Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews

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INTRODUCTION

In this Article, I seek to add clients' voices to the discussion of ethics in the representation of children. I spoke with several youths and asked them what their concerns were regarding legal ethics. The inquiries themselves, as well as the responses I received, support the thesis of postmodern legal ethicists who seek to increase the participation of disempowered clients in their representation.

The issue of how to represent disempowered clients is a central question in postmodern ethics. Whereas traditional scholarship in this area has analyzed legal ethical dilemmas by seeking to apply the proper ethical abstraction to solve each problem, critical, minority, and feminist legal scholars have found that the traditional academic approach to legal ethics does not successfully solve all ethical dilemmas. Especially in representing poor or otherwise powerless clients, postmodern legal scholars have found that traditional ethical formulas do not fit the lawyer-client relationships they have developed. The

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4. See, e.g., Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769, 772-74 (1992) (discussing theoretical perspectives for representing disenfranchised clients); Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Eth-
lawyer's goals often differ significantly from those of the client because the client's experiences of life and of the law differ radically from the experiences of her attorney.

The postmodern scholars define the source of ethical dilemmas as this gap in experience between the attorney and the client. Lawyers are individuals with a privileged level of education in our society. We are trained to analyze situations with a narrow definition of what is and what is not legally relevant. Applying the filter of legal relevance to the problems experienced by many impoverished clients prevents lawyers from examining much of the experience of impoverished and minority clients. Traditional legal definitions may fail to acknowledge the very experience that causes the most difficult problems, as well as the most effective solutions.5

Assuming that the primary duty of lawyers to their clients is to assist them in solving their legal problems, using too narrow a focus in the legal analysis risks losing opportunities to be effective in solving the problems clients may feel are the most troubling. Postmodern theorists have suggested bridging the gap between the "self" of the attorney and the "other" of the impoverished client6 by urging attorneys to listen to their clients' stories more closely and adopt a client-centered agenda. This is achieved by learning from clients' narratives of their experiences and understanding the context of their clients' lives and legal problems.7 These scholars propose that careful listening and ad-

5. For a thorough discussion of the centrality of the client's voice in effective representation of disempowered clients, see López, supra note 3, at 63-64.
6. Anthony E. Cook, Foreword: Towards a Postmodern Ethics of Service, 81 Geo. L.J. 2457, 2458 (defining postmodern ethics as "that sphere of rich interaction between Self and Other.")
7. Id. at 2473. Cook states:

[T]he ethical duty of the postmodern public interest lawyer is one of service to the Other. The ethical duty requires a willingness to meet the oppressed where they are and to empty oneself of Self in preparation for serving the Other. The hope is that in the ethical encounter of Self and Other, given such critical emptying, the stories and experiences of the latter will be given a certain affirmation and credence they normally lack as marginalized narratives within a dominant discourse.

I have called this orientation an "Ethic of Service" to "the least of these," one capable of infecting all relationships if permitted. As suggested earlier, an orientation to serve the least of these provides some answers to the pressing questions of whose story should be told and how it should be told. The ethic assumes a degree of foundationalism and normativity, but any transformative ethic must so assume. What marks this postmodern ethics off from many other ethical approaches is that it remains rooted, even at the level of articulating and applying norms, to a narrative tradition in which the experiences of the Other inform and shape the norms in the particularities of context.

Id.
justment of the attorney’s analysis to fit their clients’ agenda can over-
come the differences in perspective that impair the lawyer’s ability to
act in a client-centered way. Thus, listening to the details of the cli-
ent’s concerns is a better tool for understanding the preferences of
powerless clients than are the classical ethical abstractions. Postmodern scholars characterize this change in emphasis as looking
to narrative rather than normative models to solve ethical questions: the client’s story, rather than the structure of the lawyer’s case, is the primary focus.

While this approach may not provide obvious solutions to all dilem-
mas, it does hold the promise of finding solutions that uniquely fit
clients whose experiences do not necessarily comport with classical
abstractions. It therefore offers solutions that may assist powerless
clients—and their lawyers—to view lawyers as potentially more help-
ful in solving their legal problems.

This Article makes no pretense of presenting what all children think
about their lawyers’ ethics: I spoke with only a small number of
youths. Generalizations about what all young people think are exactly
the type of analyses I seek to challenge in presenting these interviews.
My point in this Article is that we, as lawyers, cannot represent clients
as generalizations. Even when we expect clients to have a unique per-
spective, their perspective can still be surprising. We must listen to
each individual carefully.

These interviews support the postmodern idea that referring to cli-
ent narratives enhances any ethical determination. Furthermore, they
raised questions that demonstrate that any discussion of cli-
ent-centered theoretical formulations is not truly client-centered un-

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8. See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 Geo. L.J. 2665, 2693-2712 (1993) (describing how a caring lawyer should represent her clients); see also Cook, *supra* note 6, at 2471 (commenting on Ellmann). Cook comments:
   It is possible that Ellman's approach is the most for which a postmodern 
   ethic can hope. Its normativity is fluid rather than fixed, and contextual 
   rather than transcendent. It requires the ethicist to grapple not with abstract 
   precepts and norms but with the lived experiences of those affected by the 
   decision. Thus, personal factors of self-care may outweigh the concerns of 
   care for others when thrown into the balance. Each situation is different, 
   each balancing different, and each decision must ultimately rest on its own 
   ethical bottom. The ethic of care can guide and inspire, but it cannot deter-
   mine or command.

9. See Cook, *supra* note 3, at 2473. Cook notes:
   What marks this postmodern ethics off from many other ethical approaches 
   is that it remains rooted, even at the level of articulating and applying norms, 
   to a narrative tradition in which the experiences of the Other inform and 
   shape the norms in the particularities of context. This ethics thus resists the 
   dangers of abstraction that are endemic to normative ethical structures and 
   even some empirical ones that, like utilitarianism or law and economics, dis-
   tort experience by pigeon-holing it into some formalistic calculus of what 
   people are thought to desire.
less the client is consulted in the formulation of the theory. The lawyer might disagree with the client, as in this Article where many of the youths I interviewed believed their lawyers should be legally obligated to report suspected abuse, and I do not. I am not suggesting that to be client-centered a lawyer must adopt the client’s choice of theory. Rather, I am saying that it may be a mistake to assume that the client shares the lawyer’s presumptions about the attorney-client relationship, and that discussion of these presumptions is in itself client-centered because it puts the client on notice of the lawyer’s point of view and clarifies the client’s choices.

I spoke with seven youths: six young men, ages seventeen to twenty, and one young woman who was eighteen. All of these youths had been in foster care, and their comments related mainly to attorney-client relationships developed in dependency proceedings. Three of these young people had also been involved with the criminal justice system, and each had been unimpressed with the quality of representation they had received in their criminal proceedings. None of the interviewees were my clients.

The youths I interviewed live in New York City and had a significant amount of contact with lawyers. New York, by statute, requires the appointment of lawyers for children, called law guardians, in several types of cases, including delinquency, persons in need of supervision, abuse and neglect, and termination of parental rights proceedings. Additionally, courts have discretion to appoint law guardians in Voluntary Foster Care placement cases, custody cases, and surrender proceedings. Under New York law, courts must review these children’s cases at least once every two years.

10. I am not the first to look for a closer relationship with clients. See, e.g., Goldfarb, supra note 3, at 717-21 (proposing that critical legal theory would overcome many of the obstacles it faces if it was connected to clinical legal education and the contextuality and real life issues of practice inherent in clinical programs); López, supra, note 3, at 44-56 (advocating partnerships between clients and their attorneys); Lucie White, Paradox, Piece-Work, and Patience, 43 Hastings L.J. 853, 859 (1992).

Professor White states:

Professor Alfieri’s essay [Alfieri, supra note 3] teaches the powerful lesson that we lawyers cannot “empower” impoverished communities by fitting clients into our own strategic or theoretical schemes. Rather, we must ally with embattled communities and seek ways to support people’s efforts to empower themselves. Yet the essay also enacts the lesson it purports to teach. It shows that, in their impatience to theorize their own practice, lawyer-theorists like Professor Alfieri risk usurping from poor people and their advocates the power to name the very forms of violence that pose the most formidable barriers to their empowerment.

Id.


guardians are trained to counsel their clients regarding their best interests, and to advocate strictly for their clients' wishes.\footnote{\textit{See N.Y. Jud. Law (Family Court Act)} \$ 249 cmt. (McKinney Supp. 1996) ("Law Guardians are appointed to protect the interests of the children they represent."). The Legal Aid Society, which trains most law guardians in New York City, instructs attorneys to counsel their clients carefully and to advocate for their wishes.}

As a law guardian in New York City, my clients were mostly children in foster care. As their lawyer, I attempted to strictly advocate for my clients' wishes, to discuss their choices with them, and to give them a voice in the courtroom while strictly preserving their confidences, even when those confidential communications included information of abuse or neglect. Having had a caseload that called for delegating most interviews to staff social workers within my law firm and occasionally relying on hasty interviews minutes before presenting a case in court, I was cautioned during the research for this Article by the interviewees' emphasis on the development of an ongoing dialogue with their attorneys in helping them articulate their wishes to their lawyers. Several of these youths impatiently rejected less thorough techniques of interviewing and counseling.

According to the interviewees, the process of forming the lawyer-client relationship was a critical aspect of the representation itself. The youths were interested in how their lawyers involved them in the decisions regarding their cases.

Regarding issues of confidentiality, most of the youths I interviewed were more concerned with their lawyers protecting them than with having their lawyers keep secret a confidential communication of abuse. They all believed their lawyers kept their secrets, but most of them also believed that their lawyers had a stronger duty to protect them than to keep their secrets or to follow their wishes. Several of the young people believed the lawyers should be mandated by law to report suspected neglect or abuse, even when that information was a confidential communication from a client.

As someone who believes strongly in the principles of confidentiality, this discovery came as something of a surprise. I believe it calls for a considered response from child advocates. The fact that some of these young people wish to be protected by adults, even when those adults are their lawyers, enhances the legal and personal ethical dilemma for lawyers. The nuance that a client, despite her stated desire for secrecy, may in fact expect to be rescued from an abusive situation, makes it more difficult to justify choosing to protect the formal attorney-client privilege. Children are sometimes dependent on adults for physical protection, and, being young, they are sometimes unaware that they need that protection. Is it ethical to value their relationship with their lawyer over their need for protection? These interviews demonstrate that there is no simple response to this ethical conflict.
In addition to ethical dilemmas concerning communication and confidentiality, the youths expressed views on conflicts of interest and impact litigation. Regarding conflicts of interest, all but one of the interviewees believed lawyers could represent them while simultaneously representing people with conflicting interests and positions. In discussing the ethics of decision making in impact litigation, the youths were both hopeful and skeptical about attorneys' abilities to make changes. While they certainly saw the benefits of some impact cases, they articulated a different set of priorities than they saw attorneys pursuing.14

What do young people think of their lawyers' ethics? It was clear that our clients care about their lawyers' ethics, but the issues that concerned them most were different from those that receive the most attention in traditional legal debates. The youths were most concerned with having their individuality respected by their lawyers. That is the main lesson to be found in this set of interviews. Principles that promote individualized attention to each client relationship and respect for each client's individual perspective should govern any resolution of the ethical dilemmas for lawyers representing children.

I. Decision Making

Most of the youths I spoke with chose decision making as the most important ethical issue. They cared about decision making for the process of being involved and the lessons they learned in that process, as well as the substance of the decisions. This interest affirms the postmodernist thesis that interpersonal aspects of the lawyer-client relationship hold the potential to teach and empower clients in ways that are usually ignored by the regnant theories of lawyering against subordination.15

A. Jonah

[W]hen you're young and you don't have nobody explain nothing to you... then that discourages you.

Jonah16 felt that children in foster care should have some involvement in the decisions about their lives. Jonah is eighteen years old. He is African American. He has been in foster care on and off since he was six months old. At age eight he lived in a group home, and afterward, was transferred to his great-aunt's home. He originally was placed in foster care because of neglect or abuse in his home, and he spent nine years living in his great-aunt's home as a foster care place-

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14. This point of view is López's starting point and the basis for his seeking better partnerships between attorneys and clients. López, supra note 3, at 1-10.
16. Interview with “Jonah,” in New York, N.Y. (Aug. 7, 1995). I have changed each of the names of the interviewees, with their consent, to protect their privacy.
ment. He first remembers getting to know his lawyer when he was twelve or thirteen. The same lawyer represents him now. He recalls going to court every year since he was eight years old and being interviewed, but he does not remember whether the person who asked him how he felt about his placement was a lawyer.

About decision making, Jonah said:

A lot of kids in foster care don't have a chance to make their own decisions, and it affects them in the long run. I think if they have more decisions on what they say in court, or outside of court—or whatever—then that gives them a sense of pride. It'll make them feel strong inside, feel like they can be confident.

Jonah felt that his attorney had represented him well. His attorney consulted with him, and when he wished to move from his great-aunt's home to live with his sister, his lawyer asked him to write a statement. At that time, he went into court and addressed the judge for the first time. Reflecting on his experiences with his attorney, Jonah noted:

I feel [my attorney] helped me a lot because when I was young . . . like when you're young and you don't have nobody explain nothing to you and they just go ahead and make the decisions for you then that discourages you so that when you're older you don't feel like you have a say. So if they explain it to you and ask what you want and you can tell them and explain what you want, then it probably helps—it helps them explain it to the judge. If they don't explain it to you—what you might need or might want—then you would never know your options.

B. Curtis

[Y]ou're a lawyer, not a law guardian.

Curtis\textsuperscript{17} is seventeen years old. He is Latino. He was adopted when he was eighteen months old. At age thirteen, he left his adoptive home where he had suffered abuse and lived on the streets of South Brooklyn. He slept on park benches for months. One day he finally went to a shelter. Four days later, child welfare workers came and picked him up in an unmarked car. They did not tell him who they were because he was a runaway. He was placed in foster care by the court.

Curtis had two lawyers: one for the first several years of court reviews of his foster care placement, and another for his last year in foster care. He liked the way his first lawyer allowed him to participate in decisions, but he disliked his second lawyer's approach to client counseling and decision making:

[My first lawyer] really asked for a lot of my input, like what do I want, and then we sat down and we talked about things that can

\textsuperscript{17} Interview with "Curtis," in New York, N.Y. (Oct. 15, 1995).
happen, and even in the court room she would talk, and then she would ask the judge for permission to let me stand up and talk, and talk about what I want. . . . She really was concerned about what I want and what I thought I needed. . . . The first time I went to court my mother wanted me to go home, instead of going into foster care, but I wanted to stay in foster care. She [the lawyer] was being real good in terms of helping me in making my decisions and stuff. . . . She really took great concern of what I wanted and really presented to the judge as I said it, not as how she would say it. . . . I was in the courtroom at the time.

. . . [My first lawyer] knew what she was talking about, she knew everything, she knew ins and outs. . . . Me, I loved her she was really helpful at keeping me in the system. . . .

When I went to court I had just came off the streets about four days ago after being in the streets for three months, so it was like I had a very good reason for not going home. I was living in the streets and it’s not good to go back there. I had too many problems there and so the lawyer just took it all in and presented it to the judge.

The judge, I loved her too, she was really nice. She wanted to know what I thought, and so I guess the lawyer and the judge were really helpful in terms of dealing with me.

Curtis went back to court five times for extensions of foster care placements.

There were times when I thought I was going to be placed back home, and my lawyer would say, “Don’t worry about it, I have it under control,” you know, “Don’t worry about it, I’ll tell the judge what you want and we’ll work it out.”

Even out of court my lawyer and I spoke together. I would call her if I had a situation or a problem, I would call her immediately, and she gave me a way that I could get through to her at the court house . . . . which was really good. One time we had a face-to-face meeting at lunch. . . . We sat down and talked about the case. . . . She took the time out and was very helpful, even though she had tons of other cases.

Lawyers should represent what their clients want. If the client wants something that the lawyer knows will be harmful to the client, then, if that’s the case, they should sit down and instead of . . . just meeting each other for three minutes before going into court, that’s a situation where you have to come into the office and sit down and talk about this and go over it and make sure we have everything clear before the court date comes up. My lawyer used to do that . . . if there was something she didn’t agree on, or if there was a discrepancy, anything, I used to call and talk on the phone with her for maybe fifteen, twenty minutes, and try and get things worked out. If we couldn’t get things worked out by phone, then it was like, “Okay, let’s meet.”
Curtis said that the most important thing his lawyer ever said to him was, "I'm your lawyer." He commented:

A lawyer is a lawyer, no matter who you are or what you do. You went to school, you did this, you got this degree you had to go through that, you had to go through law school, you're a lawyer, not a law guardian. And in terms of representing kids, you should always respect your clients' wishes and confidentiality and whatever your client wants, I mean I feel that no matter what the age, you know, what your client wants. . . . You're the lawyer, you learned that you should always go with what your client wants even though you may disagree with it for what ever reasons you may have, and I don't think there should be a distinction between somebody who's under eighteen and in foster care and someone who's over eighteen and out of foster care.

C. Sandra

[F]ind out what the child wants first.

Sandra\(^{18}\) is eighteen years old and is African American. She had been in foster care since she was ten years old. She initially thought the lawyer on her case was appointed to advocate for her mother. She found out that she had a lawyer of her own from the other girls in her residential treatment center. When she came into foster care, she was the youngest girl on the residential campus and she received kind, careful treatment from the staff and social workers.

She did not meet her lawyer until three years later, when she was about to be transferred to live with an aunt. Despite meeting with her attorney's social worker on several occasions, she did not trust her lawyer until she had met her personally. Then she felt her lawyer was truly interested in helping her:

At one time it was that I felt that I wanted to tell my lawyer certain stuff, that when I was staying at my aunt's house because I didn't really want to be there and there was a lot of things going on, but I just felt that I would get in trouble, you know. Maybe that's just being in the system and I have that even in my outside life, like someone [the lawyer] says "I'm not going to tell anyone" but you still have that feeling, because your trust has been broken so much before and I don't ever see them [her lawyer and lawyer's social worker] until I go and get an extension [of foster care placement: a court review of her case], so it's like I can't trust you. I only see you one time a year and it's like an hour before we go to court. And then the first thing [the lawyer says] is, "Oh, I want to speak to Sandra alone." So then that makes my aunt feel like, "What's she telling them?" and in time it makes it bad for me. . . . It kind of puts you on the spot if you're in a bad situation. It's hard to open up

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because you’re not sure. And then you can’t go in the court room, so you’re wondering.

Only after her lawyer came to the agency where she lived and conferred with her did Sandra become candid about her wishes to go home to her mother. Her lawyer helped her develop a plan, and eventually, Sandra returned to her mother’s care.

Her advice for lawyers deciding what position to take on behalf of a client is to “find out what the child wants first, and work them through it and see if that’s a possible option, and if it’s not, then . . . [the lawyer] should make the best decision.”

Sandra believed the most significant issue that distinguished representing children from adults as clients was the difficulty in developing trust and communication with a child client. She stressed that talking with the client about the choices she is making fosters trust:

I guess, giving an extra push, or keeping yourself open, you know like, “I understand we don’t see each other that much” and just letting them [the client] know that what they tell you, you will, if you can, tell the judge if it’s something that can be done. I think that’s the best thing you [a lawyer] can do. Even if I say that “Hey, listen, I really want to join the circus.” Even if you know it’s a bogus idea, still listen, and maybe just show me that, “Sandra, it’s throwing fire, it’s lions, it’s . . . .” You know, just to [have the lawyer] go through it [the basis of the decision being advocated], I think that that helps a lot. ’Cause that will kind of get you to understand something about me, you know: I don’t want to go to college, I want to go to the circus. I guess it kind of gets the person [the youth] talking, it’s like you talk about something that they’re thinking about and you [the lawyer] can kind of understand, instead of just saying, “Well, why do you want to leave the group home and go to an RTC [Residential Treatment Center] or go to another group home,” but talking to them about the other group home [that the youth is asking to be transferred to], that kind of starts [the young person] talking about why they want to leave and helps you [the lawyer] make the decision without just asking them straight out about it.

Sandra believes that only with such relevant client-centered questioning will most youths begin to tell the lawyer what their real concerns are. Moreover, even if the lawyer makes a decision to take a position different from the child’s preference, Sandra believes that if the child is involved in the decision-making process, the child is more likely to tell her lawyer what the problem really is. Client-centered interviewing makes the difference between whether a client will talk to her lawyer or not, and whether the lawyer can represent her effectively.
D. Neil

_I never had a lawyer who actually knew what exactly the living situations were of someone in the system.... Unfortunately it's hard to anticipate someone's needs from an office._

Neil is twenty years old. He is white. At age sixteen, his mother threw him out of the house. The police picked him up because he was listed as a runaway. When he was picked up and brought into care, his mother told him he had a lawyer. He was eventually placed in six different group homes. He was beaten up by other residents in two of them. He felt uncomfortable living in some of his placements because he was the only white resident and felt unable to break through the racial barriers.

Neil believed lawyers do not understand the choices children face in the child welfare system. He said, "I don't think they'd even feel themselves equipped to make that decision for their client, and I think most of them [lawyers] would be willing to follow their clients' wishes." He thinks lawyers should go to the places where their clients live to meet with them and to learn about their clients' lives.

Neil also felt that having the lawyer visit the client would set a different power dynamic in the relationship. The client would feel empowered, rather than subjugated by the lawyer.

Neil felt that his lawyer had listened to him and had represented his wishes in helping him get into the placement where he lived at the time we spoke. Unfortunately, he believed this placement to be the worst of all the group homes he had experienced. He disliked the punishment-oriented structures of his group home, and longed for some positive reinforcement. He resented his curfew because it seemed arbitrary and interfered with his other activities. He had worked on a presidential campaign, and wanted to obtain a certificate in real estate. Neil resented that the group home he lives in would not pay for that type of education, and that he had to raise the money by working at unskilled jobs. He also resented that his group home was over a year late in giving clothing allowances to the residents. He did not like the food. He felt the foster care system interfered with his plans and aspirations, and felt he was lowering his standards because his caretakers had such low expectations of him.

E. Julio

_They should have asked me more and said why they questioned me so much, because I didn't know what was going on._

Julio is eighteen. He is Latino. He has been in foster care since he was ten and has had more than one lawyer over the years. Julio

believed the quality of the communication he had with his lawyer made the difference in whether he was well represented.

I only seen my lawyer when I went to court, basically, when I was a little kid. I didn’t know what was going on back then. They should have asked me more and said why they questioned me so much, because I didn’t know what was going on. All they did was ask me a lot of questions.

At the time of the interview, though, he felt that his lawyer understood him:

They ask a lot of questions of mine before they do theirs. Most of the time they listen to my opinion, but they would do it ... a different way, but it’s still in my opinion, ... because I’d tell them this, and they’d do it but in a different way. And it probably was much better because it did work much better than what I was thinking at first, but it was still working on my own opinion. And they’ve been helping me out, you know listening to me. They understood me more than anyone else understood me at the agency,

Julio has two brothers: one is also in foster care, the other was lost in Puerto Rico. His mother said his brother was kidnapped, but her family said she sold him. He lived in four different placements in foster care, and spent a year and a half living with his family back in Puerto Rico. Before returning to foster care, he experienced a failed attempt at living with his mother. Afterwards, he went to stay with friends. He stayed with them until he was picked up as a runaway several months later and put back in foster care. He does not trust his mother and does not know how his brother manages to trust her.

Julio has had several criminal cases and has received sentences of community service. He believes his lawyers for his criminal cases acted too quickly, and that they should have exerted greater effort to help him.

F. Summary

Each of these youths described a successful relationship with his or her attorney. They cited different aspects of the relationship that inspired their confidence: Jonah’s lawyer explaining the system; Curtis’ lawyer letting him speak in court; Sandra’s lawyer encouraging her to articulate her real wishes; Neil’s lawyer helping place him into a particular group home, even if he didn’t like it; and Julio’s lawyer listening to and interpreting his wishes. The youths took different positions on who should make the ultimate decisions. Sandra left it to the lawyer to decide what was best. Neil, on the other hand, believed no lawyer could make a decision for a young person in foster care because lawyers lack experience. Curtis had long discussions with his lawyer when any conflict arose, and ultimately made the decisions

himself. Finally, Julio deferred to his attorney's judgment regarding the methods, but felt in control of the content of the decisions.

All of these youths valued the opportunity to have their attorneys get to know them. Neil wanted lawyers to go to the facilities where youths in foster care reside. Sandra's comment that having her lawyer come out to her agency resulted in giving her the incentive to trust her supports Neil's suggestion. Finally, Curtis, Sandra, and Julio all stressed that client-centered conversations were essential to their assessment of their lawyer's performance.

II. FACTORS THAT INHIBIT ATTORNEY–CLIENT COMMUNICATION: ALIENATING LAWYERING AND INSTITUTIONALIZED NEGLECT

As participants in the foster care system, these youths were familiar with an overextended child welfare bureaucracy. Not surprisingly, from our conversations, it became clear that the most troubling ethical problem they confronted with their lawyers was lawyering that made the youths feel anonymous.

A. Raymond

*I don't think my lawyer would have represented me well.*

Raymond is twenty years old. He is Latino. He has been in foster care for ten years. He has two sisters and a brother, also in foster care. His sister lived with his grandmother. His mother was a drug abuser, and he believed the state terminated her parental rights when he was fourteen. Since he was ten years old, he has lived in six different foster care placements. First he was placed in a diagnostic center and residential treatment center. From there he went to a group home in the suburbs of New York for four years. He then went back to the residential treatment center, then to a new group home for one year, then to another group home for one year, and then to the independent living group home for highly motivated young men, where I interviewed him.

Raymond could not remember his foster-care lawyer, and he was not satisfied with the counseling he had received in a criminal case:

One time I did get in trouble with the law and I had a lawyer represent me, but he didn't represent me good because it was an illegal search, and he didn't want—he just said, "Oh, just plead guilty," and he just wanted to get it done real quick and they didn't give me a fair chance.

He stated that he decided to accept the plea arrangement after overhearing some lawyers:

I heard some lawyers saying about another case, "Oh, let him go to jail, I don't care about him... Arrest him." You know... about their own client! "Oh, give him five years, who cares. Let him rot in jail" I was like, "Oh, my god!" I was scared. I was like, man, that's how they think? That's why I was like forget it. I'd rather have probation than to go to jail. I think they would have believed the cop. I don't think my lawyer would have represented me well.

Raymond's expectations of lawyers were low, however, even before he met his criminal defense lawyer. "When I speak to the lawyer and I try to ask him if he can help me he tells me what I want to hear in my face, but I don't think anything actually gets done about me."

A number of scenarios could explain why Raymond did not meet with a lawyer for his foster care case more often. Possibly, his placement was allowed to expire and never brought back to court for review. Alternatively, perhaps his parents' rights were terminated and, contrary to statute, no further petitions for review were filed so that no court reviews ever took place for his lawyer to represent him. By statute, if Raymond was voluntarily placed in foster care, his case should have been reviewed by the Family Court at a minimum of every two years until he turned eighteen. If he was placed by the court, the reviews should have been annual. Law guardians are mandatory for court-placed children and can be assigned in the discretion of the court to voluntarily placed children. It has been the practice of the court to assign lawyers to virtually all voluntarily placed children since approximately 1990.

Raymond believed that only one alternative existed for him—foster care. Although he remembered meeting his lawyer only twice, he did not believe he had been poorly represented. He said that, in retrospect, he would have preferred to have been asked about where he was being placed in care, but at the time he was not really thinking about his placements.

After he was fourteen he never returned to court. "I guess there was never any way of me going back to my mother." He was never asked about being adopted. "I have never been asked about that. Just group homes." His lawyer never asked what he wanted:

They thought my mother was going to get better, and everything, so they kept trying and trying. And she was supposed to show up at court a lot of times and she never showed up. And so they just guessed she was never going to get any better. She just passed away last year.

23. Id.
Many children in foster care live in foster homes. For Raymond, though, “Nobody never suggested foster homes. I never fought in a group home. I don’t disrespect people. I don’t know why. I did good in school.” He said that if he knew his lawyer, he would have called him or her when he had a problem. “Maybe my lawyer could have helped me.”

B. Common Views

In sum, Raymond held low expectations of his lawyer, and even lower expectations of control over his life. Similarly, Neff commented: “People, by the time they get to this point, are so deprived that they just become institutionalized in the system and that’s the sort of treatment we can expect to get.” He resented the systemic patterns of neglect, which he felt were often more damaging than the neglect children experience in their own homes. Sandra, however, had a different experience. She had met with a social worker who worked with her lawyer on several occasions before she met with her lawyer. She did not confide in the social worker. She only confided in her lawyer when she came to see her at her foster care placement. Finally, Curtis was clear that his second lawyer did not live up to his expectations. The lawyer’s manner in the interview did not promote Curtis’ trust:

[He] didn’t ask me about the case, didn’t ask me what I wanted. . . . He came from that very “I’m the lawyer, you’re the client” . . . Not very friendly, not very caring, very attitude, like, “Okay lets get this over with” type of attitude, you know, “You’re here, I’m there and your mother wants this and you want that and, . . .” You know. . . . I can see two years ago if he was my lawyer I would be very worried but since I was turning eighteen in a couple of months and I already had my apartment, I wasn’t.

Curtis had participated in his representation during his previous years in foster care, and even appeared in court regularly until his case was transferred. “[After] my case got moved into the city, I went to court once and I wasn’t allowed in the court room.”

These youths felt poorly served by absent lawyers, and by a lawyer whose interview technique was transparently attorney-based. This complaint is one of the issues that the Youth Advocacy Center has targeted in its campaign to educate youths in foster care about advocating for themselves.

C. Aiding Communication: Youth Advocates

The Youth Advocacy Center has developed a model for overcoming the gap in communication that sometimes exists between young people and their lawyers. This organization trains youths in foster care to be peer educators and advocates. They train other youths in foster care about their rights and help identify what sorts of problems need
legal intervention. On occasion, Youth Advocates also assist peers in communicating with their lawyers. Jonah, Curtis, and Sandra serve as Youth Advocates.

Jonah knows many young people who complain that their lawyers do not want to listen to them or hear them. In one instance, Jonah helped a teen mother advocate for her legal rights when her lawyer would not. She had her child living with her in foster care, and her lawyer instructed her to sign her child into care separately, though she did not want to. Under a relatively new development in New York law, girls who are living in foster care with their children are not obliged to transfer care and custody of their infants to the Child Welfare Administration. Jonah spoke with the young mother and advised her to get a new lawyer if her lawyer refused to advocate for her. She did get another attorney and, as a result, her child remained in her custody. On last report, Jonah said the mother and child were doing well in their foster home together and trying to find an apartment.

Curtis, however, was troubled by the reports he heard from the youths he met in his work as a Youth Advocate of lawyers who seemed to ignore their clients’ wishes. He said:

I think the lawyer should always represent what the client wants, . . . even if it’s not in the client’s best interests. Hearing other [youths] talk, I think the problem is that there are too many lawyers who represent what they think should be in the best interests, and what they think usually comes from their own beliefs or their own morals or whatever, and when you represent anybody you’ve got to represent what the person wants, not what you think they should get. [Youths are reporting that] lawyers are not there, lawyers are not available. I’ve heard of cases where they [the clients] say “Oh, I talked to my lawyer and then my lawyer went into the courtroom and said the totally opposite thing of what I wanted.” I think a lot of lawyers underestimate the intelligence of their [youthful] clients.

These youths’ experiences as Youth Advocates highlighted the importance of clear communication between lawyers and child clients.

III. CONFIDENTIALITY: OFTEN SECONDARY TO THE DUTY TO PROTECT

All of the youths I spoke with had high regard for their lawyers’ ability to keep their secrets and their lawyers’ duty to protect them from abuse or neglect. Curtis commented, “I didn’t tell anyone I was abused at home until I told my lawyer.” Except for Curtis, all the youths expected their lawyers to report suspected abuse or neglect, even when the rules of confidentiality would require the attorney to keep silent regarding a client confidence. Again, all the youths except for Curtis believed that the lawyer’s primary obligation was to protect

the client's safety. In response to the hypothetical situation of a client telling of an incident of abuse in confidence, each youth commented that the lawyer should notify the authorities and first protect the child, despite the child's expectation of confidentiality.

A. Bruce

The lawyer should have to tell about the abuse.

Bruce\textsuperscript{28} is nineteen years old. He is white. He was first put in foster care at age four. He had several siblings in foster care as well. He was returned home to his mother on several occasions, and remembers first having a lawyer at age seven. He always wanted to go home to live with his family, and his lawyers helped him do that. When we met, he had recently returned from out of state and was trying to find an apartment.

In response to the question of whether a lawyer should keep the client confidence or tell the authorities of suspected abuse, Bruce immediately said that any abuse had to be stopped, that the lawyer was obligated to disclose the alleged abuse, and that the law should require lawyers to report any suspected neglect or abuse.

B. Other Views

At the other end of the spectrum, Curtis stated confidentiality had to be respected:

I don't think it should be required by law, [for a lawyer to report suspected abuse,] because if I tell you I don't want you to tell anybody but then you tell somebody because you're required, I think that's a break of confidentiality. It's like you're my lawyer but I can tell you something between you and I and no matter how severe it is. Use all resources first.

If I tell my lawyer I'm being abused in my foster home, I think instead of wanting to treat me like, "Oh, wow, he's getting abused," I think you can come at it with a different angle like, "Well we'll try to get you out of that foster home," instead of making it a more uncomfortable situation for the kid by having them live there and having the foster parents knowing that they have an investigation being done on them. So it's like I think that if I tell you ... a lot of kids, they'll tell you something little, but they actually mean something actually big. That's what it is. You have to look at it in the bigger perspective and then ask them some things: "So what you're saying is you want to move out of there? ... Do you really want to go live there and go through all this trouble knowing they do this to you?"

Similarly, Sandra saw some need for caution in removing a client from an abusive situation when the client said she did not want the

\textsuperscript{28} Interview with "Bruce," in New York, N.Y. (Oct. 13, 1995).
abuse or neglect to be divulged. Sandra said she would expect her lawyer to make the decision for her to leave an abusive situation, but she stressed that such a decision should take into account the reasons a child might want to stay in the home they know, even if it is neglectful or abusive, rather than going into foster care, where other kinds of neglect or abuse occur. She distinctly remembered when she was ten and child welfare came and took her out of school—how scared she was and how terrifying it was to be pulled out of class, crying and screaming.

Jonah, Julio, and Raymond agreed that the rules of confidentiality should require lawyers to report suspected neglect or abuse. Jonah commented that an abused child can be "messed up mentally" and not seek to be removed from that situation. Jonah believed that once they are moved from the abusive situation they will feel safer. He asserted that if the client trusts the lawyer enough to confide in him or her, it is likely that the client is looking for help to escape the situation. He explained:

You should be able to talk to your lawyer about anything that's wrong in your life, or if you have a problem, they should be like a friend. If you and your lawyer say something or talk about something that you think is personal, then that should be between you two. Now if it's something that has to do with suicide, or something about you trying to hurt somebody or hurt yourself . . . other than that, anything that you have or talk between each other is y'all's, it's between y'all only. It is in nobody else's interest.

I think you gotta know a person before you can start telling them something, your secrets, or whatever . . . . Your lawyer has to be like a friend for you to open up and tell them something . . . a secret or something.

If abuse was involved, however, Jonah was unequivocal in his opinion that the lawyer should tell the authorities. A lawyer's first duty, he believed, is to protect the child. The lawyer should advise the child and discuss his actions, but the lawyer should be obliged to reveal that type of client confidence. Finally, Jonah said that in an abusive situation, the lawyer may keep the client not simply from being hurt, but from hurting someone else: "Things go both ways."

Neil added that lawyers should discuss the problem with the child and determine how to protect the child before reporting the suspected abuse or neglect. Furthermore, in the spirit of confidentiality and open communication, he believed the lawyer should warn the client, if possible, before he had information he had to report if it seemed the interview was going to elicit reportable neglect or abuse. That way the client's decision to tell the lawyer would be made with the knowledge that the lawyer would be required to report suspected abuse to the state.
These youths saw their lawyers as their allies. To Curtis, that meant the lawyer should keep his secrets and work with him to ameliorate the abuse. To the others, that meant the lawyer was trusted to protect them and should be compelled to step beyond the abstract rules of confidentiality to rescue a client from danger.

IV. Conflicts of Interest

The youths trusted their lawyers’ ability to overcome abstract legal barriers to zealous representation in conflict of interest situations, as well. Except for Curtis, all of the youths trusted their lawyers to be able to represent parties who held conflicting positions simultaneously.\(^{29}\) The reality of the relationship with a lawyer whom they trusted overcame the abstraction of a potential conflict for that lawyer’s loyalty. Again, the discussion of the legal abstraction turned to the interpersonal relationship between the youths and their lawyers. With adequate explanation, the legal barrier could be eliminated.

Bruce had the experience of working through a conflict situation with his lawyer and his sister. Some time ago, he and his sister had to decide whether to accept a settlement offer as plaintiffs in an impact case. He wanted to accept the offer and she did not. They shared a lawyer, who spoke to them both about the choice they were making. He believes the lawyer represented them each properly, providing the framework for understanding the choice each was making without forcing a decision.

Julio had a similar experience. When he first came into foster care, Julio had the same lawyer as his brother, with whom he constantly fought. The two disagreed about returning to their mother’s home. Nevertheless, he felt that there was no conflict problem, “because I can fight with my brother, but it isn’t anybody’s business. If I fight him, I fight him.”

Though none of them had experienced a conflict with their lawyers’ other clients, Jonah, Sandra, Neil, and Raymond all believed their lawyers could represent divergent opinions without compromising their clients’ trust.

V. Impact Litigation: Hope and Skepticism

In regard to lawyers’ representation of the whole class of children in foster care, these youths hoped for systemic reform, but several of them were skeptical about lawyers being able to institute reforms that would cause changes that the youths themselves would identify as priorities. They were skeptical of lawyers’ motivations and agendas, and doubted that litigation would bring about the needed change.

\(^{29}\) Curtis never had a conflict issue in his case, but he came up with the hypothetical that if he had the same lawyer as someone he had a fight with in a group home, he would be concerned about proper representation.
Much of their experience of reform, however, made them hopeful: the youths applauded reforms such as abolishing the policy of mandatory discharge from foster care at age eighteen. Raymond commented: "Eighteen? I think that's ridiculous! There's people in here right now that's eighteen and they don't have their high school diplomas or anything." He thought that a good reform would be that children should not be kicked out of foster care at age twenty-one, either. Bruce had participated as a plaintiff in an impact case. He felt that his lawyers did what he told them. He believed that change can only be accomplished if people stand up for what they believe, and felt that his impact case was effective in bringing reform. In addition, Julio believed that lawyers try to keep the system working and saluted their efforts. He thought that attorneys could help by identifying problems within the system and addressing them.

Much of their experience of foster care and well-meaning adults made these youths doubt much of the reform they hoped for would ever occur. Raymond did not think that lawyers could make much difference in reforming the system. He said: "Maybe they can, but from what I have seen and experienced, I don't think they can. I don't think they could probably take the time to do it. Me, personally, I don't think they really care. If they do, they do, but personally I don't think they do."

Curtis was thoughtful about the focus of impact litigation:

> It's not really focusing on kids' issues, it's more about what people think constitutes right and wrong, in terms of moral beliefs like you know, "we can't allow an eighteen year old to be out there in the streets with no job and no money and nothing, we have to teach him something."

He stated his view that impact litigation should be focusing on:

> the way group homes are set up, the way agencies are set up, the way money is distributed throughout the agencies—because they say there's one hundred dollars a day for a kid in a group home, but the kid doesn't see any of it. I mean, we survive off of food that is shipped in big boxes, and we survive on foods that are pre-frozen, pre-cooked, and so you get all this money and yet we have to eat pre-cooked and frozen food and stuff like that... I guess they need to focus on the living standards, you know.

Neil was similarly critical of the way reforms were being implemented. He felt that there were kids with too many different kinds of problems in one group home together. The environment was too much of a free for all, so the agencies could not help anyone. He said:

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30. See Palmer v. Cuomo, 503 N.Y.S.2d 20, 22 (App. Div. 1986) (requiring foster care providers to offer training for independent living, and enjoining the providers from discharging youths prior to the age of 21).
It's not about being lumped together. It's about the fact that you really can't create environments for people with specific needs that could really help be a therapeutic setting to get them to think. . . . This comes from abuse. This is nothing more than a storage facility for the dregs of humanity. And that's all anyone will become at the end of this. The chances of anyone here making it on the outside are about ten percent. The reforms? They're a joke. The only reforms that could make a difference would be for the legislature to make the existing laws less ambiguous. I have very little faith in any class action lawsuit making a difference.

It is readily apparent that many of the interviewees were openly critical of the reforms. 

Conclusion

Despite all their bad experiences with their lawyers, their families, and the child welfare system, all of the youths I spoke with trusted their lawyers. Raymond trusted even his hasty criminal lawyer to keep his secrets. Neil trusted his foster care lawyer to help him, even when he hated the placement she had helped him find. While the level of skepticism is high among these young people as to how lawyers can make positive changes on a system-wide level, they all would like a lawyer who listened to them, counseled them, and could help them conquer the challenges of living independently after a life of growing up in foster care.

The youths' preference of thinking of their lawyers as protectors rather than simple advocates is particularly instructive. Most of them were not asking to be treated strictly as an adult client. Rather, they preferred their lawyers to play the role of responsible adults in their lives. Except for Curtis, they often expected their lawyers to act as adults first, and as lawyers second.

Jonah ranked his lawyer among the people who wanted to help him succeed, and Neil, Sandra, Bruce, and Julio felt that their lawyers were the most important people in helping them get what they wanted and needed within the child welfare system. Sandra felt her lawyer was the person most responsible for getting her reunited with her mother; her mother—who had to stay drug free and obtain housing—ranked second, along with the judge who ordered the plan. In fact, even Raymond wished he had had a lawyer he could have asked for help, despite the poor experience he had with his criminal lawyer. Curtis was similarly clear in his statement of the importance of his first lawyer:

She was the key. She was my key to being in foster care. She was the most important person I had to deal with me in CWA [Child Welfare Administration], out of my social worker, and staff, and all those people. She was the most important because that was the key to me going home or to me staying in care.
With this type of optimism and faith in their lawyers coming from the child clients, there is good reason to hope for successful partnerships. Some lawyers are clearly forming bonds that bridge the gaps in understanding between lawyers and clients. The postmodern legal scholars have correctly identified the ethical task facing the profession. Knowing the problem, attorneys can always improve their listening skills. Models such as the Youth Advocates also give reason for hope.

The opinion voiced by several of these young people that the duty of protection takes precedence over the duty of confidentiality must be considered in any discussion of how lawyers determine their role in child protection. Likewise, in preparing impact suits, activist lawyers should discuss their theories of reform with the youths who will have to live with the reforms. The insight they can provide by virtue of their experience is too valuable to ignore.

Speaking with these youths, it was clear that developing the simple human relationship between attorney and client was important to them. Furthermore, it was clear that without their attorneys actively listening to them and engaging them in a dialogue, there was a good possibility that these youths would not have given their lawyers the information they needed to effectively advocate for the clients' true needs. For the youths whose lawyers took the time to listen, the attorney-client dialogue was in itself empowering. Such representation lays the foundation for ethics envisioned by the postmodern legal scholars.