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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/llr/vol64/iss4/12
TEN THOUSAND TINY CLIENTS: THE ETHICAL DUTY OF REPRESENTATION IN CHILDREN'S CLASS-ACTION CASES

Martha Matthews*

INTRODUCTION

IN 1991, public interest lawyers filed a class action challenging a broad array of deficiencies in Arkansas' foster care system.¹ These lawyers represented a class of thousands of plaintiffs, ranging from infants to teenagers. The class included children living at home but at risk of abuse or neglect, and children in foster homes, group homes, and institutions.

Settlement negotiations began, and the lawyers for both sides started writing a decree that would affect every aspect of these children's lives— their living situations, health care, therapy, school placement, interactions with their parents and siblings, and plans for their future. Among the hundreds of issues in the negotiations was whether the settlement should set standards for visitation among siblings placed in different foster homes. The plaintiffs' lawyers saw this as a minor issue, they would bargain away if necessary.

One of the lawyers then happened to attend a conference at which a teenage foster child was the keynote speaker. The child described many bad experiences, but the worst, she said, was finding out that she had grown up within twenty miles of her brother. She had been separated from him at the age of three, and was never told where he lived or allowed to visit him. The lawyer hurried back to the negotiating table and insisted on strict standards for sibling placement and visitation.

The lawyer sincerely believed she was fulfilling her duty to represent her clients. Both before filing and during settlement talks, she and her cocounsel interviewed scores of people: children in foster care, foster parents, birth-parents and relatives, doctors, teachers, social workers, and juvenile court lawyers and judges. And yet, had it not been for the chance occurrence described above, sibling contact would not have been a priority in the settlement.

I was that lawyer. Several years later, I am still troubled by the question of what it meant for me to "represent" those thousands of

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children. Many of them could not speak, much less tell me what to
insist on, and what to give up, in the settlement negotiations that
would so deeply affect their future lives.

In this Article, I will criticize past cases in which the attorneys could
have done more to truly represent their child clients. I do not mean to
impugn the competence or good faith of these attorneys—for I have
been one of them, and experienced the pressures and constraints they
work under. My goal, instead, is to explore the meaning of the ethical
duty of representation in the difficult context of class actions on behalf
of children, and develop ways to better fulfill this duty in future cases.

I will focus, more specifically, on structural reform litigation under-
taken to effect changes in the rules and practices of public institutions
or social service systems such as schools, juvenile justice facilities,
mental hospitals, foster care systems, or welfare programs. These
changes are intended to improve protections for the civil liberties,
safety, health, and well-being of the usually poor and minority chil-
dren and families these systems affect.

Indeed, a surprisingly large part of all structural reform litigation
involves children as plaintiffs—such as school desegregation cases,
cases attacking conditions in juvenile halls and mental institutions,
foster care reform litigation, and welfare benefits litigation. Yet, for
all that has been written about these cases, few commentators have
paused to consider the unique and troubling ethical issues they raise.

Any discussion of the ethical duties of children's class action law-
yers must be situated within a larger debate over the legitimacy of
structural reform litigation itself. This litigation involves judges and
lawyers in shaping broad, long-lasting injunctive relief, and making
administrative and political decisions affecting the everyday policies
and practices of public institutions and service systems. The legiti-
macy of structural reform litigation has been challenged through
charges that activist lawyers are using the courts to advance political
goals of their own that are divorced from the legal rights and interests
of real clients. Lawyers are accused of usurping the democratic pro-
cess, thwarting legislative and executive decisions, and wielding un-

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2. The term comes from Owen M. Fiss, The Supreme Court, 1978 Term—Fore-
word: The Forms of Justice, 93 Harv. L. Rev. 1, at 21, 26 (1979). Structural reform
litigation on behalf of children has, over the past few decades, emerged as a specialty
within the public interest law movement. For descriptions of such litigation, see Mark
Soler & Loren Warboys, Services for Violent and Severely Disturbed Children: The
Willie M. Litigation, in Stepping Stones: Successful Advocacy for Children 61 (Sheryl
Dicker ed., 1990) [hereinafter Stepping Stones]; Robert H. Mnookin, Defining the
Questions, in In the Interest of Children: Advocacy, Law Reform, and Public Policy
43, 44-51 (Robert H. Mnookin ed., 1985) [hereinafter Interest of Children]; Marcia
Lowry, Derring-Do in the 1980s: Child Welfare Impact Litigation after the Warren
Years, 20 Fam. L.Q. 255 (1986).

constrained power to realize their own conceptions of the public good. 4

A common response to this challenge is that structural reform lawsuits are needed to safeguard the basic civil rights of groups of people who are prevented by discrimination, poverty, disability, or other factors from participating fairly and equally in the political process. 5 But even ardent defenders of structural reform litigation have been worried about losing sight of the client: "[T]here is an inevitable danger that the lawyer who sets out to help disadvantaged people as members of groups may inadvertently succeed in oppressing them . . . as individuals." 6

The goal of this Article is to reach a better understanding of how lawyers can legitimately represent children in class action litigation. This understanding is an essential part of the response to broader challenges to the legitimacy of all structural reform litigation.

Class action litigation involving children, in my view, is a puzzle within a puzzle. In all class actions, the lawyer must apply ethical norms premised on a single client with articulated interests to the amorphous, conflicting, and indeterminate interests of a plaintiff class. Moreover, the interests of the class as a whole may be more than even the complex sum of the stated interests of its members, because many classes include future members. Hence, the lawyer must make judgments as to the "best interests" of the class as a whole and maintain the role of "representing" the clients while avoiding an offensive degree of paternalism and unbridled attorney power. In litigation involving children, the problem is compounded. The individuals who make up the plaintiff class themselves have interests that are indeterminate in complex ways, and that may differ from their current, stated preferences.

The solutions that have often been proposed for ethical problems faced by the individual child's attorney are not of much help to the attorney representing a class of thousands of children. Conversely, the various measures proposed to fulfill the lawyer's duty of representation in class actions cannot straightforwardly be applied to class actions involving children.


5. See David Luban, Lawyers and Justice: An Ethical Study 355 (1988). People who respond to concerns about client control in class actions by suggesting a ban or financial constraints on public-interest law practice are really proposing "a ban on attempts by poor people's lawyers to attack the causes, rather than just the symptoms, of their clients' troubles." Id.

I will argue that given this compound problem of maintaining a legitimate representational role in children's class action litigation, lawyers must acknowledge the necessity of making normative judgments about the best interests of the class, and must explicitly articulate these judgments. Lawyer's judgments, however, must be guided and constrained by their duty to use all reasonable methods of communicating and consulting with class members. Moreover, these methods must be adapted to work with child clients.

Part I discusses the procedural rules and ethical canons currently in force as they apply to class action litigation and to representation of children. This part concludes that these rules do not provide a solution to the attorney's ethical problems, but simply a starting point for discussion. Part II discusses the ethical issues involved in representing children, and the potential roles of parents and guardians ad litem. Part III discusses the ethical issues and conflicts raised by class action litigation in general, and how these issues are affected by the special problem of children as class members. Part IV recommends how attorneys should approach the ethical problems of representing children in class action cases.

I. CURRENT PROCEDURAL AND ETHICAL RULES, AND THE NEED FOR FURTHER GUIDANCE

Although class action litigation has been common for many years, prevailing legal doctrine, including the procedural rules governing class actions in federal courts, case law, and ethical standards proposed by the American Bar Association, offer very little guidance to attorneys. Specifically, the lack of clear standards prevents attorneys from understanding their ethical duties to represent the members of the class, resolve conflicts among the interests of class members, or even conceptualize and determine those interests in the first place.7

Similarly, there is inadequate and conflicting guidance from statutes, ethical rules, and case law for the attorney whose client is a child, even in simple cases involving a single client.8 One commentator has aptly stated that the typical child's attorney "essentially muddles through, trying to be sensitive to the wishes of the client and yet acting in a manner that the lawyer alone concludes is consistent with the best interests of the child."9

In addition, structural reform litigation on behalf of poor and minority clients poses additional ethical questions. "Because of the in-

herently political character of representing the disadvantaged, the peculiar vulnerability of those clients, and the absence of ordinary economic constraints on the attorney-client relationship," the ethical duties of lawyers in these cases must differ from those of lawyers representing more powerful clients. But the nature of that difference has not yet been fully articulated by the courts or commentators.\(^\text{10}\)

A. Current Procedural Rules and Ethical Standards Regarding Representation of Children

In creating a procedural mechanism for children to sue, the Federal Rules of Civil Procedure establish that children have an independent right to be plaintiffs in federal litigation, not conditioned on the permission of a parent or other adult.\(^\text{12}\) Rule 17(c) allows a child or incompetent person to sue by way of a "general guardian," or if a child has no such guardian, the court may appoint a "next friend [or] guardian ad litem" or "make such other order as it deems proper for the protection of the infant."\(^\text{13}\) Case law interpreting the rule has required that the court, in appointing a next friend or guardian \textit{ad litem}, be satisfied that the next friend is acting in good faith and in the child's best interests, and has allowed someone other than the child's parents or "general guardians" to be appointed as next friends when they and the child have conflicting interests.\(^\text{14}\)

Although Rule 17 says nothing about the relationship between an attorney and a child client, it provides a basic framework, first, by establishing the child's independent status as a party to litigation, and second, by introducing the idea of guardians \textit{ad litem}.

What is the applicability of the Model Rules of Professional Conduct? The relevant ethical canon, Model Rule 1.14, says that attorneys must maintain as far as possible a normal attorney-client relationship with child clients.\(^\text{15}\) Because Model Rule 1.2 defines a normal attorney-client relationship as one in which the lawyer abides by the client's decisions concerning the objectives of the representation, the attorney thus must allow child clients to control the objectives of the litigation to the extent possible.\(^\text{16}\)

\(^{11}\) \textit{Id.}
\(^{13}\) Fed. R. Civ. P. 17(c).
\(^{14}\) \textit{See} Brumley, \textit{supra} note 12, at 336 & nn.10 & 11 (citing cases).
\(^{16}\) \textit{Id.} Rule 1.14 cmt.
Moreover, the Model Rules acknowledge that intermediate degrees of competence exist so that a child client’s ability to direct the litigation is not an all-or-nothing matter:

When the client is a minor . . . maintaining the ordinary client-lawyer relationship may not be possible in all respects . . . . Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.17

Somewhat inconsistently, however, Model Rule 1.14 also provides that when the attorney believes that child clients cannot “reasonably act in [their] best interest,” he must take “protective action.”18 Thus, the scope of the lawyer’s decision-making power “depends upon the lawyer’s own perception of the client’s condition and the client’s ‘interest.’ ”19 The drafters of the Rules acknowledge, but do not resolve, this tension within the Rules.20

Together, Rule 17 and the Model Rules provide a helpful beginning. They rule out two possible positions: first, that children have no independent right to act as parties to litigation; and second, that lawyers for children are simply free to act on their own conception of the child’s best interests, without any duty to consult their clients.21 But the rules do not explain exactly how, and to what extent, the wishes of child clients constrain lawyers’ actions.

B. Current Procedural Rules and Ethical Standards Regarding Class Actions

Federal Rule of Civil Procedure 23 places a basic, threshold constraint on the role of class counsel. Rule 23’s provisions on class certification and approval of settlements do not allow the lawyer simply to serve as a “private attorney general” independently seeking to enforce legal rights or promote the public interest. Instead, the rules require that the lawyer somehow “represent” class members.22 Beyond ruling out a pure “roving law-enforcer” role, however, the rule offers little guidance.

17. Id.
18. Id. Rule 1.14(b).
20. See id.
22. Morawetz, supra note 7, at 3 & n.8; Garth, supra note 3, at 503.
Rule 23 leaves unanswered crucial questions about class counsel's proper role and duties to the class. The rule fails to articulate a model that makes class action lawyers accountable to class members without imposing unrealistic limitations on the lawyer's ability to act. The rule further fails to account for both the views of class members and the public interest in law enforcement. It also fails to delineate clearly the respective decision-making roles of class counsel, named plaintiffs, and the class members as a whole.23

Why is Rule 23 so cryptic and inadequate on these essential issues? An answer may be found in the long and complex history of class action litigation, and in the ongoing search for assurance of its legitimacy. Yeazell's historical study of class actions leads him to conclude that Rule 23, "by incorporating several conflicting theories into a single rule . . . arrived at a procedural replication of a deeper uncertainty."24 One strand of theory regards a class action as a consensual alliance of individuals, each of whom sees the goals of the class action as consistent with her self-interest.25 Another view of the class action regards the attorney and named plaintiffs as "enlightened trustees" who pursue the best interests of the class as a whole. These interests, however, may differ from the expressed preferences of the class members.26

The current Model Rules of Professional Conduct do not resolve the confusion over the lawyer's role left in the wake of Rule 23, because no ethical rules discuss class actions. The Model Rules generally assume the presence of an individual client, able to articulate her own interests and make key litigation decisions.27 Moreover, the Model Rules make things worse by creating the false impression that the class lawyer must have a typical client-lawyer relationship with every member of the class.28

This conclusion is strikingly parallel to the one reached above regarding the ethical constraints the Federal Rules of Civil Procedure and the Model Rules impose on the child's attorney. In both cases, the applicable rules are not entirely clear. This lack of clarity is rooted in deep tensions regarding the nature and legitimacy of "representation" of a child or a class. A child's stated preferences may differ from her best interests; class members' preferences may differ from the best interests of the class as a whole. In both cases, there is a tension between a view of the attorney as "delegate" carrying out clients' wishes, and as "trustee" of the clients' interests.29 Finally, in both cases, the

23. Grosberg, supra note 9, at 733-37; see Garth, supra note 3, at 493.
25. Id. at 251.
26. Id.
27. Grosberg, supra note 9, at 717-18.
28. See id. at 775-76.
29. See id. at 781-87.
simplest answer is ruled out. The attorney is not just let loose to act on her own view of the class's or child's best interest. But the rules fail to provide guidance on exactly how the class members' or child's views should be solicited, and to what extent these views should control the lawyer's actions.

II. CHILDREN AS CLIENTS IN CLASS ACTION LITIGATION

A. The Problem of Incapacity

Young children often cannot state their own needs and desires. Older children may be able to articulate their desires, but their desires may not be accepted as authoritative in dictating the actions of their counsel. Moreover, most structural reform cases on behalf of children involve poor and minority children, where parents and communities may also be unable to serve as a check on attorney power. At the same time, children usually cannot participate directly in the political process by voting, lobbying, organizing, or influencing the administrators of public agencies.

On one hand, arguments for the legitimacy of judicial intervention are especially strong in structural reform cases involving children because children are uniquely powerless and their needs are especially compelling. On the other hand, children are vulnerable to having their individual interests sacrificed to the broader goals of class counsel. Adults typically have some opportunity to express their views to class counsel, protest when counsel acts against these views, talk to the media, and influence the organizations (such as the NAACP and the Sierra Club) that purport to litigate on their behalf.

The school desegregation cases are classic examples of both the justification for, and the troubling issues concerning, class action litigation on behalf of children:

On the one hand, it is difficult to imagine a situation where the interests of children received less protection from ordinary political channels. Black children, even with parental involvement, lacked the political power to force states and local districts to desegregate schools. However, the children on whose behalf suit was brought exerted no influence or control over the litigation ....

The same problem can be seen in Smith v. Organization of Foster Families for Equality & Reform, ("OFFER") a class action brought to establish the due process right of foster children to notice and a

30. Mnookin, Test-Case Litigation, supra note 4, at 4.
32. See id.
33. Id.
34. Mnookin, Test-Case Litigation, supra note 4, at 8.
hearing before being moved from one foster placement to another. Class counsel, who represented both foster parents and foster children, did not speak to any child clients, or consult with any experts on child welfare or child development, before seeking preliminary injunctive relief.\textsuperscript{36} When separate counsel was later appointed for the children, she also did not interview any of the children, or any experts on child development, but simply advocated for the result she thought was in their best interests—which directly opposed her predecessor’s view.\textsuperscript{37}

These cases suggest an obvious challenge to the legitimacy of counsel’s representation of child clients. What assurance can there be that an advocate who claims to speak for the interests of children is not simply pressing for her own political preferences, unconstrained by any client involvement?\textsuperscript{38} Guggenheim has stated this challenge most compellingly: “When lawyers are assigned to speak for children, we are assured only that another adult will be heard; with the class and cultural differences that separate many lawyers from their clients, what the lawyer has to say frequently tells us nothing about what the child wants or needs.”\textsuperscript{39} Guggenheim concludes that appointment of counsel for children creates a misleading and unhelpful illusion of representation and should be dispensed with.\textsuperscript{40} He does not, however, provide a solution applicable to structural reform litigation on behalf of children, unless such litigation is to be abandoned entirely.

B. The Role of Parents

A possible response to the concerns about the legitimacy of attorneys’ representation of children is for the attorney to take direction from the child’s parents or guardians. One of the basic ways in which children differ from adults is that, in legal status as well as everyday life, they are generally in the custody of a parent, or someone standing in the place of a parent (a relative, grandparent, or government agency).

Some commentators have argued that decision-making responsibility for children involved in litigation should rest with the parents unless a judicial or administrative finding of unfitness disqualifies them from this role.\textsuperscript{41} This view rests on the longstanding body of law re-

\textsuperscript{36} David L. Chambers & Michael S. Wald, Smith v. Offer, in Interest of Children, supra note 2, 67, 82-83.
\textsuperscript{37} Id. at 91-94.
\textsuperscript{38} Mnookin, Defining the Questions, supra note 2, at 43.
\textsuperscript{39} Guggenheim, supra note 21, at 154-55.
\textsuperscript{40} Id. at 147.
\textsuperscript{41} See, e.g., Joseph Goldstein et al., Before the Best Interests of the Child 111-12 (1979) (arguing that parents should be presumed to look after the best interests of their children, including the children’s need for legal assistance, unless judicially disqualified, and that this presumption is necessary to preserve the value of family integrity and parental autonomy).
garding children as incompetent to make legally binding decisions (such as consenting to medical care or entering into contracts), and the equally longstanding legal power of parents to make such decisions for their children.

On this view, parents are a “natural” proxy for children in class action litigation, so that class actions involving children present no special ethical issues. This view fails, however, for two reasons. First, children have an independent status as legal persons, and have some rights, such as constitutional privacy rights, that are theirs alone to exercise, even against the wishes of their parents or guardians. Accordingly, they should have at least some right to legal representation free from parental control of litigation decisions. Second, because parents’ interests may conflict with their children’s, parents may fail to diligently pursue their children’s interests in litigation.42

On the other hand, parents’ views cannot simply be disregarded. They are often in the best position to articulate the needs and interests of their children. Halderman v. Pennhurst State School & Hospital,43 a federal class action of almost legendary duration and complexity, aptly illustrates the problem.44 The case was brought to challenge conditions in a state institution for severely retarded children. The ultimate goal of the children’s lawyer was to close down the institution and establish community placements and services for these children.45 After a remedial order was issued, some parents expressed opposition to closing the institution.46 The lawyer took the position that these parents had conflicts of interest with their children, and their opposition should be disregarded by the court.47

But the dissident parents’ opposition to closing the institution and moving all children into community-based placements may have had various sources. First, the parents may have had good reasons, grounded in bitter experience with state bureaucracies, to distrust the state officials’ plan to dismantle the only available place where their children could safely live and receive minimal care, and then to develop alternative community placements—which might never materi-

42. See Mnookin, Final Observations, supra note 31, at 509, 512; Ventrell, supra note 21, at 277; Rhode, supra note 7, at 1221-22. Mnookin notes that there are also reasons to doubt whether parents are adequate spokespersons for their children in the broader political arena. Parents may fail to participate in political decisions that affect children because the payoff to their own children is too diffuse. Parents also may see other people’s children as competitors for scarce social resources, so that parent groups “tend to split into self-protective factions.” Mnookin, Defining the Questions, supra note 2, at 39.
43. 446 F. Supp. 1295 (E.D. Pa. 1977)
44. See Robert A. Burt, Pennhurst: A Parable, in Interest of Children, supra note 2, 265, 266-67.
45. See id. at 268-70 (discussing the “deinstitutionalization” movement).
46. Id. at 275-76.
47. See id. at 278 (stating that parents opposed the closing of the institution simply to avoid the embarrassment of having their disabled children live in their community).
alize.\textsuperscript{48} Second, some parents might have genuinely believed that a highly restrictive, hospital-type setting was the only one in which their children could receive adequate care.\textsuperscript{49} On the other hand, some parents may have opposed deinstitutionalization because it would place hardships on themselves and other family members.\textsuperscript{50} A successful community placement might generate guilt about the prior years of institutionalization.\textsuperscript{51} Or, simply living in the same community with their severely disabled child might cause emotional pain to the parents, and embarrassment and ostracism to the child's siblings.\textsuperscript{52}

Similarly, in \textit{Roe v. Norton},\textsuperscript{53} the plaintiffs sought to invalidate a requirement that mothers cooperate with state officials in establishing the paternity of their children when applying for AFDC benefits. This position could be seen as "pro-mother, pro-child or a murky combination of both."\textsuperscript{54} In some cases, forced cooperation would hurt both the child and the mother, for example where the mother had successfully concealed her whereabouts from an abusive and violent father, or where bureaucratic misuse of the power to demand cooperation would result in cutting off benefits.\textsuperscript{55} In other cases, forced cooperation would embarrass the mother and invade her privacy, but arguably help the child by creating the basis for a father-child relationship.\textsuperscript{56} Hence, a litigation strategy designed to eliminate all pressure on mothers to establish paternity may or may not have been congruent with the children's interests.

As these cases illustrate, the child's lawyer can neither simply accept parents as authoritative spokespersons for their children's interests, nor dismiss their views as irrelevant to the determination of the children's interests. Parents—and in many cases, competing groups of parents with different views—are yet another set of voices the lawyer must listen to, evaluate, and factor into the determination of the children's interests.

\textbf{C. The Role of Guardians Ad Litem}

All the issues discussed above regarding parents also apply to guardians \textit{ad litem} or "next friends" appointed by the court under Rule 17(c).\textsuperscript{57} The lawyer's duty to evaluate independently the guard-

\begin{itemize}
  \item \textsuperscript{48} See id. at 276.
  \item \textsuperscript{49} See id.
  \item \textsuperscript{50} See id. at 278.
  \item \textsuperscript{51} See id. at 287-88.
  \item \textsuperscript{52} All these concerns are evident from various submissions of dissenting parents in the \textit{Pennhurst} case. Id. at 275-77, 285.
  \item \textsuperscript{53} 522 F.2d 928 (2d Cir. 1975).
  \item \textsuperscript{55} See id. at 388-90.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Fed. R. Civ. P. 17(c).
\end{itemize}
ian’s views of the child’s interests is not eliminated simply because a parent or other adult has been dignified with this official role.

When a guardian represents a child (or incompetent adult), the commentators to the Model Rules point out that “the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.” But the annotations to Rule 1.14 point out that even though “the lawyer must generally abide by the guardian’s decisions[,] . . . if the lawyer believes that the guardian is acting contrary to the ward’s best interests, the lawyer’s authority to take ‘protective action’ may come into play.” The annotations cite cases where lawyers have sought replacement of the guardian, sought judicial resolution of a dispute between the lawyer and the guardian, or refused to withdraw when a guardian with suspect motives “fired” the lawyer. Thus, appointment of a parent or other adult as guardian ad litem does not absolve the attorney of the duty to make an independent determination of the client’s interests. Indeed, the utility of Rule 17(c) is unclear, because counsel must independently evaluate the interests of the children, and cannot treat the guardians’ directives as controlling.

III. ETHICAL ISSUES IN CLASS ACTION LITIGATION

A. Class Actions and the Lawyer-Client Relationship

Class action litigation, even if all class members are competent adults, raises troubling issues about the role of the lawyer representing the class. There is no single client with clearly identifiable views, but “an aggregation of litigants with unstable, inchoate, or conflicting preferences. The more diffuse and divided the class, the greater the problem of defining its objectives.”

59. Annotated Model Rules, supra note 19, at 248-49.
60. Id.
61. Even an apparently irreproachable choice of guardian may raise the potential for conflicts of interest. For example, in Willie M. v. Hunt, 732 F.2d 383 (4th Cir. 1984), another institutional reform case, the director of the state Protection & Advocacy program, Albert Singer, served as next friend for the named plaintiffs, who were children living in a mental institution. Soler & Warboys, supra note 2, at 71. He would appear to be the perfect guardian, an expert in the substantive issues, deeply committed to the interests of persons with mental disabilities, yet without a personal stake in the litigation.

When the guardian, however, is affiliated with an organization involved in the litigation, potential conflicts between the interests of advocacy organizations and those of class members may arise. Here, the guardian’s employer, the Protection & Advocacy office, helped finance the case. Id.

62. Mnookin, Defining the Questions, supra note 2, at 52 (quoting Rhode, supra note 7, at 1183); see Mary Kay Kane, Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer, 66 Tex. L. Rev. 385, 389 (1987); infra notes 72-74 and accompanying text.
Moreover, class counsel's duty to represent all class members leads to numerous potential conflicts of interest among the lawyers, the named class representatives, and the unnamed class members.\textsuperscript{63} These conflicts are heightened when combined with the complex and protracted character of structural reform litigation. In addition, the subject matter of the litigation often involves class members' most fundamental rights and needs.\textsuperscript{64}

Some class members may initially oppose litigation, preferring the status quo to the risks associated with change. For example, institutionalized youth may be fearful of staff retaliation if they participate in a lawsuit challenging conditions at an institution.\textsuperscript{65} As the litigation develops, alternative strategies and remedies may be favored by different constituencies within the plaintiff class.\textsuperscript{66}

These problems cannot be avoided by deferring to the named plaintiffs or, in children's cases, the named plaintiffs' guardians \textit{ad litem}, to articulate the interests of the class, and resolve intraclass conflicts. Named plaintiffs often have neither the ability nor the motivation to synthesize the full range of interests and views held by class members, and direct counsel accordingly.\textsuperscript{67} Courts have recognized the limited authority of named plaintiffs, and lawyers have been permitted to defy their directives by asserting that the named plaintiffs are not truly speaking for the interests of the class.\textsuperscript{68} One commentator has even doubted that the role of named plaintiffs is helpful at all, suggesting that they may "simply add a layer to the decision-making machinery and . . . push the class clients even further away from those who will make decisions for them."\textsuperscript{69}

The problem of diverging interests within the class is compounded by class counsel's own interests.\textsuperscript{70} Sometimes class counsel have obvious conflicts. For example, counsel may favor a quicker remedy because they are bearing the costs of litigation, or when a proffered agreement on attorneys' fees is tied to substantive relief.\textsuperscript{71} More subtle conflicts occur because counsel may consider the current litigation as only part of an ongoing strategy of law reform or social change, or

\begin{itemize}
  \item \textsuperscript{63} Kane, \textit{supra} note 62, at 394-95.
  \item \textsuperscript{64} Rhode, \textit{supra} note 7, at 1187.
  \item \textsuperscript{65} \textit{Id.} at 1188 n.16.
  \item \textsuperscript{66} \textit{Id.} at 1188-91.
  \item \textsuperscript{67} \textit{Id.} at 1202-03. Grosberg, \textit{supra} note 9, at 760-61.
  \item \textsuperscript{68} Rhode, \textit{supra} note 7, at 1203-04.
  \item \textsuperscript{69} Grosberg, \textit{supra} note 9, at 760-61.
  \item \textsuperscript{70} Rhode, \textit{supra} note 7, at 1191.
  \item \textsuperscript{71} \textit{Id.} at 1206-10. This problem is compounded by Supreme Court case law holding that plaintiffs' counsel in civil rights cases can be forced to negotiate a settlement regarding fees and substantive relief simultaneously, so that their ethical duty to their clients could compel them to accept a favorable settlement with no provision for any attorneys' fees. Evans v. Jeff D., 475 U.S. 717, 730-733 (1986); Kane, \textit{supra} note 62, at 395 & n.61.
\end{itemize}
both, and the success of that long term strategy may conflict with the more immediate interests of the class members.\textsuperscript{72}

Moreover, the relationship between the lawyer and class members in structural reform cases is often mediated by an organization. This organization is often the attorney's employer or source of funding, such as the NAACP, ACLU, or the national legal services support centers.\textsuperscript{73} Attorneys must be especially vigilant to avoid stifling or ignoring the voices of dissident clients when their organizational employer has interests that may diverge from those of the clients.\textsuperscript{74}

Finally, the class is more than even the very complex sum of its current members' preferences.\textsuperscript{75} Most plaintiff classes in structural reform cases are defined to include future members. Thus, any determination of the interests of the class must factor in the interests of "future generations," which may differ from the interests of current class members.\textsuperscript{76} For example, a settlement in an institutional reform case may trade off relief for past unlawful practices to gain prospective changes in institutional policy and practice, benefitting future class members over class members who have suffered past harms.\textsuperscript{77}

For all of these reasons, several commentators have found that client control of litigation is neither practically feasible, nor ethically desirable in many class action cases, and have concluded that lawyers must act as "trustees" for the best interests of the class:

Since there is no one to consult, because no one represents the entire class (including future generations), the ideal of representativeness cannot require that [class lawyers] consult someone. They are thrown back by default on their own judgment.

\textsuperscript{72} Rhode, supra note 7, at 1209-10.
\textsuperscript{73} See, e.g., Bell, supra note 4, at 489-93 (discussing the importance of civil rights organizations in civil rights litigation).
\textsuperscript{74} Id. at 490-91 (criticizing the lawyers in desegregation cases for being answerable only to a minuscule constituency, the leadership and financial supporters of the NAACP, while serving a massive clientele). Justice Harlan prophetically worried that "the totality of the separate interests of the members and others whose causes the petitioner champions ... may far exceed in scope and variety that body's views of policy, as embodied in litigating strategy and tactics." NAACP v. Button, 371 U.S. 415, 462 (1963) (Harlan, J., dissenting). Justice Harlan concluded that the attorneys could not give potentially dissident parents "that undivided allegiance that is the hallmark of the attorney-client relation." Id. (Harlan, J., dissenting).
\textsuperscript{75} Rhode, supra note 7, at 1185.
\textsuperscript{76} Luban, supra note 5, at 347. Moreover, some commentators have argued that public interest lawyers must look even farther than the interests of future class members, to the interests of the class members' community as a whole. See Paul R. Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. Rev. 1101, 1141-43 (1990).
\textsuperscript{77} Kane, supra note 62, at 396.
Why the lawyers? Simply because they are the ones faced with a decision that they cannot abdicate.\textsuperscript{78}

To guide the class lawyer, Luban sets out four possible kinds of class representation: direct delegation, indirect delegation, interest representation, and best-world representation.\textsuperscript{79} Direct delegation has the lawyer canvass all class members and act on their actual wishes, which is possible only where the class is small, compact, and unified.\textsuperscript{80} Indirect delegation requires the lawyer to act on the wishes of certain class members who are chosen democratically by the class as a whole, which is possible when the class is mobilized and able to choose representatives.\textsuperscript{81} Interest representation requires the lawyer to take direction from a group of class members chosen by the lawyer as representative of the class's interests.\textsuperscript{82} Finally, in best-world representation, the lawyer acts as a trustee to create the "best possible world" for present and future members of the client class, as a last resort when no other kind of representation is feasible.\textsuperscript{83} Luban explains that "each succeeding form marks a falling away from the ideal"\textsuperscript{84} of direct representation of clients' interests, in that progressively more decision-making discretion is transferred to the attorney, and the "will of the constituents becomes progressively more conjectural."\textsuperscript{85} He concludes, however, that any of these forms of representation may be consistent with that ideal if no more direct form of representation is possible.\textsuperscript{86} Thus, when class action attorneys fall back on their own views to determine the interests of the class, they are not necessarily acting unethically or usurping their clients' proper role, if what Luban calls "best-world representation" is the only form of representation possible in the circumstances.\textsuperscript{87}

This conclusion may be comforting to some class action lawyers, in that it seems to give permission to act as "enlightened trustee" of the class's best interests. But it is important to keep in mind that Luban and other commentators apply this conclusion only in situa-

\textsuperscript{78} Luban, \textit{supra} note 5, at 348-49; \textit{see also} Kane, \textit{supra} note 62, at 389 (noting that class action attorneys make decisions normally reserved to the client).

\textsuperscript{79} Luban, \textit{supra} note 5, at 351-52.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 352.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at 351-52.

\textsuperscript{87} \textit{Id.} at 353; \textit{see also} Charles W. Wolfram, \textit{Modern Legal Ethics} 941 (1986) (arguing that because requiring full client autonomy would make public interest representation impossible, class lawyers should be allowed "to make critical decisions themselves . . . by honestly consulting their own best conception of what public interest dictates"); Kane, \textit{supra} note 62, at 394 (arguing that "it is not necessary or realistic in class suits to obtain authorization to make many decisions, which in ordinary two-party litigation are made only after client consultation").
tions where no more direct form of representation, and no greater degree of client participation, are possible. There may be various measures applicable to structural reform litigation on behalf of children that make it unnecessary to revert to complete lawyer trusteeship.

B. Ethical Issues Concerning Remedies in Class Action Cases

Remedies issues arising in structural reform class actions create additional ethical problems. In most structural reform litigation, the legal norms that determine questions of liability do not dictate the content of the remedy. The liability norms in such litigation consist of generally articulated, aspirational standards (such as constitutional doctrines) that must be implemented in the specific context of each case.\textsuperscript{88} Traditional legal processes are inadequate to fill this gap between right and remedy; the choice of remedy involves essentially political and administrative questions of effectiveness and practicability.

This indeterminacy of remedies makes conflict within the plaintiff class especially likely. Because there is "no obvious single solution flowing ineluctably from the nature of the violation,"\textsuperscript{89} different class members may favor different remedies,\textsuperscript{90} all of which are within the range of remedies permitted by the applicable legal norms.

Class action litigation often has "legislative" results in the form of court orders or consent decrees restructuring public institutions by mandating detailed procedures and policies. But these mandates are not developed by the usual legislative or administrative decision-making processes, with input from the various groups whose interests may be affected by the change. Because the remedy is determined by the preferences of class counsel, class members, and the judge, it "triggers questions about whether countermajoritarian bodies ought to be grappling with these cases in the first instance."\textsuperscript{91}

Hence, counsel must find a way to oversee the choice of remedies that takes account of both the actual views of class members and the interests of the class as a whole—all the while bearing in mind the need to defend the remedy against potential charges of illegitimately usurping legislative or administrative functions.

For this reason, one commentator on structural reform cases on behalf of children has concluded that "[c]onstitutional litigation is a poor way to make public policy about issues when knowledge is limited and


\textsuperscript{89} Rhode, supra note 7, at 1184.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 1242.
when there is no consensus on underlying values." But, the author goes on to ask, a "poor way" compared to what? The majoritarian political process also does not often result in decisions that take full account of the rights and needs of children, especially poor and minority children. Remedies achieved through class action litigation may be, to paraphrase the old saying about democracy, the worst way of reforming public institutions, except for all the others.

In some structural reform cases, however, none of the range of possible remedies may genuinely respond to the class members' substantive interests. For example, the central legal issue in Smith v. Organization of Foster Families for Equality & Reform was whether foster children have a constitutionally protected liberty interest giving rise to a right to a hearing before being moved from one foster placement to another. But the class members' substantive interests may have only a tenuous relation to such procedural rights as notice, hearings, and appeals.

One cause of this problem is that lawyers tend to turn to class action litigation without considering other kinds of advocacy, and too readily "convert social struggles into forms like § 1983 litigation," without asking whether litigation rather than some other strategy or combination of strategies makes more sense. Hence, one commentator has urged that public-interest lawyers have a duty to look beyond litigation, and to combine litigation with other strategies.

C. Ethical Issues Concerning Client Empowerment

The political nature of structural reform litigation has led some commentators to raise additional ethical concerns about the potential of the lawyer-client relationship to either contribute to, or undermine, social and political empowerment of clients. How can class counsel ensure that the experience of participating in a class action is empowering for class members and does not unintentionally perpetuate their oppression?

Bell sharply criticizes civil rights lawyers in the school desegregation cases for making decisions, setting priorities, and undertaking responsibilities that properly belong to clients and their community. But he acknowledges that in many cases "clients are all too willing to turn

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93. See id.
95. Id. at 845-47.
96. Id.
98. Id. at 1610.
99. Id. at 1713-15.
100. Bell, supra note 4, at 512.
everything over to the lawyers.” Therefore, he argues, the lawyers must find innovative strategies to organize clients and overcome their weak economic and political position.

Recent commentators, following up on Bell’s early work, have articulated a client-empowerment approach often called “rebellious lawyering.” Such lawyering seeks to remedy three defects in conventional legal practice: the interpersonal domination of clients by lawyers; the disempowerment that accompanies exclusive reliance on litigation; and the inefficacy of intra-systemic, nonstructural remedies to achieve meaningful change.

Rebellious lawyering proposes to address these problems by: restructuring the lawyer-client relationship by emphasizing the “client voice,” i.e., increasing client participation and collaboration; and by a “collectivist” approach to dispute resolution, focusing on political organizing and coalition-building as well as litigation.

101. Id.
102. See id. at 512-13.
103. López has eloquently articulated the basic idea of rebellious lawyering:
[L]awyers must know how to work with, not just on behalf of, subordinated people. They must know how to collaborate with other professional and lay allies . . . . They must understand how to educate those with whom they work both about law and about professional lawyering . . . . And, at least as importantly, they must open themselves to being educated by the subordinated and their allies about the traditions and experiences of subordinated life.

To move in these directions, those operating in the rebellious idea of lawyering must situate their work in the lives and in the communities of the subordinated themselves. . . . In short, the rebellious idea of lawyering demands that lawyers . . . nurture sensibilities and skills compatible with a collective fight for social change.

López, supra note 97, at 1608. A similar vision has been articulated by White’s exploration of litigation as an occasion for the education and mobilization of clients, by giving voice to injuries and hopes, focusing clients’ attention on shared problems and goals for change, and giving them the incentive and energy to produce other types of political action (such as demonstrations, public meetings, or political theater). Thus, litigation can become a community event, part of a larger political strategy, and processes such as evidence-gathering, hearings, publicity, and settlement negotiations can serve as vehicles for client education and empowerment. See generally Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. Rev. L. & Soc. Change 535 (1987-88) (discussing how welfare litigation can empower disadvantaged clients).

104. Tremblay, supra note 10, at 952.
105. This does not, however, mean taking the client’s views as immutable: The lawyer should “gently challenge” the client’s understanding of the problems and potential solutions, and, while respecting the client’s knowledge of and hopes for his situation, encourage him to “explore alternative versions of what is going on and what would constitute an improvement.” López, supra note 97, at 1613.

106. Tremblay, supra note 10, at 952-53. Proponents of “client-centered lawyering” have reached similar conclusions, from a less overtly political perspective, about the importance of the “client voice,” and avoiding interpersonal domination of clients. See, e.g., Ellman, supra note 6, at 1112. (“[T]he ways that clients describe themselves are inevitably influenced by the questions they are asked, and the desires clients articulate are affected by the sense of the possible that lawyers provide.”).
It is not clear whether the ideals of rebellious lawyering can be applied to class action litigation involving children. The most obvious objection is that political mobilization is not a realistic goal for a class of children. But this objection can be answered; promoting political empowerment does make sense for older adolescents, and for family members and communities acting on behalf of younger children. The more serious problem is that the class action structure itself is problematic for the goal of client empowerment. While class action status may empower groups of people by facilitating their access to court, it may not empower them vis-à-vis their own lawyers, because, as discussed above, the complex and potentially conflicting nature of the interests of class members prevent the class from directing the lawyer's actions, and ultimately place the responsibility for acting on the class's best interests in the lawyer's hands.107

Trying to apply the idea of "rebellious lawyering" to the class action context recalls the problem, posed by Luban, that protecting the interests of future class members leads to paternalistic trusteeship by class counsel.108 Because rebellious lawyering focuses on long term political and social change, it often requires clients to forego short-term solutions to their immediate problems.109 In an individual lawyer-client relationship, this problem could be resolved by asking whether the client consents, after a full discussion of all the alternatives, to a "rebellious" strategy. But when a decision between addressing immediate needs through non-structural remedies and pursuing structural reform must be made for a large class of clients, it is difficult to protect future interests and yet retain a client-centered decision-making process.110 This leads to the paradoxical conclusion that "rebelliousness may need to be imposed from above."

Thus, the children's class action lawyer who seeks to incorporate "rebelliousness" into her ethical role re-encounters, in an especially ironic form, the tension between client autonomy and empowerment, and the same pull towards paternalistic trusteeship of class interests that rebellious lawyering seeks to avoid.

D. Ethical Issues Concerning Priorities for Advocacy

Some commentators have proposed extending the class action attorney's ethical responsibility to issues arising even before an attorney-client relationship has been created—to the choice of where to target advocacy resources. How should the attorney determine that a

107. Ellman, supra note 6, at 1118-19.
108. Luban, supra note 5, at 343.
110. Id. at 959.
111. Id. at 967.
particular case addresses the most important legal problems faced by the client community, or that it is at least a good place to start? 112 Chambers and Wald recommend a "broad consultation process" in choosing which kinds of structural reform cases to bring on behalf of children. 113 More generally, writers on legal ethics have pointed out that the prevailing approaches to legal ethics have failed to address the problem of ensuring an appropriate distribution of the scarce resources of public-interest legal advocacy. 114 One commentator has proposed that, "[i]n deciding whether to commit herself to [a set of legal] claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve." 115 Therefore, a lawyer may formulate her assessment according to various criteria, including: the relative legal merit of the claims, "the importance of the interests involved, and the extent to which the representation would contribute to the equalization of access to the legal system." 116

E. Examples of Ethical Problems in Children's Class Action Litigation

It may be helpful to examine in more detail some examples of how these ethical problems have arisen in structural reform cases brought on behalf of children. The litigation that first gave rise to the current debate over the lawyer-client relationship in class actions is the school desegregation cases. 117 In these cases, potential plaintiffs (Black parents and their children) were generally told at the outset that the attorneys, and the NAACP for which they worked, would direct the course of litigation towards achieving integration. 118 Specifically, the attorneys warned that they would not settle for improvements in the quality of segregated schools, even if class members favored this remedy. 119 Initially, clients may have accepted such strategic constraints, especially because they generally did not have a choice of counsel. The litigation, however, spanned many years. How should the lawyers have responded when some parents and children later started to dis-

112. See Chambers & Wald, supra note 36, at 132-33 (criticizing counsel in OFFER for not having a "well-formulated theory of child development or children's needs to serve as a backdrop for decision making about cases to file").
113. Id. at 134.
115. Id.
116. Id.
117. See generally Bell, supra note 4 (describing strategies and theories employed in early desegregation cases and the ethical dilemmas such cases produced within the attorney-client relationship).
118. Id. at 476.
119. See id.
agree sharply with counsel's strategy, and became disillusioned with the goal of integration and more concerned with educational quality?

Bell has critically noted that "court orders mandating racial balance may be (depending on the circumstances) educationally advantageous, irrelevant, or even disadvantaged. Nevertheless, civil rights lawyers continue to argue that black children are entitled to integrated schools without regard to the educational effect of such assignments." Bell has urged that this kind of conflict among lawyers and class members must be faced and resolved, because either dissident clients will sabotage the litigation, or attorneys will be in the untenable position of imposing a legal strategy over the opposition of their clients.

Moreover, by sacrificing client dissent to the cause of the lawsuit, the cause itself may be lost. Bell argues that the NAACP's single-minded pursuit of integration remedies and their refusal to listen to the concerns of black parents about educational quality, compromised the effectiveness of the litigation:

[R]emedies that fail to attack all policies of racial subordination almost guarantee that the basic evil of segregated schools will survive and flourish . . . .

. . . Much more effective remedies for racial subordination in the schools could be obtained if the creative energies of the civil rights litigation groups could be brought into line with the needs and desires of their clients.

Another classic example of the dire effects of conflict in a structural reform class action is Halderman v. Pennhurst State School & Hospital. In Pennhurst, plaintiffs' counsel initially ignored a potential conflict between the interest of parents who had placed their children at the institution, often reluctantly after all alternatives failed, and the children's presumed interest in closing the institution. When counsel amended the complaint to request closure of Pennhurst, a bitter dispute developed over whether the parents of the named plaintiffs had known about and acquiesced to this change, or had been misled by counsel.

When this conflict finally came into the open, counsel took the position that his true clients were the children in the institution, and he would continue pursuing his own vision of their rights and interests, over the objections of dissident parents. Thus, counsel's position

120. Id. at 480.
121. Bell documents several instances of open and hostile confrontations between the NAACP and dissident black parents. Id. at 485-87.
122. Id. at 488.
125. Id. at 285-86.
126. Id.
was that he alone had the power to determine the children's interests and act on them. Although this may have been an ethically defensible position, it came as a shock to the children's parents.

One commentator noted a general tendency, throughout the Pennhurst litigation, for all the parties and amici involved, including individual parents, parents’ organizations, defendant state officials, and even two federal agencies that appeared as amici, to initially “overstate their mutuality and correspondingly to suppress their expression or even awareness of divergence” in their views of what should be done for the plaintiff children. The true divergence of interests and views only became evident as the litigation process unfolded, leading to substantial delay and disruption.

It might have been better to candidly acknowledge, in a case such as Pennhurst, that any possible remedy would benefit some children and hurt others. One commentator has criticized children's advocates for masking tensions among the interests of the plaintiff children by claiming a unitary “child-centered” position, when what the advocates were really doing was choosing among alternative remedies, and thus favoring some children over others, on the basis of other values, such as an overall goal of empowering poor people politically and reducing economic inequities.

Thus, these few examples highlight the problems discussed above: inability of child clients to define their own interests; conflict over the proper role of parents; conflicts of interest among class members, plaintiffs’ counsel, and counsel’s organizational employer; issues concerning the indeterminacy and consequent need for choice among remedies and the inadequacy of remedies to address the full range of class members’ needs; issues of client empowerment (or disempowerment); and questions of the proper allocation of the scarce resource of public-interest advocacy.

IV. RECOMMENDATIONS FOR ADDRESSING ETHICAL PROBLEMS IN CHILDREN’S CLASS-ACTION LITIGATION

Before turning to specific recommendations for addressing the problems discussed above, a caveat is in order. It is important, while seeking to provide better ethical guidance to the children’s class action lawyer, not to erect a rigid and unrealistic edifice of ethical and

127. Id. at 324.
128. See Rhode, supra note 7, at 1214 (noting that class interests and views can shift dramatically over the protracted course of reform litigation); cf. Burt, supra note 44, at 325.
129. See Sugarman, supra note 54, at 446 (providing examples of ways that striking down the requirement of maternal cooperation in paternity establishment and child-support collection may harm some of the children on whose behalf Roe v. Norton was brought, and might harm poor people generally).
130. Id. at 447.
131. See id. at 446-47.
procedural rules that "no one wants to inhabit." Various commentators, on both class action lawyering and lawyering for children, surprisingly conclude with a defense of "muddling through." For instance, Long finds that there may be no single, definable "role" that solves the ethical problems confronting the child's attorney, and that the "style of advocacy best for the client's interests depends more on the particularities of the situation than on self-limiting role perceptions." Grosberg makes an explicit parallel between the child's attorney, who tries to be respectful and responsive to the child-client's wishes but ultimately makes the decisions she thinks are in the child's best interests, with the lawyer representing a class. This "less neat and multifaceted" behavioral norm, Grosberg concludes, is actually the "most appropriate model" for both the children's lawyer and the class action lawyer (and presumably also for the children's class action lawyer).

This may not be an unprincipled retreat from rigorous ethical analysis. Some writers on legal ethics have argued against an overly rigid and formal approach, drawing on well-known work on judicial decision making. Moreover, there may be pragmatic reasons for not overly constraining the children's class action attorney with ethical and procedural rules. Even well-intentioned and carefully drawn standards may hinder the already difficult endeavor of structural reform litigation, and reduce the effectiveness of the class action device in vindicating civil rights. Without creating overly rigid rules, however, some useful guidelines can be articulated.

A. Ethical Interaction With Child Clients

Various commentators have recommended that advocates work toward empowering child clients to participate more fully in litigation decisions affecting their lives, to respect the child client's personal autonomy, unique perspective, and actual decision-making capacities.

132. Rhode, supra note 7, at 1245.
133. Long, supra note 8, at 632.
134. Grosberg, supra note 9, at 758.
135. Id. at 761.
136. Simon, supra note 114, at 1090-91. Simon notes that a "complex, flexible" view of ethical decision making has been extensively defended against more categorical styles in some of the best-known literature of judicial decisionmaking... The preference for categorical reasoning in the lawyering context reflects nothing more than a failure to carry through to the lawyering role the critique of formalism, mechanical jurisprudence, and categorical reasoning that has been applied to the judicial role throughout this century.

137. See Bell, supra note 4, at 505 (warning that overly stringent rules could also give defendant officials a weapon to obstruct reform litigation by bringing groundless disciplinary proceedings against plaintiffs' lawyers).
138. See Sheryl Dicker, Introduction, in Stepping Stones, supra note 2, 1, 7; Long, supra note 8, at 613.
Less, however, has been said about exactly how to do this, especially in the class action context.

One basic starting point is that children's lawyers have an ethical duty to educate themselves about children before working directly with child clients. These lawyers should learn enough about child and adolescent development so as to be able to form reasonable expectations regarding client participation for children of various ages and to communicate effectively with clients. Such knowledge would enable children's lawyers to understand children's limitations without minimizing their abilities.\textsuperscript{139} Lawyers should also cultivate a sensitivity to the effects of their own demeanor and communication style on child clients, and to the substantial differences in maturity, skills, education, and socioeconomic status that divide lawyers from their child clients. The child's lawyer has an ethical duty to avoid using her superior skills and social position to silence the child's voice, or coerce the child into passive compliance with the lawyer's views.\textsuperscript{140}

**B. Ethical Interaction With a Class of Children**

Even if a lawyer masters the art of communicating with individual children, this does not solve the problem of how to consult with, and take direction from, the large, diverse, and unorganized groups of children who make up the typical plaintiff class in structural reform litigation.

Recalling Luban's description of four possible types of class action representation,\textsuperscript{141} it is highly unlikely that a class of children in a structural reform case will be small and compact enough, and the individual members mature and articulate enough, for direct delegation. Nor will most classes of children be organized, informed, and mature enough to elect representatives through a genuinely democratic internal process, as required by the indirect delegation model. The most feasible model for the children's class action lawyer thus probably involves some combination of interest representation and best-world representation. Thus, the lawyer should synthesize the expressed wishes of a number of class members chosen and consulted by the attorney as representative of the class's interests, with the lawyer's assessment of the best interests of all present and future class members.

It may be tempting for the lawyer to seize immediately upon best-world representation—to assert that it is ethically permissible simply to act on her own view of the class's best interests without consulting any of its members. After all, no matter how many children she talks to, there will still be the problems of client incapacity or immaturity,

\textsuperscript{139} Ventrell, \textit{supra} note 21, at 273, 283-84 (providing a bibliography of recommended reading on child development).
\textsuperscript{140} Long, \textit{supra} note 8, at 622 n.52.
\textsuperscript{141} See \textit{supra} note 79 and accompanying text.
conflict among class members, and conflict with future class members’ interests. Several commentators, however, have warned lawyers not to fall back too readily on best-world representation, without fully exploring the potential for greater client participation. Luban emphasizes the lawyer’s duty to be “as representative as possible,” in the circumstances of each case. Grosberg argues that if the class lawyer cannot possibly consult all class members and must assume ultimate responsibility for decision making, “it becomes even more critical that she talks to some.”

The Model Code’s mandate to treat child clients as much as possible like competent adult clients, in the context of class action litigation, should be interpreted as creating a duty to use all feasible means to communicate with and solicit the views of child clients. This duty to be as representative as possible by using all reasonable means to communicate and consult with child clients, and with their parents or guardians ad litem, provides a crucial, legitimizing constraint on the lawyer’s power. Only by conscientiously fulfilling this duty can the attorney defend herself—and the whole enterprise of structural reform litigation—from serious charges that the lawyer is merely using the courts to pursue her own political ends.

C. Facilitating Participation of Child Class Members

But how should the children’s class action attorney obtain client input? One way to overcome the formidable logistical problems of communicating with a large and diffuse plaintiff class is to rely on written notices, questionnaires, and polls. Bell, for instance, suggests using notices advising the class of the existence of the suit, the type of relief to be sought, and the binding nature of the judgment. In desegregation cases, he suggests that notices be distributed to each minority child in the school system with a questionnaire to solicit parents’ views. Bell refers, however, only to soliciting the views of parents—he does not consider whether the notices would be an effective means of soliciting input from the children.

142. Luban, supra note 5, at 351-53.
143. Grosberg, supra note 9, at 729; see id. at 751. Grosberg further proposes a standard to assess the degree of client input that is ethically required, arguing that the more intrusive the lawsuit in the class members’ daily lives and the more the choice of litigation strategy and remedies involves “non-legal” (i.e., social, economic, or psychological) factors, the more client involvement should be required. Id. at 771. By these criteria, most structural reform litigation would require the lawyer to make vigorous attempts to ensure client involvement.
145. See Bell, supra note 4, at 508 n.124.
146. Id.
147. Id.
148. Id.
Commentators have pointed out serious limitations to the degree and quality of client input that can be obtained by “paper” devices such as polls and surveys, even in cases involving adult clients. Although there may be some children’s class actions in which these techniques are feasible and should be used, they would rarely, if ever, fully satisfy the lawyer’s duty to communicate with the class members and involve them in decision making.

Children’s class action lawyers should look to the other ways suggested by commentators to overcome the practical and ethical limitations of written notices and surveys. Grosberg proposes that lawyers use a combination of techniques and that no single method of communication or set of results should be dispositive. For example, the lawyer could hold one-on-one interviews with a random sample of class members, public meetings or hearings at places where class members live or go to school, or more informal meetings with small groups of class members, perhaps in combination with written notices and surveys. Thus, lawyers should synthesize various forms of information about the class members’ views and interests.

Named plaintiffs’ views are important, but not dispositive, in determining the interests of the class as a whole. Lawyers should both find named plaintiffs who are articulate and will stay actively involved throughout the litigation, and reach out beyond the named plaintiffs to discern the full range of views held by class members. Similarly, parents or other adults serving as guardians ad litem for child plaintiffs are a key source of information about the needs and interests of the class members, but children’s lawyers should also reach out beyond parents to consult actual class members as much as possible.

149. Client views obtained through these means will often be unrepresentative (because of low response rates), uninformed, and inadequate to address the kinds of issues that typically arise in structural reform litigation. Rhode, supra note 7, at 1233. Only the more highly educated class members may fully understand the notices, and even their responses may be ill-considered because they have not weighed all the factual and legal considerations involved in the case. Id. at 1234-35; Kane, supra note 62, at 398 n.80; see Grosberg, supra note 9, at 764. Surveys and polls are necessarily “majoritarian” techniques of determining class interests; overreliance on such techniques may lead class counsel to disregard valid concerns of a minority of class members. Grosberg, supra note 9, at 764. Moreover, these techniques may disregard the interests of future class members.

150. For instance, these techniques should be used in desegregation cases involving high school students, where distribution of written materials can readily be achieved through the school itself, and most students are capable of understanding the issues and articulating their views.

151. Grosberg, supra note 9, at 768-69 & n.259.

152. Id. at 765; see also Luban, supra note 5, at 346 (arguing that when lawyers cannot canvass the views of all class members, they should consult with a part of the class that adequately represents the views and values of the class as a whole); Rhode, supra note 7, at 1258-60 (using the Pennhurst litigation as an example of how the degree and quality of client involvement could have been improved at an earlier stage, thus avoiding later dissension).

153. Grosberg, supra note 9, at 756.
The subject matter and timing of communications with class members should not be limited to a "yes or no" notice when the case is about to be settled. Indeed, client involvement should begin even before the class action is filed and should encompass questions about whether to file a class action or to pursue other advocacy strategies. If litigation is to be pursued, clients should have ongoing input on such issues as whom to sue and what relief to seek.\textsuperscript{154}

Finally, children's class action lawyers should draw on the work of commentators who have sought to apply the values of "client-centered lawyering" to class representation. Some of these suggestions may be impossible to apply to large classes of children. But many of the basic points still apply: the lawyer should take active steps to win clients' trust, instead of assuming that trust is automatic;\textsuperscript{155} the lawyer should help groups of clients identify relevant concerns and discuss them among themselves;\textsuperscript{156} and the lawyer should try to resolve disputes within the client group by using techniques of mediation, but remain alert to the possibility that the class's interests may be too deeply divided and may need separate representation.\textsuperscript{157}

D. The Ethical Relevance of Empirical Data

Even with the lawyer's best efforts at effective communication with the class of child clients, however, for all the reasons surveyed above, the interests of child clients will often be difficult to determine—some children are simply too young to articulate their desires, some are disabled, some are articulate but their judgment is questionable, and some class members (and their parents and other involved adults) may disagree.

Mnookin's parting advice, at the conclusion of his review of the complexities and pitfalls of structural reform litigation on behalf of children, is to "face up to indeterminacy,"\textsuperscript{158} and explicitly seek data on how alternative strategies and remedies might affect different groups of children.\textsuperscript{159} Moreover, lawyers should bear in mind the background constraints imposed by the social and political circumstances "under which clients must function even if the case is won."\textsuperscript{160}

Past instances of litigation conducted in an empirical vacuum should serve as a warning. For instance, in \textit{Smith v. Organization of Foster Families for Equality \\& Reform},\textsuperscript{161} the trial court focused almost exclusively on the stories of a few named plaintiffs, and the parties never

\textsuperscript{154} Id. at 753-54.
\textsuperscript{155} Ellman, \textit{supra} note 6, at 1135-36.
\textsuperscript{156} Id. at 1139-46.
\textsuperscript{157} See id. at 1153-59.
\textsuperscript{158} Mnookin, \textit{Final Observations, supra} note 31, at 526.
\textsuperscript{159} Id.
\textsuperscript{160} Bell, \textit{supra} note 4, at 513.
\textsuperscript{161} 431 U.S. 816 (1977).
developed and presented to the court information about how the foster-care system operated as a whole, such as the average number of moves experienced by foster children, the reasons for these moves, the psychological and developmental impact on children resulting from changes in placement, and the average length of stay in foster care.\textsuperscript{162} Similarly the lack of data to support key factual assumptions about the potential effects of alternative policies may make it impossible to determine whether children truly would gain or lose from the outcome sought by plaintiffs’ counsel.\textsuperscript{163}

The lesson from these cases is that no children’s class action attorney should embark on the complex task of sorting out the divergent and potentially conflicting interests and needs of a class of children without studying available social-science and developmental literature on the impact of alternative approaches to the children’s situations.\textsuperscript{164}

What are the effects, separate and combined, of racial integration and of school quality on Black students? Does deinstitutionalization always benefit children with developmental disabilities? What are the key factors leading to a successful transition from foster care to a permanent home? Does forcing mothers to cooperate in establishing paternity when applying for AFDC lead to domestic violence? Does it lead to higher rates of economic and emotional involvement from fathers? No responsible advocate should set forth without the benefit of the insights that social-science literature may have to offer on these kinds of questions.

E. Ethical Responses to Conflicts of Interest

Even if the children’s class action lawyer learns to communicate effectively with child clients, facilitates client involvement in litigation through various creative strategies, and uses all available empirical data to help determine which remedies will best serve her clients’ interests, these actions may not be enough. She may still be faced with conflicts of interest within the class, and between class members and the various adult players, such as their parents, advocacy organizations, and the lawyer herself.

1. Disclosure

Criticism of the conduct of children’s class action lawyers in past cases has led to the question whether counsel should be obligated to depart from their traditional adversary role, for instance, by a heightened duty to disclose actual and potential conflicts of interest within

\textsuperscript{162} Chambers & Wald, \textit{supra} note 36, at 100-01, 104.

\textsuperscript{163} Sugarman, \textit{supra} note 54, at 380.

\textsuperscript{164} Soler and Warboys praise counsel in the \textit{Willie M.} litigation for being “especially careful to consult with experts before making significant legal decisions. . . . [T]hey talked to literally dozens of mental health and juvenile justice professionals . . . including many state employees.” Soler & Warboys, \textit{supra} note 2, at 96.
the class. In Chambers’ and Wald’s view, the lawyers’ adversarial stances in OFFER meant that “[n]one of the lawyers involved felt any obligation to put before the judges a rounded view of issues.” They resisted intervention motions, sought to cut off the fact-finding process, and objected to adverse witnesses’ testimony. Perhaps class lawyers should be made more responsible for ensuring that the judges receive a full view of the issues.

Similarly, Kane advocates a “partnership between the judge and class counsel,” in which class counsel freely divulges any conflicts of interest or other representational problems, and uses the court as a resource to help solve them. Kane argues that the unique features of structural reform litigation, such as broad-ranging prospective relief and the potential for costly and time-consuming disruptions if conflicts emerge belatedly, should motivate lawyers and judges to “shed their typical postures and enter into a more cooperative partnership.”

But other commentators have pointed out that this proposed cooperative relationship is in tension with the basic functions of lawyers and judges. It may be hard, if not impossible, for the court to be both a protector of the class and an impartial adjudicator. It also may be hard for plaintiffs’ lawyers to be both zealous advocates for the class and “partners” with the court in managing conflicts within the class.

A more modest version of Kane’s proposal can readily be adopted. Because of the powerlessness and incapacity of children as class members, counsel should have a special duty to make a record of contacts with the class and views expressed by (or on behalf of) class members, and to disclose any emerging conflicts to the court at all stages of the litigation. Counsel should firmly resist any temptation to hide con-

165. Chambers & Wald, supra note 36, at 141.
166. Id.
167. Id. at 146.
168. Kane, supra note 62, at 405 & n.120 (noting that courts have recognized their special position as guardian of the interests of all class members).
169. Id. at 406. These arguments hark back to Fiss’s early proposal that, in structural reform litigation, judges should “construct a broader representational framework.” Fiss, supra note 2, at 26. This would create a court that “tolerates, or even invites, a multiplicity of spokesmen... each perhaps representing different views as to what is in the interest of the victim group,” so that reform litigation comes to more closely resemble an administrative hearing process, or even a “town meeting,” in which anyone affected by the litigation can have a voice. Id. at 21.
170. Grosberg, supra note 9, at 748 & n.181; see Garth, supra note 3, at 517.
171. Kane, supra note 62, at 403-04 & n.110 (citing Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978), cert. denied, 439 U.S. 1015 (1979); National Ass’n of Regional Medical Programs v. Mathers, 551 F.2d 340, 346 n.31 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977); League of Martin v. City of Milwaukee, 588 F. Supp. 1004, 1011 (E.D. Wis. 1984)); Garth, supra note 3, at 522. The corollary to this ethical duty is that the judge must have a corresponding duty to work with class counsel to handle intraclass conflicts without unduly penalizing such disclosure. See Grosberg, supra note 9, at 771. Courts must communicate to counsel and the class that “differences of opinion or dissension among class members need not result in the
licts from the court—a strong temptation when conflict arises late, and threatens a hard-won litigation victory or settlement.172

Moreover, in contacts with class members, counsel should never stifle or conceal any hints of emerging dissent, but instead should actively flush it out.173 Counsel should be wary of the potential for any organization or group involved in the case, such as parents' groups or guardians ad litem, to overlook or suppress the possibility of conflict within the class for whom they purport to speak.174

For example, the views of the dissident parents in *Pennhurst* who opposed closure of the institution were ignored by counsel, and were not disclosed to the court until after the case was tried and a remedy—institutional closure—was decreed by the judge.175 The belated and acrimonious emergence of conflict in this case may have been a major impediment to the overall success of the litigation. Rhode suggests that the lawyers in *Pennhurst* should have addressed the concerns of those objecting to closing the institution promptly and openly, suggested the appointment of separate counsel for the dissenting parents, and tried to negotiate with the dissenting faction by explaining the evidence supporting deinstitutionalization.176 Such a course of action would have prepared families for the possibility of closure, and provided reassurance that any remedial plan would take account of their concerns.177

Children’s class action lawyers may ultimately have to function more as Burkean trustees178 than as delegates instructed by their clients. The trusteeship role, however, should still encompass ethical obligations to dissenting constituencies within the class. Thus, the lawyer should have a duty to record all contacts with class members and adults who purport to speak for them, flush out early indications of conflict, and disclose conflicts to the court as they emerge. This would, if nothing else, “narrow [counsel’s] capacity for self-delusion about whose views they were or were not representing.”179

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172. Complying with this ethical duty may be especially difficult for attorneys whose livelihood depends on recovering fees under civil rights fee-shifting statutes, such as 42 U.S.C. § 1988 (1988). The temptation to stifle a late-arising conflict that threatens the class’s status as prevailing party must be acknowledged and resisted.

173. Correspondingly, Burt argues that judges in cases like *Pennhurst* should “actively solicit[ ] dissent,” so that the final resolution reflects a true airing of all competing interests and viewpoints. Burt, supra note 44, at 328.

174. Id. at 355.

175. See id. at 314-15.

176. Rhode, supra note 7, at 1259-60.

177. Id. Rhode points out that effectively addressing conflict within the class is not only an ethical duty, but may be essential to the success of the litigation, because united parental support of the remedy may be crucial in cases where implementation is complex, lengthy, and politically controversial. See id. at 1260.

178. Id. at 1258.

179. Id.
2. The Class Certification Process

The class certification process under Rule 23 should be used not as a routine, mechanical step in litigation. Instead, class counsel should use the certification process to search out and respond to any emerging conflicts of interest within the class. Moreover, this process should not be seen as a one-time occurrence. Lawyers should consider their initial decisions as to the definition of the class and the use of subclasses as tentative and subject to revision if conflicts emerge.

Bell points out that Black parents' concerns about educational quality and racial integration were "poorly served by the routine approval of plaintiffs' requests for class status," without any attempt to broaden the representational framework in desegregation cases to reflect differing views on remedies within the Black community. Bell advocates both a more careful inquiry at the stage of initial class certification and closer monitoring of class status throughout the litigation.

Bell, Rhode, and other commentators propose several specific changes that are applicable to children's class actions. They suggest more thorough hearings on class certification motions. They also suggest consideration of partial class actions, such as authorizing the case to proceed as a class action only as to certain issues, and the use of subclasses and intervention motions to deal with later-emerging conflicts, so as to channel conflict and dissent into a broader representational framework. Rhode criticizes courts' traditional hostility to belated intervenors and suggests that "courts should make maximum efforts to accommodate new entrants in some capacity."

Rhode also suggests more informal means of accommodating diverse perspectives within the class. For example, advisory committees of parents and students should participate in implementing desegregation remedies. Additionally, expert witnesses, special masters, and magistrates should obtain more detailed information about the views

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180. Bell, supra note 4, at 507.
181. See id. at 505-11.
182. Id. at 511.
183. Grosberg suggests that courts should ensure that named plaintiffs have sufficient "knowledge, interest, or experience in the matters being litigated" to serve "in the useful role of information source or as a watchdog to spur the class lawyer." Grosberg, supra note 9, at 737-38. Garth proposes that courts ask "whether all the members of the proposed class stand in the same objective position with respect to the alleged violations of the law"; what is the scope of conflict and dissent within the class; and whether such conflict is substantial enough to preclude class certification. Garth, supra note 3, at 523.
184. Bell, supra note 4, at 508-09 & nn.124 & 125; Garth, supra note 3, at 527; Grosberg, supra note 9, at 745-48, 772-73; Kane, supra note 62, at 400-02; Rhode, supra note 7, at 1221-22.
185. Rhode, supra note 7, at 1253; see also Garth, supra note 3, at 519 (discussing a case where a subclass was denied).
186. Rhode, supra note 7, at 1253.
of class members and give more members of the class a direct participatory role in the litigation.\textsuperscript{187}

The goal of these devices is not only to ensure that the court hears the full range of legal positions within the class, but also that the court has a complete understanding of the class members' responses to those positions. The court can use this information to tailor the litigation process and the remedy to accommodate, as far as possible, the diversity of views, interests, and circumstances of the children in the class and the various adults who claim to speak for them.\textsuperscript{188}

These devices, however, should be used with caution. An attorney should weigh the benefits of fuller representation of diverse interest-groups within the class against the problems created by multiplying the representational relationships involved in the case. Rhode warns against "the possibility that greater reliance on separate counsel or court-appointed experts will simply increase the numbers of platonic guardians involved in institutional reform litigation."\textsuperscript{189}

When faced with conflicts within the class, the lawyer may be tempted to abandon the class action device entirely and simply pursue relief on behalf of an individual child or a few children. In most cases, however, this would simply exchange the ethical problems posed by conflicts of interest within the class for another set of equally difficult ethical problems. First, the lawyer would have to choose how to apportion her time among potential individual plaintiffs. Second, although the very nature of structural reform litigation, regardless of its form, generally means that a finding of liability would trigger relief affecting large numbers of similarly situated children, without the class action device they would have far less opportunity to participate. Thus, pursuing structural reform litigation on behalf of individual plaintiffs would generally be worse than facing up to the problems of class actions.\textsuperscript{190}

F. Ethical Concerns Regarding Remedies

Even if the children's lawyer manages to communicate effectively with class members (and adult spokespersons) and deal with conflicts of interest in the early stages of class action litigation, her most difficult ethical problems are likely to arise later, at the remedies phase. Remedial choices in structural reform litigation involve complex forms of injunctive relief with many opportunities for trade-offs among subgroups within the class. These choices compel lawyers and judges to assume seemingly legislative or administrative roles.\textsuperscript{191}

\textsuperscript{187} Id. at 1256.
\textsuperscript{188} Garth, supra note 3, at 532.
\textsuperscript{189} Rhode, supra note 7, at 1258.
\textsuperscript{190} Luban, supra note 5, at 342-43; see Rhode, supra note 7, at 1195-97.
\textsuperscript{191} Rhode, supra note 7, at 1200.
1. Developing the Remedy

Class counsel have an affirmative duty to seek out, inform, and mobilize class members to ensure their participation in shaping the remedy. In cases involving children, the techniques discussed above for soliciting the views and facilitating the participation of class members should be applied to inform the choice among remedial options. Creative measures may be necessary to enable class members to develop informed views on remedies. For instance, in cases where the remedies under consideration have been implemented in other jurisdictions, class counsel should consider organizing meetings or phone contact between class members and persons who have experienced the remedial process in a similar case (e.g., young adults who went to school under a desegregation decree, or lived in a juvenile institution during its reform).

The attorney, however, must do more than communicate with the class. Due to the political powerlessness and dependent status of children, lawyers representing children in structural reform cases must often seek input and cooperation from "outside actors"—and from the defendant agencies and officials themselves—to shape a remedy that truly serves their best interests. For example, in *Angela R. v. Clinton*, the expertise and cooperation of Arkansas' state health department was crucial in carrying out provisions of the settlement that mandated better health care for foster children.

Hence, the class action lawyer's ethical duties in the remedy phase may extend to ensuring broad participation by non-parties—government agencies and other groups affected by or responsible for a remedial decision. The attorney must facilitate a decision-making process that factors in the knowledge and concerns of all these actors, while maintaining the primacy of participation by class members.

Moreover, in planning remedies, children's class action lawyers must again take account of the unique dependency of their child clients on the very institutions or service systems under attack. For instance, one commentator on the *Pennhurst* litigation criticized class counsel for dismantling an institution on which the children depended for their daily needs and physical safety, without first building an adequate alternative. An alternative strategy might have been to file a right-to-education lawsuit to force the creation of community-based

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193. I am indebted to Professor Randy Hertz of New York University Law School for this suggestion.
195. 999 F.2d 320 (8th Cir. 1993).
196. See id. at 324.
schools for children with developmental disabilities, and then seek to close down the institution. 199

2. Ensuring Fairness Among Class Members

Some commentators criticize the tendency to concentrate solely on procedural mechanisms for dealing with class conflicts as an evasion of lawyers' ultimate responsibility for making decisions involving the substantive fairness of remedies. 200 Morawetz, for example, argues that "class representation demands a more careful articulation of how to resolve questions of a just distribution among the members of the class." 201

Similarly, Simon argues that lawyers cannot always rely on procedural mechanisms to ensure the fairness of the results in a case; the less reliable the procedures and institutions involved, the more the lawyer must assume direct responsibility for ensuring substantive justice. 202 In structural reform litigation involving children, where the choice of remedy is often indeterminate and the class members are often inarticulate, powerless, and unable to perceive or complain about an unfair result, it is especially implausible to rely entirely on procedural mechanisms to ensure substantive fairness.

Morawetz proposes criteria to evaluate the substantive fairness of class action settlements, using a model that seeks to balance the principle of equality (that some class members' interests should not be sacrificed for others') and the principle of value (that it is also important to obtain the greatest aggregate benefits from the lawsuit). 203 She suggests that the greater the degree of inequality among how much class members will benefit from the settlement, the greater the additional overall value of the settlement must be. 204

G. Ethical Duties After the Case Is "Won"

Commentators and veteran practitioners have pointed out that an injunction or consent decree in structural reform litigation, to use

199. See id.
200. See Morawetz, supra note 7, at 4-8.
201. Id. at 9.
202. Simon, supra note 114, at 1097-98.
203. Morawetz, supra note 7, at 42-46.
204. Id. at 44. Under this model, a settlement giving some class members less than what they could expect to win at trial might be permissible, because all class members share an interest in the feasibility of the class action device, including a workable system of settlement rules that generally results in settlements of real value. Id. at 64-65. The model would even allow settlements that provide no relief to some plaintiffs, if this would permit a large increase in the overall value of the settlement, and if the excluded class members had weak claims anyway. Id. at 58. This would be "neither an easy option," nor entirely "off the table," but would remain a choice to be "undertaken reluctantly and with attention to the relative strength of the claims of class members." Id.
Churchill's phrase, "signals not the end, nor even the beginning of the end, but only the end of the beginning of the remedial process."205

Once a lawyer undertakes representation of a class of children, the children's uniquely powerless and dependent status leads to the lawyer's duty not to abandon the representation until relief has actually been implemented.206 Achieving compliance with remedial orders or decrees in structural reform cases requires years of persistence, and a "fairly sophisticated knowledge of bureaucracies and what is necessary to break their momentum and shove them in a different direction."207 The litigation in Willie M. v. Hunt,208 after more than a decade of advocacy and substantial successes, suffered a major setback when a dedicated and sympathetic administrator left the system, which, along with increases in the number of children, lead to backsliding in implementation.209 Many foster care reform cases have been active for over ten years.210

Lawyers must also ensure that their child clients, and adults involved with them, are engaged as much as possible in continued vigilance. The establishment of a political base in the community to support implementation of the remedy is a crucial element in achieving social change through litigation.211 This can happen only if the groundwork of communication and client participation has been laid throughout the litigation process.

H. Beyond Litigation

The lawyer's ethical duties in class actions involving children may extend beyond the boundaries of the litigation itself. They may extend back to the preliminary stage of deciding which clients to represent and which cases to bring, and forward to the consideration of alternatives to litigation. Lawyers may have ethical duties concerning the distribution of the scarce resource of public-interest advocacy, and may be obligated to engage in a rational and systematic case selection process in choosing among the many potential groups of children—all needy and powerless—who could benefit from representation. Chambers and Wald recommend that lawyers engage in a “broad consultation process” with child development experts and other advisory experts.
groups in choosing which cases to file and which advocacy strategies to pursue.212

Moreover, after choosing whom to represent and which issues to address, lawyers should consider administrative and legislative advocacy strategies, and guard against an unexamined, self-serving preference for litigation.213 Also, lawsuits and other advocacy strategies may be complementary in that litigation may serve as a vehicle for setting in motion other political processes, building coalitions and alliances,214 and exposing injustice.

For example, advocates seeking to create an adequate juvenile court system in Arkansas

conducted studies to document the problem; they lobbied to secure remedial legislation; they negotiated with administrative agencies to change government policy; they campaigned for a constitutional amendment to establish a new court system; they used litigation to challenge the system and to seek its abolition; and they continue to use legislative and administrative advocacy strategies.215

CONCLUSION

The civil rights lawyer's standard answer to the challenge that she is usurping legislative or executive power by trying to change public institutions through litigation is that she is merely representing the interests of her client within the bounds of the law. The legitimacy of the power she wields depends on the legitimacy of the representational relationship between lawyer and client.

But how does the lawyer "represent" an infant? A ten-year-old foster child? A sixteen-year-old youth confined to a mental hospital? She cannot simply do what the client says, but she also cannot ignore anything the client says and act on her own unconstrained view of the client's interests. Her ethical duty is to communicate as well as possible with the child, to consult the child on key decisions as much as possible, and also to communicate and consult with adults who claim

212. Chambers & Wald, supra note 36, at 132-36.
213. Id. at 525; Bell, supra note 4, at 511 n.134; Dicker, supra note 138, at 7-8.
Dicker's case study of efforts to oppose the Massachusetts workfare program is a vivid example of the need for multiple strategies:

Workfare collapsed by the cumulative weight of numerous strategies used by hundreds of members of the anti-Workfare coalition. Reliance on litigation alone would have failed; reliance on lobbying alone without commensurate use of the media, community organizing, and the statewide, grassroots efforts to stymie placements [i.e. organizing local service providers to refuse to employ people being forced to participate in workfare] would also have failed.

Sheryl Dicker, Mothers and Children First: Advocates, the Massachusetts ET Program, and its Child Care Component, in Stepping Stones, supra note 2, 11, 58.

214. Bell, supra note 4, at 514 n.142.

215. Don Crary & Sheryl Dicker, Reforming the Arkansas Juvenile Justice System, in Stepping Stones, supra note 2, 197, 197-98.
to speak for the child—but she must ultimately rely on her own judgment of the child's best interests.

What about a thousand children? The lawyer's problem is compounded by the potential for conflicts of interest among differently situated children and by her duty to protect the interests of future class members. Again, the lawyer cannot simply do what some individual named plaintiff, or guardian ad litem, or even a majority of class members, tell her to do. She must make normative judgments as to the best interests of the class. But this judgment must be informed by the greatest degree of input and consultation from the children in the class, and from adults who may speak for them, feasible under the circumstances of the case. The lawyer must also address conflicts of interest among class members and ensure fairness in the relief obtained. Finally, the lawyer's duty to represent child clients, especially when her goals include political empowerment of poor and minority children and their families and community, may take her outside litigation entirely.

The lawyer should strive to fulfill her ethical duty of representation in children's class actions not only to serve the abstract goal of legitimizing structural reform litigation. She should do so for the intrinsic value of creating and maintaining an ethical and humane relationship with her clients—no matter how numerous, how young, how inarticulate, or how powerless.

In their little world in which children have their existence . . . , there is nothing so finely perceived and so finely felt, as injustice.216

216. Charles Dickens, Great Expectations 64 (Margaret Cardwell ed. 1993).