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The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client

Cover Page Footnote

Associate Professor of Law, Tulane Law School.

THE ETHICS OF EMPOWERMENT: RETHINKING THE ROLE OF LAWYERS IN INTERVIEWING AND COUNSELING THE CHILD CLIENT

Katherine Hunt Federle*

"Then you should say what you mean," said the March Hare.

"I do," Alice hastily replied; "at least—at least I mean what I say—that's the same thing, you know."

"Not the same thing a bit!" said the Hatter. "Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see!'"

"You might just as well say," added the March Hare, "that 'I like what I get' is the same thing as 'I get what I like!'"

"You might just as well say," added the Dormouse, which seemed to be talking in its sleep, "that 'I breathe when I sleep' is the same thing as 'I sleep when I breathe!'"¹

INTRODUCTION

LAWYERS must feel, occasionally, that they have fallen down the rabbit hole when they try to speak with and advise their clients. This sensation may partially explain why issues of competency, coercion, and manipulation arise in the context of the lawyer's representation of the adult client.² Scholars have acknowledged that such problems are the inevitable consequence of an unequal relationship in

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1. Lewis Carroll, *Alice's Adventure in Wonderland*, reprinted in *More Annotated Alice* 83 (Martin Gardner ed., 1990).

2. See, e.g., Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974) (surveying various models of lawyer-client relationships and analyzing ethical issues that arise in these models); Abraham S. Blumberg, *The Practice of Law As a Confidence Game: Organizational Coaptation of a Profession*, *Law & Soc'y Rev.*, June 1967, at 15, 22-31 (analyzing manipulation of client interests in context of criminal law proceedings); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *Stan. L. Rev.* 503, 504-05 (1985) (examining influence of ideal of autonomy on lawyer-client relationships in large firm practice); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 *Buff. L. Rev.* 177 (1986) (analyzing lawyer-client relationships in consumer bankruptcy law practices, focussing in particular on interviewing and counseling behavior); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *Geo. J. Legal Ethics* 241, 278 n.291 (1992) (examining historical origins of the vision of lawyers' role as representative of communitarian goals and analyzing the influence of this vision on lawyer-client relationships); Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *Law & Soc'y Rev.* 737 (1988) (examining how lawyers and clients interpret social conduct involved in legal process of divorce).

which the client is seen as subordinate and dependent.³ Moreover, the client may be particularly susceptible to interpersonal domination because of invasive practices that systematically disempower the client.⁴ Client empowerment, therefore, becomes essential to the creation of an equal relationship between lawyer and client.

This question of empowerment is central to the lawyer's relationship with her child client. Furthermore, that relationship is inextricably linked to notions of client competency and lawyer autonomy. For the child, an emphasis on capacity creates a peculiar disability, one that suggests that the child may be unduly susceptible to coercion and manipulation because of the child's inability to make reasoned decisions. Although these difficulties often underlie justifications that deny the child access to counsel in the first instance, they also suggest that the attorney's ethical obligations to the child client differ. Thus, what the child wants may be subordinated to some vision of the child's best interests and to what is a "good" or "right" decision. This necessarily enhances opportunities for autonomous decisionmaking by the lawyer.

This emphasis on capacity has structured much of our discussion about children's rights and ethical issues in interviewing and counseling child clients. The dominant lawyering paradigms, for example, center on issues of client autonomy and lawyer independence, on who gets to make decisions about the case. These models implicitly reflect rights constructs that, ultimately, inform the lawyer about what she may or may not do for the client. Moreover, rights theories themselves rest on some underlying notion about capacity as a prerequisite to having and exercising rights. But because children are not seen as capable, autonomous beings, much of our rights talk, and our lawyering, cannot accommodate children. What is needed is a new way of thinking about rights and lawyering that will account for children as rights holders.

This Article proposes a new lawyering model that stems from an empowerment perspective on the rights of children. An empowerment perspective rejects capacity as an organizing principle in rights theory and argues that power is central to any coherent account of rights. From an empowerment perspective, it is the powerlessness of children that mandates their empowerment. Moreover, ethical issues in the representation of children would be resolved by considering the child client's need for empowerment. Consequently, coercive and manipulative practices could no longer be justified and paternalistic practices would not only be inappropriate but unethical, for they would have a disempowering effect on children as clients.

3. See *infra* notes 42-53 and accompanying text.

4. See *infra* notes 42-46 and accompanying text.

The first section of this Article begins with an overview of the two dominant lawyering paradigms and illustrates how theories of rights structure the relationship between attorney and client. The Article then analyzes the implications of these theories for lawyering when the client is a child by considering the child's right to counsel in delinquency, abuse and neglect, and custody cases.⁵ Lawyering for the child within the framework of these proceedings is then discussed and interviewing and counseling techniques are reviewed. The Article then concludes with a discussion of an empowerment perspective on the rights of children and a suggestion as to how interviewing and counseling the child client might differ under such an account.

I. OF PROFESSIONAL ETHICS, RIGHTS, AND CHILDREN

Two competing visions of the good lawyer animate much of the discussion about professional ethics. The first is a paradigm of client autonomy, in which lawyering is client-centered and client-empowering; the attorney is partisan, loyal, zealous, subordinate and morally nonaccountable for the client's autonomous choices.⁶ Dignity, freedom, individual autonomy and, somewhat paradoxically, communitarianism are central features.⁷ The second model emphasizes lawyer autonomy: within this construct, the attorney is professionally independent of and, perhaps, even paternalistic towards the client, as

5. This article focusses on these proceedings because lawyers come into contact with children most frequently in these sorts of cases. Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 Creighton L. Rev. 1369, 1370 n.14 (1985) (noting that lawyers come into contact with children most frequently in delinquency, neglect, abuse, divorce, or tort cases); Marvin Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259, 268 (1995) (stating that children are most commonly represented in abuse, neglect, dependency, delinquency, and status offense cases).

6. See generally Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* (1978) (discussing the issues and conflicts that arise in the lawyer-client relationship); 1 *Lawyers in Society: The Common Law World* (Richard L. Abel & Philip S. C. Lewis eds., 1988); Monroe H. Freedman, *A Lawyer Doesn't Always Know Best*, 7 Hum. Rts., Spring 1978, at 28, 52 (stating that legal advice is "indispensable . . . to the effective exercise of individual autonomy," and that lawyers should not deny clients their autonomy by preempting clients' moral choices); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1087 (1976) (proposing a model for lawyer-client relationships in which the lawyer acts as the client's legal friend and accords the client "special indulgences").

7. See Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 Hastings L.J. 769, 839 (1992) (recognizing that lawyers may empower their clients through such tactics as personalization) [hereinafter Alfieri, *Disabled Clients*]; William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 Cornell L. Rev. 1447, 1497 (1992) (acknowledging that power is fluid and that clients exercise power over their lawyers in a number of ways); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 Hastings L.J. 947, 951-54 (1992) (advocating a form of rebellious lawyering, in which the attorney seeks to empower subordinated clients) [hereinafter Tremblay, *Rebellious Lawyering*].

well as morally accountable for her actions.⁸ In this instance, notions of professional integrity are tied to larger concerns about the rights of other clients and an overarching duty to the principles of truth and justice.⁹

Neither account, however, goes deep enough to suggest a paradigm that meaningfully addresses the seemingly intractable problems of role and morality. This difficulty ultimately stems from an impoverished account of rights. Lawyering models implicitly engage in rights talk: what the lawyer is to do (or not) for the client depends primarily on how one constructs and values rights. But the accounts of rights that lie beneath these lawyering models are invariably impoverished because they fail to account for powerlessness. To be coherent, a theory of rights must recognize the connection between powerlessness, hierarchy, and exclusion; in this sense, rights flow downhill toward the least powerful in any given relationship.¹⁰ The difficulty with models of professional ethics lies in their unsatisfactory accounts of rights and explains, I think, the paradigmatic concern for the individual lawyer's morality or goodness.

A. *Two Lawyering Models*

This section illustrates how two different notions of rights structure models of lawyering. It begins with an overview of the client autonomy model and contends that the choice theory of rights best accounts for the value placed on client autonomy. The Article then discusses the critique of client autonomy and its alternative paradigm, the lawyer autonomy model. Interest theory, in which interests generate rights and there is an explicit concern for the underlying moral justifications of a duty, best explains this emphasis on lawyer autonomy. The section then concludes with a brief description of the implications of these accounts for lawyering when the client is a child.

1. Client Autonomy Model

Client autonomy is the central value of the first lawyering model. Within the simplest account of this paradigm, autonomy is seen as a fundamentally moral concept, as a good in and of itself, because it

8. David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 493 (1981) [hereinafter Luban, *Paternalism*]; Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 Cath. U. L. Rev. 319, 329-30 (1987) [hereinafter Shaffer, *Good Client*].

9. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 Vand. L. Rev. 717, 737-40 (1988) (arguing that a morally activist vision of lawyering has historical roots in a progressive professionalist view of legal profession) [hereinafter *Noblesse Oblige Tradition*].

10. Katherine Hunt Federle, *Looking for Rights In All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 Cardozo L. Rev. 1523, 1525-26 (1994); Katherine Hunt Federle, *Rights flow downhill*, 2 Int'l J. Children's Rts. 343, 343-45 (1994) [hereinafter Federle, *Rights flow downhill*].

promotes and secures individual dignity and freedom.¹¹ Furthermore, autonomy promotes individual happiness and satisfaction and, consequently, benefits society because it reaffirms those values promoted by the liberal state.¹² Finally, autonomy is inextricably linked to our preference for an adversarial system of justice. It is being able to say what one wants, to make one's case, to have some control over or to influence an outcome—that is the essence of autonomy and freedom.¹³

Under this model, the attorney is the systemic promoter and facilitator of client autonomy. She has certain obligations to the client necessitated by this role. They include duties of loyalty, partisanship, zealous advocacy,¹⁴ and even a special-purpose friendship.¹⁵ But above all, the attorney must be professional, neutral with respect to the ends sought, and nonaccountable to others for her part in the pursuit of the client's objectives, even when they may be wrong or immoral.¹⁶ Because autonomy is a moral good and the promotion of autonomy depends, in large part, upon access to law, the attorney is exempted from moral responsibility for the pursuit of the client's stated ends.¹⁷ At worst, this renders the attorney's role amoral¹⁸ and

11. Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 St. Louis U. L.J. 761, 764 (1983); Fried, *supra* note 6, at 1074; Stephen L. Pepper, *A Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 616-17; Robert S. Redmount, *Paternalism and the Attorney-Client Relationship*, 14 J. Legal Prof. 127, 132 (1989); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 605 (1985); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. Rev. 315, 339 (1987). Monroe Freedman has been one of the most ardent and articulate supporters of this position. Monroe H. Freedman, *Understanding Lawyers' Ethics* 57 (1990) [hereinafter Freedman, *Ethics*]; Freedman, *supra* note 6, at 31, 52; Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 Cath. U. L. Rev. 191, 204 (1978) [hereinafter Freedman, *Personal Responsibility*].

12. D'Amato & Eberle, *supra* note 11, at 764; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501, 547-52 (1990) (discussing micro-arguments favoring a client-centered approach to legal counseling); Strauss, *supra* note 11, at 338.

13. Hazard, *supra* note 6, at 129; D'Amato & Eberle, *supra* note 11, at 764-65; David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum. L. Rev. 1004, 1035-37 (1990) [hereinafter Luban, *Partisanship*] (critiquing the "standard conception" of lawyering). For a more comprehensive account of the Luban-Ellmann debate, see also Ellmann's review of Luban's book, Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 Colum. L. Rev. 116 (1990) (reviewing David Luban, *Lawyers and Justice: An Ethical Study* (1988)).

14. Freedman, *Ethics*, *supra* note 11, at 65-66.

15. Fried, *supra* note 6, at 1071-72. Fried analogizes the role of lawyer to that of a limited-purpose friend who adopts the client's interests as her own within the context of a (narrower) legal relationship.

16. Freedman, *supra* note 6, at 32-33; Fried, *supra* note 6, at 1082-87.

17. Pepper, *supra* note 11, at 617-18.

18. *See id.* at 617-19. For critiques of Pepper's claim that the lawyer's role is amoral, see Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role,"* 1986 Am. B. Found. Res. J. 651; David Luban, *The Lysistratian Prerog-*

may promote moral nonaccountability, a central criticism of the client autonomy paradigm.¹⁹

Some proponents of the client autonomy model, however, claim that the attorney's act is, in and of itself, a moral one.²⁰ Proponents of the paradigm argue that the lawyer acts morally when she helps clients realize their legal rights.²¹ This sort of action insulates the attorney from moral condemnation, even when she represents an "unworthy" client, because it promotes the expression of client autonomy within the legal system.²² The lawyer, nevertheless, may be held morally and professionally accountable when she preempts client decision making by denying the client the information or the means to carry out her lawful purposes.²³ This not only violates the client's right to pursue her legal objectives²⁴ but deprives the client of autonomous action, a central value of this paradigm.²⁵

Moreover, under the client autonomy model, the attorney has an additional obligation to ensure that the client participates freely and autonomously within the attorney-client relationship itself. Because the client accesses legal structures through the attorney, the client's primary expression of autonomy occurs within the attorney-client relationship.²⁶ Concerns about the paternalistic, manipulative, and even deceptive practices of lawyers, however, suggest that client objectives may be sacrificed to lawyer self-interest.²⁷ Client-centered or participatory decision-making techniques counteract this tendency to subordinate client interests by sensitizing the attorney to the ways in which she may influence client decision making.²⁸ Thus, by creating

ative: A Response to Stephen Pepper, 1986 Am. B. Found. Res. J. 637 [hereinafter Luban, *Lysistratian Prerogative*]; and Pepper's response, Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 Am. B. Found. Res. J. 657.

19. See Freedman, *Ethics*, *supra* note 11, at 49-57; Fried, *supra* note 6, at 1074-75.

20. Freedman, *Ethics*, *supra* note 11, at 57; see Fried, *supra* note 6, at 1074; Freedman, *supra* note 6, at 52.

21. Fried, *supra* note 6, at 1075.

22. Freedman, *Ethics*, *supra* note 11, at 57; Freedman, *supra* note 6, at 52; Fried, *supra* note 6, at 1074-75.

23. Freedman, *Ethics*, *supra* note 11, at 57; Freedman, *supra* note 6, at 52.

24. Fried, *supra* note 6, at 1075.

25. Freedman, *Ethics*, *supra* note 11, at 57; Freedman, *supra* note 6, at 52.

26. Dinerstein, *supra* note 12, at 514; Freedman, *Personal Responsibility*, *supra* note 11, at 204; Fried, *supra* note 6, at 1073.

27. Lisa G. Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 669 (1990); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. Pa. L. Rev. 761, 781-82 (1990) (responding to and expanding upon Lerman); see also Dinerstein, *supra* note 12, at 593 (arguing that lawyer-centered approach "contributes to the professional mystification that persuades clients that the lawyer knows best").

28. Gary Bellow & Bea Moulton, *The Lawyering Process: Ethics and Professional Responsibility* 1018-1104 (1981); David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* 147-48 (1977); Dinerstein, *supra* note 12, at 555-56; Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. Rev. 717, 720 (1987); Lerman, *supra* note 27, at 670; Menkel-Meadow, *supra* note 27, at 781-82.

mechanisms to ensure the client's full participation in legal decision making, participatory models enhance client autonomy.²⁹

This emphasis on client autonomy clearly presupposes a degree of competency.³⁰ If autonomy suggests the freedom to make choices about and to control our lives, then being autonomous suggests having the present capability to exercise such freedom. Furthermore, the process of choosing implies that the decision maker is competent to weigh the alternatives and to assess their consequences in a rational and informed manner.³¹ Ascertaining when a decision is competent, however, also provides greater opportunities for lawyer manipulation, particularly if the attorney confuses a mistaken or poor decision for an incompetent one.³² Even a presumption of competency, however, would not preclude occasional infringements upon client decision making when necessary to preserve the client's autonomy.³³

This vision of the autonomous and competent client comports with Western rights traditions of individual liberty.³⁴ Within a construct of rights as the exercise of choice, the rights holder is an autonomous and competent being with the power to compel others to perform some duty owed to the rights holder.³⁵ The performance of the duty, however, is conditioned upon the rights holder's decision to demand performance of the obligation; in other words, the right preexists the duty.³⁶ But the need to choose whether to enforce the obligation also means that the rights holder must have the capacity to recognize that a decision must be made and to execute that choice.³⁷ Consequently, capacity becomes a prerequisite to having and exercising rights.³⁸

The client autonomy model also values the competent and autonomous rights holder. Rights not only provide access to the legal structure: they also define and preserve individual liberty. For a lawyer to find a client incompetent is thus to declare that the client has no status as a rights holder.³⁹ Client incompetency, therefore, authorizes the

29. Binder & Price, *supra* note 28, at 147-48; Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 14 (1974); Ellmann, *supra* note 28, at 759-61.

30. See Ellmann, *supra* note 28, at 717, 726-29; Luban, *supra* note 8, at 462-64.

31. *Id.* at 727-28.

32. *Id.* at 769 & n.149. For a more complete understanding of Ellmann's position, see John Morris's critique, John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. Rev. 781 (1987); and Ellman's rejoinder, Stephen Ellmann, *Manipulation by Client and Context: A Response to Professor Morris*, 34 UCLA L. Rev. 1003 (1987).

33. See Ellmann, *supra* note 28, at 778.

34. Federle, *Rights flow downhill*, *supra* note 10, at 343.

35. *Id.* at 343-44; Jeremy Waldron, *Introduction to Theories of Rights* 1, 6 (Jeremy Waldron ed., 1984).

36. Federle, *Rights flow downhill*, *supra* note 10, at 347-48.

37. *Id.* at 348.

38. *Id.* at 344.

39. *Id.* at 361-62; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515, 539 [hereinafter Tremblay, *Lawyer Decisionmaking*].

attorney to act paternalistically and this sort of paternalism does not infringe upon client autonomy when the client is not competent.⁴⁰ Furthermore, paternalistic intervention may even appear to preserve the client's opportunities for the future exercise of autonomy by preventing the client from making choices that actually restrict liberty.⁴¹

The centrality of capacity thus creates a special problem for proponents of participatory decision making because erroneous assessments of the client's competence significantly impinge upon client autonomy. Furthermore, the construct of competence may be used in ways which disadvantage and disempower certain client groups, like the poor, particularly if their political or moral beliefs serve as a basis for assessing the "rightness" or competence of their choices.⁴² This image of the client as incompetent and dependent, as "disabled,"⁴³ provides significant opportunities for the lawyer to exercise power at the expense of client autonomy.⁴⁴ Existing legal structures also permit and perpetuate the image of client as incompetent other and create systemic occasions for disempowerment.⁴⁵ In this way, the dominant vision of competence narrows the client's exercise of autonomy to the politically permissible.⁴⁶

Lawyering, nevertheless, may be a mechanism for significant individual and collective empowerment if we broaden our conception of the autonomous, capable client. This would envision enabling the client within the attorney-client relationship to resist attorney domination by enhancing client participation and encouraging collaboration through new methods of interviewing, counseling, and investigation.⁴⁷ By freeing the client from a legal hegemony designed to perpetuate unequal class structures, this account also would permit the client to challenge the subordinating systemic effects of law and to consider long-term rewards.⁴⁸ Client empowerment, in turn, promotes class

40. See Luban, *Paternalism*, *supra* note 8, at 465-66.

41. See *id.* at 465.

42. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. L. & Soc. Change 659, 665 (1987-88) [hereinafter Alfieri, *Antinomies of Poverty Law*]; Ellmann, *supra* note 28, at 770-71; see also Tremblay, *Lawyer Decisionmaking*, *supra* note 39, at 538-39 (discussing the role of the lawyer whose client appears to be incompetent).

43. See Alfieri, *Disabled Clients*, *supra* note 7, at 773.

44. Tremblay, *Lawyer Decisionmaking*, *supra* note 39, at 554; see Alfieri, *Disabled Clients*, *supra* note 7, at 811-12; Felstiner & Sarat, *supra* note 7, at 1449-50.

45. Alfieri, *Disabled Clients*, *supra* note 7, at 812-15.

46. *Id.* at 811-12.

47. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107, 2147 (1991).

48. Alfieri, *Antinomies of Poverty Law*, *supra* note 42, at 711-12; Tremblay, *Rebellious Lawyering*, *supra* note 7, at 959. Alfieri argues that the dominant traditions in poverty lawyering (direct service and law reform litigation) cannot and will not succeed in abolishing poverty because these traditions depoliticize the struggle against poverty. Rather, the goal of lawyering for the poor should be the mobilization and

consciousness and facilitates collectivist strategies for positive and long-term legal change.⁴⁹ This vision of client empowerment thus fosters both individuality and collectivity: the freedom to express personal goals to the lawyer and the power to effect long-term change through political communitarian agitation.⁵⁰

Although this version of client empowerment offers a different accounting of rights, client autonomy is nevertheless a central value. Unlike the vision of rights articulated by the simple autonomy model, this theory reconstructs rights to accommodate notions of both individual and class rights.⁵¹ By pursuing the individual claim within a case-specific context while empowering the client to agitate for rights vindicating the client's class interests, the attorney combines these disparate objectives into a unified, multidimensional theory of rights.⁵² But this emphasis on transcendent class rights does not obviate autonomy as a primary goal of client empowerment lawyering for the client has the freedom to choose among various rights demands and the attorney is obligated to respect those client choices.⁵³ Furthermore, and somewhat counterintuitively, class consciousness facilitates autonomy by freeing individuals from subordinating structures and practices and thereby enhancing individual dignity while recognizing the advantages of community.

2. Lawyer Autonomy Model

Proponents of the competing lawyering paradigm, however, claim that the client empowerment model does not adequately account for the powerful client. The corporate lawyer, for example, often serves wealthy and socially powerful clients upon whom she may depend for recurring business; consequently, she may be reluctant or unable to

empowerment of the poor as a class to enable effective collective challenges to oppressive welfare systems. Alfieri, *Antinomies of Poverty Law*, *supra* note 42, at 663-65.

49. See Alfieri, *Antinomies of Poverty Law*, *supra* note 42, at 711-12 (arguing that poverty can be abolished only through the unification of the poor as a class and that lawyers must facilitate this process by transforming the attorney-client relationship); see also Tremblay, *Rebellious Lawyering*, *supra* note 7, at 957-58 (discussing one strand of empowerment theoretic—the “collectivist” theme—in which mobilization is an effective method for clients to redress their grievances).

50. Alfieri, *Antinomies of Poverty Law*, *supra* note 42, at 711; Tremblay, *Rebellious Lawyering*, *supra* note 7, at 958 (discussing view urging attorneys to encourage collective activity among the poor in order to achieve long-term community goals). For a summary of the modern and postmodern views of lawyering, see Anthony V. Alfieri, *Stances*, 77 Cornell L. Rev. 1233 (1992).

51. Alfieri, *Antinomies of Poverty Law*, *supra* note 42, at 701.

52. *Id.* Alfieri argues that traditional methods of poverty lawyers continue to have a place in poverty lawyering and that the lawyer should respect the client's limited rights demand. Nevertheless, the lawyer should engage the client in a dialogue about the possibilities of transcendent and comprehensive rights demands.

53. *Id.*

challenge stated client objectives.⁵⁴ Organizational constraints imposed by a large-firm practice setting or the role as in-house counsel to a corporation suggest additional diminutions in lawyer power.⁵⁵ Furthermore, the lawyer's willingness to defer when confronted by a powerful client is particularly problematic because the powerful client is more likely to be in a position to harm third persons.⁵⁶ Even the merely savvy or sophisticated client, who may have a clear sense of how to accomplish certain objectives, is unlikely to feel overwhelmed by or act unduly deferential to the attorney.⁵⁷

The critique of client empowerment also rejects the claim that zealous advocacy and partisanship promote the values of individual dignity and autonomy. While the justification for adversariness has great force when applied to criminal proceedings, not all cases handled by lawyers are criminal cases.⁵⁸ In the civil context, the lawyer may be representing a powerful client for whom the traditional appeals to autonomy and freedom from oppression are exceedingly inappropriate.⁵⁹ But even within the criminal context, systemic interests in uncovering the truth and in promoting fairness place limitations upon zealous advocacy and client loyalty.⁶⁰ Furthermore, much of what lawyers do—negotiating, counseling, settling—occurs outside the adversarial system and without an independent arbiter⁶¹ and, in some instances (as with much transactional work), in the absence of an identifiable opponent.

Under this view, the adversary system excuses lawyers from moral accountability for the harm caused to third parties by the facilitation of client objectives.⁶² Adversariness, according to its critics, exonerates role-differentiated behavior: the lawyer may engage in certain acts on behalf of the client, acts which would be immoral if done for

54. John P. Heinz, *The Power of Lawyers*, 17 Ga. L. Rev. 891, 899 (1983).

55. *Id.* at 900; Rhode, *supra* note 11, at 631-38.

56. Morris, *supra* note 32, at 799.

57. *Id.* at 798.

58. Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. Legal Prof. 97, 115-16 (1985); Erwin Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role*, 5 J. Legal Prof. 31, 38-39 (1980); Morris, *supra* note 32, at 796; Rhode, *supra* note 11, at 606; Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 Wis. L. Rev. 1529, 1540; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts., Fall 1975, at 1, 12.

59. Rhode, *supra* note 11, at 606-08.

60. Richard K. Burke, "Truth in Lawyering": *An Essay on Lying and Deceit in the Practice of Law*, 38 Ark. L. Rev. 1, 16-17 (1984); D'Amato & Eberle, *supra* note 11, at 767-68; Morris, *supra* note 32, at 789-90.

61. Burke, *supra* note 60, at 12-13; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 671 (1978).

62. David Luban, *The Adversary System Excuse*, in *The Good Lawyer* 83, 84 (David Luban ed., 1983) [hereinafter Luban, *Adversary System Excuse*]; Morris, *supra* note 32, at 788-89; see Luban, *Partisanship*, *supra* note 13, at 1018-21.

others outside the attorney-client relationship.⁶³ The legal profession nevertheless protects role-differentiated behavior through the promulgation of ethical codes that promote moral nonaccountability as a necessary adjunct to adversariness.⁶⁴ But, as the critics point out, adversariness cannot be justified across a range of cases or the spectrum of lawyering situations, leaving role-differentiated behavior with little moral force.⁶⁵ Consequently, critics of the client autonomy model contend that the lawyer has broader obligations and may be held morally accountable to the same extent as a nonlawyer for the harms caused to others.⁶⁶

Whether a good lawyer also may be a good person is an important issue for proponents of the lawyer autonomy model.⁶⁷ The obligations of the professional role, imposed by a paradigm in which client autonomy is a central value, may not only insulate the attorney systematically from responsibility but also discourage the attorney's direct and personal examination of the moral implications of her actions.⁶⁸ Furthermore, to ignore the moral aspect of professional life denies the essential nature of law office talk, in which attorney and client engage in a moral conversation that, at its best, reflects mutual interdependence and caring.⁶⁹ Encouraging the moral independence of lawyers promotes goodness by thinking about the morals of others⁷⁰ and pro-

63. Schwartz, *supra* note 61, at 673; Wasserstrom, *supra* note 58, at 3.

64. Luban, *Adversary System Excuse*, *supra* note 62, at 84; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 73 (1980); Schneyer, *supra* note 58, at 1533-34; Schwartz, *supra* note 61, at 672-73; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 36-37.

65. Luban, *Adversary System Excuse*, *supra* note 62, at 117. Luban argues that while adversariness may be justifiable in criminal or quasi-criminal cases because we have political reasons for handicapping the state and the criminal defendant appears to be the paradigmatic "man in trouble," adversariness cannot be justified in noncriminal cases. According to Luban, adversariness has little moral force. Thus, lawyers must have some additional moral justification for their actions other than the adversary system. *Id.* at 117-18.

66. Luban, *Adversary System Excuse*, *supra* note 62, at 118; Luban, *Partisanship*, *supra* note 13, at 1005; Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. Rev. 213, 223-24 (1990); Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 Fla. L. Rev. 439, 454 (1990); Morris, *supra* note 32, at 794; Rhode, *supra* note 11, at 643-44; Wasserstrom, *supra* note 58, at 12.

67. Thomas L. Shaffer, *On Thinking Theologically About Lawyers As Counselors*, 42 Fla. L. Rev. 467, 468 (1990).

68. Postema, *supra* note 64, at 73-81; Rhode, *supra* note 11, at 626; Wasserstrom, *supra* note 58, at 12-13.

69. Warren Lehman, *The Pursuit of a Client's Interest*, 77 Mich. L. Rev. 1078, 1079 (1979); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 Notre Dame Law. 231, 231-32 (1979) [hereinafter Shaffer, *Moral Discourse*].

70. Shaffer, *Moral Discourse*, *supra* note 69, at 252; Shaffer, *Good Client*, *supra* note 8, at 319.

duces happier and more productive attorneys.⁷¹ Ethical discretion also fosters a more just legal system; the lawyer may confront the client about the moral implications of the client's actions and actively seek justice by pursuing only those objectives deemed right and fair.⁷²

Proponents of moral independence accord the attorney considerable autonomy over both the means chosen and the ends pursued on behalf of a client.⁷³ While the moral lawyer may refuse to engage in any proposed course of conduct that violates her conscience, she nevertheless must accept responsibility for those actions she chooses to undertake for the client.⁷⁴ Irrespective of the client's legal right to pursue her objectives,⁷⁵ the attorney must make judgments about the moral implications of the client's goals that are grounded either in the lawyer's own moral understanding⁷⁶ or in some sense of common morality, a concept less difficult to apply in practice than may first appear.⁷⁷ Such assessments necessitate a moral conversation between lawyer and client to ascertain the client's wishes and reconcile any conflicts between the lawyer's moral judgments and the client's aims and to counsel the client about the rightness or wrongness of her actions.⁷⁸ Although such counseling may be explicitly client-centered in that it seeks only to enlighten and persuade,⁷⁹ it also opens discourse to the possibilities of the client's moral conversion.⁸⁰

Because a morally activist vision of lawyering exhorts lawyers to shape and judge client objectives,⁸¹ it necessarily encourages certain paternalistic practices.⁸² The notion of lawyer as moral counselor is not new to the bar:⁸³ the Brandeisian concept of the "lawyer for the situation" envisions the attorney as actively engaged in the improve-

71. Bastress, *supra* note 58, at 118. Chemerinsky argues that lawyers should not take positions counter to their own personal beliefs because of the possibility that such advocacy may actually force a change in the lawyers' own beliefs. Chemerinsky, *supra* note 58, at 34.

72. Bastress, *supra* note 58, at 117; William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1090-91 (1988).

73. Bastress, *supra* note 58, at 113; Luban, *Partisanship*, *supra* note 13, at 1005.

74. Burke, *supra* note 60, at 22; Luban, *Partisanship*, *supra* note 13, at 1021-22; Rhode, *supra* note 11, at 643.

75. Rhode, *supra* note 11, at 644.

76. Bastress, *supra* note 58, at 114.

77. Luban, *Partisanship*, *supra* note 13, at 1023; Wasserstrom, *supra* note 58, at 10-11.

78. Bastress, *supra* note 58, at 99-103; Luban, *Partisanship*, *supra* note 13, at 1022, 1026; Margulies, *supra* note 66, at 221-27 (discussing a model for counseling clients about moral implications of actions); Morgan, *supra* note 66, at 456; Shaffer, *Moral Discourse*, *supra* note 69, at 235.

79. Bastress, *supra* note 58, at 128; Luban, *Partisanship*, *supra* note 13, at 1026; Morgan, *supra* note 66, at 456.

80. Shaffer, *Moral Discourse*, *supra* note 69, at 247.

81. Luban, *Noblesse Oblige Tradition*, *supra* note 9, at 738.

82. See Luban, *Partisanship*, *supra* note 13, at 1036-37 & n.109.

83. *Id.* at 1014.

ment of both law and client.⁸⁴ Nor is the profession unaware of the ways in which lawyers may act independently of their clients. For example, courts have upheld lawyers' decisions to override their clients' preferences in tactical matters and the legal profession has sanctioned lawyer decision making in other instances as well.⁸⁵ The bar's willingness to sanction paternalistic practices suggests that acting on the client's behalf, even when contrary to the client's expressed wishes, may be better for the client and, therefore, create a positive moral good.

In justification of these infringements upon client decision making, proponents of a morally activist ideal of lawyering contend that the client autonomy model exaggerates both the extent to which lawyers actually impinge upon client autonomy and the value of autonomy itself.⁸⁶ The most significant interference with a client's autonomy occurs when the lawyer refuses to accept a case or continue with the representation, yet this hardly affects the client's autonomy because of the other opportunities the client has for independent action.⁸⁷ It may also be extremely difficult to distinguish between an autonomous choice and a paternalistic one because, in practice, an autonomous decision often appears consonant with the client's best interests.⁸⁸ Furthermore, the client autonomy model values the autonomous act over acting autonomously,⁸⁹ taken to its logical extreme, this elevates autonomous action to a good, even when the results of that action would be immoral.⁹⁰ But as autonomy itself has little, if any, inherent worth, refusing to further the client's immoral purposes cannot be morally objectionable simply because it impinges upon client autonomy.⁹¹

84. Luban, *Noblesse Oblige Tradition*, *supra* note 9, at 721 (recounting a speech made by Justice Brandeis at Harvard in which Brandeis argued that the lawyer should engage in law reform and exhort her clients to act in the public good). Russell Pearce argues that the lawyer's obligation to pursue the common good, even when it conflicted with the client's or the lawyer's interests, may be traced to an even earlier source—an essay written by a nineteenth century jurist. This essay, argues Pearce, influenced subsequent national codifications of the lawyer's ethical obligations. Russell Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *Geo. J. Legal Ethics* 241 (1992).

85. Luban, *Paternalism*, *supra* note 8, at 458-60.

86. Luban, *Lysistratian Prerogative*, *supra* note 18, at 643 (noting that limited impositions do not threaten clients' autonomy given the clients' other opportunities for decision making); Luban, *Partisanship*, *supra* note 13, at 1037 (finding no intrinsic value to autonomy).

87. Luban, *Lysistratian Prerogative*, *supra* note 18, at 639.

88. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 *Md. L. Rev.* 213, 226 (1991).

89. Luban, *Lysistratian Prerogative*, *supra* note 18, at 639. Luban argues that while it may be good that people may make their own choices, it does not necessarily mean that what they choose to do is good. Thus, autonomy cannot be preferred over good or right conduct.

90. *See id.*; Shaffer, *Good Client*, *supra* note 8, at 328.

91. D'Amato & Eberle, *supra* note 11, at 773 (arguing that "moral rules cannot be eclipsed by nonmoral considerations" thus encouraging a move away from autonomy

Nevertheless, not all infringements upon client autonomy are morally permissible.⁹² Autonomy may not have any intrinsic goodness, but it is a means of promoting other values like responsibility.⁹³ To have responsibility means to have the freedom to exercise choice but in a manner that suggests the individual act in accordance with moral principles.⁹⁴ While the freedom to choose encompasses even mere whims, its value lies not in the individual's ability to make choices but in the decision to act morally.⁹⁵ If the autonomous action can be said to be responsible, then restricting the client's choice would be an unjustifiable act of paternalism.⁹⁶

Autonomy in this narrower sense apparently welcomes moral discourse between lawyer and client.⁹⁷ Making moral decisions does not occur in isolation and implies that the client is willing to receive moral influence and correction.⁹⁸ The moral advisor necessarily must have integrity if she wishes for her advice to be followed; the lawyer has integrity if there are certain things she will not do for her client.⁹⁹ The conversation between lawyer and client thus facilitates moral decision making by opening the client to the ethical possibilities of his actions¹⁰⁰ and even to conversion.¹⁰¹ But condemning this practice as paternalistic necessarily misconstrues the value of paternal metaphors to the practice of law,¹⁰² for being paternalistic resonates with moral worth.¹⁰³

This vision of lawyering, which is explicitly Kantian,¹⁰⁴ suggests a different approach to understanding individual rights. Within such an account, a right is an interest that the legal or ethical system recognizes as worthy of advancement or protection by imposing duties on others.¹⁰⁵ Rights, therefore, are not correlative to duties and this has the advantage of permitting one to say that another has a right with-

and not a move toward a socialist model of professional responsibility in which lawyer acts as an agent for the state); Luban, *Partisanship*, *supra* note 13, at 1037-38; Shaffer, *Good Client*, *supra* note 8, at 328.

92. Luban, *Paternalism*, *supra* note 8, at 474; Menkel-Meadow, *supra* note 27, at 767-74 (suggesting that withholding information from the client may be permissible only in some circumstances).

93. Luban, *Partisanship*, *supra* note 13, at 1037-38.

94. *Id.* at 1038-39.

95. *Id.*

96. *Id.*

97. Shaffer, *Moral Discourse*, *supra* note 69, at 246

98. *Id.*

99. Shaffer, *Good Client*, *supra* note 8, at 329-30.

100. Shaffer, *Moral Discourse*, *supra* note 69, at 246-47.

101. *Id.* at 247.

102. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 *Tex. L. Rev.* 963, 987 (1987).

103. *Id.*

104. Luban, *Partisanship*, *supra* note 13, at 1038; Shaffer, *Moral Discourse*, *supra* note 69, at 246.

105. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1531; Waldron, *supra* note 35, at 10.

out having to identify who has the duty.¹⁰⁶ Questions pertaining to the nature of the duty and the identity of the obligor are addressed by a substantive account of which interests generate rights.¹⁰⁷ Of course, not every interest will generate a corresponding right, but an interest theory may accommodate a larger class of rights and rights holders than would a choice theory.¹⁰⁸

Furthermore, interest theory permits one to consider not simply the interests of the rights holder but also of the duty bearer when justifying the imposition of rights and obligations.¹⁰⁹ References to individual autonomy thus cannot begin to explain why one's interests should be exchanged for another's or for some moral principle.¹¹⁰ A conception of political morality nevertheless requires some explanation of the trade-off.¹¹¹ The process of justification implies that the individual, whose interests are affected, may be reasoned with by those proffering the explanation.¹¹² This suggests two interrelated concepts about capacity and interests: the individual must have the capacity to apprehend moral reasoning and those interests central to capacity must remain intact.¹¹³

Moral discourse thus involves a conversation between two individuals capable of understanding moral argument, of giving and receiving moral advice.¹¹⁴ But would the client's lack of moral competence obviate the need for a moral conversation? The question is an important one, for an affirmative answer would indicate that the attorney may justifiably treat the incapacitated client differently. Furthermore, a determination that the client is incompetent would countenance the lawyer's paternalism.

How, then, from within this perspective, should the client's capacity be ascertained? Respect for the client's autonomy implies that eccentric or peculiar decisions do not necessarily denote incapacity.¹¹⁵ But an incompetent client cannot be said to be autonomous because she lacks the capacity to engage in rational decision making.¹¹⁶ A finding

106. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1531; Waldron, *supra* note 35, at 10.

107. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1531.

108. *Id.*; Waldron, *supra* note 35, at 12.

109. Waldron, *supra* note 35, at 12-13. To distinguish right-based from duty-based theories, Waldron uses the example of torture. Under a right-based theory, torture is prohibited out of a concern for the sufferings of those who are tortured. But under a duty-based theory, torture is prohibited because it degrades the torturer. *Id.* at 13.

110. *Id.* at 19-20.

111. *Id.* at 19.

112. *Id.* at 19-20.

113. Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DePaul L. Rev. 983, 1000-01 (1993); Waldron, *supra* note 35, at 20.

114. Shaffer, *Moral Discourse*, *supra* note 69, at 248-50.

115. See Luban, *Paternalism*, *supra* note 8, at 466 (discussing "a notion of incompetence that is not self-justifying and self-serving").

116. *Id.* at 465.

of incompetency, therefore, must be based upon some factual account of how the individual came to be incompetent or a judgment that the basis for the client's choices cannot be inferred from the available facts.¹¹⁷ If the client could not satisfy this test of her rationality, the lawyer would be justified in making decisions for the client.¹¹⁸

When that client is a child, capacity becomes a central issue because we lack any definitive statement about the competency of children.¹¹⁹ There is, nevertheless, a strong presumption that children are not competent beings and have not yet reached that level of moral development that would enable them to participate in a moral conversation.¹²⁰ Even if the child has certain interests that can be said to generate rights, that substantive account invariably emphasizes the child's needs and dependencies.¹²¹ Proponents of the lawyer autonomy model, when they have addressed the issue at all, imply that the child, simply by virtue of her age, lacks the requisite capacity.¹²² Certainly, the child's incompetency would warrant paternalistic intervention.¹²³

Acting paternalistically when the client is a child would seemingly be justifiable even under the client autonomy model.¹²⁴ Although this construct values individual rights, it presupposes a rights holder who is capable of making decisions. This connection between competency and rights constrains our rights talk about children because of their perceived incapacities. If children are not autonomous beings, then it is difficult to see how a lawyering model that values client decision-making would have any applicability in the case of a child client. Despite the deep skepticism about individual rights from a communitarian perspective,¹²⁵ client autonomy remains a central value because of its connection to greater political empowerment.

117. *Id.* at 479, 482. Luban argues that we may override a person's choices on behalf of that person's own good only if we have some causal account explaining how that person came to be incompetent or if that individual cannot be said to have engaged in some inferential process based on real facts before making her choice.

118. *Id.* at 482. Luban identifies four different conceptions of paternalism: "1) constraining, on behalf of [one's] values, one's liberty to act according to [one's] values; 2) . . . constraining, on behalf of [one's] values, [one's] liberty to do what [one] wants; 3) . . . constraining, in [one's] own best interests, [one's] liberty to act according to [one's] values; 4) . . . constraining, in [one's] own best interests, [one's] liberty to do what [one] wants." *Id.* at 472. According to Luban, paternalistic actions are not justifiable when the paternalist overrides one's real values. To permit this sort of paternalism would allow an attack upon one's integrity. *Id.* at 473-74.

119. Federle, *Rights flow downhill*, *supra* note 10, at 348 n.35.

120. *Id.* at 347-49.

121. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1531-32.

122. Luban, *Paternalism*, *supra* note 8, at 490 (stating that "not at all clear that the 13-year-old is capable of making such a far-reaching decision"); Shaffer, *Moral Discourse*, *supra* note 69, at 250 (noting that "[p]arents give; children receive").

123. See Luban, *Paternalism*, *supra* note 8, at 493; Wasserstrom, *supra* note 58, at 19 (explaining that acting paternalistically is to treat someone like a child).

124. See *supra* notes 39-41 and accompanying text.

125. See *supra* notes 47-53 and accompanying text.

Nevertheless, a notion of empowerment tied to a strong account of rights seems to hold the greatest promise for constructing a lawyering model that would account for the child client.

II. LAWYERING AND THE CHILD CLIENT

The centrality of capacity to rights theory raises two difficult, inter-related questions about a lawyering paradigm that would accommodate the child client. The first lies in constructing a child's right to counsel. Seemingly, a child would fall entirely outside the class of rights holders because of her incapacities and, therefore, could not even claim such a right. But even if a child has a right to counsel despite her incompetencies, then what role would the lawyer play? Could a lawyer for a child ever be a zealous advocate or is her role like that of a wise and understanding parent?

Central to the resolution of these issues is the idea of autonomy and the inherent tension between client decision making and lawyer independence. This section of the Article illustrates these issues by providing an overview of the literature on models of lawyering for the child client. The section begins with a discussion of the child's right to counsel primarily in three types of proceedings: delinquency, abuse and neglect, and divorce custody. This Section focusses on the role of the lawyer representing the child client and analyzes that role in terms of the two competing lawyering paradigms discussed in the previous section. The relationship between models of lawyering and interviewing and counseling the child client is then examined in terms of underlying notions about autonomy and capacity.

A. *Counsel for the Child in Delinquency Proceedings*

Prior to 1967, the question of whether a child was entitled to counsel as a matter of constitutional law was unresolved.¹²⁶ Much of the debate centered on the nature of and justifications for a separate judicial system to handle the problems of delinquent, dependent, and neglected children. From an historical perspective, the juvenile court system was seen as an integral part of the child welfare movement and was concerned primarily with the protection and rehabilitation of wayward youth.¹²⁷ Because its purpose was to reform, rather than to punish, the juvenile court rejected the philosophy of the criminal court and eschewed traditional legal trappings like procedural formality.¹²⁸

126. The United States Supreme Court decided *In re Gault*, 387 U.S. 1 (1967), in that year. Until that time, children in delinquency proceedings had no constitutional right to be represented by court-appointed counsel.

127. Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. Pa. L. Rev. 1156, 1158-59, & n.16 (1968).

128. *Id.* at 1159-61.

There was little need for counsel in a setting designed to benefit children and foster their development.¹²⁹

Furthermore, the traditional lawyer's role, with its emphasis on the zealous protection of individual rights, seemed peculiarly unsuitable to the unique goals of the juvenile justice system.¹³⁰ The lawyer was not a vigorous advocate of civil and constitutional rights and was "missing the whole point" if she sought to secure the release of a child who had committed the act alleged.¹³¹ Counsel who insisted on procedural formality and the protection of rights could find herself facing a hostile and unsympathetic judge who might threaten to waive the child to adult court if counsel persisted in her adversariness.¹³² If the child did have counsel, however, her role was that of guardian and officer of the court. The lawyer was to interpret the philosophy of the juvenile justice system to the child and to assist in the minor's rehabilitation by insuring the child's cooperation with the court's orders.¹³³

Some commentators, however, were deeply skeptical of the juvenile court's rehabilitative ideal. These critics noted that the benevolent practices of the juvenile court often masked harsh and punitive sanctions.¹³⁴ For example, children could be detained before trial in adult jails and lock-ups and, upon an adjudication, could be committed to secure facilities resembling adult penal institutions often for longer periods of time than would have been possible had they been convicted of a crime.¹³⁵ Furthermore, the process of adjudicating a child as delinquent often had stigmatizing effects not unlike those associated with criminal convictions.¹³⁶ The distinction between the juvenile and criminal courts, therefore, was not a meaningful one and the

129. *See id.*

130. *See* Robert E. Furlong, *The Juvenile Court and the Lawyer*, 3 J. Fam. L. 1, 24-25 (1963).

131. David A. McMullan, *The Lawyer's Role in the Juvenile Court*, Prac. Law., Apr. 1962, at 49, 52; *see* Furlong, *supra* note 130, at 24-25; William B. McKesson, *Right to Counsel in Juvenile Proceedings*, 45 Minn. L. Rev. 843, 846 (1961).

132. McKesson notes the following:

There were a few rare instances in which the lawyer insisted that his client be treated in much the same way that he would be in a criminal court, and that his client's "rights" made it necessary for the lawyer to demand that strict rules of evidence should be followed. One effective way of meeting this contention was to suggest that if he or his client wanted a criminal trial, it would be necessary for the juvenile court to transfer the case to the criminal court This suggestion usually brought a change in the attitude of belligerent counsel.

McKesson, *supra* note 131, at 846.

133. *Id.*; *see* McMullan, *supra* note 131, at 54.

134. Chester J. Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 387-91 (1961); Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 550 (1957); Platt & Friedman, *supra* note 127, at 1160; Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 Colum. L. Rev. 281, 281 (1967).

135. Antieau, *supra* note 134, at 387, 390.

136. Platt & Friedman, *supra* note 127, at 1160-61.

constitutional requisites of due process mandated certain procedural protections, including the right to counsel.¹³⁷

Nevertheless, the role of counsel for the child was constrained by the rehabilitative underpinnings of the juvenile court. Although some commentators acknowledged the need for a lawyer to zealously defend her child client, her adversariness was to be tempered with an understanding of the juvenile court's welfare orientation.¹³⁸ The child's attorney was to be flexible and to adjust to the special needs of the court while avoiding the indiscriminate use of adversarial techniques.¹³⁹ Additionally, the lawyer was to serve as "wise parent" by considering the child's welfare, as interpreter to the child of the court's objectives, and as facilitator of an acceptable and beneficial disposition.¹⁴⁰ Some, however, doubted the ability and commitment of the legal profession to temper its approach to adversarial representation and claimed that children would be better served by nonprofessional advocates.¹⁴¹

Concerns about the lawyer's overzealous representation of the child client had been overstated. Studies indicated that the minor's lawyer was often unprepared at trial¹⁴² and frequently stipulated to the facts.¹⁴³ Furthermore, the attorney often failed to recognize the potential for a conflict of interest when retained by the parents to represent the child,¹⁴⁴ particularly when the child's behavior might be attributable to neglectful parenting.¹⁴⁵ The zealous lawyer also could expect some pressure from the bench to conform to the nonadversarial and informal nature of juvenile proceedings.¹⁴⁶ Juvenile court judges indicated in several surveys that the role of the lawyer was not exclusively an adversarial one and many suggested that the lawyer needed special training beyond trial advocacy.¹⁴⁷

The question whether the child had a right to counsel in juvenile proceedings was partially answered by the United States Supreme

137. Platt & Friedman, *supra* note 127, at 1161 (citing *In re Gault*, 387 U.S. 1, 41 (1967)); see Antieau, *supra* note 134, at 392-93; Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 13; Paulsen, *supra* note 134, at 550.

138. Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 Buff. L. Rev. 501, 506 (1963); see Junius L. Allison, *The Lawyer and His Juvenile Court Client*, 12 Crime & Delinq. 165, 169 (1966).

139. Allison, *supra* note 138, at 169; Isaacs, *supra* note 138, at 506.

140. Isaacs, *supra* note 138, at 506-07.

141. See Handler, *supra* note 137, at 37-40.

142. Note, *Rights and Rehabilitation in the Juvenile Courts*, *supra* note 134, at 324.

143. *Id.* at 326-27.

144. Daniel L. Skoler & Charles W. Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 J. Fam. L. 77, 90-91 (1964).

145. Glenn C. Equi et al., Comment, *In re Gault: Understanding the Attorney's New Role*, 12 Vill. L. Rev. 803, 814 (1967).

146. McKesson, *supra* note 131, at 846; see Equi et al., *supra* note 145, at 814.

147. Skoler & Tenney, *supra* note 144, at 93; Equi et al., *supra* note 145, at 814.

Court in 1967 when it decided *In re Gault*.¹⁴⁸ The Court held that due process mandates the child's representation by counsel in a proceeding to determine delinquency where the child's freedom may be curtailed by commitment to an institution.¹⁴⁹ The Court's decision, however, left unresolved two related issues. The narrowness of *Gault's* holding created some confusion about the applicability of the Court's ruling to other stages of a delinquency proceeding and to other types of cases, such as status offenses, in which the child faced a potential loss of liberty.¹⁵⁰ The Court's opinion also failed to clarify the role of counsel for the child and left open the question whether the lawyer's obligations to the child client differed in any way from those owed to the adult client.¹⁵¹

Several commentators have subsequently interpreted *Gault* to require zealous advocacy from the child's attorney in delinquency proceedings. Noting the *Gault* Court's recognition of the similarities between delinquency and criminal cases,¹⁵² the legal system's commitment to adversarial proceedings,¹⁵³ and doubts about the lawyer's ability to make therapeutic judgments in the child's best interests,¹⁵⁴ these scholars have suggested that the lawyer has an ethical obligation to assume a more traditional role in juvenile court. Thus, the child's lawyer is a partisan advocate at all stages of the proceeding¹⁵⁵ who has a duty to present the best possible case for her client.¹⁵⁶ The lawyer should treat all communications with the child as confidential and should vigorously protect the child's privilege against self-incrimination.¹⁵⁷ Furthermore, the lawyer should not hesitate to put the state to its burden of proof, even if that may mean the client's release.¹⁵⁸

148. *In re Gault*, 387 U.S. 1 (1967).

149. *Id.* at 41.

150. *Id.* at 13. The Court announced:

We do not . . . consider the impact of constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.

Id.

151. Norman Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A. J. 811, 812 (1967); see Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 Sup. Ct. Rev. 233, 261-62.

152. See *Gault*, 387 U.S. at 24, 27.

153. Paulsen, *supra* note 151, at 264.

154. *Id.* at 262.

155. See Elizabeth D. Dyson & Richard B. Dyson, *Family Courts in the United States*, 9 J. Fam. L. 1, 58 (1969).

156. See Paulsen, *supra* note 151, at 261-62.

157. See Theodore McMillian & Dorothy L. McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 St. Louis U. L.J. 561, 598 (1970); Paulsen, *supra* note 151, at 262-63.

158. McMillian & McMurtry, *supra* note 157, at 598.

This vision of the child's lawyer as zealous advocate is consistent with the client autonomy paradigm of lawyering. The parallels between delinquency and criminal proceedings suggest that the justification for adversariness is equally applicable to all cases in which the state seeks to limit the freedom of the individual.¹⁵⁹ Because freedom is a central value, the erroneous deprivation of individual liberty is intolerable even when the person whose freedom is constrained is a child.¹⁶⁰ Thus, the lawyer as loyal partisan facilitates the accuracy of factual and legal determinations in the juvenile court by challenging and presenting evidence.¹⁶¹ The attorney's role as zealous advocate and ardent defender of the child, therefore, is entirely appropriate within a legal system that values individual freedom.¹⁶²

Furthermore, this approach to lawyering accords the child client considerable autonomy. Some commentators have indicated that the lawyer is obligated to seek those results desired by the child client and to represent the child's expressed preferences.¹⁶³ Such an approach comports with traditional ethical rules governing the attorney's behavior¹⁶⁴ while promoting certain goals of the legal system.¹⁶⁵ The lawyer's failure to act upon the client's objectives, however, would prevent the child from presenting certain legal claims to the court for consideration and adjudication.¹⁶⁶ The adversarial approach is also likely to encourage respect for the courts if the child, as a participant, believes she has had a full and fair opportunity to present her case through loyal counsel.¹⁶⁷

159. *Id.* at 598.

160. Paulsen, *supra* note 151, at 237; see Antieau, *supra* note 134, at 387-88; Thomas A. Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 Minn. L. Rev. 653, 662-64 (1966).

161. Paulsen, *supra* note 151, at 261-62; Welch, *supra* note 160, at 673.

162. Antieau, *supra* note 134, at 405-06; Paulsen, *supra* note 151, at 261; Welch, *supra* note 160, at 695.

163. Institute of Judicial Administration, American Bar Association, Standards Relating to Counsel for Private Parties, Part 3.1(b)(ii)[a], at 17 (1979) [hereinafter IJA-ABA Standards]; 1 Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Court* 13 (1991); Samuel M. Davis, *The Role of the Attorney in Child Advocacy*, 32 J. Fam. L. 817, 830 (1994); Elyce Z. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 Fordham L. Rev. 375, 387 (1971); Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76, 87 (1984); Daniel L. Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 Ind. L.J. 558, 580 (1968); George L. Lyon Jr., Comment, *Ethical Obligations of Defense Counsel in the Juvenile Court*, 3 J. Juv. L. 135, 147 (1979).

164. Davis, *supra* note 163, at 829-30; Ferster et al., *supra* note 163, at 387; Lyon, *supra* note 163, at 144-45. *But see* Guggenheim, *supra* note 163, at 96-99 (arguing that ethical rules do not provide the lawyer representing a client under seven years of age with sufficient guidance as to her role).

165. Lyon, *supra* note 163, at 145-46.

166. *Id.* at 146-47.

167. Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 Cal. L. Rev. 694, 705 (1966); H. Bruce Hamilton, Comment, *In re Gault and the Persisting*

The client autonomy model, however, does assume a competent client. Therefore, several proponents of the adversarial approach to lawyering for the child have suggested that, in most instances, the child client is capable of making decisions about her case.¹⁶⁸ They argue that the assumption of incompetency often is based on a definition of capacity that few adult clients could meet: to require more of the child client merely because of her age would be illegitimate.¹⁶⁹ Furthermore, the child's prosecution for a delinquent act reflects a legislative determination that the child is of sufficient maturity to be held accountable for her actions if she is adjudicated.¹⁷⁰ Thus, fairness mandates that any individual held morally responsible for her actions should be given the autonomy to seek the outcome she desires.¹⁷¹

Although proponents of the client autonomy model note that the child often is competent to instruct the attorney, they also concede that the young child may be incompetent to make certain decisions.¹⁷² Consequently, the lawyer must make an initial assessment of the minor's decision-making capacity.¹⁷³ Under certain circumstances, if the attorney determines that the child is incapable of making reasoned choices, the attorney may make decisions on behalf of her client.¹⁷⁴ Such decisions should be made only after the lawyer has conducted a thorough investigation and considered the child's wishes and interests.¹⁷⁵ The lawyer, too, should argue for the least intrusive disposition that may be justified under the circumstances.¹⁷⁶

Assessments of client competence, however, provide significant opportunities for unwarranted infringements upon client autonomy. The lawyer's belief in the foolishness of the choice may convince the lawyer that the child is not capable of considered judgment.¹⁷⁷ Furthermore, even within the client autonomy paradigm, there continues to

Questions of Procedural Due Process and Legal Ethics in Juvenile Courts, 47 Neb. L. Rev. 558, 590 (1968).

168. See, e.g., IJA-ABA Standards, *supra* note 163, at 8 (stating that most adolescents meet the standard of understanding the "nature and purposes of the proceedings and [their] general consequences").

169. *Id.*

170. Guggenheim, *supra* note 163, at 87 (arguing that the decision to prosecute children seven years of age and older for delinquent acts reflects legislative judgment that such children are mature enough to be held accountable for their actions).

171. *Id.*

172. See, e.g., IJA-ABA Standards, *supra* note 163, Part 3.1(b)(ii)[c][3].

173. Lyon, *supra* note 163, at 148. It is unclear exactly how the lawyer is to make an initial assessment of the child's capacity. The IJA-ABA Standards suggest that a child is competent if she understands the nature and purposes of the proceedings and its general consequences, and is able to formulate her desires as to those proceedings. IJA-ABA Standards, *supra* note 163, at 8.

174. IJA-ABA Standards, *supra* note 163, Part 3.1(b)(ii)(c); Lyon, *supra* note 163, at 148.

175. IJA-ABA Standards, *supra* note 163, Part 3.1(b) cmt. at 82.

176. *Id.* Part 3.1(b)(ii)[c][3].

177. *Id.* cmt. at 81-82.

be some recognition of the need to preserve the client's future autonomy. Thus, the minor's attorney may have a special role in juvenile court given the needs and possibilities of the child.¹⁷⁸ The lawyer may counsel the juvenile about the importance of accepting responsibility for her wrongful acts¹⁷⁹ and explain the limits of her advocacy.¹⁸⁰

In the absence of a clear articulation that the child has a right to counsel, pervasive beliefs about the incompetency of children structure the attorney's role in juvenile court. Because the *Gault* Court did not indicate the extent to which its holding might be applicable to other stages of a delinquency proceeding, some commentators have argued that counsel for the child is not bound by her traditional professional obligations in nonadjudicatory hearings.¹⁸¹ For example, during the dispositional phase, the lawyer has an obligation to consider the welfare of her client even though she may have acted as an ardent defender of the child's rights during the adjudicative stage of the proceedings.¹⁸² A nonadversarial approach to the representation of the child is a practical necessity because the child lacks the capacity to instruct her attorney.¹⁸³ Furthermore, this approach would promote the child's welfare by insuring a more thorough and nonpunitive disposition and, ultimately, would preserve the minor's right to receive rehabilitative treatment.¹⁸⁴

For critics of an adversarial role, systemic concerns for the minor's welfare and rehabilitation appropriately limit the adversarial behavior of lawyers.¹⁸⁵ During the dispositional phase of a delinquency proceeding, a systemic concern for the child's well-being suggests that the judge should consider a range of dispositional alternatives.¹⁸⁶ But adversariness would impede the court's search for an appropriate disposition, redounding to the child's disadvantage if the judge were to impose a more restrictive disposition out of ignorance of the available alternatives.¹⁸⁷ According to these critics, the child's attorney, should adopt a nonadversarial posture to insure that the court consider a

178. Spencer Coxe, *Lawyers in Juvenile Court*, 13 *Crime & Delinq.*, 488, 490 (1967); Paulsen, *supra* note 151, at 261-62 (noting, nevertheless, that there is a limit to the special stance a lawyer may take in the juvenile court).

179. Skoler, *supra* note 163, at 580.

180. Gregory L. Curtis, *In Defense of a Youth*, 36 *Mont. L. Rev.* 225, 225-26 (1975); Hamilton, *supra* note 167, at 591; Charles L. Merz, Comment, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 *St. Louis U. L.J.* 424, 451 (1968).

181. Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 *Geo. L.J.* 1401, 1407-08 (1973).

182. Julian Greenspun, *Role of the Attorney in Juvenile Court*, 18 *Clev. St. L. Rev.* 599, 602 (1969); Robert W. Lockwood, *The Role of the Attorney in the Treatment Phase of the Juvenile Court Process*, 12 *St. Louis U. L.J.* 659, 661 (1968).

183. See Kay & Segal, *supra* note 181, at 1415.

184. *Id.* at 1419.

185. For a discussion of systemic limitations upon a lawyer's zealous advocacy, see *supra* note 60 and accompanying text.

186. Kay & Segal, *supra* note 181, at 1416-17.

187. *Id.* at 1417.

broader range of alternative proposals for disposition.¹⁸⁸ The result may be a more positive disposition that proves less restrictive for the child.¹⁸⁹

These critics also argue that the attorney's nonadversarial role at disposition serves an additional systemic interest in uncovering the truth.¹⁹⁰ Certainly, assisting the court in searching for the truth does sacrifice some of the client's rights; the child, however, may be advantaged by her lawyer's nonadversarial approach.¹⁹¹ By presenting the court with information about the child, rather than simply the offense, the attorney may help structure a less punitive disposition.¹⁹² Furthermore, in light of the additional information presented, the judge may be reluctant to impose a disposition that is punitive and restrictive.¹⁹³ This approach may actually advance the child's right to rehabilitative treatment because the court may be forced to consider the child's needs.¹⁹⁴

From this perspective, the justification for adversarial behavior has little persuasive moral force. It is the lawyer's *nonadversarial* behavior that promotes the child's rehabilitation during the dispositional phase of a delinquency proceeding. In this sense, it can be said that the lawyer engages in a positive moral act that benefits the child by espousing the child's right to rehabilitation and treatment.¹⁹⁵ Similarly, the lawyer's duty to convince the minor that the court's disposition is fair is morally obligatory because by securing the child's compliance with the court's orders, the lawyer facilitates the child's rehabilitation.¹⁹⁶ By counseling the client to accept responsibility for her actions,¹⁹⁷ the lawyer also promotes the client's goodness.

In practice, many attorneys seem to favor a lawyering paradigm that accords them considerable autonomy and independence from their child clients. Studies conducted after the *Gault* decision have found that strong systemic pressures discourage adversarial behavior during all stages of a delinquency case.¹⁹⁸ Juvenile court judges have resisted

188. *Id.* at 1417-18.

189. *Id.*

190. *Id.* at 1418.

191. *Id.*

192. *Id.* at 1419.

193. *Id.* at 1418.

194. *Id.* at 1419-20.

195. *See id.*

196. Joseph T. Walsh, Comment, *The Attorney and the Dispositional Process*, 12 St. Louis U. L.J. 644, 654-55 (1968).

197. Coxe, *supra* note 178, at 490 (stating that a sensitive lawyer knows when confession is good for the client's soul); Curtis, *supra* note 180, at 249 (stating that when the state acts as *parens patriae*, a lawyer should subrogate his role as advocate, but remain a fierce adversary when the state acts to imperil the child's interests); Walsh, *supra* note 195, at 654.

198. David Duffee & Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 Crim. L. Bull. 544, 552-53 (1971); Monrad G. Paulsen, *Juvenile Courts and the Legacy of '67*, 43 Ind. L.J. 527, 536-37 (1968) (reciting complaints of

Gault's implementation by providing children with prejudicial advice about the right to counsel and waiver,¹⁹⁹ imposing more severe sanctions upon those who appeared with counsel at disposition,²⁰⁰ and failing to assiduously apply the burden of proof.²⁰¹ Attorneys have continued to identify with a nonadversarial role because of hostility from juvenile court judges and a general belief in the appropriateness of serving the child's best interests.²⁰² The relationship between attorney and child client is, consequently, paternalistic because of the lawyer's perceptions about the child's dependent status and immaturity.²⁰³

B. *The Child's Counsel in Abuse and Neglect Proceedings*

The right to and role of counsel in abuse and neglect proceedings is even less clear. The United States Supreme Court has never held that the child in an abuse or neglect proceeding has a constitutional right to counsel, although most jurisdictions require independent representation for the child.²⁰⁴ Federal law does mandate the appointment of a guardian *ad litem* for the minor,²⁰⁵ but does not indicate whether the guardian should also be a lawyer nor what her duties should be.²⁰⁶ State laws also fail to clarify the identity and responsibilities of the child's representative.²⁰⁷ Nevertheless, some commentators have ar-

juvenile court judges that lawyers are too adversarial in juvenile court); Anthony Platt et al., *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 Ind. L.J. 619, 621 (1968); Platt & Friedman, *supra* note 127, at 1176 ("There is strong pressure from legislatures, judges and legal commentators to repress adversary tactics in juvenile court") *Id.*

199. Norman Lefstein et al., *In Search of Juvenile Justice: Gault and Its Implementation*, 3 Law & Soc'y Rev. 491, 511-16 (1969).

200. Duffee & Siegel, *supra* note 198, at 550-52; Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 Crime & Delinq. 393, 403-05, 409-16 (1988). *But see* Ferster, *supra* note 163, at 402 (stating that more judicial findings of "not involved" and fewer commitments when children represented by counsel).

201. Martin Guggenheim, *Conducting a Bench Trial*, Crim. Just., Summer 1986, at 20, 20-21 (noting that judges seldom apply the burden of proof, preferring to keep children in the system).

202. Ferster, *supra* note 163, at 406 n.167; John H. Laub & Bruce K. MacMurray, *Increasing the Prosecutor's Role in Juvenile Court: Expectations and Realities*, 12 Just. Sys. J. 196, 203-04 (1987); Debra C. Moss, *In re Gault Now 20, But . . .*, 73 A.B.A.J., June 1, 1987, at 29, 29; Platt & Friedman, *supra* note 127, at 1183-84; Platt et al., *supra* note 198, at 624-28; Stephen G. Walker, *The Lawyer-Child Relationship: A Statistical Analysis*, 9 Duq. L. Rev. 627, 644-45 (1971).

203. *See* Platt et al., *supra* note 198, at 625, 633; Platt & Friedman, *supra* note 127, at 1179-80, 1184; Walker, *supra* note 202, at 627.

204. Donald Duquette & Sarah Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 J.L. Reform 341, 346 (1987).

205. 42 U.S.C. § 5103(b)(2)(G) (1974).

206. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 Fam. L.Q. 287, 289 (1983).

207. *Id.* at 289-90.

gued that the child does not need independent representation because her interests will be adequately protected either by the attorneys for the parents or by the state.²⁰⁸ Others, however, have acknowledged that the child should have independent representation, although there is significant disagreement about whether the child's representative should be a lawyer or a guardian *ad litem* and the appropriate role for that representative.²⁰⁹

Those who do see a role for an attorney in abuse and neglect proceedings differ as to the nature of that role. Some have argued that the attorney has a duty to zealously advocate the child's expressed preferences, even when the attorney disagrees with the client's objectives.²¹⁰ Such representation rejects unwarranted paternalistic practices and is consistent with a deep respect for individual autonomy.²¹¹ From this perspective, the child has a right to have her views expressed to the court and the attorney should not substitute her judgment for that of the child.²¹² Under certain circumstances, the ethical obligations of the profession may even require the lawyer to advocate for a position that would prove harmful to the child.²¹³

This vision of lawyering promotes the child client's autonomy. By defining the attorney's role to mandate zealous representation of the child's expressed wishes, this lawyering model recognizes the value of the child's preferences and permits her participation in the proceedings. Representation of the child's desires also may focus the court on the child and her needs rather than on her parents' behavior.²¹⁴ Additionally, the promotion of the child's autonomy may have a positive effect on the ultimate disposition of the client's case. The complexity and uncertainty inherent in these cases suggest that the child's wishes are just as likely to be right as those made on her behalf; consequently, representing the child's preferences may result in better and more accurate decisions.²¹⁵

208. Duquette & Ramsey, *supra* note 204, at 347.

209. Ramsey, *supra* note 206, at 288-91.

210. Douglas J. Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. Fam. L. 217, 234-35 (1981-82); Duquette & Ramsey, *supra* note 204, at 352; Leonard P. Edwards & Inger J. Sagatun, *Domestic Violence, Child Abuse, and the Law: Who Speaks for the Child?*, 2 U. Chi. Roundtable 67, 70 n.16 (1995); Massachusetts Bar Ass'n, *Opinions of the Comm. on Professional Ethics: Op. No. 93-6*, 78 Mass. L. Rev. 153, 154 (1993); Ramsey, *supra* note 206, at 320; Ventrell, *supra* note 5, at 79-80; Jennifer Bellah, *Comment, Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 Cal. L. Rev. 481, 510-11 (1982).

211. Ramsey, *supra* note 206, at 320.

212. Besharov, *supra* note 210, at 235-36; Edwards & Sagatun, *supra* note 210, at 70 n.16; Ventrell, *supra* note 5, at 281-82.

213. Ventrell, *supra* note 5, at 280-82.

214. Ramsey, *supra* note 206, at 295.

215. Besharov, *supra* note 210, at 235-36.

Client autonomy does presuppose a client capable of autonomous action. Proponents of a zealous advocate for the child in abuse and neglect proceedings thus argue that most children are capable of considered judgment and are mature enough to understand crucial aspects of the proceedings in which they are involved.²¹⁶ They note that if the child client is capable of expressing a mature judgment, then the attorney has an obligation to espouse the client's preferences.²¹⁷ The mere ability to express a preference, however, is not an adequate test of capacity.²¹⁸ Rather, the child must have the intellectual and emotional capability of making a decision that is reasonably accurate.²¹⁹

Proponents of this view note that the lawyer must make an initial determination about the child's capacity to make a reasoned decision.²²⁰ The evaluation of the child's competence, however, may create occasions for needless paternalism.²²¹ The assessment of capacity is highly subjective.²²² In difficult cases, the lawyer may be tempted to evaluate the child's capacity based on the "rightness" of her decision, if only because the lawyer may find it easier to advocate for a position with which she is in agreement.²²³ The lawyer's uncertainty about her client's capabilities also may engender an ambivalence in the lawyer's representation of the child that leaves neither lawyer nor client satisfied.²²⁴

To avoid unnecessary infringements upon the child's autonomy, proponents of client autonomy contend that the attorney should not assume that her client is incompetent merely because she is a child.²²⁵ Furthermore, the attorney should be careful to distinguish the decision-making process from the actual decision made by the child to assure that the minor's autonomy is not needlessly overridden simply because the attorney disagrees with the choices made by the child.²²⁶ Even when the attorney has determined that her client is incompetent, she nevertheless has an obligation to express the child's views to the court out of a respect for the child's feelings.²²⁷ But under this view, the lawyer is still free to advance what she believes to be in her client's

216. See, e.g., IJA-ABA Standards, *supra* note 163, Part 3.1(b)(ii)(b) & cmt. at 81.

217. *Id.*; Besharov, *supra* note 210, at 234; Edwards & Sagatun, *supra* note 210, at 70 n.16; Massachusetts Bar Ass'n, *supra* note 210, at 154; Ramsey, *supra* note 206, at 320; Bellah, *supra* note 210, at 510.

218. Ramsey, *supra* note 206, at 306.

219. *Id.* at 307.

220. *Id.* at 305-07; see also Massachusetts Bar Ass'n, *supra* note 210, at 154.

221. Ramsey, *supra* note 206, at 308-09.

222. *Id.* at 310; Besharov, *supra* note 210, at 236.

223. Ramsey, *supra* note 206, at 307.

224. Besharov, *supra* note 210, at 236.

225. Massachusetts Bar Ass'n, *supra* note 210, at 154.

226. Ramsey, *supra* note 206, at 307-09.

227. Besharov, *supra* note 210, at 235-36; Edwards & Sagatun, *supra* note 210, at 70 n.16.

interests once she determines that the minor is incompetent.²²⁸ According to its proponents, such advocacy, although contrary to the child's present wishes, may actually foster greater client autonomy by preserving the child's opportunities for future decision making.²²⁹

By focussing on the nature of the child's interests in abuse and neglect proceedings, other critics have concluded that advocating the child's expressed preferences is not central to the role of counsel for the child. These writers note that the purpose of an abuse or neglect proceeding is the protection of the child from abusive or neglectful parenting.²³⁰ Nevertheless, in the absence of an adjudication, there is no reason to presume that the interests of parents and their children diverge.²³¹ From this perspective, independent representation for the minor may be unnecessary because the parties to the proceeding—the child's parents and the state—could be expected to vigorously litigate issues pertaining to the child's welfare.²³² Moreover, the child's own preferences are irrelevant to the initial determination that the child is, in fact, abused or neglected.²³³

If, however, separate counsel is appointed to represent the minor, she may assume one of several roles, all of which accord the lawyer significant autonomy. First, the lawyer may ascertain what she believes to be in the child's best interests and then zealously advocate for a disposition consistent with her views.²³⁴ Moreover, the attorney may seek an appointment as the child's guardian *ad litem*; because of her adversarial skills and familiarity with courtroom procedures, the attorney may be in the best position to fulfill the obligations of that role.²³⁵ Alternatively, the lawyer may assume a nonadversarial role and act as an independent investigator whose job is to provide the court with all information relevant to the child's interests.²³⁶ Finally,

228. Massachusetts Bar Ass'n, *supra* note 210, at 154.

229. See Ramsey, *supra* note 206, at 306.

230. *Id.* at 291.

231. Guggenheim, *supra* note 163, at 119. Guggenheim argues that the appointment of separate counsel for children *before* abuse or neglect charges have been proven may violate the parents' constitutional rights to make decisions about their children.

232. See Guggenheim, *supra* note 163, at 131.

233. *Id.*

234. See Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 Cal. W. L. Rev. 16, 33-34 (1976); Guggenheim, *supra* note 163, at 100; David O. Bell et al., Comment, *A Recommendation for Court-Appointed Counsel in Child-Abuse Proceedings*, 46 Miss. L.J. 1072, 1092-93 (1975).

235. Fraser, *supra* note 234, at 30; Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. Fam. Law 405, 411 (1982-83). *But see* Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 338-41 (1993) (arguing that lay volunteers are effective advocates for children).

236. Fraser, *supra* note 234, at 34 (noting that the lawyer also has a role as an advocate); Guggenheim, *supra* note 163, at 107-08.

the lawyer may define her role in a dependency proceeding more narrowly prior to an adjudication and oppose the state's attempts to establish parental unfitness.²³⁷ This comports with the legal presumption that it is in the child's best interests to be reared by her natural parents.²³⁸

From this perspective, the child's preferences are secondary to the child's interests as defined by some other, capable adult. Thus, the minor's wishes and desires may be construed as irrelevant to a determination of what is best for the child.²³⁹ The attorney, therefore, need not represent the child's views if they conflict with the child's interests, although the lawyer may have some obligation to communicate the minor's preferences to the court.²⁴⁰ Moreover, relating the child's wishes to the court enhances the judge's ability to make a reasoned decision about the child based on all available information.²⁴¹ The attorney's role as spokesperson for the minor, however, must be balanced against her role as advocate for the child's best interests.²⁴²

Furthermore, the child client's inability to instruct counsel mandates a lawyering paradigm that does not center on client autonomy. Under this view, young children lack the capacity to make reasoned choices and may be incapable of articulating a preference to counsel.²⁴³ Consequently, the lawyer may be unable to advocate for her client's expressed wishes and may find herself taking a position that accords with her own views of the child's interests.²⁴⁴ Because of her incompetency, the minor's present wishes may endanger her future well-being and the attorney may justifiably act to protect the child from her present desires.²⁴⁵ The attorney, therefore, may be unable to rely on her client's expressed wishes and may have a duty to notify the court about the extent of the child's incapacity.²⁴⁶

The lawyer's role thus envisioned affords the attorney considerable autonomy. The determination of the client's interests is left to the child's lawyer, although she may consider the views of experts as well as of the child herself.²⁴⁷ Moreover, the lawyer has an obligation to protect the minor and may override her client's wishes in order to

237. Guggenheim, *supra* note 163, at 138-39.

238. *Id.*

239. *Id.* at 131.

240. Edwards & Sagatun, *supra* note 210, at 74; James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 Vill. L. Rev. 521, 545 (1977-78).

241. Edwards & Sagatun, *supra* note 210, at 74.

242. Redeker, *supra* note 240, at 545.

243. Edwards & Sagatun, *supra* note 210, at 75; Guggenheim, *supra* note 163, at 93-94.

244. Guggenheim, *supra* note 163, at 94.

245. Redeker, *supra* note 240, at 545.

246. *Id.*

247. *Id.*

preserve the child's future options.²⁴⁸ The lawyer's decision to disregard the child's preferences nevertheless is morally justifiable, even though the child's autonomy is infringed, because the lawyer's actions are necessary to preserve the client's future ability to make responsible choices. In this sense, the lawyer acts morally when she acts paternalistically.

In practice, there is still considerable confusion about the proper role for child's counsel in an abuse or neglect case. State statutes and court rulings do not clarify the role of counsel in abuse and neglect proceedings and trial judges may obscure the lawyer's role by directing counsel to assume contradictory obligations.²⁴⁹ The lawyer may be uncertain about whether she should remain neutral, act as an investigator, or provide the court with her own assessment of the child's best interests.²⁵⁰ Furthermore, the lawyer may receive little guidance from the court as to her obligation to represent the child's expressed preferences as opposed to the child's interests.²⁵¹ Serious questions also have been raised about the dedication and effectiveness of counsel for the child in abuse and neglect proceedings.²⁵²

C. *The Lawyer for the Child in Custody Disputes*

As in abuse and neglect proceedings, the child has no definitive right to counsel in a disputed custody matter ancillary to a divorce proceeding.²⁵³ Some writers contend that the child does not need independent representation because the child's interests are adequately protected by one or both of the parents' attorneys.²⁵⁴ From this perspective, a custody dispute is an essentially private matter between two individuals and appointing an independent representative for the child would be unduly intrusive.²⁵⁵ Furthermore, the appointment of

248. *Id.*

249. Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* 3 (1993).

250. Kelley & Ramsey, *supra* note 235, at 412.

251. *Id.* at 413.

252. Duquette & Ramsey, *supra* note 204, at 385-91; Kelley & Ramsey, *supra* note 235, at 451-54; Ramsey, *supra* note 206, at 302.

253. Compare Monroe L. Inker & Charlotte Anne Perretta, *A Child's Right to Counsel in Custody Cases*, 55 Mass. L.Q. 229, 235 (1970) (purpose of custody hearing so similar to that of juvenile hearing that procedures required by *Gault* have some application to custody hearings) with Guggenheim, *supra* note 163, at 119 (asserting that *Gault* is not a precedent for right to counsel for young children in custody cases).

254. Representing Children: Standards for Attorneys and Guardians *ad Litem* in Custody or Visitation Proceedings § 1.1 cmt. at 3-4 (Am. Acad. Matrimonial Law, 1994) [hereinafter Representing Children]; Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 Fam. L.Q. 327, 350 (1983); see Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 Yale L.J. 1304, 1312 (1974) (reviewing Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973)).

255. Representing Children, *supra* note 254, § 1.1 cmt. at 4-5 (stating that custody proceedings are "private disputes," and the "fact that parents have decided to resolve

a child's representative would generate unnecessary delay, increase fees, and impose additional financial and psychological costs.²⁵⁶ There is also a possibility that the representative's assessment of the child's interests will receive undue weight, particularly when the representative agrees with an expert witness.²⁵⁷ If the attorney does receive an appointment to represent the child in a disputed custody case, the lawyer should offer no active assistance at trial.²⁵⁸

Nevertheless, most states permit the discretionary appointment of a representative for the child, although that representative may not be an attorney.²⁵⁹ Eight states mandate the appointment of a representative, but that appointment is contingent upon the existence of certain conditions, such as an allegation of abuse or neglect.²⁶⁰ Only one state mandates the appointment of a representative when custody is contested.²⁶¹ Some state statutes permit the court to appoint an attorney,²⁶² an attorney or a guardian *ad litem*,²⁶³ or an attorney as the guardian *ad litem* to represent the child.²⁶⁴ While most of these statutes require the representation of the child's interests, it is unclear whether the child's preferences should be advocated in addition to or in lieu of the minor's best interests.²⁶⁵

Among those who do see a role for an attorney in a custody proceeding, there are two views as to the nature of that role and the obligations of the lawyer to her child client. Some commentators evoke the lawyer autonomy paradigm and argue that the attorney's role is to ensure the protection of the child's best interests by advancing her view of what she believes will best serve the child.²⁶⁶ The attorney should zealously represent the minor's interests and present all rele-

their dispute in a contested manner is insufficient reason to require a separate legal representative for children in most cases"); Guggenheim, *supra* note 163, at 121-22.

256. Representing Children, *supra* note 254, § 1.1 cmt. at 3-4.

257. Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 106-07* (1991).

258. Guggenheim, *supra* note 163, at 125 (discussing the proper role of the attorney when the child-client is without a preference or is too young to express one).

259. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1551-52 & nn.170-74. Texas subsequently recodified its statute. See *Tex. Fam. Code Ann.* § 107.001 (West 1995).

260. *Id.* at 1552 & nn.171-74.

261. *Wis. Stat. Ann.* § 767.045(1)(a)(2) (West 1993).

262. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1553 & n.177.

263. *Id.* at 1554.

264. *Id.*

265. *Id.* at 1554-55.

266. Cochran & Vitz, *supra* note 254, at 351; Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 *Fam. L. Q.* 53, 68 (1985); Robert E. Sheperd, Jr., *Solomon's Sword: Adjudication of Child Custody Questions*, 8 *U. Rich. L. Rev.* 156, 169-70 (1974); Brenda Magaziner Flock, Comment, *Custody Disputes Arising From Divorce: The Child's Need for Counsel in Pennsylvania*, 87 *Dick. L. Rev.* 351, 362 (1982); Ron Hewitt, Comment, *McKercher v. McKercher, Independent Counsel for Children in Custody Disputes*, 42 *Sask. L. Rev.* 295, 302-03

vant evidence as to the child in court.²⁶⁷ If there is a conflict between what the child wants and what the attorney thinks the child should have, the attorney need not be bound by the client's expressed preferences.²⁶⁸ Under these circumstances, the lawyer may argue her own opinion as to the child's best interests and specifically urge the court to discount the child's views.²⁶⁹

Other writers, however, argue that the child's attorney should respect and promote her client's autonomy. Under this view, the attorney is a zealous advocate who should represent the child's expressed preferences rather than the attorney's own opinion of what is in the child's best interests.²⁷⁰ The lawyer is a representative of the child alone and should not advocate the competing claims of the child's parents.²⁷¹ Moreover, the attorney should treat her child client much as she would any adult client and capably defend the child's views in the courtroom.²⁷² If the lawyer disagrees with the child's stated prefer-

(1977-78); Sibylle Kobienia, Comment, *Separate Representation in Custody Cases*, 6 Adel. L. Rev. 466, 474 (1978).

267. Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 Fam. L.Q. 53, 63 (1992); Marvin C. Holz, *The Child Advocate in Private Custody Disputes: The Wisconsin Experience*, 16 J. Fam. L. 739, 741-42 (1977-78); Inker & Perretta, *supra* note 253, at 239-40; Carl E. K. Johnson, *The Role of the Guardian ad Litem in Custody and Visitation Disputes*, 17 Colo. Law. 1301, 1303 (1988).

268. Jeff Atkinson, *Modern Child Custody Practice* 712 (1986); Robert I. Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting From a Termination of the Marriage*, 50 Conn. Bar J. 150, 165 (1976); Debra L. Norberg, Comment, "Mom, Dad, I Want to Introduce My Lawyer": *The Development of Child Advocacy in Family Law*, 29 S.D. L. Rev. 98, 109 (1983); see Eitzen, *supra* note 266, at 68-69; Flock, *supra* note 266, at 362; Kobienia, *supra* note 266, at 474.

269. Atkinson, *supra* note 268, at 712.

270. Haralambie, *supra* note 249, at 31; Berdon, *supra* note 268, at 165; Donald N. Bersoff, *Representation for Children in Custody Decisions: All That Glitters is Not Gault*, 15 J. Fam. L. 27, 34 (1976-77); Elrod, *supra* note 267, at 68-69; James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.-C.L. L. Rev. 565, 588-89 (1976); 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, 448 (1993); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. Fam. L. 607, 633 (1982-83); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. Fam. L. 1, 16 (1977-78); Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. Am. Acad. Matrim. Law. 45, 56 (1993); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687, 749 (1985); Kerin S. Bischoff, Comment, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged*, 138 U. Pa. L. Rev. 1383, 1392 (1990); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681, 706 (1987); Paul K. Milmed, Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. Rev. L. & Soc. Change 177, 187-88 (1974); Edward Sokolnicki, Note, *The Attorney as Guardian ad Litem for a Child in Connecticut*, 5 Conn. Prob. L.J. 237, 254 (1991); Maurice K. C. Wilcox, Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 Hastings L.J. 917, 949 (1976).

271. Bischoff, *supra* note 270, at 1393.

272. Haralambie, *supra* note 249, at 12; Parley, *supra* note 270, at 57-58.

ences, the lawyer nevertheless has a duty to present and vindicate those views in court.²⁷³

This view of the lawyer as zealous advocate for the child's expressed wishes acknowledges the child client as a capable and autonomous being. From this perspective, the opinions of a competent child deserve the same respect as those of an adult.²⁷⁴ Because the minor does have the capacity to make a reasoned and intelligent choice, she should be permitted to present her views to the court through an independent and partisan advocate.²⁷⁵ The lawyer thus has an obligation to ensure that the child's voice is heard throughout the course of the proceedings.²⁷⁶ Moreover, a child who is a sufficiently mature and competent individual is capable of instructing her attorney and providing her lawyer with the necessary guidance as to her objectives.²⁷⁷

Furthermore, this approach underscores the institutional commitment to the adversary system. Adversariness has value because it preserves and facilitates client autonomy by giving the child access to law and legal structures.²⁷⁸ Some commentators have argued that the child's right of access may have constitutional dimensions, for due process may require the protection of the child's liberty interest in her placement.²⁷⁹ But even in the absence of a constitutional mandate, separate counsel for the child is needed because the child's best interests are often compromised in the bargaining process.²⁸⁰ Professional rules of ethics also mandate the lawyer's role as zealous advocate and the vigorous representation of the child client's views.²⁸¹

From the other perspective, however, the lawyer has considerable autonomy to determine the child's interests. As with the adversarial paradigm, this approach also acknowledges the child's need for independent representation because parents may be motivated to sacrifice the child's best interests for other concerns.²⁸² But this view of

273. Haralambie, *supra* note 249, at 31; Berdon, *supra* note 268, at 165; Bersoff, *supra* note 270, at 34; Elrod, *supra* note 267, at 64; Genden, *supra* note 270, at 588-89; Hafen, *supra* note 270, at 462; Long, *supra* note 270, at 633; Mlyniec, *supra* note 270, at 16; Parley, *supra* note 270, at 56; Schepard, *supra* note 270, at 748-49; Bischoff, *supra* note 270, at 268; Lyon, *supra* note 270, at 706; Milmed, *supra* note 270, at 187-88; Sokolnicki, Note, *supra* note 270, at 254; Wilcox, *supra* note 270, at 949.

274. Genden, *supra* note 270, at 589.

275. Berdon, *supra* note 268, at 164-65.

276. Elrod, *supra* note 267, at 63.

277. Berdon, *supra* note 268, at 165; Genden, *supra* note 270, at 589.

278. Berdon, *supra* note 268, at 165 (citing Henry H. Foster, Jr. & Doris J. Freed, *A Bill of Rights for Children*, 6 *Fam. L.Q.* 343, 356 (1972)).

279. Berdon, *supra* note 268, at 160-61; Genden, *supra* note 270, at 582-83; Inker & Perretta, *supra* note 253, at 234; Long, *supra* note 270, at 627-30; Milmed, *supra* note 270, at 179-80.

280. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1559; Genden, *supra* note 270, at 573.

281. Parley, *supra* note 270, at 54-56.

282. Norberg, *supra* note 268, at 102-03.

the lawyer's role values the lawyer's independent judgment.²⁸³ The child's immaturity and inability to make a reasoned choice require the child's lawyer to make an independent assessment of the child's best interests and to advocate her position as to those interests in court.²⁸⁴ Moreover, this approach recognizes the systemic importance of promoting the minor's welfare²⁸⁵ by ensuring the presentation of objective evidence as to the child's interests.²⁸⁶

There is, however, substantial agreement among these commentators as to the attorney's obligations when the child client is incompetent. Those who argue for a more adversarial role for the child's representative envision a sufficiently mature client who is capable of reaching a reasoned and intelligent decision.²⁸⁷ If, however, the child lacks the capacity to articulate a reasonable preference, then the attorney may communicate the child's views to the court while remaining neutral as to the desirability of the child's proposal.²⁸⁸ The lawyer also may argue for a result contrary to her client's express wishes if, in her best judgment, the child's stated preference is not a reasonable or intelligent choice.²⁸⁹ Whether a particular child has the requisite degree of maturity and capacity to make decisions thus becomes definitive, and the attorney either must make the assessment herself or request help from the court.²⁹⁰

Both lawyering models, therefore, provide opportunities for paternalistic intervention. From within a lawyer autonomy paradigm, the necessity for independent moral judgment requires the lawyer to engage the client and shape her objectives. Although this would infringe upon the client's autonomy, the lawyer is morally justified in refusing to further those objectives that are irresponsible. But even within the client autonomy model, the attorney may act paternalistically. From within this paradigm, a client may be said to be competent only if she is autonomous; thus, acting on behalf of the incapacitated client does not infringe upon the client's autonomy.

283. Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 Yale L.J. 1126, 1180 (1978).

284. Holz, *supra* note 267, at 741-43; Hewitt, *supra* note 266, at 302-03.

285. Kobienia, *supra* note 266, at 474.

286. Flock, *supra* note 266, at 362.

287. Haralambie, *supra* note 249, at 30-31; Berdon, *supra* note 268, at 165; Eitzen, *supra* note 266, at 69; Elrod, *supra* note 267, at 64; Genden, *supra* note 270, at 588; Schepard, *supra* note 270, at 750; Flock, *supra* note 266, at 362; Lyon, *supra* note 270, at 706; Sokolnicki, *supra* note 270, at 254.

288. Berdon, *supra* note 268, at 165.

289. *Id.* at 165; Flock, *supra* note 266, at 362; Kobienia, *supra* note 266, at 474; Lyon, *supra* note 270, at 705; Milmed, *supra* note 270, at 188.

290. See Haralambie, *supra* note 249, at 32-33; Hafen, *supra* note 270, at 462; Tara Lea Muhlhauer, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N. D. L. Rev. 633, 637-38 (1990); Lyon, *supra* note 270, at 699-700.

D. *Interviewing and Counseling the Child Client*

The question of the minor's competence also structures the obligations of the lawyer to communicate with, advise, and counsel the child. Within the client autonomy paradigm, the attorney should treat the competent child client much as she would any adult client.²⁹¹ The lawyer should interview the child as soon as possible and as often as is necessary, as the client is an important source of information about the case.²⁹² Furthermore, the attorney should encourage a frank and open discussion and full disclosure of all relevant information so that she might have a better understanding of the legal matter and more capably represent the minor.²⁹³ As with an adult client, the lawyer should not hesitate to probe for detail and implausibility to assess the client's credibility as a potential witness.²⁹⁴

Despite valid reasons for treating child and adult clients similarly, the capacity, maturity, and intellectual development of the child are thought to require special communicative and interviewing techniques.²⁹⁵ The minor, for example, is unlikely to have a clear understanding of the legal system and the lawyer's role in that process, and may be suspicious of the attorney's motivations.²⁹⁶ The child also may be more passive and suggestible than other clients and may have difficulty recalling events with accuracy.²⁹⁷ The minor's degree of language acquisition may further impede successful communication between lawyer and client because the child simply may not understand the questions asked of her.²⁹⁸ She also may have difficulty expressing herself because of her limited linguistic and cognitive capabilities.²⁹⁹

From this perspective, the attorney for the child must adapt her interviewing techniques to accommodate the child's special needs. The lawyer should provide the child with a clear explanation of the attor-

291. IJA-ABA Standards, *supra* note 163, Part 4.2(a) cmt. at 99-100; Elrod, *supra* note 267, at 63-64; Ventrell, *supra* note 5, at 274.

292. IJA-ABA Standards, *supra* note 163, Part 4.2; see Haralambie, *supra* note 249, at 66-67.

293. IJA-ABA Standards, *supra* note 163, Part 4.2(b), cmt. at 102.

294. IJA-ABA Standards, *supra* note 163, Part 4.2(b); see also Perry & Teply, *supra* note 5, at 1408 (arguing the need to assess child as witness through vitally important pretrial interviews).

295. Atkinson, *supra* note 268, at 706-10; Haralambie, *supra* note 249, at 67-69; Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 Creighton L. Rev. 757, 758-59 (1990); Parley, *supra* note 270, at 48-49; Perry & Teply, *supra* note 5, at 1375-76; Karen J. Saywitz, *Bullying Children Won't Work*, 10 Fam. Advoc., Winter 1988, at 16, 16; Gregory D. Smith, *Considerations When Interviewing Children*, 12 Children's Legal Rts. J., Summer 1991, at 2, 3; Ventrell, *supra* note 5, at 273-74.

296. Perry & Teply, *supra* note 5, at 1377-78; Saywitz, *supra* note 295, at 16.

297. Perry & Teply, *supra* note 5, at 1379, 1387, 1393; Smith, *supra* note 295, at 2.

298. Haralambie, *supra* note 249, at 146-47; Perry & Teply, *supra* note 5, at 1383-84; Saywitz, *supra* note 295, at 18.

299. Haralambie, *supra* note 249, at 146; Perry & Teply, *supra* note 5, at 1384; Saywitz, *supra* note 295, at 17.

ney's role and her obligations as zealous advocate and loyal partisan.³⁰⁰ The lawyer should also assure the child client that all communications will be kept confidential and encourage the child to speak freely and candidly about the case.³⁰¹ To ensure the minor's understanding, the lawyer should ask simple and concrete questions and avoid legal terminology.³⁰² Additionally, the lawyer should reassure the child and empathize with her feelings in order to facilitate communication and foster a positive attorney-client relationship.³⁰³

Children, however, are not the only clients who may benefit from these techniques, which are equally applicable to interviewing situations involving adult clients. Enhancing client communication by using facilitators like empathy and reassurance, avoiding legal terminology, and improving the client's understanding of the attorney's role are essential to the promotion of client-centered interviewing methodologies.³⁰⁴ Client-centered techniques expressly value client autonomy because they nurture client control.³⁰⁵ By sensitizing the lawyer to the ways in which she may subordinate her client and influence client decision making, the lawyer may empower the client to make decisions about her case in an informed and fully participatory manner.³⁰⁶ Such participation not only improves the attorney-client relationship but is likely to enhance client satisfaction with the outcome of the case.³⁰⁷

The extent to which the attorney finds interviewing the child client difficult may actually be a reflection of the attorney's own expectations and assumptions. Class and racial differences between attorney and client may generate misunderstandings and frustration; consequently, the attorney should be aware that her personal beliefs may foster unnecessary suspicions about her client.³⁰⁸ The attorney, however, could expect these sorts of difficulties even when dealing with an adult client, but what distinguishes the child client from other kinds of clients is the attorney's perceptions about the cognitive and emotional limitations of childhood. The relationship between attorney and client thus may reflect the lawyer's expectations about the child's capacities

300. Perry & Teply, *supra* note 5, at 1377-78.

301. Haralambie, *supra* note 249, at 74; Elrod, *supra* note 267, at 64; Perry & Teply, *supra* note 5, at 1379; Ventrell, *supra* note 5, at 276.

302. Haralambie, *supra* note 249, at 75-76; Perry & Teply, *supra* note 5, at 1383-84.

303. Perry & Teply, *supra* note 5, at 1381; Saywitz, *supra* note 295, at 17.

304. See e.g., Binder & Price, *supra* note 28, at 14-18 (discussing techniques to facilitate full participation by the client).

305. See *supra* notes 22-29 & accompanying text.

306. See *supra* notes 27-31 & accompanying text.

307. Binder & Price, *supra* note 28, at 148; Rosenthal, *supra* note 29, at 14-15; see Ellmann, *supra* note 28, at 720.

308. IJA-ABA Standards, *supra* note 163, Part 4.2(a), cmt. at 100; H. Freeman & H. Weihofen, *Clinical Law Training* 242 (1972).

that are unrelated to the client's actual abilities.³⁰⁹ This, in turn, may serve to disempower the minor who will be treated as less competent to participate in and make decisions about her case.

Both lawyering paradigms recognize that speaking to the child, even if she is incompetent, may provide the attorney with new insights into the case.³¹⁰ Nevertheless, the interview's purpose is investigatory and the lawyer may be more interested in acquiring information than in developing a rapport with the client.³¹¹ Furthermore, from within the lawyer autonomy paradigm, ascertaining the client's preferences may be of secondary importance since the attorney may have the power to override her client's express wishes.³¹² Under this view, the lawyer may not find an interview very constructive, particularly if the child is very young.³¹³ Thus, merely observing the child may satisfy any obligation that the lawyer may have to meet with her client.³¹⁴

Questions about the child's capacity also structure the lawyer's counseling obligations. When the attorney perceives the client as competent and she values client autonomy, she should treat the child client as she would an adult and advise the child fully and candidly about her case.³¹⁵ The lawyer should not manipulate or coerce the child into choosing a particular course of action or usurp the client's decision-making authority.³¹⁶ This approach also requires the lawyer to recognize that certain decisions are the client's alone to make,³¹⁷ although the attorney may make some strategic or tactical decisions on her client's behalf.³¹⁸ Additionally, the attorney should acknowledge her responsibility to counsel the child about nonlegal matters and should make the client aware of other professional treatment services.³¹⁹

From this perspective, there is some recognition of the need to utilize special techniques when counseling the child client. The counseling process should be a collaborative one in which the child is

309. IJA-ABA Standards, *supra* note 162, Part 402(a), cmt. at 100; Ventrell, *supra* note 5, at 273.

310. See e.g., Atkinson, *supra* note 268, at 706-07; Haralambie, *supra* note 249, at 66-67; Ventrell, *supra* note 5, at 275.

311. Brooks, *supra* note 295, at 764-65; see Sokolnicki, *supra* note 270, at 245 (recommending ways to fulfill guardian ad litem's function as an investigator); see generally Elrod, *supra* note 267, at 59 (describing ways in which guardians *ad litem* conduct investigations); Inker & Perretta, *supra* note 253, at 239-240 (discussing ways in which a child's attorney represents the child).

312. Haralambie, *supra* note 249, at 6; Elrod, *supra* note 267, at 60; Ventrell, *supra* note 5, at 269.

313. Atkinson, *supra* note 268, at 706-07.

314. Ventrell, *supra* note 5, at 275.

315. IJA-ABA Standards, *supra* note 163, Part 5.1(a) cmt. at 109-10.

316. *Id.* at 110; Perry & Teply, *supra* note 5, at 1423.

317. IJA-ABA Standards, *supra* note 163, Part 5.2(a), cmt. at 111-15; Shannan L. Wilber, *Counsel for Children*, 27 Fam. L. Q. 349, 353-54 (1993).

318. IJA-ABA Standards, *supra* note 163, Part 5.2(b), cmt. at 115.

319. *Id.* at Part 5.3 cmt. at 116-19.

encouraged to reach a decision on her own.³²⁰ The attorney should encourage the child to identify alternatives and to evaluate their legal and nonlegal consequences.³²¹ The lawyer should be careful to avoid suggesting that one alternative is preferable to another by manipulating the discussion of the various courses of action that may be open to the client.³²² Finally, the attorney should help the child reach a final decision and ensure that that choice is truly one made by the client.³²³

These techniques are not only suitable for counseling sessions with adult clients but also reflect many of the same problems that a client-centered approach seeks to avoid. Lawyers may manipulate and deceive all kinds of clients, not just the very young ones.³²⁴ Many clients, regardless of their age, may feel intimidated by their lawyers who, consciously or not, may dominate their clients.³²⁵ Participatory decision making, however, promises to counteract subordination by empowering the client to make fully informed decisions that will be respected by her attorney.³²⁶ Furthermore, participatory models promote client autonomy by giving the client greater control over the outcome of her case.³²⁷

Because of the connection between client autonomy and capacity, however, paternalism appears to be warranted when the client is incompetent. Both the client autonomy and the lawyer autonomy paradigms envision a more intrusive approach to counseling the minor if the lawyer believes the child to be incapacitated.³²⁸ At a minimum, the lawyer should feel free to advise the child about the wisdom of her position and the likelihood of its success³²⁹ and to counsel the client about the appropriateness of the case's disposition in order to ensure the client's acceptance of or compliance with the court's orders.³³⁰ The attorney may even try to persuade the client to pursue those objectives that are in her best interests, although the child's expressed wishes are to the contrary.³³¹ In some instances, the client's incapacity may even authorize the attorney to make decisions on behalf of the child.³³²

320. Perry & Teply, *supra* note 5, at 1425.

321. *Id.* at 1424.

322. *Id.* at 1423.

323. *Id.* at 1425.

324. *See supra* notes 27-28 & accompanying text.

325. *See supra* notes 22-23 & accompanying text.

326. Wilber, *supra* note 317, at 355; Bellah, *supra* note 209, at 513.

327. Wilber, *supra* note 317, at 354-55.

328. Elrod, *supra* note 267, at 65; Ventrell, *supra* note 5, at 281; Wilber, *supra* note 317, at 358-59.

329. Wilber, *supra* note 317, at 354.

330. Walsh, *supra* note 196, at 654.

331. Ventrell, *supra* note 5, at 279.

332. Elrod, *supra* note 267, at 65; Ventrell, *supra* note 5, at 281; Wilber, *supra* note 317, at 358-59.

The issue, then, turns on an assessment of client competency. Under either paradigm, the lawyer has considerable autonomy to structure the case when the client is incapacitated. Most commentators do not challenge the centrality of capacity to lawyering models, although they differ in their assessments of the extent to which incapacity is defined by the boundaries of childhood. Proponents of client autonomy, therefore, are most likely to be skeptical of claims that children of a certain age are incompetent and to reject age-based presumptions.³³³ Nevertheless, notions about capacity organize the ways in which lawyers approach their child clients and structure attorney-client relationships.

III. RETHINKING LAWYERING

As stated previously, capacity has disadvantaging effects, not the least of which is an incoherent rights theory that cannot accommodate notions of children's rights.³³⁴ But what if we were able to reconstruct our rights talk in ways that would acknowledge the status of children as rights holders? Such a theory would have positive consequences for children as well as other oppressed and marginalized groups. Moreover, a coherent account of rights would recognize the value of rights and rights claims, which have been under critical attack in recent years.³³⁵ A coherent rights theory also may provide a lawyering paradigm that would account for the powerfulness or powerlessness of the client and would ultimately offer the lawyer some stronger sense of what it means to engage in the ethical practice of law.

I think that a coherent account of rights must be premised upon notions of power. Power structures the interactions between and among individuals and the state. It is power that permits an individual to assert a claim against another and power that permits the enforcement of that claim. It is through the exercise of that power that individuals are recognized by others as worthy and their objectives as having value. Moreover, power creates access by claiming the attention and respect of others.

In its most fundamental sense, a right is power. But note that the value of rights lies in the redistributive effect they have on power in any given relationship. Rights have merit because they hold out the promise of challenging hierarchy and mitigating marginalization. In this sense, rights do not stem from the power an individual has over another but from her powerlessness; consequently, rights are a means of accessing power and of demanding the respect of those with power. Furthermore, thinking about rights as power enables us to see the dif-

333. See, e.g., Wilber, *supra* note 317, at 357.

334. Federle, *Looking for Rights in All the Wrong Places*, *supra* note 10, at 1525; Federle, *Rights flow downhill*, *supra* note 10, at 344.

335. See, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860, 1860 (1987).

ferent ways in which we may be marginalized and oppressed by powerful elites who are advantaged by incoherent rights talk.

From a coherent rights perspective, then, having a right does not depend upon the capacity of the rights holder but upon her powerlessness. Rights prohibit those who have power from exercising it over those who do not and create zones of respect in which the excluded may be empowered. Moreover, empowering those who have been marginalized would reduce their victimization and oppression within elitist hierarchies because they would no longer be seen as powerless beings. Grounding rights in notions of power also has the advantage of allowing us to think about the world as it is, not as it should be. That, too, is critical because it helps to avoid the pitfalls of rights theories that cannot speak of the realities of the world and thus lack the force to effectuate real change.

For children, a coherent rights theory permits the child to make rights claims and to have them heard. The capacity and maturity of the child is irrelevant within such an account because it is the child's status as a powerless being that accords her rights. Thinking about rights in terms of power also allows for challenges to paternalistic practices that often disguise attempts at control and domination. Recognizing the powerlessness of children enables us to see the relationships they have with others in terms of that powerlessness and to question claims of acting in the best interests of the child. Furthermore, viewing such claims with skepticism may reveal additional ways in which children are disempowered by the relationships they have with others.

Ultimately, our lawyering paradigms are impoverished because they rest on incoherent accounts of rights. The lawyer has obligations to the client stemming from the client's legal rights and interests.³³⁶ Thus, if the client has no legal right, the lawyer would appear to owe nothing to the client; moreover, if the client's interests stem from her incapacities, the lawyer's obligations would center on protecting the client. Children are disadvantaged by rights talk that is organized around principles of capacity because they are excluded from the class of rights holders or have rights that promote their dependencies and vulnerabilities. This generates considerable confusion about the role of the lawyer for the child in the absence of a coherent account of rights.

By moving our rights talk away from notions of capacity and towards conceptions of power, we may find it easier to reconceptualize a paradigm of lawyering. From within a coherent account of rights, it is the powerlessness of the individual, rather than her capacity to make an intelligent or reasoned decision, that is determinative of her status as a rights holder. Moreover, the rights of the powerless do not pro-

336. Ventrell, *supra* note 5, at 259.

mote their dependent status. Consequently, lawyering paradigms that turn on the competency of the decision maker cannot adequately account for those individuals who may lack the requisite capabilities. But if rights flow to the powerless, then a lawyering paradigm that facilitates the recognition of the rights of the marginalized has coherence.

From this perspective, client empowerment is the central value of a lawyering model. The lawyer must recognize that existing legal structures, as well as the attorney-client relationship itself, may disempower the client. By freeing the client from subordinating lawyering practices, the attorney enhances the client's participation in the lawyer-client relationship. The attorney has an ethical obligation to ensure that the client has the power to make decisions about her case and to determine the true objectives of her representation. Moreover, client empowerment encourages a more meaningful expression of the client's goals and may foster a true collaboration with the lawyer.

This approach to lawyering also permits the attorney to challenge dominant visions of her client's abilities. For example, claims by powerful elites that an individual lacks rights holder status because of her incompetencies should be viewed skeptically. By seeing relationships in terms of dominance and subordination, however, a coherent account of rights may reveal the ways in which powerful elites oppress and marginalize. Rights, therefore, have value because they allow challenges to these hierarchies and force these elites to hear the claims of those without power. The advantage of seeing rights in this way is to recognize the rights claims of all those, including children, who have been oppressed.

The lawyer for the child, therefore, must be aware of the ways in which she, as an adult, may dominate her child client. Because children are powerless, they do not expect adults to treat them with respect or to listen to their opinions. They are treated as passive and subordinate beings who must follow the instructions of an older and wiser adult. The lawyer, therefore, must be cognizant of the effect she may have on her client and must take steps to facilitate the client's empowerment in the relationship. By acknowledging that the association between attorney and child is an unequal power relationship, the lawyer begins the process of client empowerment.

Interviewing and counseling are effective mechanisms for facilitating the child client's full participation in both the legal system and the attorney-client relationship. From this perspective, the lawyer has an ethical obligation to meet with the client and discover information about the client's situation. The lawyer also has an obligation to foster communication between the lawyer and the child and to utilize whatever techniques may be necessary to accommodate the child client. While some of these methods may account for the child's varia-

ble linguistic and cognitive capacities, they nevertheless serve to free the child from potential domination by the adult lawyer. Moreover, by empowering the child in the attorney-client relationship, the lawyer also enhances the child's ability to participate in the legal system.

Counseling methodologies also need to be sensitive to the disempowering effects of the attorney-client relationship. Manipulative and deceptive practices subordinate the client and have no place in a lawyering model which promotes client empowerment. The lawyer should be particularly careful to avoid the imposition of her own views as to what she thinks is best for the client and to empower the client to make her own decisions. This sort of counseling is premised upon a deep respect for the client as a rights holder and the ethics of promoting the client's status in the face of domination. Additionally, because the goal of counseling is to facilitate the client's decision making, it is focussed not on the correctness of the decision made but on the process by which the client reaches her decision.

To put it another way, the point of client empowerment is not to make sure that the child client has made a good decision or the best choice; nor is it to ensure that the way in which she reached her decision is a reasoned one. Rather, by empowering the client, the lawyer ensures that the child, and no other, has truly made her own choice. Of course, this may mean that some decisions will be made by the child that the lawyer believes are wrong or ill-conceived, but then, all clients, not just those of a certain age, are capable of making and have made bad choices. Nevertheless there is value in allowing a client to speak in her own voice and to determine her own goals. This is the essence of empowerment and of ethical lawyering.

CONCLUSION

Our rights tradition, which emphasizes competency, perpetuates hierarchy by excluding those from the class of rights holders who lack the requisite capacity. For children, who are seen as immature and incompetent beings incapable of making important decisions about their lives, this vision of rights has made it extremely difficult for them to claim they have rights. Moreover, even when children have certain interests deemed worthy of protection by the state, those interests invariably perpetuate their subordination and oppression. This sort of rights talk also disadvantages children by structuring lawyering models that cannot accommodate the child as client. Consequently, our lawyering paradigms rest on an impoverished account of rights.

But if we reconstruct our rights talk to account for the powerless, we may reconsider our approaches to lawyering. If rights have value because they challenge hierarchy and mitigate oppression, then our rights accounts must accommodate those who have been excluded. A coherent rights theory must account for power and powerlessness and a coherent right empowers those who have been subordinated. Under

this account, children are rights holders who may make rights claims that will be recognized and treated seriously. Furthermore, this account of rights directly challenges images of children as dependent and vulnerable and may reduce the opportunities for their victimization.

Rethinking rights also permits us to reconsider the ways in which we approach lawyering. Recognizing powerlessness accords rights status and structures the obligations we owe to our clients as lawyers. In addition, by thinking about the powerlessness of our clients, we become more aware of the ways in which we, as lawyers, may dominate, oppress, and manipulate them. Interviewing and counseling techniques are critical to client empowerment, no less so when they are used with the child client. Moreover, these methods may ensure that the child's voice is heard by those who have been unwilling to listen.

