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## Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment

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# LAWYERING IN JUVENILE COURT: LESSONS FROM A CIVIL *GIDEON* EXPERIMENT

*Katherine Hunt Federle\**

Introduction .....	93
I. Lawyering and Autonomy.....	96
II. Lawyering in Juvenile Court.....	103
III. Lessons Learned .....	111

## INTRODUCTION

After September 11, 2001, news reports and organizations estimated there were tens of thousands of children left orphaned by the attacks.<sup>1</sup> The New York Times reported that “secretaries at the New York State Office of Children and Family Services and press officers at [New York City’s] Administration for Children’s Services could hardly answer the telephone without hearing from people who had read news of the many hundreds, even thousands of orphans left in need of a home by the September 11 disaster.”<sup>2</sup> “All were eagerly offering to adopt a World Trade Center orphan.”<sup>3</sup> The Twin Towers Orphan Fund, established on September 13, 2001, raised millions of dollars<sup>4</sup> to provide long-term higher educational assistance and mental and physical health care assistance for the children

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1. See, e.g., Charisse Jones, *Orphaned by Terrorism—An Agonizing Road for Kids of Sept. 11*, USA TODAY, Oct. 19, 2001, at A1.

2. Nina Bernstein, *A Nation Challenged: The Families; Thousands of Orphans? An Urban Myth*, N.Y. TIMES, Oct. 26, 2001, at B1.

3. *Id.*

4. The 2007 financial report indicated that the fund had over seven million dollars in assets. See TWIN TOWERS ORPHAN FUND, TWIN TOWERS ORPHAN FUND 2007 ANNUAL REPORT, available at <http://www.ttop.org/pdf/2007-ttof-annual-report.pdf>.

orphaned by the attacks.<sup>5</sup> It soon became apparent, however, that there were no “Twin Towers orphans.” “Not a single child [needed] foster care or adoption by strangers.”<sup>6</sup> In contrast, the state of New York at that time had 2,558 orphaned children eligible for adoption.<sup>7</sup> While the imaginary orphans of September 11 elicited tremendous sympathy and charity, there was little outpouring of anger over the fate of children missing from foster care across the country.<sup>8</sup> The reasons for the difference may lie in the way society views both poverty and the responsibility for children. Simply put, society tends to view poverty as the fault of the poor. The general view is that, in this land of plenty, no one is poor unless he wants to be poor. In contrast, the “orphans” of the World Trade Center were not to blame for the September 11 attacks; as a result society felt responsible for them as a community.

This view of poverty dominates many of our public policy choices—not only about children and their families, but about those individuals in need—and structures public commitment to, and responsibility for, the poor. We often adopt approaches that place full responsibility on those least able to meet these demands because, as a society, we feel less communal responsibility for the poor, who often are contradictorily portrayed as shiftless, lazy, criminal, and easily duped.<sup>9</sup> For those proponents of a civil right to counsel, this view about poverty structures the debate concerning the existence, nature, and extent of that right (that is, who gets a lawyer, what cases warrant the appointment of counsel, and who pays for

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5. Twin Towers Orphan Fund Mission Statement, *available at* <http://www.ttof.org/html/mission.htm>. The Fund adopted a new charity in 2008 known as America’s Child, the mission of which is to provide “educational assistance and physical and mental healthcare assistance for the children of our military heroes: the fallen men and women who proudly sacrificed their lives fighting terrorism and whose strength and courage has kept our nation safe.” America’s Child Mission Statement, *available at* <http://www.americaschild.org/html/mission.htm>.

6. *See* Bernstein, *supra* note 2.

7. *Id.*

8. By September 11, 2001, one child in foster care, Rilya Wilson, made headlines because she had been missing for months from her foster care placement before anyone discovered she was gone. Rilya Wilson was not the only child in state care who was gone; over 500 proved missing in Florida, 100 in Texas, 200 in Michigan, and 227 in Illinois. In Los Angeles County alone, California could not locate 700 children. Sally Kestin & Megan O’Matz, *Missing Foster Kids Often Turn Up Dead*, S. FLA. SUN-SENTINEL, Dec. 29, 2002, at 1A.

9. The debate over welfare reform emphasized the view that poverty is the fault of the poor. Newspaper accounts were replete with stories about welfare cheats, promiscuous mothers, and deadbeat dads. Very little was said about the effects of welfare reform on children. Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 OHIO ST. L.J. 1225 (1999). For a more recent discussion of welfare reform see Angela Ards, *Welfare Family Values*, 21 WOMEN’S REV. BOOKS 7 (2004).

the representative). But it also alludes to a deeper question about what it means to be a good lawyer for the poor and the degree to which the lawyer must facilitate client autonomy.

The extent to which the lawyer must accord the client autonomy remains a source of considerable debate.<sup>10</sup> From one perspective, ethical lawyering must be client-centered and client-empowering; within this paradigm, the attorney is partisan, loyal, zealous, subordinate, and nonaccountable. Dignity, freedom, and individual autonomy are central features. Under another view, however, the attorney is professionally independent of and perhaps even paternalistic toward the client, as well as morally accountable for the attorney's own actions. In this instance, notions of integrity are tied to larger concerns about the rights of others and an overarching duty to the principles of truth and justice. For poverty lawyers, the dominant vision of the poor as somehow "disabled" and thus less capable of exercising the kind of autonomy required within the attorney-client relationship, may allow others to challenge the legitimacy of an attorney-client relationship in which client autonomy is primary.

The kind of lawyering that occurs in juvenile court illustrates the challenges of client autonomy within the additional context of poverty. Because children are entitled to counsel (and court-appointed counsel if indigent) in delinquency cases as a matter of due process,<sup>11</sup> children are entitled to be represented by lawyers. For many lawyers, however, the idea that the attorney must advocate for the client's express preferences when that client is a child runs counter to common sense. Largely because the question of who gets to decide is inextricably linked to notions of competency and autonomy, the child client is peculiarly disadvantaged. This emphasis on capacity suggests that the child may be incapable of making reasoned decisions and may thus be unduly susceptible to coercion and manipulation. 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 what is a "good" or "right" decision.

It is this insistence on capacity that has structured much of our discussion about rights and ethical issues in lawyering. The dominant lawyering paradigms center on issues of client autonomy and lawyer independence—on who gets to make decisions in a given case. These models implicitly re-

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10. For a more complete discussion of that debate, see *infra* notes 15-76 and accompanying text.

11. *In re Gault*, 387 U.S. 1, 40-41 (1967). For a more complete discussion of *Gault*, see *infra* notes 77-82 and accompanying text.

flect 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 for having and exercising those rights. “But because [certain groups] are not seen as capable, autonomous beings, much of our rights talk, and our lawyering, cannot accommodate them.”<sup>12</sup>

Lawyering in juvenile court offers some lessons to those who seek to extend the right to counsel for the poor in civil cases. Not only do juveniles in delinquency cases have the right to counsel as a constitutional matter, but that right is, explicitly, a civil right.<sup>13</sup> Nevertheless, many juveniles are unrepresented in delinquency proceedings; advocates have had only mixed success in extending the right to counsel to other types of juvenile court cases. Lawyers who are appointed to represent children often express considerable confusion about their role, and the quality of their representation often is poor. Furthermore, lawyers for children, even those with the best of intentions, may disempower and disable their clients.

To understand how a good lawyering paradigm may nevertheless undermine client empowerment and perpetuate disability, it is necessary to appreciate the larger ethical debate about client autonomy. In the following section, this Article will examine two dominant models of good lawyering and explore their implications for client choice and lawyer autonomy, with an emphasis on poverty lawyering. The Article then turns to a discussion of the lawyering experience in juvenile court to illustrate the ways in which dominant visions of the client as dependent, incompetent, and disabled affect not only the role and responsibilities of the attorney for the child but the extension of the right to counsel itself. Lastly, the lessons learned from lawyers for children are proffered to those who propound a civil right to counsel.

## I. LAWYERING AND AUTONOMY

Generally, there are two distinct and competing lawyering models,<sup>14</sup> both grapple with the question of client autonomy within the attorney-client relationship and the extent to which the lawyer must promote and serve client independence. One model of good lawyering places greater value on

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12. Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1656 (1996).

13. See *infra* notes 77-82 and accompanying text for a discussion of the implications of *In re Gault*.

14. See *infra* notes 15-76 and accompanying text for a discussion of the two competing paradigms.

lawyer autonomy, professional integrity, and the rights of others, while embracing a duty to promote the principles of truth and justice.<sup>15</sup> Advocates of this model reject the claim that client autonomy is of such value that the attorney acts morally when he engages in acts that promote the client's ends without regard to the impact of the client's express preferences on others; rather, the lawyer has broader obligations that render the attorney as morally accountable as a nonlawyer for the harms that may be caused to nonclients.<sup>16</sup> From this perspective, the adversary system wrongly exonerates the lawyer from moral accountability<sup>17</sup> by authorizing the lawyer to engage in certain acts, on behalf of the client, that would be immoral if done for others outside that attorney-client relationship.<sup>18</sup> Proponents of lawyer autonomy thus claim that because the attorney is morally accountable for her actions, she must maintain her professional independence.<sup>19</sup>

A central concern for advocates of lawyer autonomy is how to be both a good lawyer and a good person.<sup>20</sup> From this perspective, lawyering that emphasizes client autonomy may not only insulate the attorney from personal responsibility, but discourage the attorney's direct and personal examination of the moral implications of her actions.<sup>21</sup> Under a different view, however, moral independence promotes the goodness of lawyers who

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15. See David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 737-40 (1998) [hereinafter Luban, *Noblesse Oblige*] (arguing that a morally activist vision of lawyering has historical roots in a progressive view of the legal profession).

16. See David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 118 (David Luban ed., 1983) [hereinafter Luban, *Adversary System Excuse*]; David Luban, *Partisanship, Betrayal, and Autonomy in The Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1005 (1990) [hereinafter Luban, *Partisanship*]; Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Non-legal Issues and the Interests of Non Clients*, 68 N.C. L. REV. 213, 223-24 (1990); Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 454 (1990); John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 794 (1987); Deborah L. Rhode, *Ethical Perspectives on Legal Practices*, 37 STAN. L. REV. 589, 643 (1985); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, Fall 1975, at 12.

17. See Luban, *Adversary System Excuse*, *supra* note 16, at 84; Luban, *Partisanship*, *supra* note 16, at 1019-20; Morris, *supra* note 16, at 788.

18. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978); Wasserstrom, *supra* note 16, at 3.

19. See 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*].

20. See Thomas L. Shaffer, *On Thinking Theologically About Lawyers As Counselors*, 42 FLA. L. REV. 467, 468-69 (1990).

21. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73-81 (1980); Rhode, *supra* note 16, at 626.

must think about the moral consequences of facilitating client choice;<sup>22</sup> in turn, this produces happier and more productive attorneys.<sup>23</sup> Because the good lawyer may confront the client about the moral implications of the client's actions, the attorney may seek justice by pursuing only those objectives deemed right and fair, thereby fostering a more just legal system.<sup>24</sup> Furthermore, freeing the attorney to engage the client in a moral conversation promotes mutual interdependence and caring.<sup>25</sup>

Within this construct, the attorney has considerable autonomy over both the means chosen and the ends pursued.<sup>26</sup> 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.<sup>27</sup> The attorney must make a judgment about the moral implications of the client's goals (irrespective of the client's legal right to pursue those objectives),<sup>28</sup> grounded either in the lawyer's own moral understanding,<sup>29</sup> or in some sense of common morality.<sup>30</sup> A moral conversation between lawyer and client is thus necessary to ascertain the client's wishes and reconcile any conflicts between the lawyer's moral judgments and the client's aims, in order to counsel the client about whether those actions are "right" or "wrong."<sup>31</sup> Such counseling may be explicitly client-centered in that it seeks only to enlighten and per-

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22. See Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 252 (1979) [hereinafter Shaffer, *Moral Discourse*]; Shaffer, *Good Client*, *supra* note 19, at 329-30.

23. Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97, 118 (1985); see also Erwin Chemerinsky, *Protecting Lawyers from Their Profession: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31, 34 (1980).

24. Bastress, *supra* note 23, at 117; see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988).

25. See Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1079 (1979); Shaffer, *Moral Discourse*, *supra* note 22, at 231-32.

26. See Bastress, *supra* note 23, at 113; Luban, *Partisanship*, *supra* note 16, at 1005.

27. Rhode, *supra* note 16, at 643; see also Richard K. Burke, "Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law, 38 ARK. L. REV. 1, 22 (1984); Luban, *Partisanship*, *supra* note 16, at 1021.

28. See Rhode, *supra* note 16, at 644.

29. Bastress, *supra* note 23, at 114.

30. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 105 (1988); Luban, *Partisanship*, *supra* note 16, at 1023; see also Wasserstrom, *supra* note 16, at 10-11.

31. See Luban, *Partisanship*, *supra* note 16, at 1022, 1026; Morgan, *supra* note 16, at 456; Shaffer, *Moral Discourse*, *supra* note 22, at 235; see also Bastress, *supra* note 23, at 98; Margulies, *supra* note 16, at 221-27 (discussing a model for counseling clients about moral implications of actions).

suade;<sup>32</sup> however, it also opens the conversation to the possibilities of the client's recognition of the immorality of her choice.<sup>33</sup>

This vision of lawyering necessarily encourages certain paternalistic practices<sup>34</sup> because it exhorts lawyers to shape and judge client objectives.<sup>35</sup> The underlying idea is a straightforward one: the lawyer may override client choice when it is for the client's own good. The notion of lawyer as moral counselor is not new to the bar,<sup>36</sup> nor is it unusual for lawyers to act independently of their clients in certain circumstances. (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.)<sup>37</sup> But proponents of this view contend that client autonomy itself has little, if any, inherent moral value—that is, an autonomous action that is immoral is still wrong despite its autonomous nature<sup>38</sup>—so refusing to further the client's immoral purposes cannot be morally objectionable simply because it impinges on client autonomy.<sup>39</sup>

Nevertheless, the lawyer should promote client autonomy when it is likely to facilitate client responsibility and moral action.<sup>40</sup> So, if the autonomous action is responsible (read: moral), then restricting the client's choice would be an unjustifiable act of paternalism.<sup>41</sup> This necessarily involves moral discourse between lawyer and client,<sup>42</sup> implying both the client's readiness to receive moral influence and correction<sup>43</sup> and the attorney's willingness to refuse to undertake certain actions on behalf of the

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32. See Bastress, *supra* note 23, at 128; see also Luban, *Partisanship*, *supra* note 16, at 1026; Morgan, *supra* note 16, at 456.

33. See Shaffer, *Moral Discourse*, *supra* note 22, at 247.

34. Luban, *Partisanship*, *supra* note 16, at 1036-37.

35. Luban, *Noblesse Oblige*, *supra* note 15, at 738.

36. Luban, *Partisanship*, *supra* note 16, at 1014.

37. Luban, *Paternalism*, *supra* note 19, at 458-59.

38. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639 (1986) [hereinafter Luban, *Lysistratian Prerogative*]; see also Shaffer, *Good Client*, *supra* note 19, at 328.

39. Luban, *Partisanship*, *supra* note 16, at 1037-38; see also Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U. L.J. 761, 773 (1983) (arguing that moral rules cannot be eclipsed by nonmoral considerations; thus we should move away from autonomy, not move toward a socialist model of professional responsibility in which lawyer acts as an agent for the state); Shaffer, *Good Client*, *supra* note 19, at 328.

40. See Luban, *Paternalism*, *supra* note 19, at 474; see also 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, 770 (1990).

41. See Luban, *Partisanship*, *supra* note 16, at 1037-38.

42. See *id.* at 1038; Shaffer, *Moral Discourse*, *supra* note 22, at 246.

43. See Shaffer, *Moral Discourse*, *supra* note 22, at 246.

client.<sup>44</sup> From this perspective, the good lawyer facilitates moral decision-making by opening the client to the ethical ramifications of her actions,<sup>45</sup> and even possibly to a moral epiphany.<sup>46</sup> Paternalistic it may be, but it nevertheless has moral worth.<sup>47</sup>

In contrast, proponents of client autonomy contend that a good lawyer is client-centered and client-empowering; from this perspective, the attorney is loyal, zealous, and morally nonaccountable.<sup>48</sup> Within the simplest account of this paradigm, client autonomy is “good” because it secures individual dignity and freedom;<sup>49</sup> thus the “good” lawyer promotes these values by facilitating client autonomy.<sup>50</sup> Consequently, the attorney has certain obligations to the client, including duties of loyalty, partisanship,

44. See Shaffer, *Good Client*, *supra* note 19, at 329-30.

45. Shaffer, *Moral Discourse*, *supra* note 22, at 246.

46. *Id.* at 247.

47. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 987 (1987) (observing that paternalism, stripped of its modern negative meaning, can portray sympathy, familial feelings, and the virtues of a good parent).

48. See generally GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* (1978); RICHARD L. ABEL & PHILIP S.C. LEWIS, *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (1988); Monroe H. Freedman, *The Lawyer Doesn't Always Know Best*, 7 HUM. RTS. 28 (1978); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

49. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS ETHICS* 57 (1990) [hereinafter FREEDMAN, *ETHICS*] (Monroe Freedman has been one of the most ardent and articulate supporters of this position); see D'Amato & Eberle, *supra* note 39, at 764; Freedman, *supra* note 48, at 31, 52; Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204 (1978) [hereinafter Freedman, *Personal Responsibility*]; Fried, *supra* note 48, 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 (1986); Robert S. Redmount, *Paternalism and the Attorney-Client Relationship*, 14 J. LEGAL PROF. ANN. 127, 129, 132 (1989); Rhode, *supra* note 16, at 605; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 339 (1987).

50. HAZARD, *supra* note 48, at 129; 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); D'Amato & Eberle, *supra* note 39, at 763, 764-65; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 505, 547-49 (1990) (discussing micro-arguments favoring a client-centered approach to legal counseling); 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); Luban, *Partisanship*, *supra* note 16, at 1019 (critique of the “standard conception” of lawyering); Strauss, *supra* note 49, at 338; Paul A. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street Level Bureaucracy*, 43 HASTINGS L.J. 947, 951-54 (1992) [hereinafter Tremblay, *Rebellious Lawyering*] (advocating a form of rebellious lawyering, in which the attorney seeks to empower subordinated clients); see also Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE* (1988) and providing a more comprehensive account of the Luban-Ellmann debate).

zealous advocacy,<sup>51</sup> and even a special-purpose friendship.<sup>52</sup> Because autonomy is a moral good and the promotion of autonomy depends, in large part, on access to law, the attorney is exempted from moral responsibility for the pursuit of the client's stated ends.<sup>53</sup> At best, this renders the attorney's role moral in and of itself because it promotes another moral act (client autonomy),<sup>54</sup> even when the autonomous act may have a wrong or immoral consequence.<sup>55</sup> At worst, the attorney's role is simply amoral.<sup>56</sup>

The client's expression of autonomy primarily occurs within the attorney-client relationship because the client accesses the legal system through her lawyer.<sup>57</sup> The lawyer thus acts morally when she helps her client realize legal rights,<sup>58</sup> even when the client or the client's objectives are morally suspect.<sup>59</sup> On the other hand, if the lawyer preempts client decision-making by denying the client the means to pursue lawful objectives, the lawyer may be held morally and professionally accountable<sup>60</sup> because the lawyer deprives the client of her autonomy.<sup>61</sup> Client autonomy nevertheless presupposes the capacity for rational choice.<sup>62</sup> In its absence, the attorney may act paternalistically and there is no subsequent infringement on client autonomy because the client is not competent.<sup>63</sup> The degree of client

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51. FREEDMAN, ETHICS, *supra* note 49, at 65-66.

52. Fried, *supra* note 48, at 1071-72 (analogizing the role of a 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).

53. Pepper, *supra* note 49, at 617.

54. Freedman, *Personal Responsibility*, *supra* note 49, at 204; Freedman, *supra* note 48, at 52; Fried, *supra* note 48, at 1074; *see also* FREEDMAN, ETHICS, *supra* note 49, at 57.

55. Freedman, *supra* note 48, at 32-33; Fried, *supra* note 48, at 1082-87.

56. Pepper, *supra* note 49, at 617-19. *See* Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role"*, 1986 AM. B. FOUND. RES. J. 651, 653-55 (1986) (critiquing Pepper's claim that the lawyer's role is amoral); *see generally* Luban, *The Lysistratian Prerogative*, *supra* note 38; Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657 (1986) (Pepper's response).

57. *See* Dinerstein, *supra* note 50, at 514; Freedman, *Personal Responsibility*, *supra* note 49, at 204; Fried, *supra* note 48, at 1073.

58. Fried, *supra* note 48, at 1075.

59. *See* Fried, *supra* note 48, at 1074-75; *see also* FREEDMAN, ETHICS, *supra* note 49, at 57; Freedman, *supra* note 48, at 52; Freedman, *Personal Responsibility*, *supra* note 49, at 199, 204.

60. *See* Freedman, *Personal Responsibility*, *supra* note 49, at 204; Freedman, *supra* note 48, at 52.

61. *See* Freedman, *Personal Responsibility*, *supra* note 49, at 204; Freedman, *supra* note 48, at 52.

62. *See* Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 726-29 (1987); Luban, *Paternalism*, *supra* note 19, at 462-65.

63. *See* Luban, *Paternalism*, *supra* note 19, at 465-66.

autonomy, thus, may depend significantly on the lawyer's assessment of the client's competence.

Tying autonomy to competence provides more opportunity for lawyer manipulation, especially if the attorney conflates a "mistaken" or "poor" decision for an incompetent one.<sup>64</sup> Within the context of poverty lawyering, for example, the construct of competence may disadvantage and disempower certain client groups (like the poor), particularly if the clients' political or moral beliefs serve as a basis for assessing the "rightness" (and thus competence) of their choices.<sup>65</sup> Constructing the client as incompetent, dependent, and "disabled"<sup>66</sup> permits the lawyer to exercise dominance at the expense of client autonomy.<sup>67</sup> Existing legal structures also may create systemic occasions for disempowerment by perpetuating this image of the client as incompetent.<sup>68</sup> In this way, competence may become a construct of a dominant viewpoint, narrowing the client's exercise of autonomy to the politically permissible.<sup>69</sup>

But poverty lawyering also should promote individual empowerment. By welcoming client participation and ensuring collaborative decision-making (through new interviewing and counseling methodologies, for example), the good lawyer enables the client to exercise autonomy within the attorney-client relationship.<sup>70</sup> This vision of client empowerment thus fosters individual client autonomy by freeing the client to express personal goals to the lawyer.<sup>71</sup> In turn, the good lawyer, cognizant of a legal hegemony that perpetuates inequality, empowers the client to challenge the subordination of law and to consider long-term rewards.<sup>72</sup> This approach not

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64. See Ellmann, *supra* note 62, at 769 & n.149. For a more complete understanding of Ellmann's position, see John Morris's critique and Ellmann's rejoinder. Morris, *supra* note 16; See also Stephen Ellmann, *Manipulation by Client and Context: A Response to Professor Morris*, 34 UCLA L. REV. 1003 (1987).

65. Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 670 (1987-88) [hereinafter Alfieri, *Antinomies of Poverty Law*]; see also Ellmann, *supra* note 62, at 770-71; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 537-39 (1987).

66. See Alfieri, *supra* note 50, at 773.

67. See *id.* at 811-12; Felstiner & Sarat, *supra* note 50, at 1449-50; Tremblay, *supra* note 65, at 554.

68. See Alfieri, *supra* note 50, at 812-15; Tremblay, *supra* note 65, at 552.

69. See Alfieri, *supra* note 50, at 811-12; Tremblay, *supra* note 65, at 554.

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

71. See Alfieri, *Antinomies of Poverty Law*, *supra* note 65, at 698-700; Tremblay, *Rebellious Lawyering*, *supra* note 50, at 958-59. For a summary of the modern and postmodern views of lawyering, see Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992).

72. See Alfieri, *Antinomies of Poverty Law*, *supra* note 65, at 701; Tremblay, *Rebellious Lawyering*, *supra* note 50, at 955, 959.

only advances the client's goals but encourages the client to think about broader strategic objectives that may benefit others.

The good lawyer thus may facilitate the collective empowerment of the entire client class. The lawyer facilitates these seemingly disparate goals by empowering the client to agitate for rights vindicating the interests of the client class while pursuing the client's individual claim within the context of the specific case.<sup>73</sup> Individual client empowerment promotes class-consciousness and facilitates collectivist strategies for positive, long-term change<sup>74</sup> through political communitarian agitation.<sup>75</sup> Notwithstanding the emphasis on collectivist class rights, client autonomy is the primary goal of good lawyering because the client is still free to choose among competing rights demands.<sup>76</sup> In respecting those choices, the good lawyer actually facilitates individual client autonomy by promoting class-consciousness, which has the potential to liberate individuals from subordinating practices, thereby enhancing individual dignity.

The question of client autonomy and empowerment is an important one for those advocates of civil legal assistance. While proponents of a civil right to counsel tend to focus—quite understandably—on securing such a right for the indigent, they have paid less attention to the ethical debate about what it means to be a good lawyer. Lawyering in this context nevertheless raises practical questions about client competence, autonomy, and empowerment that need to be explored as these issues may themselves contribute to an underlying resistance to extending the right to counsel in civil cases. The need for counsel thus becomes attenuated when the client is seen as incapable of meaningfully participating in the attorney-client relationship. This is not simply theoretical: the experience with lawyers for children in juvenile court suggests that the concern is real. This Article next examines lawyering for children in juvenile court to illustrate and provide some additional insights into challenges facing the civil *Gideon* movement within the paradigm of good lawyering, client autonomy, and the role and responsibilities of counsel.

## II. LAWYERING IN JUVENILE COURT

The civil *Gideon* experiment began in juvenile court in 1967, when the United States Supreme Court decided *In re Gault*.<sup>77</sup> The Court held, in

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73. See Alfieri, *Antinomies of Poverty Law*, *supra* note 65, at 711-12.

74. See *id.*; Tremblay, *Rebellious Lawyering*, *supra* note 50, at 958-59.

75. See Alfieri, *Antinomies of Poverty Law*, *supra* note 65, at 711; Tremblay, *Rebellious Lawyering*, *supra* note 50, at 958.

76. See Tremblay, *Rebellious Lawyering*, *supra* note 50, at 958.

77. 387 U.S. 1 (1967).

part, that in a delinquency case “which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”<sup>78</sup> Although the Court noted the quasi-criminal nature of delinquency proceedings, the Court did not extend the Sixth Amendment right to counsel to minors, but instead chose to ground the right to counsel in the Due Process Clause of the Fourteenth Amendment. Noting that “[d]ue process of law is the primary and indispensable foundation of individual freedom”<sup>79</sup> and an essential check on governmental power,<sup>80</sup> the Court made clear that “[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”<sup>81</sup> Notwithstanding this seemingly clear statement, the Court’s opinion subsequently engendered a vigorous scholarly debate about the role and responsibilities of counsel for the child.<sup>82</sup>

The current weight of academic and professional opinion now clearly indicates that the attorney for the child is a zealous advocate for her client’s express preferences.<sup>83</sup> Every state has a statute providing counsel for children in delinquency cases.<sup>84</sup> Nevertheless, in practice there is considerable resistance to the notion that children are entitled to zealous, client-directed advocates. Children routinely are unrepresented in delinquency proceedings: many waive their right to counsel, based on either a lack of understanding about the significance of the charges and the consequences of proceeding without legal assistance, or as a result of pressure—subtle or otherwise—from the judge, court personnel, or their parents.<sup>85</sup> When

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78. *Id.* at 41.

79. *Id.* at 20.

80. *Id.*

81. *Id.* at 36.

82. See Elizabeth D. Dyson & Richard B. Dyson, *Family Courts in the United States*, 9 J. FAM. L. 1, 58 (1969); Norman Lefstein, *In re Gault*, *Juvenile Courts and Lawyers*, 53 A.B.A. J. 811 (1967); 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); Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 261-62.

83. Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 255-57 (2005).

84. Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 383 (2008).

85. In 2001, the National Juvenile Defender Center, in collaboration with other national and state based experts, began conducting assessments of individual states to determine how

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state courts were implementing the *Gault* mandate. Sixteen states were studied between 2001 and 2007. Generally, the findings supported the conclusion that juvenile indigent defense in various states was a patchwork of chaotic and underfunded delivery systems. *See, e.g.*, AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., *THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA (2001)* [hereinafter LA. ASSESSMENT], available at <http://www.njdc.info/pdf/LAreport.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR. & CENT. JUVENILE DEFENDER CTR., *ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN KENTUCKY (2002)* [hereinafter KY. ASSESSMENT], available at [http://www.njdc.info/pdf/Kentucky\\_Assessment.pdf](http://www.njdc.info/pdf/Kentucky_Assessment.pdf); AM. BAR ASS'N JUVENILE JUSTICE CTR. & CENT. JUVENILE DEFENDER CTR., *JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO (2003)* [hereinafter OHIO ASSESSMENT], available at [http://www.njdc.info/pdf/Ohio\\_Assessment.pdf](http://www.njdc.info/pdf/Ohio_Assessment.pdf); AM. BAR ASS'N JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., *VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002)* [hereinafter VA. ASSESSMENT], available at <http://www.njdc.info/pdf/Virginia%20Assessment.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE JUSTICE CTR., *MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003)* [hereinafter MD. ASSESSMENT], available at <http://www.njdc.info/pdf/mdreport.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR., *MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003)* [hereinafter MONT. ASSESSMENT], available at <http://www.njdc.info/pdf/mtreport.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR. & NEW ENGLAND JUVENILE DEFENDER CTR., *MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003)*, available at <http://www.njdc.info/pdf/mereport.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., *SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS (2000)* [hereinafter TEX. ASSESSMENT], available at <http://www.njdc.info/pdf/TexasAssess.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, *GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2001)* [hereinafter GA. ASSESSMENT], available at <http://www.njdc.info/pdf/georgia.pdf>; AM. BAR ASS'N JUVENILE JUSTICE CTR. & S. JUVENILE DEFENDER CTR., *NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003)*, available at <http://www.njdc.info/pdf/ncreport.pdf>; ELIZABETH M. CALVIN, AM. BAR ASS'N JUVENILE JUSTICE CTR., NAT'L JUVENILE DEFENDER CTR. & NW. JUVENILE DEFENDER CTR., *WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003)* [hereinafter WASH. ASSESSMENT], available at <http://www.njdc.info/pdf/wareport.pdf>; CATHERYN CRAWFORD, CHILDREN & FAMILY JUSTICE CTR. ET AL., *ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2007)*, available at [http://www.njdc.info/pdf/illinois\\_assessment.pdf](http://www.njdc.info/pdf/illinois_assessment.pdf); ELIZABETH GLADDEN KEHOE, NAT'L JUVENILE DEFENDER CTR. & KIM BROOKS TUNDY, CENT. JUVENILE DEFENDER CTR., *INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2006)* [hereinafter IND. ASSESSMENT], available at <http://www.njdc.info/pdf/Indiana%20Assessment.pdf>; LAVAL S. MILLER-WILSON, JUVENILE LAW CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003) [hereinafter PA. ASSESSMENT], available at <http://www.jlc.org/files/publications/paassessment.pdf>; PATRICIA PURITZ, NAT'L JUVENILE DEFENDER CTR. ET AL., *MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2007)*, available at [http://www.njdc.info/pdf/mississippi\\_assessment.pdf](http://www.njdc.info/pdf/mississippi_assessment.pdf); PATRICIA PURITZ, NAT'L JUVENILE DEFENDER CTR. & CATHERYN CRAWFORD, NORTHWESTERN UNIV. SCH. OF LAW, *FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS*

children do assert their right to counsel, they nevertheless may be ineligible to receive free legal assistance because of extremely narrow definitions of indigency that exclude many families who fall well below the poverty line.<sup>86</sup> This may leave parents in the untenable position of having to choose between retaining legal counsel and providing basic necessities; but even once the decision to secure legal assistance is made, the process of obtaining court-appointed counsel may be so confusing and time-consuming that children still appear in court without representation.<sup>87</sup> On the other hand, many parents, regardless of their socioeconomic status, may simply be unwilling to hire private lawyers because they are angry, confused about the need for counsel, or do not understand the consequences of a juvenile delinquency adjudication.<sup>88</sup>

Securing appointed counsel, however, does not ensure highly skilled, competent, and zealous representation. Perhaps in part because *Gault* extended the right to counsel only to the adjudicatory phase of a delinquency proceeding,<sup>89</sup> lawyers are seldom appointed to represent children at initial proceedings or detention hearings.<sup>90</sup> Moreover, there is considerable evidence that attorneys for children fail to investigate or file pretrial motions<sup>91</sup>

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(2006) [hereinafter FLA. ASSESSMENT], available at <http://www.njdc.info/pdf/Florida%20Assessment.pdf>.

86. FLA. ASSESSMENT, *supra* note 85, at 33; PA. ASSESSMENT, *supra* note 85, at 46; TEX. ASSESSMENT, *supra* note 85, at 17.

87. Mlyniec, *supra* note 84, at 382-83.

88. *See id.*

89. *See In re Gault*, 387 U.S. 1, 13 (1967). The Court stated:

We do not . . . consider the impact of these constitutional provisions upon the totality or 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 dispositional process.

*Id.*

90. KY. ASSESSMENT, *supra* note 85, at 29 (finding that most defenders are not appointed until the detention hearing and do not meet clients until adjudication); OHIO ASSESSMENT, *supra* note 85, at 25 (finding that only 10% of attorneys and 22% of judges say counsel is appointed at the detention hearing stage in their jurisdiction); VA. ASSESSMENT, *supra* note 85, at 21 (stating that the law does not require that defenders be appointed at arrest, intake, initial detention hearings, or arraignments); MD. ASSESSMENT, *supra* note 85, at 30 (describing defenders routinely meeting clients for the first time at adjudication); TEX. ASSESSMENT, *supra* note 85, at 18 (noting how some children get counsel at first hearing, but many wait weeks for their appointed counsel); WASH. ASSESSMENT, *supra* note 85, at 29 (stating that in some counties counsel is never present, and in others counsel is rarely present); FLA. ASSESSMENT, *supra* note 85, at 34 (suggesting that appointing counsel at first hearing is resorted to as a second choice for judges).

91. LA. ASSESSMENT, *supra* note 85, at 66; KY. ASSESSMENT, *supra* note 85, at 29; VA. ASSESSMENT, *supra* note 85, at 25; MD. ASSESSMENT, *supra* note 85, at 30-31; TEX. ASSESSMENT, *supra* note 85, at 21; GA. ASSESSMENT, *supra* note 85, at 26; IND. ASSESSMENT,

and provide little or no assistance during or after the dispositional hearings.<sup>92</sup> Systemic problems—such as crippling caseloads, little to no training, resource constraints, and poor pay—further depress the quality of representation.<sup>93</sup> Additionally, court culture may create a set of expectations and norms that pressure lawyers into acting as best-interests advisors rather than as zealous advocates for their clients' express preferences.<sup>94</sup> Lawyers and judges themselves devalue the work done in juvenile court, seeing it as a mere stepping stone<sup>95</sup> to “better”—and higher-paying—positions.

Extending *Gault*'s right to counsel mandate beyond delinquency proceedings has met with considerable resistance and mixed success. In abuse and neglect proceedings, for example, thirty-six states and the District of Columbia require the appointment of counsel for the child.<sup>96</sup> Nevertheless, only seventeen states mandate that the lawyer be bound by the client's express preferences and directives,<sup>97</sup> and even fewer have held that the appointment of counsel is mandated by state constitutional law.<sup>98</sup> Whether a child should have counsel in these cases at all, and what the role of the lawyer should be, continue to be subjects of considerable (and heated) debate.<sup>99</sup> In status offense proceedings, children have a statutory right to

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*supra* note 85, at 36; PA. ASSESSMENT, *supra* note 85, at 50-51; FLA. ASSESSMENT, *supra* note 85, at 34-35.

92. LA. ASSESSMENT, *supra* note 85, at 69-70; KY. ASSESSMENT, *supra* note 85, at 30; OHIO ASSESSMENT, *supra* note 85, at 31-33; VA. ASSESSMENT, *supra* note 85, at 27-28; MD. ASSESSMENT, *supra* note 85, at 33-34; MONT. ASSESSMENT, *supra* note 85, at 29, 31; TEX. ASSESSMENT, *supra* note 85, at 14; GA. ASSESSMENT, *supra* note 85, at 16; IND. ASSESSMENT, *supra* note 85, at 38; PA. ASSESSMENT, *supra* note 85, at 51-54.

93. Mlyniec, *supra* note 84, at 400-07.

94. *Id.* at 407-09.

95. *Id.* at 407.

96. FIRST STAR, A CHILD'S RIGHT TO COUNSEL: FIRST STAR'S NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN 5 (2007).

97. *Id.*; see, e.g., Representing Children Worldwide <http://www.law.yale.edu/RCW/rcw/summary.htm> (follow “U.S. Summary Chart” hyperlink) (last visited July 17, 2009) (approximately seventeen states and two U.S. territories mandate the appointment of a child's attorney); see also Representing Children Worldwide [http://www.law.yale.edu/RCW/rcw/jurisdictions/am\\_n/usa/united\\_states/frontpage.pdf](http://www.law.yale.edu/RCW/rcw/jurisdictions/am_n/usa/united_states/frontpage.pdf) (last visited July 17, 2009).

98. See, e.g., *In re Williams*, 805 N.E.2d 1110 (Ohio 2004) (holding that child who is the subject of a termination of parental rights proceeding has a right to independent counsel as a matter of due process).

99. For the most recent volley in this ongoing debate, see Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63 (2008) and Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103 (2008).

counsel in a majority of the states,<sup>100</sup> and at least one state supreme court is considering whether a child in a status offense proceeding has a right to counsel as a matter of due process.<sup>101</sup> The extension of the right to counsel in these particular cases, however, may be the direct result of the increasingly punitive nature of these proceedings, rather than of a strong commitment to a civil right to counsel.<sup>102</sup>

This resistance to client-directed lawyering for children is in no small part attributable to an underlying doubt about children as autonomous and capable actors. Dominant visions of children as irrational and less capable structure the attorney-client relationship in ways that undermine client autonomy and promote lawyer independence. In this sense, the lawyer for the child client may feel greater personal and moral responsibility for case decisions and outcomes and, thus, may pursue certain goals that emphasize the client's "best interests" over the client's express preferences, especially when those preferences are viewed as "bad" or "wrong." This approach, of course, may prove self-serving: helping the child client fully realize the options and their consequences simply may take more time than the lawyer has or is willing to give. Additionally, pressures from judges and court personnel, heavy caseloads, and poor pay may further erode a strong commitment to client autonomy.

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100. See, e.g., ALA. CODE § 12-15-210 (2009); ARK. CODE ANN. § 9-27-316 (2009); COLO. REV. STAT. ANN. § 19-1-105 (2009) (right to counsel mandatory except in truancy cases where appointment of counsel permitted but not required); HAW. REV. STAT. § 571-87 (2009); IDAHO CODE ANN. § 20-514 (2009); IND. CODE ANN. § 31-32-4-1 (West 2009); KY. REV. STAT. ANN. § 610.060 (West 2009); LA. CHILD CODE ANN. art. 607 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20 (West 2009); MASS. GEN. LAWS ANN. ch. 119, § 29 (West 2009); MICH. COMP. LAWS ANN. § 712A.17c (West 2009); MISS. CODE ANN. § 43-21-201 (2009); MONT. CODE ANN. § 41-5-1413 (2009); NEB. REV. STAT. § 43-272 (2009); NEV. REV. STAT. ANN. § 62D.030 (West 2009); N.H. REV. STAT. ANN. § 169-D:12 (2009); N.M. STAT. ANN. § 32A-3B-8 (West 2009) (mandatory appointment of counsel for children fourteen or older); N.Y. FAM. CT. ACT § 741 (McKinney 2009); N.C. GEN. STAT. § 7B-2000 (2009); N.D. CENT. CODE § 27-20-26 (2009); OHIO REV. CODE ANN. § 2151.352 (West 2009); OKLA. STAT. ANN. tit. 10, § 24 (West 2009); R.I. GEN. LAWS § 14-1-31 (2009); S.D. CODIFIED LAWS § 26-7A-30 (2009); TEX. FAM. CODE ANN. § 51.101 (Vernon 2009); UTAH CODE ANN. § 78A-6-1111 (2009); VT. STAT. ANN. tit. 33, § 5112 (2009); VA. CODE ANN. § 16.1-266 (2009); WASH. REV. CODE ANN. § 13.32A.192 (West 2009); W. VA. CODE ANN. § 49-5-8a (West 2009); WYO. STAT. ANN. § 14-6-422 (2009).

101. *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009) (holding due process demands child be represented at initial truancy hearing).

102. See, e.g., IND. CODE ANN. § 31-32-4-1 (West 2009) (status offense is a delinquent act); see also Maria Grahn-Farley, *A Child Perspective on the Juvenile Justice System*, 6 J. GENDER RACE & JUST. 297, 308 (2002). For a discussion of how these issues may affect girls and minority youth differently, see Katherine Hunt Federle & Meda Chesney-Lind, *Special Issues in Juvenile Justice: Gender, Race, and Ethnicity*, in JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA 165 (Ira M. Schwartz ed., 1992).

Thus, even in the delinquency context, assessments of client competence provide significant opportunities for infringements on client autonomy. The attorney's opinion that the client is making a foolish choice supports the lawyer's conclusion that the child is incapable of considered judgment and thus authorizes the attorney to override client autonomy. Moreover, if the lawyer believes she has some obligation to preserve the client's future autonomy, she may adopt a role that seeks to promote the child's needs, even when they may run counter to the child's legal interests. From this perspective, the lawyer may counsel the child client to accept responsibility for his wrongful acts or tell the client that she will not advocate for certain outcomes, even when those are legitimate legal options. Other critics might go even further, arguing that a nonadversarial approach to the representation of the child is a practical necessity because the child lacks the capacity to instruct his attorney.

Because the right to and role of counsel in other juvenile court proceedings—abuse and neglect, for example—is even less clear, claims of client incompetence not only permit opportunities for infringement on client autonomy but may even serve to deny children counsel in the first instance. Thus, some critics contend that the child does not need independent representation because the child's interests will be adequately protected either by the attorneys for the parents or by the state.<sup>103</sup> But even if the child does need independent representation, there is still significant disagreement about whether the child's representative should be a lawyer or a guardian *ad litem*, the latter advocating for the child's best interests rather than the child's express preferences.<sup>104</sup> For those who see a role for counsel, however, perceptions of client incompetence may permit significant incursions on client autonomy. Consequently, the lawyer may act to "protect" the client from the client's "ill-considered" choices by pursuing objectives at odds with the client's express wishes.

Whether lawyering for children should be client-directed implicates a larger ethical debate about what it means to be a good lawyer. Thus, a particular lawyering model will dictate the extent to which the lawyer must be client-centered. If client autonomy is highly valued, then a "good" lawyer would promote client independence over other principles. On the other hand, if client autonomy is not a guiding principle, then the "good" lawyer may set aside client preferences when those directives do not comport with some other, more important value. Problematically, an attorney may em-

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103. See, e.g., Donald N. Duquette & Sarah M. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 347 (1987).

104. See Federle, *Ethics of Empowerment*, *supra* note 12, at 1677-88.

brace a particular lawyering model based less on a specific commitment to the model than on the lawyer's view of the client and her abilities. Some lawyers for children may fall into this kind of thinking, acting in ways that comport with the clients' "best interests," and advocating for the clients' needs rather than the clients' wants.<sup>105</sup>

But the value of a client-directed lawyer for the child cannot be underestimated. When the lawyer advocates for the child's express preferences, she does so in the language of rights. Rights have the potential to challenge political and legal hierarchies that have served to oppress and subordinate the interests of the rights holder<sup>106</sup> by remedying powerlessness.<sup>107</sup> Understood in this way, rights create a zone of respect and certain behavioral boundaries that discourage casual encroachment.<sup>108</sup> Rights thus command the attention and respect of those with power while providing access to legal and political fora in which rights claims may be heard and resolved.<sup>109</sup>

Lawyering models that undermine client autonomy also undermine rights. It is not enough to suggest that because children are incompetent, or otherwise disabled, they lack rights—for it is very clear that children do have rights: constitutional, statutory, procedural, and substantive. Moreover, it is the lawyer for the child who is in the best position to insist that the child's rights are respected, valued, and considered. "The American conception of justice is not simply encapsulated in the notion of Due Process, but is encapsulated in a notion of Due Process defined in terms of adversarial presentation."<sup>110</sup> Because the American legal system is adversarial, counsel fills an indispensable role in ensuring that individual claimants are represented and that the requisites of due process are met.<sup>111</sup>

Consequently, lawyering paradigms that turn on the competency of the client cannot adequately account for those individuals who may lack the requisite capabilities. But a lawyering paradigm that facilitates the recogni-

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105. *See id.*

106. Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 437-38 (2000) [hereinafter Federle, *Children's Rights and the Need for Protection*]; Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1597 (1994) [hereinafter Federle, *Looking for Rights in All the Wrong Places*].

107. *See* Federle, *Children's Rights and the Need for Protection*, *supra* note 106, at 437-38; Federle, *Looking for Rights in All the Wrong Places*, *supra* note 106, at 1595.

108. *See* Federle, *Children's Rights and the Need for Protection*, *supra* note 106, at 438-40; Federle, *Looking for Rights in All the Wrong Places*, *supra* note 106, at 1598.

109. *See* Federle, *Children's Rights and the Need for Protection*, *supra* note 106, at 438-40; Federle, *Looking for Rights in All the Wrong Places*, *supra* note 106, at 1598-99.

110. Geoffrey C. Hazard, Jr., *After Legal Aid is Abolished*, 2 J. INST. FOR STUDY LEGAL ETHICS 375, 382 (1999).

111. *Id.* at 379.

tion of the rights of those who are marginalized has coherence. From this perspective, client empowerment becomes the central value of good lawyering. By recognizing that existing legal structures, as well as the attorney-client relationship itself, may disempower the client, the good lawyer has an ethical obligation to free the client from subordinating lawyering practices that deny the client the ability to engage in autonomous decision-making. In turn, client empowerment may foster a truer collaboration with the lawyer because the client is free to engage in meaningful conversation with counsel.

This particular approach also has the advantage of permitting the attorney to challenge dominant visions of the client's disabilities. Thus, claims by powerful elites about powerless clients should be challenged because they are grounded in an incoherent account of rights. By seeing relationships in terms of dominance and subordination, a coherent account of rights reveals the ways in which the powerless are oppressed and marginalized. Rights thus have value because they allow challenges to those hierarchies and force elites to hear the claims of those without power. The advantage of seeing rights in this way is the recognition of the rights claims of the oppressed.

### III. LESSONS LEARNED

There are three important lessons to be learned from the experience of lawyers in juvenile court. First and foremost, even the Supreme Court's finding of a constitutional right to counsel simply has not been enough to guarantee that children have access to legal assistance. There is considerable resistance to the notion that children in delinquency cases should have (or even need) attorneys, a resistance born of a stubborn belief in the juvenile court's child-saving mission and knowing what is best for children. The second (and related) message is that the courts and legislatures generally have been renitent in extending the constitutional right to counsel to other types of proceedings. The reluctance may be self-serving, since denying children counsel in other types of proceedings is certainly cost-effective (at least if one takes the short-term, narrow view), but it also relates to an underlying belief that children do not need lawyers because they are incapable of articulating preferences that warrant serious consideration.

The third and final lesson is that even when children do get lawyers, they do not get very good lawyers. There are a number of systemic reasons for this. The work may not always attract the best advocates because of low pay and low status. On the other hand, heavy caseloads and limited resources may make it virtually impossible for the attorney to devote the time and energy needed for the case, so the attorney simply does not do what

may need to be done. Moreover, the system may simply discourage (or even reject) client-directed advocacy because the client is perceived as incompetent. This not only affects what the lawyer does (why file a motion suppressing evidence that may render the case unprosecutable when the child should face consequences for his or her actions?) but also permits greater opportunity for lawyer-driven decision-making that may override client directives (why not accept the imposition of court-ordered services that are “good” for the child even though the client does not want them?).

For those who wish to extend a civil right to counsel for the poor, these lessons are critical. Support must come from those most intimately involved in the administration of justice—judges, lawyers, and court personnel—and cannot simply be imposed by a court or legislature. There must be a sense that lawyers for the poor are good, not just for those who will have access to counsel but for the system itself. Furthermore, notions in the civil *Gideon* community that only certain types of cases are sufficiently worthy of appointed counsel may bar poor clients from litigating issues that in retrospect would have raised some critical legal question or innovative legal position. It also may set a disturbing precedent about who gets to decide which cases (and, by proxy, which clients) are sufficiently important to warrant the commitment of state resources, thereby leaving that determination to dominant political viewpoints that could run counter (and often do) to the interests of the poor.

Even if there is a civil right to counsel, our experience in juvenile court suggests that there must be a larger obligation to ensuring that those lawyers are highly trained, competent, and valued. While this depends, in part, on those in the system, it also means grappling with the ethical question about what it means to be a good lawyer. We must directly confront our views about the poor and rethink the ways in which these perceptions allow us to construct images of clients as flawed, less capable, and less worthy of our respect. By reimagining the client as competent and valued, we open lawyering to the possibility of client-directedness. This commitment to client autonomy is essential if we hope to provide the poor with meaningful access to courts.

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 these lawyering models rest on impoverished accounts of rights that fail to accommodate powerlessness. A coherent theory of rights, however, recognizes the connection between powerlessness, hierarchy, and exclusion. In this sense, rights flow downhill toward the least powerful in any given relationship and seek to remedy the exclusion and marginaliza-

tion of the powerless through the redistribution of power.<sup>112</sup> It is indisputably good that the client's voice is heard without a filter, not only because it gives the client a sense of having participated in the decision-making process but also because it adds a dimension to the court's understanding of the facts that otherwise might be lost.

Bluntly put, rights provide access to justice. A client-directed lawyer is thus in the best position to ensure that the client's voice is heard and taken seriously by facilitating client autonomy as a means to greater political empowerment. Policymakers—politicians—know that the poor are powerless, and it appears that they are free to ignore certain issues affecting the poor as there appear to be few negative political consequences for doing so. (In fact, the opposite may be true: they ignore the “problem” of the poor at their own peril, as the welfare-reform debate illustrated.) Empowering the poor forces political and legal recognition and the simplest way to do that is to provide access to counsel.

In short, the poor must be empowered in our society if they are to be respected and taken seriously. Empowerment means letting the impoverished be active participants and stakeholders. At bottom, it means rethinking approaches that talk *about* the poor and enabling the poor to speak for themselves. Lawyers are critical to this endeavor because they are a means by which the poor have access to justice. At some point, we need to accept that communal responsibility for the impoverished in our society is not only morally right but socially responsible and fiscally sound. How, then, do we move beyond notions that poverty is the fault of the poor? I think the answer is straightforward—albeit not simple. The voices of the poor, like those of children, need to be heard.

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112. See Federle, *Looking for Rights in All the Wrong Places*, *supra* note 106, at 1525-26; Katherine Hunt Federle, *Rights Flow Downhill*, 2 INT'L J. CHILD. RTS. 343, 343-45 (1994).