistakes that further education. Thus, lawyers for children


27. See Jean Jacques Rousseau, Emile 111 (Everyman ed. 1911).

28. Of course, we must also always be mindful that our view of what constitutes a "mistake" necessarily is a function of our own assumptions and biases. When decisions some think unwise stem from cultural differences, such as a decision to pursue a course of home schooling rich in religion, rather than a secular public education, the First Amendment often requires respect for that decision. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).
should have a role in balancing their client’s perceptions of short-term and long-term consequences.

B. Connection

Children’s connection with others, particularly their parents, provides another reason to treat children differently from adults. While a web of relationships defines each person, children’s dependence makes these connections even more salient. It makes no sense to consider a parent’s welfare without reference to the welfare of her child. A mother, asked how she is doing, will not answer, “Fine,” if her child is sick. Similarly, a child’s welfare is linked to the welfare of her parents. In addition, continuity is vital for children’s development. Severing connections, such as the parent-child connection, can destroy that continuity. A grave risk of child advocacy is that an advocate will define the scope of representation in a way which neglects the child’s connections to her parents.

C. Voice

Voice, the sharing of experience and insights, is the third element in competence issues regarding children. Voice implies participation, and a sense that others value one’s opinions and sentiments. This sense is vital for children, particularly in conjunction with decisions about custody and child welfare, which threaten children’s sense of control.

Voice is important for both instrumental and expressive reasons. The participation of children can inform decision making, by bringing to light information that professionals miss. As suggested above, however, competence also has an expressive dimension. Competence is about reciprocity—if society subjects people to certain burdens, people are entitled to input on how society allocates those burdens. Reciprocity, at least as much as ability, explains why we offer adults of

29. Hannah Arendt, The Human Condition 3-84 (1958). To the extent that all clients are part of a web of relationships, lawyers should always take connection into account.
30. Scott et. al., supra note 7, at 229-30.
31. See Fitzgerald, supra note 3, at 81.
32. See Guggenheim, supra note 1, at 116-17. It is tempting to define one’s role in such a way, because the risks are much less palpable, particularly in the child welfare context. No children’s advocate wants to be on the front page of the newspaper if a child returned to her parents subsequently dies from abuse. Cases of children removed from parents, by contrast, are routine—they do not make the front page even though they cause the break-up of families. The natural bias for children’s advocates is to act in a way which minimizes the first, more visible risk, even if it also maximizes family break-ups. See Davis & Barua, supra note 3, at 142-43.
33. See Lawyering for the Child, supra note 1, at 1163-72.
34. See Lucy S. McGough, Child Witnesses 25-26 (1995) (citing an experiment which demonstrates that children and adults focus on different elements of an event, which although different are both highly relevant).
widely disparate decision-making skills the right to vote, to marry, and to contract. If the legal system takes steps that affect children, such as allocating custody to one parent or terminating parental rights, it should take the time to listen to what children think.

II. LEGAL APPROACHES TO CHILDREN'S COMPETENCE

Two legal approaches to competency dominate lawyering for children: the libertarian approach and the "mature minor" approach. Unfortunately, neither approach pays sufficient attention to the context in which lawyers assess a child's competence. In searching for a clear test, the approaches ignore important considerations that bear on the issue of a child's competency.

A. The Libertarian Approach: Competence at Virtually Any Age

One approach to dealing with competency is to either do away with competence as a predicate for decision making and rely solely on the importance of voice, or to deem virtually any child, or any person, who can express wishes as competent.35 This approach, the libertarian approach, takes as its premise two propositions: (1) the ability to make decisions without being second-guessed is an essential attribute of human dignity and autonomy; and (2) competence is often a fig leaf used to hide grasping for power by professionals entrusted to determine competence. While both propositions have merit, ultimately neither compels the conclusion libertarians advocate.

The authority to make decisions for oneself is a central aspect of human dignity and autonomy. The crucial questions, however, remain: what do lawyers for children mean by dignity, autonomy, and self? The value of connection suggests that self, for example, cannot be understood without reference to others. Making a decision for one's self necessarily involves this plural understanding of self. Freedom also entails connections: Freedom from family connections is not freedom, in a positive sense, but a radical detachment which makes a person less, not more, human.

Similarly, while the libertarian emphasis on professional power is a legitimate concern, it assumes a world in which the self is radically unconnected and not subject to power already. Individuals are subject to a myriad of connections, and always subject to power, from other people, from institutions, and from their own whims, wishes, and addictions.36 Professionals, rather than introducing power where none previously was exercised, may in fact countervail power which already

35. See Federle, Reconceiving Rights, supra note 3, at 1011-15.
36. See Steven L. Winter, The "Power" Thing (unpublished manuscript on file with the author) (offering a post-modern, "four-dimensional" view of power informed by the thought of Michel Foucault).
affects a person adversely. The real question is, how is this power being used, and how does it affect the persons involved?

B. The "Mature Minor" Approach: The Presumptive Competence of Adolescents

Another approach to the issue of the competence of children is to presume that children above a certain age, twelve for example, are competent. While this "mature minor" approach is valuable as a rough guide to determining competency, it nevertheless begs the question confronted in this Article: How should lawyers consider factors that rebut a presumption of capacity?

Although the mature minor approach enjoys support, it ignores distinct issues, such as custody, delinquency, or medical treatment, that may involve different kinds of competence. Different children on either side of age-based presumptions will perform differently on each of these issues. On some occasions, the age-based presumption will discount unduly the capacities of younger children who may be able to communicate a meaningful preference or offer useful information. On other occasions, an age-based presumption will overstate the decision-making capacity of adolescents, who may posture because of attempts to break free of parental regulation. When courts are not involved, families will often be able to absorb such rites of passage. The involvement of the judicial system, however, raises the stakes for everyone and can elicit posturing from many parties that would otherwise not surface. This is clearly true in adults, for example, when fathers seek custody as a bargaining chip in divorce. It can be true of children, too. The difference is that with adults, posturing may be the

37. See Martin Guggenhein, supra note 1, at 82-85; see, e.g., Academy Standards, supra note 15, § 2.2 (advocating for a rebuttable presumption that children above the age of twelve are competent).

38. The most vigorous support for the mature minor standard in the context of lawyering for children comes from commentators who view such lawyering as a threat to parents’ rights. See, e.g., Jonathan O. Hafen, Children’s Rights And Legal Representation—The Proper Roles of Children, Parents, and Attorneys, 7 Notre Dame J.L. Ethics & Pub. Pol’y 423 (1993) (arguing that a parent’s right to control litigation involving young children should be protected). Representation of very young children increases this threat because lawyers in this situation may discount the connections young children have developed with parents and instead impose their own values. See Guggenheim, supra note 1, at 154. This Article argues, however, that a lawyer who takes seriously the possibility of learning something from a very young child client will present less risk of disrupting connections. While it is tempting to not even talk to younger children, see Wizner & Berkman, supra note 1, at 333, particularly the very young, this seems to run counter to studies which suggest that even infants are taking in information, and giving it out, at a spectacular rate. An advocate who accepts an assignment in a custody case should be grateful for any information she can find. The fact that the child may have seen many other adults in connection with a judicial proceeding, such as social workers and psychologists, does not oust the lawyer from her role. If other professionals have been sensitive, another intervention will not be unduly intrusive. If the other professionals have been insensitive, the lawyer will have an opportunity to prove that some people in the judicial system are different.
product of a desire to exploit children for strategic purposes. With children, posturing may be the product of being exploited. Competence is a rubric broad enough to encompass the latter problem.

Another problem with the mature minor approach is that it emphasizes intellectual development, while downplaying the role of experience and judgment. The premise of the mature minor approach is that children acquire experience and judgment through making mistakes. While this is often true, such a premise fails to distinguish between mistakes which promote learning and mistakes, including irreversible mistakes, which prejudice the ability to learn in the future. Making such distinctions is one goal of a contextual approach.

III. APPLYING A CONTEXTUAL APPROACH TO COMPETENCY

A contextual approach to competency recognizes that competency is contingent and constructed, varying with the decision involved, and necessarily is constituted by considerations of both process and substance. Engaging the substance of decision making is a departure from modern trends. Older analyses of competence looked either to status—was someone old, young, a person of color, a woman, or a person with a mental disability—or to the outcome of decisions. Under an outcome test, if the decision was substantively sound, from the vantage point of the judge, doctor, or other arbiter, then the subject was competent.

Modern trends have frowned on the invidious biases of the status test and the paternalistic and tautological character of the outcome test. Often, modern approaches have focused on the “process” of decision making. Yet, this focus raises as many questions as it answers.

The problem with the focus on process is that when an approach denies the importance of substance, substance usually comes in through the back door. Consideration of process is meaningless unless the approach first brings to bear some basic assumptions about substance. In fact, any process-oriented view necessarily relies on some underlying conception of substance. Consider, for example, the issue of whether a client’s decision fits a particular goal. In order to

40. See id. at 774-75.
41. See Scott, supra note 7, at 224.
analyze this issue, a lawyer needs some independent conception of what decisions serve what goals.

The American Academy of Matrimonial Lawyers Standards for the representation of children demonstrate the importance of integrating substance and process in defining competence. The Academy Standards note, "For purposes of determining impairment, counsel's inquiry should focus on the process by which a client reaches a position, not on the position itself." In setting out how to assess this process, however, the Academy Standards necessarily allude to substance. They note, for example, that "counsel should look to the client's 'basic understanding of the facts and possibilities described.'" Of course, to assess someone else's understanding of facts, a lawyer must compare them with her own views, or with her perception of how "similarly situated persons" might interpret a given situation. Indeed, the Academy Standards expressly ask the lawyer to compare the child's choice with the outcome that "similarly situated persons might choose."

While the Academy Standards go on to say that a lawyer cannot view her client as lacking capacity just because the client has made a choice which the lawyer deems to be "not in the client's best interests," this proviso seems to mean in practice that in close cases, where the client's choice passes some baseline test of substantive plausibility, the lawyer cannot second-guess the client. This lowers the risk that children's lawyers will exercise untrammeled power, but it does so in a way that is not illuminated by making the distinction between substance and process.

To reinforce this point, consider two hypotheticals. In the first case, a seven-year-old child tells her lawyer that she wishes to go live with her father, who has abused both her and her mother, because she will be embarrassed if classmates discover why she has moved. In the second hypothetical, the child tells her lawyer that she wishes to live with her mother, not her father. A social worker has told the lawyer that the father has repeatedly abused both mother and child. The child does not, however, cite the abuse in explaining her preference. Instead, the child asserts that her mother is Wonder Woman.

43. See Academy Standards, supra note 15, §§ 2.1-2.2.
44. Id. § 2.2 cmt. (emphasis added).
45. Id. (quoting Lois A. Weithorn, Involving Children in Decisions Affecting Their Own Welfare, in Children's Competence to Consent 245, 248 (Gary B. Melton et al. eds., 1983).
46. Id.
47. Id. The Academy Standards also recommend that the lawyer assess the child's ability "to appreciate the consequences of each alternative course of action." Id. Here, too, one can only assess that ability if one has a substantive interpretation of what those consequences might be.
48. Id.
Analyzing the reasoning processes of the children in these hypotheticals is not helpful for the lawyer wondering about how to represent her client. The reasoning process of the child in the first hypothetical, who can describe plausible consequences of an alternative course of action, is more sophisticated than the reasoning process of the child in the second hypothetical, who enlists a comic book character to bolster her position. However, a lawyer will most likely hesitate before acceding to the first child's wishes, but advocate in a manner consistent with the wishes of the second child. Process does not explain the decisions; only resort to the value of avoiding family violence accounts for the lawyer's choices.

This observation triggers analysis of individual factors that reflect a dialogue between substance and process. The following factors are not a checklist. Using them as such will only replicate the mechanical results of the narrow "lawyer as agent" view. Rather, these factors should inform the lawyer's conversations with the person she represents.

A. Ability to Articulate Reasoning

A child who is competent should be able to explain the reasoning behind a decision. A child who tells a lawyer, "I don't feel like it," when the lawyer asks her why she doesn't want an operation, is not articulating reasons. Nor is a client who tells a lawyer, "I don't like the nurse," in response to the same question. In such cases, spite or irrational fear may be the decision's catalyst.

The burden of justification for a decision rises with the gravity of the decision. In some instances, the risk of harm created by a given decision may be substantial and alternative decisions may not have a comparable downside. If, the client's reasons for the decision are trivial, such as, "I don't like the nurse," doubts about competence arise. Allowing substantial risks to children based on whimsical or capricious reasoning betrays the adult whom the child will become. The law vindicates that prospective adult's interests when it demands a more substantive justification.

To demonstrate this point, consider the operation hypothetical discussed above. If the child's initial wishes are overridden and the operation is performed, the child will probably be very satisfied with the result. This is, of course, assuming that the risks and long-term pain are negligible, and that the risks and pain of the condition requiring surgery, such as a stomach obstruction, are substantial. In other cases, however, a medical course of treatment may involve chronic pain or discomfort, such as in the case of chemotherapy. Here, a child who

49. See Margulies, Access, Connection, and Voice, supra note 4, at 1085-87 (discussing analogous situation involving senior citizens).
responds, "I don't want this pain if I may die anyway," is offering a reason completely in line with the risks involved.

Similarly, a child in a delinquency proceeding who says, "I want to fight this delinquency charge because I don't like the prosecutor," is not giving a reason with any nexus to the risks of being adjudicated delinquent, including spending time in a detention facility. A child who turns down a deal to go to a counseling program because he says he wants to "make the prosecutor prove his case," however, is offering a reason rooted in dignity and citizenship. Indeed, this reason is the same one that experienced defense attorneys often give for going to trial. It would be odd to hold that a reason relied on by defense attorneys connotes incompetence in the mouth of a child.

B. Variability of State of Mind

Variability of state of mind is another characteristic of incompetence that society associates with younger children. A client who switches her decision constantly, each time taking the new position with the alacrity formerly displayed for the opposite position, raises doubts about competence. A child who says, "I definitely want to live with my father," today, after having expressed a strong preference yesterday for living with her mother, and a vigorous preference for her father the day before that, is not manifesting sound decision making. This must be distinguished, however, from ambivalence, in which a client acknowledges that the issue is a close one, and because of this tension changes her mind frequently. This latter condition, which may sometimes trigger volatile behavior, may frequently occur in the charged atmosphere of a custody proceeding, when children seek to avoid alienating either parent. Such ambivalence requires that the attorney adopt a strategy to address her client's needs, for example, by mediating between the parents.


51. Criminal defense lawyers invoking this rationale may, however, develop conflicts of interest with their clients. Conflicts can occur, for example, when a criminal defendant wishes to cooperate with a government investigation, but his lawyer refuses to facilitate such cooperation because of an antiprosecution perspective, concerns about professional reputation, or pressures from third parties paying the lawyer's fees. See, e.g., Daniel C. Richman, Cooperating Clients, 56 Ohio St. L.J. 69, 111-26 (1995) (identifying various situations where conflicts arise between defense attorneys and their clients).

52. The attorney cannot be a bystander with questionably competent clients; she must be a participant, seeking to bolster competence through conversation and exposure of the client to peer groups and professional resources. See infra notes 72-78 and accompanying text (discussing the value of peer groups).

53. See Wizner & Berkman, supra note 1, at 331.
C. Ability to Understand Consequences

People cannot make competent decisions without some conception of the consequences flowing from that decision. For a contextual view of a decision, some concern about the decision's effects is crucial. Indeed, on a pragmatic level, what happens as a result of a decision is virtually the only important concern.\(^4\) Consequences are often unpredictable. In certain cases, however, a lawyer will feel sufficiently confident about her ability to predict the future that she may properly conclude that a client's refusal to acknowledge particular consequences demonstrates incapacity. In the case of a patient who declines to acknowledge that gangrene, if not treated, will lead to death, a lawyer has good reason to doubt the patient's competence.

How a person interprets consequences can vary, of course. One person might look to fiscal or financial effects of a given decision, while another might look to its effect on ethics, values, or identity—less readily quantifiable, but still vital concerns. Any concept of cognitive development should view attention by a decision maker to both kinds of consequences as important. The bald statement, "I don't care about the consequences," without more, will lead most audiences to puzzlement and questions about capacity. Society accepts the decision not to care, but typically only when the person has implicitly weighed consequences before making the decision. In these situations, such as a Christian Scientist refusing medical treatment, someone saying, "I don't care" does not mean indifference. Instead, the Christian Scientist is saying something like, "My faith and my identity as a Christian Scientist are more important to me than the health consequences my doctors describe—I don't dispute that my gangrene will kill me if it is left unattended; it is just that the doctors attend to the gangrene with medicine, while I attend to it with faith."

Yet, dealing with consequences in decisions made by children is especially difficult precisely because children may lack the experience to form an appreciation for different consequences. Experience is a critical element of knowledge.\(^5\) This is not to say that children do not possess experience on which to draw as a basis for knowledge and judgment—clearly they do, and they add to this store of knowledge constantly. Democratic theories of education would argue that society needs to do more to take advantage of children's knowledge and

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\(^4\) See William James, Pragmatism, in Pragmatism And Four Essays From The Meaning of Truth 43 (Ralph B. Perry ed. 1955) ("To attain perfect clearness in our thoughts of an object, then, we need only consider what conceivable effects of a practical kind the object may involve . . . .").

\(^5\) Many schools of thought consider experience an essential component of knowledge. For example, this concept is fundamental to pragmatism and feminism. See, e.g., Sandra Harding, Rethinking Standpoint Epistemology: What is "Strong Objectivity"?, in Feminist Epistemologies 49, 55 (Linda Alcoff & Elizabeth Potter eds., 1993) ("[W]omen's experience is the 'grounds' of feminist knowledge . . . . ").
experience, and involve them to a greater extent in decisions. Yet certain kinds of experience are difficult for children to attain.

For example, the experience of regret for life chances foregone is a difficult experience for children to attain in a society that typically gives children only short term projects, such as playing baseball, or extraordinarily long ones, like completing elementary and secondary education. Of course, children have opinions, including very strong opinions, on whether a given activity is the best use of their time. However, I mean something different by use of the term regret. Regret in this context goes not to short-term issues, such as how one spends an afternoon, but to long-term issues of identity and values. Should someone cultivate talent for swimming or tennis, pursue excellence in scholarship, spend time with friends, or engage in politics as a vocation? While these choices are not necessarily as stark as I have made out, trade-offs are necessary. An opportunity embraced is another opportunity neglected. Unfortunately, someone may not know whether she has made the right choice until she has already made a substantial commitment of time and effort.

Children may have well-considered views on these issues, and parents may be obtuse. Some children are quite capable of taking a long-term perspective and deferring gratification, factors central to personality development. For example, a child may feel that her parents are pushing her into cultivating her talent for tennis, while she would rather be spending time with friends. Considerations of voice suggest that a lawyer must listen carefully to a child’s concerns. At the same time, however, a lawyer must be attentive to the possibility that children will not be in a position to look back and reflect on their commitments until relatively late into their minority.

Consider the consequences of neglecting an education. People can appreciate these consequences fully only when they are no longer children. The narrowing of options and life chances resulting from neglect of an education is not a phenomenon which children experience; they only experience the liberty of time away from books as time for sports and play. The disapproving looks of adults may be a kind of perverse positive reinforcement for children, confirming that they are doing what will produce the most fun. So when a twelve-year-old child says, “Getting an education is not important to me, so I prefer to live with Dad, because he won’t press me to do my homework,” a lawyer would be foolish to presume, without more, that this is a competent decision.

Indeed, even a child who tells her lawyer, “I know that neglecting my education will make it difficult for me to find a job, and—guess

56. See John Dewey, Experience and Education 35 (1938).
57. For an incisive analysis of regret, see Kronman, supra note 11, at 74-87 (1993).
what—I don’t care about that, either,” should engender doubts about capacity. In this sense, consequences entail both a procedural and a substantive component. Even if the procedural element is present—if a child acknowledges consequences, like the difficulty in finding a job that results from neglecting one’s education—substantive concerns still counsel against deference to the child’s decision. Does the child really know what it is like not to have a job as an adult? No; she has not had the benefit of experiencing that choice, and therefore cannot fully appreciate its consequences. 59

D. Irreversibility of Decision

A lawyer for children should consider the danger of long-term adverse effects of a decision in evaluating the competency of a child client. Conceptions of the autonomy of children often rely on what David Luban calls the “own mistakes” principle: the notion that people are entitled to make their own mistakes, and to learn from them. 60 For children, whose experience is inherently more limited than adults, learning is even more crucial. The thin autonomy argument, however, fails in cases where a child’s decision may make it less, rather than more, likely that she will have the opportunity of learning in the future.

59. Of course it is correct that the lawyer affects the adult’s life chances no matter what the lawyer does. Nevertheless, this truism should not obscure the fact that some chances will prejudice those life chances more than others. Making such judgments about prejudice to life chances is something lawyers for children are not only permitted, but required, to do. Any other view is either disingenuous, or else intolerably thin in its assessment of the lawyer’s role.

Some might assert that the dilemmas confronting lawyers representing children occur primarily in the custody and child welfare context, not in delinquency proceedings. In delinquency proceedings, they argue, a lawyer is basically doing what any criminal defense lawyer does, except with younger clients. The lawyer is not called upon or expected to be an officer of the court, as is often formally or informally the case in custody or child welfare matters. Yet this argument for the difference in delinquency is not entirely convincing.

It is not convincing because children, particularly if this is their first proceeding, lack the experience to decide whether or not they want to take a plea, and to evaluate the consequences of doing so.Going to a juvenile detention facility or a court-ordered placement can have a lasting effect on the child which the child cannot predict, but which the lawyer can because of her experience. The result of such a sentence may be an education in the wrong direction—an education in alienation and distrust. A lawyer should be allowed to persist in negotiations and motion practice to seek a dismissal of delinquency proceedings, even if the child wishes to plead. In particular, if the child’s rationale for wishing to plead is that he wants to “get it over with,” the lawyer should consider whether the child, some years in the future, would be happy or sad that the lawyer took some more time to negotiate, and ultimately procured a dismissal. A child’s tolerance for boredom and ambiguity may be much less than an adult’s, but the child’s preference, if acted upon mechanically by the lawyer, will nonetheless affect the adult. In this context, as in the custody or child welfare context, the lawyer for a child really has at least two clients: the child today, and the future adult whose life will be irrevocably changed by the decision in which the lawyer is involved. The lawyer must consider the interests of “both” clients.

ture. Where, for example, the child's decision can result in death, concerns about conserving the opportunity for education become paramount.

Consider the case of a fifteen-year-old girl with cancer whose doctors are recommending a leg amputation. The girl has a very good chance of survival with the amputation but virtually no chance without it. The girl's refusal of the amputation will be irreversible, because without the amputation the cancer will spread. In this context, a lawyer for the girl should demand some particularly compelling justification, such as one rooted in the family's religious beliefs, before the lawyer will regard a refusal as a competent decision.

E. Combatting Exploitation

Exploitation can also limit opportunities. Typically, the law conceptualizes exploitation as analogous to duress, a doctrine which it separates from competence per se. Yet duress and competence both have an impact on the issue of how much deference a lawyer should accord to the preferences that an individual has asserted. The law does not honor contracts made under duress, even though the individual so coerced at the time of formation of the contract stated that she wished to enter into the agreement. A decision made under duress is not knowing and voluntary—and therefore does not manifest informed consent.

The law must recognize some conception of duress in the context of representing children so that it can cope with overreaching, as it does in contracts and other areas. Duress need not be direct to affect decision making. Indeed, some of the most insidious effects on decision making stem from indirect duress. Suppose a child wants to live with her father, but the father has abused his wife, the child's mother. The child is ten-years-old, and evidence indicates that she has internalized the scenes of domestic violence she has witnessed and drawn the lesson that violence is an appropriate approach to domestic disagreements. While the mother gives every indication of being a fit parent and her custody may wean the child from this perception that violence pays, the father seems to be seeking custody mainly as a way

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61. See Buchanan & Brock, Deciding For Others, supra note 42, at 238-39.
62. See Scott, supra note 7, at 234 n.7.
63. Let us assume that the girl's parents agree with her, that the hospital commences a child welfare proceeding, and that the court appoints a lawyer to represent the girl.
64. See Stefan, supra note 39, at 792-96.
65. See id.
of punishing his wife. Because the child's sentiment that she wishes to live with her father stems, to a large degree, from her father's abuse of her mother, a lawyer should discount heavily the child's view to avoid ratifying the father's abusive conduct.

F. Presumption in Favor of the Primary Caregiver

While the preceding subsection suggests that the law may discount a child's expressed wishes when they are the product of exploitation, some basis exists for doing what a substituted judgment standard seeks to do: make decisions based on the commitments and values expressed through a person's life. Even very young children express preferences and develop commitments, whether tacitly or actively. The value of connection suggests that the law honor those commitments whenever possible. The value of connection also implies that continuity is important, so that connections are not needlessly severed. These concerns indicate that lawyers representing children of questionable competence should presume that a child should remain with her primary caregiver.

The law should place a heavier burden of explanation on a child who wants to leave her long-time primary caregiver than on a child who wishes to stay with the primary caregiver. Children wishing to turn their back on their established connections should have to explain why. Otherwise, the lawyer should consider whether resentment over the caregiver's performing her role too well, insisting that the child do her homework, for example, is behind the child's preferences.

Similarly, this interest in continuity dictates that a lawyer should defer to a child who wishes to stay with both parents. The lawyer should yield to the child's preference even when the parents are respondents in an abuse or neglect proceeding, the exception being cases where the child's injuries are so severe that the lawyer reasonably believes that extreme and imminent bodily harm will follow if the natural parents retain custody.

The attorney must realize that foster care is not a mecca. For example, often foster care separates siblings, even though sibling relationships may embody a child's most meaningful commitments. Wishing to remain united with one's siblings is an eminently rational goal that reflects the child's need for connection.

Considerations of voice cut the same way. In a situation where a lawyer has been appointed to advocate for a child, the judge will always look to that attorney for the most disinterested expression of the

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68. Id. at 1055-57.
69. See Wizner & Berkman, supra note 1, at 345.
70. The exception in cases of extreme harm derives support from two factors: irreversibility of decision making and combatting exploitation.
child’s wishes. All other things being equal, the lawyer should respect her client’s fear of foster care. The education value also points in this direction: except in cases where serious bodily harm is imminent, where the attorney may have separate authorization under the American Bar Association’s Model Rules of Professional Conduct (“Model Rules”) to disclose otherwise privileged confidences, the child who wishes her family to remain intact still knows more about her family than the lawyer does. Thus, the lawyer should advocate for the child’s stated preference. Given the contextual view of competence advanced in this Article, such a preference for family unity manifests as much competence as a lawyer has a right to expect from any client, adult or child.

IV. ENHANCING COMPETENCE

This Article’s argument that competence is made, not found, assigns to lawyers the important task of enhancing the competence of their child clients. The goal of enhancing competence partakes of the three values, connection, education, and voice, described earlier—particularly the goal of education.

A. Consulting with a Diagnostician

Consider how these values—connection, education, and voice—illustrate the benefits and risks for the lawyer of consulting with treatment or social service professionals who have treated or examined a child. Such consultation clearly offers benefits to the diligent attorney. Having access to the experience and insight of diagnosticians who have treated the child over time can help a lawyer understand and enhance her client’s competence. The Model Rules recognize this benefit and allow the lawyer who has doubts about her client’s competence to consult a diagnostician. While diagnostic professionals play an important role in determining competency, the lawyer should consult the child before seeking the help of a diagnostician. Despite the Model Rule’s authorization, if a child does not wish the lawyer to make such overtures, the lawyer ordinarily should not do so. A child may feel some territorial interest in the information that the personal diagnostician possesses. Indeed, this quasi-property interest is the same interest that adults have in communications with physicians, social workers, and lawyers. When a child can express her wishes, even if the lawyer has reasonable doubts about the child’s competence, the lawyer should respect them. To violate those wishes sends the message that the child is in fact helpless and promotes the passive-aggressive behavior that is the principal

means of resistance for those who have no direct voice. The loss of trust embodied in such behavior, which may take the form of refusing to communicate with the lawyer on other issues, is the central evil that privileges seek to prevent.

Passive-aggressive behavior, and the loss of trust which it manifests, is the antithesis of competence. Violation of the child's wishes makes it more difficult for the child to act in the world and to find her voice because it tells the child that adults do not listen. Building competence and responsibility—goals that are at the heart of the education value—require, that at least on some personal decisions, children have the opportunity to decide for themselves what they wish to do. A lawyer obligated to have a serious conversation with a child about these issues will learn more about the child and the child's values than a lawyer who can do an end-run around the child and use social service and medical professionals as convenient surrogates for the child's voice.

B. Empowerment Through Peers

Another strategy for enhancing child competence is consultation with the child's peers. Peer groups are a useful way for people to work through difficult situations. Various groups such as senior citizens, substance abusers and their families, and survivors of domestic violence, employ this strategy. Similar to adults, children can work through issues in groups. Indeed, in custody and child welfare cases, siblings acting as a group can be a vital source of empowerment, as well as a resource for attorneys.

Children working together may find, as adults do, that addressing issues in concert with others is more productive than facing them alone. Developing vehicles for such group learning in the custody and child welfare settings will clarify children's sentiments, and enhance

73. See Winter, The Power Thing, supra note 36.
74. There may be times when dealing with children of doubtful competence that consultation with a diagnostian (in the face of the client's refusal) is necessary to deal with an emergency.
76. See Lawyering for the Child, supra note 1, at 1183.
their competence to deal with life's challenges, as well as offering more guidance to attorneys. Education theorists recognize increasingly that children learn in school from interaction with their peers, as well as from interaction with adults. 77 Barring information gained in such group sessions from direct use in custody or child welfare proceedings and instead using it mainly for ascertaining the views of children and refining those views will cure any confidentiality concerns. In addition, it will produce valuable insight for children and for their lawyers. 78

C. Attorney Training

While using diagnostic professionals and peer groups can help enhance competency, training is essential for attorneys to appreciate the insight which their child clients can provide. The curriculum for training should include study of child development theory, interviewing and counseling, and the risk of bias in custody and child welfare decisions. Helping professionals, clinical legal educators focusing on family law issues, and children themselves, should be resources in this training task. 79 For example, foster children should be part of the "faculty" dealing with child welfare proceedings, discussing both the benefits and the drawbacks of their experiences in foster care.

A central focus of training should be on reducing the risk of bias. For example, while attorneys frequently invoke the parents' relative financial status as one element in deciding on custody, 80 stressing financial status can unduly discount children's affective and cultural ties. 81 Issues of relative financial status are more properly the realm of child support, not custody. Similarly, focusing on whether a parent has remarried, 82 and can provide a two-parent household for the child, penalizes women, who tend to remarry less frequently than men. Finally, there is no evidence that a parent's sexual orientation correlates with the self-esteem, gender identity, or sexual orientation of the

77. See generally Dewey, supra note 56.
78. The lawyer must also be willing to try alternative methods for communicating with the child which depart from the traditional lawyer's office interview approach. Interviews at the child's home, or at McDonald's, are useful strategies. See Lawyering for the Child, supra note 1, at 1160-62 & n.163.
79. For a discussion of a simulation which explores dilemmas encountered by professionals in child welfare proceedings, see Jean Koh Peters, Jose and Sarah's Story: The Usefulness of Roleplay in an Ethically-Based Evaluation of the Present and Future Family Court, 21 Pac. L.J. 897 (1990).
80. See Lawyering for the Child, supra note 1, at 1169 n.205 (discussing different criteria attorneys might consider when assessing a child's preference for placement).
81. In some settings, such as child placement cases within the purview of the Indian Child Welfare Act, courts must weigh supplying material abundance less heavily than conserving cultural heritage.
82. Evidence suggests that some attorneys consider the issue of remarriage when making decisions for a child they deem to be incompetent. See Lawyering for the Child, supra note 1, at 1169 n.205.
Affective concerns, such as the emotional ties between a parent and child, and concerns such as parental commitment of time to education, continuity of caregiving, and freedom from exploitation, should be more important when lawyers consider how to counsel a child client about custody. Careful training is the best way to avoid the mix of arrogance and ignorance which unfortunately characterizes much representation of children today.

V. REPRESENTING AN INCOMPETENT CHILD: ALTERNATIVE APPROACHES

The potential for arrogance and ignorance is greatest when a lawyer appointed to represent a child decides that the child is not competent. Some commentators have proposed curbing the risk of abuse in this situation by limiting the lawyer to fact-finding. Unfortunately, this restrictive approach does not effectively address concerns about lawyers overreaching their roles. In addition, the restrictive approach ignores the important function of substantive values in lawyering. A contextual approach, which provides lawyers with substantive guidance and training, limits the effects of bias and arrogance without stifling the child's voice.

A. The Fact-Finder-Only View

Standards enacted by the American Academy of Matrimonial Lawyers embrace the restrictive view, recommending that lawyers for concededly incompetent children be barred from taking substantive positions in custody cases. The Commentary to the Academy Standards asserts that an attorney who makes decisions for an incapacitated client is compromising "the rule of law" by interposing her own values in the place of the client's. Those values will vary from attorney to attorney, the Commentary declares. When lawyers interpose their own values, decisions will vary, and courts will be inconsistent in their decisions involving similarly situated children, thus violating the rule of law.


84. See Academy Standards, supra note 15, § 2.7 (prohibiting a lawyer from even advocating a position).

85. See id. § 2.7 cmt.

86. Id.

87. Id.
While the restrictive view stems from valid concerns, its premises are unpersuasive. The view offers an unduly narrow account of the role of values in the attorney-client relationship. In addition, it creates a false dichotomy between two activities which are fundamentally intertwined—finding facts and articulating substantive positions. In light of these concerns, limiting lawyers for incompetent children to factfinding will only exacerbate, not resolve, the abuses the restrictive view's proponents identify.

The first problem with the restrictive view is its narrow view of the role of values in attorney-client counseling. Proponents of the restrictive view are troubled by the influence of lawyer values on positions taken for incompetent child clients. This concern discounts the fact that the attorney-client relationship frequently involves lawyer values. Most directly, substantive values inform a lawyer's assessment of a client's competence. Even with unimpaired clients, attorney values may fundamentally reshape client decisions.

A lawyer's values often will influence the position she advocates for a client because clients do not necessarily come to attorneys with preferences fully formed. Often a client's decision about what legal position to take is a product of deliberation between lawyer and client. The Academy Commentary recognizes this when it notes that the responsibilities of a lawyer's role may sometimes require her to "confront" clients whose initial preferences are imprudent or self-destructive. In some cases, a lawyer should "persuade" the client to relinquish her position. Of course, lawyers may disagree about exactly which positions they consider to be self-destructive or imprudent, depending on the individual lawyer's values. The only difference between these situations and those in which lawyers for impaired clients make decisions is that in the latter case the law deems the clients to lack capacity. The problem in this latter scenario, however, is that someone other than the client is making the decision, not that the decisions will vary with the attorney's values.

88. See supra notes 39-71 and accompanying text (demonstrating how the contextual approach uses substantive values to assess a child's competency).
89. See Kronman, supra note 11, 128-34; Amy Gutmann, Can Virtue Be Taught to Lawyers?, 45 Stan. L. Rev. 1759, 1769-70 (1993).
90. See Academy Standards, supra note 15, § 2.4 cmt.
91. See id. (indicating that if counsel is ineffective in persuading client, then counsel must zealously advocate client's wishes).
92. That this delegation to another decision maker is central to the Academy's concerns is plain from the Commentary's refusal to permit even guardians ad litem, typically appointed expressly to safeguard the child's best interests, to express an opinion in custody proceedings. Academy Standards, supra note 15, § 3.2 & cmt. Guardians ad litem do not have role problems, as attorneys with impaired clients do, with staking out their own positions; guardians ad litem are appointed expressly to stake out such positions. Indeed, the Academy Commentary also urges that guardians ad litem not only be attorneys, but also be selected from the ranks of social workers and psychologists. To the extent that the objection with attorneys speaking out is that they lack the expertise to determine what is best for the child, the objection
This concern about the identity of the decision maker does not consider that, in practice, someone other than the client may make the decision even in cases where a client is deemed to be competent. When an attorney is sufficiently persuasive, and a client sufficiently weak-willed, as will be the case with some of the vulnerable clients represented in custody disputes, even an unimpaired client may effectually cede decision-making authority to her attorney. Indeed, studies suggest that matrimonial lawyers routinely seek this abnegation by clients in divorce proceedings.93

The only way to stop this phenomenon of disparate attorney values driving litigation decisions is to bar all clients, including spouses seeking divorces, from retaining counsel. The Academy of Matrimonial Lawyers, however, stops short of recommending this step. The Academy, therefore, envisions custody proceedings in which divorcing spouses have lawyers, but many children have only limited representation. The most concrete result of this regime would be an increase in the power of matrimonial lawyers. Such increased power will not make custody adjudication more responsive to children’s needs.94

should not hold for social workers and psychologists, unless one believes that all expertise is overblown and tends to undermine parental authority. See Fineman, supra note 12, at 735 (arguing that social service professionals systematically discount maternal interests in custody litigation).


94. Professor Guggenheim, the Reporter for the Academy Standards, has previously suggested, for legitimate reasons, that the entire notion of court-appointed advocates for children in custody disputes is counter-productive. There are good reasons for this position: court-appointed advocates for children can disregard children’s connections with parents; apply invidious biases; and allow judges to escape responsibility for decisions. See Guggenheim, supra note 1, at 135-43; see also Mlyniec, supra note 1, at 9-10 (stating that “[t]he advocate seemingly makes the ultimate decisions regarding what is the child’s best interest”).

Curbing or eliminating lawyers for children, however, significantly increases the power of matrimonial lawyers. Life for matrimonial lawyers would be much easier if they did not have to worry about the “wild card” of an advocate for children who may disagree with them about the outcome of the case. A little inconvenience may be just what matrimonial lawyers need, however, in light of their tendency, amply documented in a well-known empirical study, see Sarat & Felstiner, supra note 93, at 741-43, for putting their own convenience ahead, not only of the welfare of the children involved in custody disputes, but also of the wishes, needs, and emotions of their own clients.

While one does not want to unduly generalize about matrimonial lawyers, some of whom in my experience are exceptionally thoughtful about gender issues and other matters important to custody disputes, the Sarat and Felstiner study is a sobering look at a cross-section of behavior within the matrimonial bar. Other lawyers, including poverty lawyers, have been criticized for similar behavior which places professional power over client welfare. See Alfieri, Reconstrutive Poverty Law, supra note 8, at 2146-47. One does not need to single out matrimonial lawyers to appreciate that reducing the power of an advocate for children just gives the other advocates more authority, and that sound policy must take this factor into account.
The restrictive view is also problematic because it creates an artificial dichotomy between values and substantive positions on the one hand, and factfinding on the other. Narrative theory teaches that any account of facts either states or implies a particular substantive position. A lawyer cannot organize facts in a coherent manner unless she first takes a position which informs how she should organize the facts. Indeed, the Academy’s Reporter, Professor Guggenheim, recognizes as much in his path-breaking article, *The Right to be Represented But Not Heard,* which notes that the information yielded by the attorney as fact-finder “will have been colored by the Investigator’s values, by his sense of what is relevant and what is not.”

Because of the link between values and fact-finding, allowing the lawyer for a child to expressly advance a substantive position will assist the court in assessing the accuracy of the related facts. A judge can better evaluate accuracy of facts if she knows the position which the relator takes, and can discount that perspective accordingly. If the judge does not know the relator’s bias, she cannot appropriately weigh the accuracy of the recounted facts. That is why asking about the bias of witnesses is always a fair ground for cross-examination.

In addition, the need to take a position enhances the advocate’s sense of responsibility. The advocate has to work harder in order to find evidence to support her position. An advocate who does not take a position may settle for routine fact-finding which does not help the court or the client. An advocate’s knowledge that she cannot directly influence the outcome of a case may make her lazy, a phenomenon which is already a concern in representation of children. The exception to that tendency will be in cases where an attorney can convey her position merely through an ostensibly “neutral” presentation of facts. In such cases, of course, the distinction the Academy Standards draws between taking a position and finding facts disappears.


96. Judges are the best example of the corollary of this statement, namely, that the substantive position one takes necessarily influences how one recounts facts. The statement of facts in any judge’s opinion will differ, depending on the result which the judge reaches. The judge will include some facts, and omit others, depending on how she decides the case. For instance, Justice Cardozo found it unnecessary to include the name of Mrs. Palsgraf in the body of his opinion in that notable case. See John T. Noonan, Persons and Masks of The Law 111 (1976).

97. See Guggenheim, *supra* note 1, at 108-09.

98. Id. at 108.


100. Prohibiting a lawyer for an incompetent child from stating a position will also frustrate another goal set out in the Academy Standards: the promotion of settlement. Negotiating with an advocate who refuses to take a position does not foster settlement, but instead magnifies uncertainty. At some point in settlement, parties need to have the opportunity to ask each other, “What are your goals and interests?” Negotiating with someone who lacks the authority to answer that question is difficult,
B. Lawyering for Incompetent Child Clients: A Contextual View

The better, more contextual approach to dealing with the problems of attorney arrogance identified by the restrictive view is to allow the lawyer to play a range of roles, including fact finder, mediator, and advocate, while offering both training and some substantive guidance to reduce the effect of invidious biases on the advocate. A cardinal virtue of this approach is that it perceives the ambiguities of representing children as posing challenges, whereas the restrictive view sees only perils.

This openness to ambiguity more effectively captures the realities of representing children. The contextual view acknowledges that fact-finding, advocacy, and mediation are intertwined, instead of seeking to separate them into neat compartments, as the restrictive view attempts to do. In addition, the contextual approach reflects the interaction of connection, education, and voice in the representation of children. It realizes that a child's connection to her family and the ongoing education process that shapes her development necessarily affect the child's voice. Such interaction makes the lawyer for a child more like Brandeis's "lawyer for the situation," like a special master appointed in complex, "polycentric" cases, and like the "de facto guardian" mentioned in the Commentary to the Model Rules.

In its openness to ambiguity, the contextual approach reflects the experience of lawyers representing children. Most lawyers for children move from one role to another, as the needs of their client require, regardless of the terms they use to describe their role. Practice in this area is too fluid for the kind of cabining contemplated by the restrictive view.

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101. While voice is always a plural concept—with many voices contributing, even within a single person, see Cahn, Inconsistent Stories, supra note 8, at 2485; Margulies, The Mother With Poor Judgment, supra note 8, at 709-16—the values of connection and education are especially salient with children.

102. See generally Lawyering for the Child, supra note 1 (advocating a generalized or "lawyer for the situation" role for attorneys representing a child clients).


104. See Model Rules, supra note 71, Rule 1.14 cmt.; cf. Margulies, Access, Connection, and Voice, supra note 4, at 1093-98 (discussing de facto guardian concept in context of elder law). But see Tremblay, supra note 8, at 1435-45 (taking a critical view of the de facto guardian approach).

105. See Lawyering for the Child, supra note 1, at 1146-50.
Proponents of the restrictive view are correct in warning that this very fluidity offers opportunities for the introduction of invidious biases into advocacy for children. The contextual approach deals with this problem not through cabining the role of the lawyer for the child, which merely allows more room for the prejudices of the other lawyers, but instead through training and substantive guidance. Training should emphasize the unreliability of factors such as parent's financial or marital status, or sexual orientation. In addition, three substantive factors should inform lawyering for incompetent children: (1) conserving continuity of caregiving, assessed with reference to the status quo before the commencement of legal proceedings; (2) promoting parents' commitment of time to their child's education; and (3) preventing violence against the child or other family members.

Lawyer reliance on substantive factors in the representation of incompetent children is not a new concept. Indeed, Professor Guggenheim, the most eloquent proponent of the restrictive view, suggests continuity of caregiving as a default position for lawyers representing very young children. He recommends that lawyers for young children in child welfare cases argue for preservation of parental rights. Avoiding exploitation is another well-established goal reflected in statutes, case law, and commentary. Similarly, commitment of time to education is a goal which embodies society's concern for children's development.

Consider how the contextual approach might work in the arena of visitation, one of the crucial issues in a custody proceeding. The lawyer for a three-year-old girl might encourage the parties to the proceeding to agree that the noncustodial parent, the father, would enjoy liberal visitation. The lawyer would base her efforts on perceptions gleaned from the girl's eleven-year-old half-sister, who lives with the girls' mother, social service professionals, and from meeting with the three year old at her home, where the child spoke about missing her father. Change the facts somewhat, however, and the role of the lawyer under a contextual approach also changes. Suppose that the mother informs the lawyer that the father battered her while they lived together, sometimes in front of the three-year-old. In this situation, the lawyer might shift from a mediator's role, seeking consensus on the issue of visitation, to a fact-finder's role, informing the court.

106. See supra notes 80-83 and accompanying text.
107. See Guggenheim, supra note 1, at 138-43.
109. This factor is phrased in terms of commitment of time so that a lawyer cannot view a parent's mere financial commitment as dispositive. Stressing a time commitment allows the lawyer to avoid the issues of class bias raised earlier. See supra notes 80-83 and accompanying text.
110. For examples of this kind of negotiation with parents in a custody proceeding, see Wizner & Berkman, supra note 1, at 334-43.
both of the three-year-old's sentiments and about the spousal abuse that occurred in front of the child. If the father happened to be seeking custody in this case, the lawyer for the three-year-old could shift roles again, acting as an advocate in opposing the father's bid, despite the three-year-old's sentiments. Protecting the child from exploitation, so that her voice is not stunted, would govern the lawyer's role.

In another situation, involving a child who wishes to live with her father because he will not make her do her homework, issues of a parent's commitment of time to education will shape the role of the lawyer. The child's preference clearly does violence to the value of education, which is premised on the cultivation of long-term perspectives over short-term views. Mechanically following the child's preference, regardless of the child's age, is an abdication of the lawyer's obligation to counsel her clients. The lawyer has a responsibility to stress to the client the importance of education.

If the child persists in her preference, the lawyer would have two options under the contextual model. First, particularly with younger children, the lawyer can advocate against the child's preference, on the ground that the child's short-term perspective demonstrates a lack of capacity. Second, with older children, the lawyer could act as a fact finder, bringing to the attention of the court both the child's preference and the reason behind it. The one thing that the lawyer should not do in the "I like Dad because he won't make me do my homework" scenario, absent some other reason which the child articulates for her preference, is seek to do what a lawyer would do for other clients: strategize on how to vindicate the client's goal, if necessary by browbeating the mother into relinquishing custody. Vindicat-

111. Proponents of the restrictive view would agree that counseling is called for in this situation. See Academy Standards, supra note 15, § 2.4 cmt.
112. When a lawyer determines that a child lacks capacity, she should proceed as the Model Rules permit, as a de facto guardian. She may seek appointment as a guardian ad litem, although we should view this as a formal conferral of legitimacy, not as any guarantee that the child's interests will be more effectively or authentically represented. Although a lawyer who is also a guardian ad litem experiences a conflict of interest, this conflict is no greater than other possible solutions to decision-making issues, such as naming another person as the guardian ad litem. A lawyer who is also the guardian ad litem will be more likely to spend time speaking with the client and obtain guidance when necessary. When another person is appointed as the guardian ad litem, the lawyer is likely to spend more time speaking with the guardian ad litem, and less time with the client. In addition, the lawyer's need to maintain credibility with the court is a more effective check on abuse than any of the largely nominal checks on the guardian ad litem's authority. But see Tremblay, supra note 8, at 1435-45 (asserting value of legal checks on guardian's authority). This arrangement also means the child has one person, not two, to communicate with, which gives the child more opportunity to influence decisions. As a legal services lawyer who has done much work in this area says, the lawyer should strive, in terms of legal formalities, to be "as close as possible to the child."
113. This Article's use of this hypothetical should not obscure the fact that many children will desire the involvement and discipline provided by the mother in the scenario. See Lawyering for the Child, supra note 1, at 1169 n.207.
ing the values of education and connection that underlie the court’s appointment of counsel for children require a less partisan approach.

CONCLUSION

The contextual approach will not banish the conscientious lawyer’s dilemmas. It does, however, offer a framework for making lawyers more sensitive to the context of competency decisions. The approach embraces three values—education, connection, and voice—and rejects the false dichotomies between autonomy and welfare, substance and process, and fact and value. It offers a flexible approach to determining competency, in which substance and process in decision making are both legitimate concerns.

In addition, the contextual approach, rather than forcing a lawyer for very young children into a narrow role as the restrictive approach does, allows the lawyer to choose the most appropriate strategy, including advocacy, fact-finding, and mediation. The contextual approach holds that cutting off access to any of these roles frustrates effectiveness in the other two. Indeed, the most concrete result of limiting the role of the child’s lawyer is augmentation of the power of the other lawyers in the proceeding.

To guard against the possibility of the child’s lawyer taking over proceedings and acting as a kind of judge on the cheap, the contextual approach uses three factors as guidelines: (1) continuity of caregiving, assessed with reference to the status quo before the commencement of legal proceedings; (2) parents’ commitment of time to their child’s education; and (3) the presence of exploitation or violence against the child or other family members. The approach also advocates training in listening skills and avoidance of invidious bias, such as bias based on a parent’s social class, sexual orientation, or marital status.

The contextual approach does not make a lawyer a surrogate parent for the child she represents. A lawyer assuming the surrogate parent role can only stifle the client’s voice and prompt the kind of overreaching which commentators who favor limitations on the lawyer’s role criticize. At the same time, the lawyer for the child must acknowledge the connection which shapes the child’s values and the need for education which will define the child’s voice. This creates a paradox. A lawyer who purports to be a surrogate parent for a child will not perform her role adequately. However, a lawyer who never feels the urge to act as a surrogate parent and then to channel this urge into connecting with her client, will also not be a good lawyer for children. The virtue of the contextual approach is that it allows lawyers to find their way between these extremes.