Representing Children Representing What?

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REPRESENTING CHILDREN REPRESENTING WHAT?
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ABSTRACT

This essay reflects on how lawyering for children relates to the personhood of children and youth. More concretely, it critically explores the role of children’s lawyers in promoting the individual and systemic interests of their youthful constituents. At a time when children are increasingly viewed as rights-holders, provided with attorneys, and subject to coercive state intervention and restriction, questions regarding who speaks for children and how children’s voice informs discussions about childhood, dependency, family and community are particularly cogent. On behalf of individual, and classes of, children, lawyers are actively engaged in the creation, definition and promotion of rights regarding with whom children live and the roles among children, parents and the state in caring for, educating and disciplining children. This advocacy reaches both the heart of individual lives and the core of value production and promotion in a liberal republican democracy.

In the past fifty years, the children’s bar has grown in numbers and influence. It is not entirely clear, however, whether children are present and accounted for in this advocacy. In other words, there is some debate about whether this advocacy centers around children and their experiences or around the advocates’ views of who children are and what they need. It would be ironic if attorneys used children’s rights to step into the traditionally parental role of determining children’s interests, for it is not clear that children would be any freer under the control of an attorney rather than a parent; nor is it clear that attorneys do not have much to learn from their child clients. Yet there has been little critical study of children’s rights or the hegemony of children’s attorneys in creating and pressing those rights.

This essay sets forth some critical observations about the role of children’s attorneys in reinforcing and challenging socio-legal norms, particularly those norms that are not child-driven or child-centered. The essay first reflects on the indeterminacy and contingency of the category of children, checking our natural tendencies to idealize children and childhood. The following section describes these children’s bars, noting their tendency to advocate for children in isolation from their communities. It suggests that in contrast to attorneys who advocate for social and economic justice, children’s attorneys generally contemplate legalistic problem and solutions. After noting the decline in children’s well-being despite the growth of a children’s bar, the next section the sketches five thematic observations that might account for this anomaly and raise questions regarding the utility of children’s lawyers and the roles that they might occupy. These observations relate to the multiple gulfs between children and attorneys, and the limitations of rights-based advocacy, particularly for clients who do not have the authority to define justice in their own terms. The essay concludes with a discussion of how children's attorneys are beginning to critically assess their dominance and their approaches to the legal representation of children, develop methods to ensure that the child’s viewpoint is expressed, and suggest different methods for achieving justice for children that are more holistic and reflective of the norms of child clients, their families and their communities.
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The designation of a stage of life called childhood over a century ago has led to a steady growth in the view that children have their own interests anchored to, but distinct from, their parents. Since the Progressive era when this view intensified, adults outside the family have pressed children’s interests in courts and before public policy makers with increasing breadth and frequency. More recently, the notions that children have voice and that voice should be heard have gained currency through the expressive power of the law, most universally in the Convention on the Rights of the Child (CRC). Although the United States, famously, is one of only two countries that has not ratified the CRC, federal and state law and procedure have moved toward the norm of providing representation for children in certain matters involving protective or coercive state intervention. It is not clear though whether this representation promotes children’s voice for reasons related in part to the attorney-child-client relationship and the tenacity of the best interests of the child guidepost.

This essay reflects on how lawyering for children relates to the personhood of children and youth. More concretely, it critically explores the role of children’s lawyers in promoting the individual and systemic interests of their youthful constituents. At a time when children are increasingly viewed as rights-holders, provided with attorneys,
and subject to coercive state intervention and restriction, questions regarding who speaks for children and how children’s voice informs discussions about childhood, dependency, family and community are particularly cogent. On behalf of individual, and classes of, children, lawyers are actively engaged in the creation, definition and promotion of rights regarding with whom children live and the roles among children, parents and the state in caring for, educating and disciplining children. This advocacy reaches both the heart of individual lives and the core of value production and promotion in a liberal republican democracy.

In the past fifty years, the children’s bar has grown in numbers and influence. It is not entirely clear, however, whether children are present and accounted for in this advocacy. In other words, there is some debate about whether this advocacy centers around children and their experiences or around the advocates’ views of who children are and what they need. The irony when the latter occurs is that children’s rights are viewed as an enlightened progression from children’s status as chattel under the exclusive control of their parents. Yet there has been little critical study of these children’s rights or the attorneys who create and press them. Nor is there much assessment of the conceptual-legal separation of children from their families when extra-familial adults represent children’s interests.

The maturing children’s bar and legal scholars, facing worsening conditions for youth, have begun to assess how attorneys can best promote the interests and norms of their child clients, rather than the interests and values of the attorney, or the larger legal

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and societal norms that inform law and policy. This assessment is crucial because representation occurs in confidential relationships in which children's attorneys have great power compared to their clients who may be too youthful to forcefully direct the representation. Moreover, as adults, children's attorneys may feel the need to protect their immature clients, imposing the attorneys' own views about what is best or least risky for their young charges. As a result, children's attorneys, by virtue of their social status and relative power are well-positioned to preserve current regimes, even at the expense of the values and desires of their child clients. In these ways, the attorney-child-client relationship provides an often hidden site for competing notions regarding justice for children.

This essay sets forth some critical observations about the role of children’s attorneys in reinforcing and challenging socio-legal norms, particularly those norms that are not child-driven or child-centered. Children's rights movements appear to comprise adults, mainly lawyers and other professionals, who largely embody dominant norms, view problems and solutions legalistically, and take little direction from the children on whose behalf they are seeking change. This critique builds on the work of social

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4 See discussion infra section D. The existing literature regarding community lawyering and cause lawyering has barely touched on the representation of children. See, e.g., STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN, POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); CAUSE LAWYERING, POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3-28 (Austin Sarat & Stuart Scheingold, eds., 1998); GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Thomas M. Hilbink, You Know the Type . . .: Categories of Cause Lawyering, 29 LAW & SOC. INQUIRY 657, 665-73 (2004).

5 These observations are part of a larger work in progress that examines the understudied area of child advocacy, where lawyers are inordinately powerful vis a vis their clients, and traces the role of attorneys and other adults in defining, developing, and enforcing children's rights.

scientists and other students of social movements, “cause lawyering” and critical legal ethics who have examined the roles of social movements and lawyers in promoting social and legal change, although these studies have largely ignored children’s attorneys. This essay adds insights from the growing interdisciplinary field of childhood studies, which has challenged dominant norms regarding childhood and adult-centered visions of children, while seeking to give relatively unmediated voice to children. My own research and legal experience regarding coercive state intervention into the lives of children and families who do not embody dominant norms and who are most vulnerable to losing their own voice and status during encounters with child welfare and juvenile justice systems also inform this critique.

The essay first reflects on the indeterminacy and contingency of the category of children, checking our natural tendencies to idealize children and childhood. The following section describes these children’s bars, noting their tendency to advocate for children in isolation from their communities. It suggests that in contrast to attorneys who advocate for social and economic justice, children’s attorneys generally contemplate legalistic problem and solutions. After noting the decline in children’s well-being despite the growth of a children’s bar, the next section the sketches five thematic observations

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7 E.g., Stuart A. Scheingold & Austin Sarat, Something to Believe In, Politics, Professionalism, and Cause Lawyering (2004); Cause Lawyering and the State in a Global Era (Austin Sarat & Stuart Scheingold, eds., 2001); Cause Lawyering, Political Commitments and Professional Responsibilities 3-28 (Austin Sarat & Stuart Scheingold, eds., 1998)

8 E.g., Allison James & Adrian L. James, Constructing Childhood: Theory, Policy and Social Practice (2004); Allison James, Chris Jenks, Alan Prout, Theorizing Childhood (1998); Berry Mayall, Towards a Sociology for Childhood: Thinking from Children’s Lives (2002); Representing Youth (Amy L. Best, ed. 2007).
that might account for this anomaly and that raise questions regarding the utility of children's lawyers and the roles that they might occupy. These themes relate to the multiple gulfs between children and attorneys, and the limitations of rights-based advocacy, particularly for clients who do not have the authority to define justice in their own terms. The essay concludes with a brief discussion of how children's attorneys are beginning to critically assess their dominance and their approaches to the legal representation of children, develop methods to ensure that the child’s viewpoint is expressed, and suggest different methods for achieving justice for children that are more holistic and reflective of the norms of child clients, their families and their communities.

A. Constructing the Child, Children and Childhood

We have all been children. Many of us parent children. It is, therefore, easy for adults to believe we have knowledge and expertise about children and to project our experiences onto other children. Such transferences are reflexive. If, however, we view children as subjects and to some degree as authors of their own lives, it is essential to interrupt and then examine the foregoing presumptions. This deconstruction is particularly important for adults who are strangers to the child, but in positions of power that can significantly affect the child’s life. This deconstruction is also important for adults who advocate for classes of children.

Children’s attorneys are in such positions of unrelated power. In individual matters, children’s lawyers can affect whether a child will live with his or her family or in foster care, placed on probation or incarcerated, or maintain contact with siblings after family dissolution or change in custody. These representatives bring class actions regarding the terms of juvenile confinement and children’s health, education and welfare
services. Similarly, these lawyers, and other professionals, also engage in national and local policy making to lobby for or against laws and regulations that will affect matters like education, family protection and racial preferences in adoption. In these fora, advocates frame the problems and their remedies. Moreover, there are growing ranks of prosecuting attorneys who do not represent children but prosecute child abuse and neglect and juvenile justice cases on behalf of children and society. These attorneys too have a great effect on children and often in proceedings which specifically require that the child’s best interests or welfare be considered if not paramount.

Stepping back then, it is helpful to explore what we mean or see when child is the referent and a flesh and blood child’s interests are at stake. “Child” functions as a relational term, a legal status, an adjective, and a cultural structure. As a relational term, child refers to kinship relationships, generally through the relationship to a parent, such that even adults are children in connection to or through their parents. As a legal matter in the United States, generally a child is a human being between the point of birth and eighteen,9 or an adult in relation to a parent in probate and other contexts. As adjectives, “child” or “childish” or “child-like” refer to a set of behaviors or perspectives with positive and negative connotations.

Perhaps most fundamentally, “child” refers to someone who inhabits a “structural site . . . occupied by children,” known as “childhood.”10 This site is culturally bound and includes culturally contingent notions of psychological, cognitive and physiological development as well as a set of rules regarding the proper roles, treatment and behaviors


10 Allison James & Adrian L. James, Constructing Childhood 14 (2004).
of children. As such, the construction of childhood “varies considerably across and between cultures and generations, and in relation to . . . children’s everyday lives and actions.” Thus, the determination of who children are and what they need depends upon cultural notions of childhood. In turn, the assessment of a particular child reflects the observer’s conceptions of children, a group that is itself a bundle of socially constructed and contingent norms regarding the nature of childhood.

Law regulates childhood, codifying the dominant values and conceptions of who adults and children are and what they need. Locally and generally speaking, those dominant values might include adult, rational, white, middleclass, nuclear-family, English-speaking, male, heterosexual, native born, and financially independent. According to those norms, children are young and vulnerable, white, middleclass, two-parented, dependent, obedient, innocent, not sexually-active, English-speaking, unemployed, cared-for and not care-giving, irrational, unformed and without judgment. Children who do not reflect these norms, “other people's children, . . .[are viewed] largely as a danger and a threat to societal order and to adult economic and personal security.” The law promotes law-makers’ norms and frowns upon or ignores such phenomena as

11 See, e.g., BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD, THINKING FROM CHILDREN'S LIVES (2002); ALLISON JAMES & ADRIAN L. JAMES, CONSTRUCTING CHILDHOOD (2004).

12 ALLISON JAMES & ADRIAN L. JAMES, CONSTRUCTING CHILDHOOD 13 (2004).

13 See JAMES & JAMES, supra note , at 49-51.


child labor, children caring for family members, children’s sexuality, and the value of children’s subjectivity, voice and agency.

Moreover, in a democratic republic such as the United States, these laws reflect those with the social, legal, economic and political power to make law. As people without such power, children have at best a very indirect affect on the law. Children do not vote and do not hold office. It is the adults (with power and access), not children, who identify children’s existence, needs, and authority and turn them into law. These identifications are a function of personal experience – of the adults themselves as reflected by their childhood or the childhoods of children they know. These identifications are also informed and pressed by experts on childhood, such as doctors, psychologists, social workers, lawyers, and educators; these experts too are informed by their own personal experiences.

It appears then that children inhabit a large and complex category called childhood that serves descriptive, normative and regulatory purposes. Yet, children have little say about it because they are in this category. Instead, their parents or attorneys identify and press their interests as a class and individually. Those children who are not part of the dominant class may have even less impact on the substance of the law, because their parents have little political and economic power and there are substantial cultural gaps between the children and the attorney who might help form law. Given the silence of children in these processes, the contingency of childhood and the cultural

diversity of norms, who represents children’s interests can make a great deal of difference regarding whether a child’s own values and experiences or those of the attorney are reflected in advocacy.

B. The Children’s Bar

Children's attorneys generally seem to be motivated to help children and thereby do well for them. Generally, these attorneys want to give children some voice and protect their interests in legal proceedings or to reform the content or application of the laws affecting children. In this way, they seek justice for children, but they may not be terribly self-conscious about what that means, what their role is in defining justice, or whether promoting justice for children actually helps children. In other words, most children's attorneys have barely begun to deeply and broadly explore their role in making children's lives better or worse. This is not surprising given the relative youth of the children’s bar itself.

As dependents under the law, children’s legal interests normally have been represented by their parents and in the context of a family unit. Only recently did children begin to be viewed as having separate interests and rights apart from their parents and a need for attorneys. At least two major legal events have led to the

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17 Appell, supra note [CV]. Indeed, children's attorneys are rarely in it for the money - for there are more remunerative areas of the law and wealthier client bases.

18 Appell, supra note [CV].

19 Although children have enjoyed legal protections since colonial times and have been subject to removal from their families for centuries (particularly African American children in slavery and Native American children), it was not until the Progressive era and the related rise of social sciences and professionalism that children began to be seen as needing oversight outside and apart from the family. See, e.g., LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999); JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION (1991); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S
expansion of the number of children's attorneys in the United States. First, in 1967, the United States Supreme Court decided In re Gault, which held that children subject to juvenile delinquency proceedings are entitled to procedural due process protections, including the provision of an attorney. Second, in 1974, Congress enacted the Child Abuse Prevention and Treatment Act (“CAPTA”), which requires states to provide representatives for children subject to child welfare (abuse and neglect proceedings). Since those events, and perhaps related to the expansion of rights movements, there has been both an increase in the number of children's attorneys and a growing self-consciousness about child advocacy as a specialized field. In turn, the children’s bar has become further specialized according to doctrinal areas: child welfare, juvenile justice, education, domestic violence, private custody, adoption, immigration, and others.

Child welfare and juvenile justice attorneys are by far the largest and perhaps oldest bars, probably as a result of the federal mandates for representation in these areas and the existence of juvenile courts for over a century. These two bars often view themselves and their roles differently. Very generally, juvenile justice lawyers are defense attorneys, protecting their clients from coercive, punitive state intervention.

Rights (1994).

20 387 U.S. 1, 42 (1967).


22 In re Gault, 387 U.S. 1 (1967); CAPTA; David S. Tanenhaus, Juvenile Justice in the Making (2004). Child welfare and juvenile justice are also the two primary areas over which juvenile courts have jurisdiction. Although children's attorneys also represent children in other legal matters, the bulk of organization and literature involves juvenile justice and dependency attorneys.

23 E.g., Kristin Henning, It Takes a Lawyer to Raise a Child? Allocating Responsibilities Between Parents, Children & Lawyers in Delinquency Cases, 6 Nev. L.J. 836 (2006); Michael
while child welfare attorneys may be more prosecutorial or paternalistic, frequently viewing themselves as protecting young children from abusive or neglectful parents.\textsuperscript{24}

Although the children who receive representation in these two various legal areas are often from the same neighborhoods and families, the legal net in which they are caught may well determine the role their attorneys inhabit. Indeed, these two bars also have in common a client base that is disproportionately composed of African American and Latino children from economically disadvantaged communities.\textsuperscript{25}

For the most part, a uniform code of conduct governs attorneys within each state, regardless of their clients’ age and in what substantive area of law they practice. These codes direct the attorney to follow the client's objectives in the representation, to be loyal to the client and to avoid other clients, matters or interests that interfere with that loyalty.\textsuperscript{26} These codes, however, say little about the unique challenges of representing

\begin{footnotesize}
\begin{enumerate}
\item American Bar Association, \textit{Model Rules of Professional Conduct} (2004), Rule 1.2(a) (“a lawyer shall abide by a client's decisions concerning the objective of representation”); Rule 1.6(a) (“a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”); Rule 1.7(a) (“a lawyer shall not represent a client if...the representation of a client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the
Thus, children's attorneys, judges and ethicists have developed guidelines for
attorneys to help account for the special challenges of representing children, who by
definition range in age from zero to eighteen and who inhabit a wide range of
developmental stages.28 Perhaps not surprisingly, these two main groups of children's
attorneys have also developed distinct guidelines from each other, reflecting the more
narrow age range of children subject to juvenile justice jurisdiction and the wider, and
younger, age range of children subject to dependency proceedings.29 These distinctions
also reflect the different conceptions the two children's bars generally have about the
nature and beneficence of state intervention.30 Simply put, the dependency bar is more
likely to welcome state intervention while the delinquency bar opposes it.

Each bar’s guidelines, however, primarily embraces a fairly traditional and

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27Bruce A. Green & Bernardine Dohrn, Foreword: Children and the Ethical Practice of

28Recommendations of the UNLV Conference on Representing Children in Families:
Child Advocacy and Justice Ten Years after Fordham, 6 NEV. L.J. 592 (2006) [hereafter UNLV
Recommendations]; Recommendations of the Conference on Ethical Issues in the Legal
Representation of Children, 64 FORDHAM L. REV. 1301 (1996), also reprinted in 6 NEV. L. J.
1408 (2006) [hereafter Fordham Recommendations]. These Recommendations and other information about the UNLV
Conference, including the working group reports are also available at http://rcif.law.unlv.edu/.

29E.g., AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO
REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, http://www.abanet.org/child/repstandwhole.pdf (last visited June 6, 2006); NATIONAL
ASSOCIATION OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION
(American Bar Association, 1996); but see Fordham Recommendations and UNLV
Recommendations, supra note .

30Martin Guggenheim, How Children’s Lawyers Serve State Interests, 6 NEV. L.J. 836
individualized attorney-client model with some further prescriptions relating to the clients’ youth and the nature of the proceedings. That is, these attorneys mostly represent the children in legal proceedings individually or on behalf of a class. In this way, they are very much like other lawyers, protecting the rights of their clients and, often, giving their clients “voice” in legal proceedings. In this role, children's attorneys promote state norms by participating in legalistic and individualistic definitions of problems and solutions. But they also challenge these norms to the extent that they defy attempts to categorize clients as deviant or law breakers (especially in the juvenile justice arena) and to the extent that they take direction from their clients and thus treat children as moral agents with their own identities and norms.

In addition, children's attorneys are often involved in group advocacy, seeking to effect system and policy change and conduct class action litigation aimed at reforming systems. Children's attorneys may also advocate for changes in state or national laws relating to children. For example, the Child Welfare League of America, the Children's Defense Fund and the American Bar Association’s Center for Children and the Law appear to be regularly involved in child welfare legislation at the national level; the latter two organizations are composed of children's attorneys while the former organization

31For a discussion of the limitation of children’s rights and legal justice, see infra. [sec. C.5].

represents child welfare agencies. It is not clear, however, whether children's attorneys (or attorneys who identify as children's attorneys) advocate more broadly for policies that promote better social services and economic resources for families and communities, rather than for children in isolation from their families and communities.

Similarly, groups that do promote improved conditions for families and communities, advocacy that also supports children, do not appear to identify themselves primarily as children's advocates or children's attorneys. For example, the National Association for the Advancement of Colored People (NAACP) and its legal advocacy arm, the NAACP Legal Defense Fund, have been at the forefront of litigation to improve the lives of children, most famously in Brown v. Board of Education. More recently, the Advancement Project has taken on a number of racial, immigrant and economic justice issues that affect communities, education and children. Even the Bazelon Center for Mental Health Law, which has been a leader in successful child welfare system reform in the past several decades, does not identify itself as a children's rights organization although much of its advocacy centers around children's rights to education.


34 Attorney Marian Wright Edelman, director of the Children's Defense Fund, may be an exception. See Marian Wright Edelman, Why Don't We Have the Will to End Child Poverty?, 10 GEO. J. ON POVERTY L. & POL'Y 273 (2003).

35 Appell, supra note [CV].


and community based mental health treatment.38

In contrast, children's lawyers and child advocates do not seem, for the most part, to take holistic approaches to children. Instead, these advocates often appear to view children as separate and separable from their families and communities.39 Yet despite decades now of legal representation of children, it is not clear that children are any better off. On the contrary, schools are failing children academically while serving as pipelines to incarceration;40 children of color continue be disproportionately targeted for arrest and other coercive state intervention;41 the United States has the highest poverty rate in the western, industrialized world and is one of the very few countries that imposes life sentences on children, and is among the even fewer countries that have not ratified the Convention on the Right of the Child.42 This simultaneous deterioration of children's interests - or at least interests of certain children - and the growth of children's bars suggest that the question of the role of children's attorneys in legitimating or failing to


39For example, the Children's Rights Inc. website lists its issues as: “Child Abuse and Neglect; Child Fatalities; Foster Care; Preventing Foster Care Placement; Adoption; Youth Aging out of Foster Care”, http://www.childrensrights.org/site/PageServer?pagename=home_page.


42See Appell, supra note [CV]; Koh Peters, supra note [2006].
stem these policies is certainly worth noting. The following sections may serve to illuminate some of the challenges children’s attorneys face in identifying and seeking justice for children and which may have at least a partial bearing on children’s status.

C. Observations about Children’s Attorneys and Norms

A major question regarding legal representation of children and youth is what interests those attorneys serve and who defines them: the state, the attorney, the parents, or the children themselves. If the attorneys are inserting their own substantive values, the attorneys are standing in for the child or for their parents, who are the traditional arbiters of their children’s lives and values (especially in free middle and upper class families). As paid or volunteer professionals, attorneys are not likely to share the same socio-economic background and cultural values as their children they represent or to know the children better than children know themselves or their parents know the children. Of course as children age or when children are raised by persons other than their parents, the circle of people who know the child well widens to include friends, caregivers, teachers, ministers and other members of social organizations. What is true, however, is that attorneys are not normally members of children’s kin and other social networks.

Yet the number of children’s attorneys continues to grow.43 These children’s attorneys have extraordinary power to promote and undermine the norms that determine how their clients’ interests will be defined and met. Because it is not clear whose

interests children's attorneys serve\(^{44}\) and the interests of children are contested both generally and in particular contexts for particular children, the heightened power of children's attorneys deserves examination.

Preliminary findings regarding children's attorneys suggest that they, rather than their clients, may play a strong role in the promotion and destruction of norms affecting children. The following five interrelated thematic observations explain or flow from this finding. First, children's attorneys have extraordinary power in the attorney-client relationship. Second, and relatedly, the attorney-child-client relationship can serve to displace the parent as decisionmaker, moral guide and cultural progenitor for the child. Third, poor children and children of color are over-represented in legal matters for which children receive attorneys while their attorneys are disproportionately white and middle class and may not share fundamental racial, cultural, social and economic cornerstones with their clients. Fourth, and relatedly, children's rights, and particularly those for protection of which children receive attorneys, are frequently designed precisely to reinforce and propagate dominant societal norms and children’s attorneys are often enforcers of these dominant norm-based rights against non-dominant families in non-dominant communities. Fifth, children's attorneys, like many attorneys, take legalistic approaches to defining and solving problems and thus do not address systemic socio-economic conditions relating to their clients.

1. *Indeterminacy and the Extraordinary Power of the Child's Attorney*

Much has been written about the power of attorneys in the attorney-client

\(^{44}\) In the child welfare context, this power is at or near its height and at its most destructive to norms that diverge from dominant culture. Appell, *supra* note [CV].
relationship in individual matters, in class action contexts, and in policy arenas. When attorneys represent children this power is amplified for several reasons: (a) children are less able than adults to direct the representation; (b) attorneys may be appointed or engaged to represent the child’s best interests, rather than the child’s wishes or rights; (c) attorneys, as adults, feel responsible for children; and (d) the category of child is indeterminate, creating definitional space for attorneys. Moreover, children's legal, moral and social status as minors, immature beings, and dependants militates against empowerment and toward adult control. When attorneys represent children, a door opens that may empower the attorney to assert that control.

Indeed, people who inhabit the legal categories of childhood, such as “infant” and “minor,” span a broad developmental spectrum from preverbal to near-adult. Within that range, children's ability to understand consequences, project into the future, weigh options and direct their attorneys varies greatly. Accordingly, children's attorneys are subject to special considerations that may enhance or diminish the attorney's power, depending upon what rules apply. For example, an attorney might be appointed as a guardian ad litem who is required to represent the child's best interests or the attorney


\[\text{46 Appell, supra note [CV].}\]

\[\text{47 Green & Dohrn, supra note . In child welfare proceedings, it is common to appoint attorneys to represent the child's best interests. Koh Peters, supra note [2006].}\]
might be appointed as an attorney and be subject to the child's direction.\textsuperscript{48} Sometimes, attorneys are required to represent the child's wishes \textit{and} best interests.\textsuperscript{49} Ascertaining the attorney's role when the child is too young to direct the representation is an especially difficult challenge for the appointing entity and the attorney.\textsuperscript{50} Attorneys in juvenile justice proceedings, whose clients usually are adolescents or preteens, generally represent their clients as attorneys.

Studies and anecdotal reports suggest that child welfare attorneys (whose clients span the whole "childhood" spectrum) and even juvenile justice attorneys can be paternalistic with their clients to the point of disregarding the clients' direction, failing to consult their clients, and failing to keep the client apprized of case developments.\textsuperscript{51} When an attorney represents a very young or even school age child, the attorney has a great deal of power in that relationship to make strategy and even goal decisions for the child because of many children's developmental limitations and their youthful lack of interest in or connection to their attorneys.\textsuperscript{52} The hallmarks of the attorney-client

\textsuperscript{48}See also Model Rules of Professional Conduct, 1.14; Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child is My Client, But Who Am I?", \textit{64} FORDHAM L. REV. 1917 (1996); Green & Dohrn, \textit{supra} note , at 1292.


\textsuperscript{50}UNLV Recommendations, \textit{supra} note ; Fordham Recommendations, \textit{supra} note .


relationship - confidentiality and loyalty - create a private, inaccessible space between the attorney and child that shields from view what happens within the relationship; in this space, attorneys may be most free from accountability to the child and to others in the child's life, including the judge.

Moreover, the notion of “child” has much less coherence in social and material, as opposed to legal, contexts given the range children span across age, class, race, gender, sexual orientation and identity, nationality, language, culture, ethnicity, and geography. Even developmental norms associated with children are cultural and variable within the category of children. Of course attorneys for adults and for children each face these social and material differences among clients and between attorney and client, but the children’s bar further struggles with special considerations relating to children and childhood. These considerations are significant in the attorney-child-client relationship given the attorney's sometimes unchecked and unseen power in that relationship, combined with the recurring lack of a clear referent for the attorney to interpret or determine the child's objectives or interests. Without such a referent and unless the attorney takes special care to get to know the child and the child's family and community, the attorney must rely on his or her own experience or training. For many attorneys,


\[\text{\[54\text{Annie Bunting, Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue, 14 SOCIAL & LEGAL STUDIES 17, 18, 21 (2005).}\]

\[\text{\[55\text{UNLV Recommendations, supra note , pt. I.A..}\]}


however, legal training and life experience do not necessarily prepare them with the skills needed for representing children, such as cross-cultural competence and knowledge of family systems, child development and other disciplines. Even if attorneys were trained in these areas, their caseloads may well constrain attorneys from utilizing these skills. But without these competencies, skills and relevant experience, attorneys may make self-referential, unprincipled determinations about what is the best course for the child and the weight of risks and benefits attendant to any course of action.

In the class action and policy contexts, the attorney's power is particularly unfettered as the variety of children's material conditions, cultures, communities, and the like challenge general solutions. Some generalizations may be possible about age or legal status, such as that newborns cannot meet most of their own physical needs for survival without assistance or that a state agency is legally responsible for many aspects of rearing children in foster care. Beyond that, it is difficult to make meaningful statements about what children experience or need because they are so variable in such aspects as culture, race, language, community, family, values, sexuality, gender, and sexual orientation. For example, legislative advocacy regarding transracial adoption

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56 This is particularly true given the class, age, cultural, language and race difference between attorneys and child clients. See, infra., section C(3).

57 UNLV Recommendations, supra note , pt. II. Green & Dohrn, supra note , at 1286.


59 Appell, supra note [CV].

60 E.g., Removal of Barriers to Interethnic Adoption Act, 42 USC §§ 671, 674, & 1996b (2000).
might seem narrow enough, but is still a topic hospitable to generalizations across race, age, culture and gender.  

Conversely, it is easier to assess children individually because of the specificity of the task, but it is problematic to then generalize to other children from any individual child. For example, children's attorneys responding to the situation of certain clients (who may well be infants) might decide that legislation designed to protect Native American children's family and tribal relations should be limited (or perhaps expanded), but these attorneys may not take account of the values, experiences and wishes of other children who may have contrary views or these attorneys may not take account of how children's views may change over time. Although it is possible that older children affected by these laws might be organized and able to assert themselves into the law reform advocacy, it is not very likely and not clear that the children so organized would represent the interests of very young children or children who were not organized.

In other words, the challenges facing attorneys and child-clients are endemic to

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62 See Annette R. Appell, Uneasy Tensions Between Children's Rights and Civil Rights, 5 NEV. L.J. 141, 142, 166 (2004) (noting such an example and the contingency of the children's interests or desires depending on their age and situation). Indeed, the children's “interests” may be contingent on the identity of their attorney. See In re. Bridget R, 59 Cal. Rptr 2d 507, 515 n.2 (Cal. App. 1996) (in a matter regarding the custody of Native American twins, “the twins have been represented by three different attorneys over the course of these proceedings and have shifted sides in the controversy with each change of attorney”); see also Neta Ziv, supra note (describing how the lawyers in the disability rights movement chose to follow the direction of some but not other clients).
the attorney-client relationship and to group advocacy. Children though tend not to be organized\textsuperscript{63} and the category that unites them – their childhood – is perhaps even more diffuses than other social categories because “child” includes nearly all other social categories. This is not to suggest that group advocacy on behalf of children is impossible, but simply that the advocates are particularly unfettered unless they take special steps to address the unique barriers to discerning who children are and what they need.\textsuperscript{64}

2. The Child’s Attorney as Parent

Children's youth and the minimal direction that various states' ethical codes provide for representing children may make attorneys' obligations to their child clients unclear and perhaps inconsistent. The very act of appointing an attorney for a child assumes, or perhaps more accurately, fails adequately to account for, two things about children's autonomy: (1) whether the child has enough of it to direct the representation; and (2) whether the child has the power to decide certain issues under the substantive law. That is, there may be decisions that belong to the child's parents or guardian; examples of such decisions are determinations regarding the child's custody and the decision whether to contest or plead to charges in dependency proceedings. Without ethical direction, attorneys may assume the traditionally parental, judicial or client roles of deciding and weighing the child's interest. Attorneys may also feel morally obliged to protect children rather than to do their bidding.\textsuperscript{65}

In our liberal constitutional system, parents (or their designees) determine how

\textsuperscript{63} Appell, supra note [CV], at 718-722.

\textsuperscript{64} UNLV Recommendations Introduction, Pts. I & II.

\textsuperscript{65} Appell, supra note [CV].
and where their children will be reared, how and where they will be educated, what, if any, religion they will have and a host of other decisions related to moral freedom. This delegation of primary responsibility of child rearing to parents is based in political and moral philosophy that values individual moral autonomy and views government as maintaining the political conditions for people to determine for themselves what is the good life. In this system, democratically elected representatives govern subject to the rule of law, which, inter alia, protects individual liberty to determine one's own values and sources of meaning (within liberal constructs); this autonomy is in turn necessary to promote democracy. These freedoms arguably mandate decisional privacy within the parent-child relationship (albeit with some limits) as expressions of adult moral autonomy and as the primary method for shaping future democratic citizens who are separate enough from the state to govern in a democracy. The freedom to determine what is best for children belongs primarily to the parents and gradually shifts to children as they become more physically autonomous and independent.

This balance is interrupted and liberty diminished when children receive attorneys who consciously or unconsciously assume the role of determining what is best for children. Over two decades ago, Robert Mnookin defined the dilemma that continues to surround children's legal representation:

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67 *Id.* at 706.

68 *Id.* at 706-7.

69 *Id.* at 707.

70 *Id.* at 702-3.
Children need advocates because, in most circumstances, young persons cannot speak for and defend their own interests. And yet, because children often cannot define their own interests, how can the advocate know for certain what those interests are? More fundamentally, how can there be any assurance that the advocate is responsive to the children's interests, and is not simply pressing for the advocate's own vision of those interests, unconstrained by clients?71

Attorneys' natural tendencies are often to protect children and to look to themselves, rather than the children's families, to determine what protection of children or each child means. Indeed, it may be or seem to be unprofessional to look to the parent for guidance.72

In most child welfare and juvenile justice representation, the role of the attorney is to advocate for the individual child client. Thus children's attorneys look to the client for direction73 and view the child's interests as separate and often in conflict with the interests of other adults in the child's life, particularly parents.74 Although the reasons for providing lawyers for people are based, at least in part, on notions of client autonomy,75 children's attorneys are not always able to ascertain and follow, or perhaps are not always


72But see, Christine Gottlieb, Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests, 6 NEV. L.J. 1236 (2006).

73Particularly in the child welfare field, many attorneys represent their client's best interests. I do not address that issue in this essay.

74Henning, supra note [2006]; Guggenheim, supra note [2006].

75See Kate Kruse, Lawyers, Justice and the Challenge of Moral Pluralism, 90 MINN. L.REV. 389, 403-7 (2005).
confident in ascertaining and following, their child clients' direction. Moreover, most children (and adults for that matter) need assistance in reaching considered decisions.76

The attorney-child-client relationship almost by definition separates assessment of the child's interests from his or her family as a functional and substantive matter. The tendency of some lawyers to feel protective over their child clients and to believe they know what is best contributes to this separation. This dissociation of the child from his or her family also serves, conceptually, to isolate the child from his or her social and material conditions, which are themselves rooted in family and community.77 These phenomena may arise out of the ethics of legal representation, the dependency and immaturity of the child, and the fact that often when children have lawyers, it is because the fitness of one or both parents is at issue. As a result, children's attorneys may unselfconsciously insert their own views of what is best for children into the representation of the child.

Robert Mnookin's classic study of class action litigation on behalf of children stands out as a fine collection of case studies that critically examine the roles of clients, lawyers and courts in the advancement of children's rights.78 In that study, Mnookin found numerous problems regarding representation relating to client control, ability to assess the clients' wishes, the children's lack of agency in choosing their own lawyers,

76Kimberly Mutcherson, Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-making and Criminal Responsibility, 6 NEV. L. J. 927 (2006); see also, UNLV Recommendations, supra note 12, pt. IV.

77See Appell, supra note [CV], 713-14; Susan L. Brooks, Representing Children in Families, 6 NEV. L.J. 724 (2006).

and a great deal of overlap in interests among the lawyers on various sides of each case.\(^{79}\)

In short, a very few lawyers in a very small bar, either self-appointed or court-appointed, sought to represent the interests of children all over the country. Although this lawyer hegemony is common in class actions,\(^{80}\) child clients have even less control because of their youth and their lack of financial power or control over their attorneys.\(^{81}\)

More recently, Marty Guggenheim, who has long brought a critical perspective to child advocacy and was part of the children's bar Mnookin studied, has reviewed the New York Legal Aid Society Juvenile Rights Division ("JRD") from its inception in 1962 through its transition from juvenile defense representation to representation of dependent children after CAPTA's enactment in 1974 and through the 1980s.\(^{82}\) These attorneys were appointed by the court to represent children in individual cases in which one would expect their advocacy to be more cabined than in the class context where attorneys represent many clients with whom they have little personal contact.\(^{83}\) Nevertheless, the JRD attorneys interjected their own or the state's views of what was in their clients' interests, particularly as their appointments changed from defending juveniles in delinquency proceedings to representing children in dependency proceedings. Of this transition, Guggenheim found:

\(^{79}\)MNOOKIN, supra note , at 51-54.

\(^{80}\)Appell, supra note [CV], at 703-04.

\(^{81}\)MNOOKIN, supra note , at 54-55.

\(^{82}\)Guggenheim, supra note [2006].

\(^{83}\)See Appell, supra note [CV], at 695-705, 710 (distinguishing between legal justice and procedural justice lawyers, the latter representing their clients interests as defined by existing law and the former representing their clients while seeking to enlarge or create new rights).
as the center of gravity in the office shifted from criminal defense to child welfare practice, a remarkable transformation of a different sort was taking place. The defense types were rapidly being crowded out by lawyers who saw coercive intervention by the state in the service of advancing children's needs as a good thing to be supported by them."

Indeed, "[m]uch more than the caseload statistics changed at JRD from 1971 to 1991. The philosophy, behavior, and persona of the office also changed dramatically. . ." such that the attorneys became adversaries to their clients' parents. In fact, judges have reinforced this adversarial stance by removing children's attorneys who advocate against the state's position and Guggenheim and others have experienced children's attorneys who ignore their clients' wishes when the client expresses a desire to return home. The attorneys thus submerged not only the children's views, but also those of their parents, further displacing the parent's authority regarding children's interests. Moreover, this state-oriented advocacy occurs in a legal system in which children's parents do not receive meaningful and adequate representation, even though it is the parents who are the accused.

In contrast, children's attorneys who represent older children, particularly in the juvenile justice context, generally have brought and continue to bring a more traditional defense approach that is mistrustful of state intervention and seeks to protect children's

84 Guggenheim, supra note , at 809.
85 Guggenheim, supra note , at 813.
86 Guggenheim, supra note , at 819-20.
87 Guggenheim, supra note , at 823-24. This behavior on the part of attorneys may be explained by their fear of professional reprisal and their fear that if they advocate for return home, the child may be harmed, despite the fact that children are more likely to be harmed in foster care than by their own parents. Id.
88 Guggenheim, supra note , at 814-818.
freedom from the state rather than children's dependency on the state. In this context, although the attorneys do not represent the parent and may not seek the parent's input, they do not necessarily undermine or displace the parent. Moreover, they may, as zealous advocates, promote the child's wishes and interests, which are often inextricably related to or shaped by their families and communities.

It may not be surprising that these attorneys for older children are increasingly aware of the justice system’s racial and gender assumptions that are designed to control juvenile behavior. For example, lesbian, gay, bisexual, transgender, and queer youth are selectively arrested, prosecuted and sentenced because of they diverge from dominant gender norms; and once in care, treatment or detention experience unchecked harassment. Moreover, the juvenile justice system presently and historically enforces dominant racial and gender norms against African American girls while disregarding the social, familial and material conditions that lead to the arguably unlawful behavior and

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[89] E.g., Taylor-Thompson, supra note [2006], 1162-64; Guggenheim, supra note , at 807-808. This is not to say that paternalistic children's attorneys do not populate criminal and juvenile justice contexts. See, Katherine R. Kruse, Standing in Babylon, Looking Toward Zion, 6 NEV. L.J. 1315, 1317-21 Erik Pitchal, Buzz in the Brain and Humility in the Heart: Doing It All, Without Doing too Much, on Behalf of Children, 6 NEV. L. J. 1350 (2006).

[90] Henning, supra note [2006].


[92] Barbara Fedders supra note, at

[93] Taylor-Thompson, supra note , at 1162 ( “History reveals a juvenile justice system designed, at least in part, to bring girls in line with white middle class standards for appropriate feminine behavior. The difference that girls exhibited by virtue of their sexual expression, ethnicity or race permitted the state to target them in an effort to assimilate them into dominant culture”); Appell, supra note [virtual mos] at 770-74.
arrest in the first place.94

Both the juvenile justice system and dependency system view families of color, particularly African American, more negatively than white families, thus further transplanting state norms for family norms.95 “The system that results stubbornly reflects, and then acts on, race based conceptions of deviance and gender-based perceptions of appropriate behavior that all too often reinforce racial, economic and social hierarchies.”96 Whether children's attorneys challenge this hegemony depends on the attorney's self-awareness, knowledge of these forces and recognition that this punitive, ungenerous system itself is the product of well-intentioned advocates who sincerely seek to help children.97 If attorneys do not carry this knowledge and are unable to navigate the precarious balance among identifying, over-identifying and failing to identify with the client, then even well-meaning children's attorneys are likely to promote state norms over those of the child and her family and community.98

3. Disparities Between Children's Attorneys and the Children They Serve

The list of differences between attorneys and the children they represent are vast. There are, of course, the age, developmental and educational differences. But most

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94 Taylor-Thompson, supra note .

95 DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Peggy Cooper Davis & Gautam Barua, Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law, 2 ROUNDTABLE 138 (1995); Taylor-Thompson, supra note , at 1158-59.

96 Taylor-Thompson, supra note , at 1162.

97 See id. at 1163.

98 See id. at 1163-64.
striking are the class and race differences. As noted above, children in the child welfare and juvenile justice systems – the dominant areas in which children receive lawyers – are disproportionately of color (African American, Native American and, at least in juvenile proceedings, Latino). Attorneys are disproportionately white. Attorneys are also, by definition middle or professional class and few come from poor backgrounds. In contrast, the vast majority of children represented by attorneys are poor. These disparities are particularly acute in the context of representing children in child welfare and juvenile justice proceedings for not only do the attorneys share little common ground with the children along racial, social and economic lines, but there is little incentive or opportunity for children's attorneys to move beyond the courthouse walls and into the children's communities and families. On the contrary, rules of confidentiality and loyalty to the child client would make such ventures unethical without

99 Supra notes [in sec. B].

100 According to the American Bar Association, “America's general population is about 75% white, but the legal profession is nearly 90% white, the 2000 census reported. Yet, minorities represent only about 20% of law school enrollment, and that percentage is dropping...” http://www.abanet.org/leadership/councilondiversity/home.html.


103 Crushing case loads are a significant barrier to such investigation. See Shari F. Shink, In Search of a Child's Future, 6 NEV. L.J. 1374 (2006) (describing caseload crisis); see also, Katherine R. Kruse, Standing in Babylon, Looking Toward Zion, 6 NEV. L.J. 1315 (2006) (noting the practical disparities between aspirational and everyday child advocacy).
express permission of the child.104 Moreover, as discussed in the next two sections, legalistic approaches, and children’s rights themselves, may reinforce dominant norms and fail to address the social and material conditions of children, their families and their communities.

4. *The Role of Children's Rights in Norm Enforcement*

A basic children's rights narrative holds that children's rights protect children and their freedom,105 and that the attorney-client relationship protects children from the loss of these rights and enables children to have a voice in decisions about their lives; giving children voice in turn promotes their moral autonomy and, perhaps, leads to better outcomes.106 Of course the notion of children's rights is complicated by the contingency and variability of childhood and the unique but changing capacity and needs of children as they age. A full discussion of the rich and growing literature regarding children's rights,107 is beyond the scope of this paper, but it is sufficient to note here that children's rights are generally recognized to include both protective and liberty rights, or as this

104 See UNLV Recommendations, supra note , at pt. IA.


107 E.g., DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 2nd ed. (2004); GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS; JAMES & JAMES, supra note [ ]; JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006); Appell, supra note [uneasy tensions].
author refers to them, as dependency rights and quasi-civil rights. Each of these two types of rights is very important, but they are not equally liberatory, because the former rights type promotes socialization into dominant norms while the latter protects children's freedom from state interference with the child's liberty.

Dependency rights govern the care and custody of children. These rights are largely rooted in the parens patriae doctrine, which both protects children and promotes dominant societal norms. These rights exist precisely because children are dependent and are not designed to promote independence or autonomy during minority. Instead, the aim of dependency rights is the social development and control of children either by the parent (or other adults, such as teachers and guardians) over the child, by the state over the parents through promulgation of general standards regarding child welfare, or through direct benefits such as welfare and education.

These dependency rights include children's "right" to be sheltered, fed, nurtured, and educated and are reflected in laws governing child protection, child custody, mandatory education, and material aid to families like food and cash assistance (including child support) and medical care. Some of these benefits or rights do not

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108 Appell, supra note [Uneasy Tensions]. There are other types of rights, but these two are the ones for which children normally receive or engage legal representation. Id. at 150-53.

109 Id. at 153-61.

110 Appell, supra note [Uneasy Tensions], at 153-61.

111 Although an aim of providing for children during their dependency is to prepare them to be autonomous and self-supporting adults. Id. at 153.

112 Indeed, as Peter Edelman recently noted: “At its heart the war on poverty was a strategy to mold children, youth, and young adults into capable people who could function successfully in the job market and be good citizens.” Peter Edelman, The War on Poverty and Subsequent Federal Programs: What Worked, What Didn't Work, and Why? Lessons for Future Programs, May-June 2006 CLEARINGHOUSE REVIEW 7, 10.
belong directly to the child, but instead may flow to the child through the parent or guardian. The foundational dependency right is for children to be reared by their parents. This right, from the child's perspective, may have constitutional dimensions,\textsuperscript{113} but from the parents' perspective, the right to bear and rear children is clearly fundamental.\textsuperscript{114} Generally, children are recipients or beneficiaries of dependency rights; and even when these rights empower them to make choices regarding their own care and control, their choices are limited to contexts and options adults dictate.\textsuperscript{115}

Quasi-civil rights are those rights that arise conceptually, and historically, out of the civil rights movements. These rights aimed to protect members of non-dominant groups (e.g., racial and sexual minorities and women) from state interference and remove undue state barriers to legal and moral autonomy.\textsuperscript{116} These children's rights are "quasi-civil" because most of them do not extend to children in the same way or with the same breadth as they do to adults.\textsuperscript{117} These rights include the right to demand or expect from the state equal protection,\textsuperscript{118} due process,\textsuperscript{119} freedom of expression,\textsuperscript{120} and a limited


\textsuperscript{114}Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); Santosky v. Kramer; Smith v. OFFER; Mabe v. San Bernardino County, 237 F.3d 1101, 1107 (9th Cir. 2000); Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000).

\textsuperscript{115}GUGGENHEIM, supra note [book] at 17-18, 90-91, 130-32.

\textsuperscript{116}Appell, supra note [tensions], at 154-56. Recent United States Supreme Court Jurisprudence has cast doubt on the viability of the anti-subordination aspects of civil rights. E.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. ___ (2007).

\textsuperscript{117}Id. at 153.

\textsuperscript{118}Brown v. Board of Ed., 347 U.S. 483 (1954); Levy v. Louisiana, 391 U.S. 68 (1968);
right to seek an abortion. Because of children's dependencies, their civil rights are not coextensive with adult civil rights. For example, the United States Supreme Court has not extended the Constitution's criminal rights amendments to children but instead has invoked the more fluid due process standard when children are in the juvenile justice system. Similarly, the Court has not fully extended free speech to children, but left the question of what materials children can view to their parents. These quasi-civil rights protect children from over-reaching state action that interferes with a child's freedom to think freely and be treated fairly. These rights are similar to adult civil rights but are mediated by the child's minority.

It is the intersection of rights and representation that determines whether children's attorneys serve to reinforce dominant norms or meaningfully bring the identities and values of their clients to bear. In other words, representation of children's dependency rights tends to promote dominant norms because these rights embody dominant values regarding how children should be raised. Furthermore, the very fact of representation separates children's interests from those of their parents' and displaces parental assessments of their children's interests. Particularly in the dependency rights

119 E.g., In re Gault, 387 U.S. 1 (1967).
120 E.g., Tinker v. DeMoines, 393 U.S. 503 (1969).
124 See Appell, supra note [Uneasy Tensions], at 150-61.
context, legal representation enables attorneys and other involved professionals to substitute more homogenizing norms for those of the child's family. Conversely, representation of children’s quasi-civil rights protects the children from state domination over their person or moral choices and expression. Thus lawyers representing children's more liberatory rights are less likely to promote dominant norms.\textsuperscript{125}

This distinction between children's quasi-civil and dependency rights roughly echoes the distinction between the children's bars discussed above in which attorneys representing children in child welfare matters feel particularly protective of their clients and view themselves as promoters of state interests while juvenile justice attorneys, who represent children's civil right to due process tend to be more hostile to state intervention. These distinctions are also, no doubt, related to the age differences of children in each type of matter; the juvenile justice client generally middle-school age and even older, while the child welfare client spans from birth to eighteen (or older).\textsuperscript{126} In any event, the separation of children from their families through the appointment of counsel who are ethically obligated only to the child, combined with the dominance of lawyers and the immaturity of children, can place the lawyer in an unduly powerful role of imposing the lawyer's values (which are more likely to be reflective of dominant norms) on the child's

\textsuperscript{125}Of course attorneys are able to impose their or dominant norms on clients of any age. See, e.g., Bell, supra note ; Ronald R. Edmonds, \textit{Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits}, 3 BLACK L. J. 176 (1974); Neta Ziv, supra note .

\textsuperscript{126}For example, in Nevada, although juvenile justice jurisdiction applies to all children under the age of eighteen (NRS.62A.030), children under eight cannot be remanded to custody even for non-criminally defined acts (N.R.S 62E.510 & .520) or punished for a criminal act. See NRS. 194.010. Child welfare jurisdiction extends to all children under eighteen (NRS 432B.040) and contains no age floor for substitute custody. NRS 432B.480.
decisions.127

5. Limitations of Legal Rights Approaches

The very context of legal representation is often framed by a single or related set of legal issues. For children legal representation often arises in the context of litigation.128 Litigation primarily is concerned with legal rights which are extraordinarily important – particularly for those who, like children, have few rights or inhabit a place without political power.129 Yet rights are mostly individualistic and individualizing, which could be problematic for children who are dependent on and enmeshed in family systems.130 Indeed, in light of the extent to which children are embedded in and dependant upon families, it may be counterproductive to divorce the welfare and needs of the child from those of the family (and community) are essential to the child's welfare.

127 See Appell, supra note [CV].


129 Appell, supra note [vm], at 765-787 (defending the political importance of family rights for families that do not meet dominant norms of class, race, marital status and gender); Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority, in CAUSE LAWYERING, POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 9 (Austin Sarat & Stuart Scheingold, eds., 1998) (noting lawyers can "use rights claims" to expose inequality and lay bare power disparities and social differences); Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L.L. REV. 401, 416 (1987) (“rights imply a respect . . . which elevates one's status from human body to social being.”)

Rights also reinforce existing power structures and socio-economic inequities. Instead, legalistic approaches do little to address systemic problems that create risks for children, such as racism, poverty, poor schools and limited economic opportunity. On the contrary, legalistic approaches may legitimate systemic problems, and amount to mere tinkering with law and legal systems which are by nature conservative. For example, in the juvenile justice and education contexts, children’s rights are focused on the individual child. More money is spent on locking up children than on public schools. The schools in turn are increasingly resorting to diagnosis and medication to

131 See, e.g., Wendy Brown, Rights and Identity in Late Modernity: Revisiting the “Jewish Question,” in IDENTITIES, POLITICS, AND RIGHTS 85, 87, 118-19, 123 (Austin Sarat & Thomas R. Kears, eds., 1995) (claiming rights depoliticize groups and individuals and instead serve merely to privatize and mask social and material conditions and political and economic forces); Richard Delgado, About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties, 39 HARV. C.R.-C.L.L. REV. 1, 9-11 (2004) (expressing this critique in context of civil liberties, rather than civil rights); Martha Minow, Children's Rights: Where We've Been, and Where We're Going, 68 TEMPLE L. REV. 1573, 1579 (1995) (“The language of individual rights does not begin to illuminate the locus of power and responsibility in corporate, foreign policy, and other adult decisions that have foreshortened the life options of so many young people.”).

132 Robin West, Re-Imagining Justice, 14 YALE J.L. & FEMINISM 333, 340 (2002); see also William E. Forbath, Not So Simple Justice: Frank Michelman on Social Rights, 1969 - Present, 39 TULSA L. REV. 597 (2004) (rehearsing the ultimate failure of constitutionally-based economic justice litigation and theory); Sarat & Scheingold, supra note , at 105 (noting conservatism of the law and limitations even of political or legislative strategies for achieving distributive justice); Derrick A. Bell, supra note , at 478, 488 (explaining how the legal strategy for school desegregation failed to account for "the complexity of achieving equal educational opportunity for children to whom it so long has been denied" and the fact that "racial subordination of blacks [would be] reasserted in, if anything, a more damaging form.")

133 Menkel-Meadow, supra note , at 49.


manage students. Thus the problems and solutions for youth are personalized, individualized and pathologized while the remedies address behavior through penal and medical models, rather than community development, job training, better schools, parks, and after school programs. Indeed, the public school system has become, especially for disadvantaged youth of color, a “pipeline” to prison rather than to the trades, unions, colleges and professional schools.

In child welfare or other custody matters as well, this individuation defines children and their needs in developmental, rather than socio-economic terms. Thus, children's rights in these and other dependency contexts do not address, for example, a living wage for families, public recreation areas, or the distribution of economic and social capital. Instead, these children’s rights address psychological attachments to persons who provide conventionally good developmental environments and provision of a safe home in which the child's individual need for physical and emotional growth and safety is met, but not affordable daycare, housing, well-funded schools and safe communities. For the individual child (and in general), child welfare does not look to remedy socioeconomic risks in the child's community, and too often fails to apprehend

136 GROSSBERG, supra note [] 32-33.

137 GROSSBERG, supra note [] 32-35.


139 See Peggy Cooper Davis, The Good Mother: A New Look at Psychological Parent Theory, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996) (arguing that children's psychological attachments to the parents from whom they are removed in child welfare proceedings are severely undervalued while those attachments children have to their foster parents are privileged).
the safety in that community. Instead, the child's child welfare rights require services to be provided in the home to make it safe or for the child to be removed to another home.

The very growth of children's attorneys also reflects, and indeed rises out of, a series of policy decisions that have even more narrowly defined child welfare in individual rather than social and economic justice terms. These policies exacerbate liberal notions of the privacy of wealth and need, in which children's welfare is directly related to the social and economic resources of their parents and community, by replacing more direct funding to poor families with the child abuse and neglect system as a primary method of addressing children's welfare. In other words, with the advent of CAPTA and the reforms to foster care funding that followed in 1982, federal funding was all but removed from poor families and given to state agencies and foster and adoptive families; the following decade, aid to poor families under the Aid to Families with Dependent Children program became much more limited and temporary under the Personal Responsibility and Work Reconciliation Act. That Act essentially forbade poor

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women to care for their children rather than work for wages at about the same time that Congress increased federal incentives for adoption and essentially mandated termination of parental rights for most children in foster care longer than one year. All of this while the United States falls farther and farther behind its wealthy peers in expenditures for children and families.

D. Critical Assessments and Corrections: The Intersection of Substance and Representation

These worsening conditions for children and the apparent failure of children’s attorneys to stem this tide raise questions about the role and value of such representation. The relationships between rights, autonomy and legal representation for children are complex and do not appear to have received much integrated treatment. Indeed, while children’s attorneys and academics continue to press children’s rights and call for more children’s representation, there has been little discussion of these relationships. What limited critical analysis exists about children’s rights has occurred apart from the discussions about legal representation of children.

Scholars have also been studying the role and effectiveness of legal rights for children. Some scholars have addresses the beneficence of children’s rights. Others


146 Guggenheim, supra note [2006], at pp. 825-28.

scholars have addressed the racially and economically regressive and homogenizing aspects of the substance of youth and family law, particularly in the child welfare and juvenile justice areas,\(^\text{148}\) noting that separating children or their interests from their families and communities, although sometimes necessary, can discount the fullness of their lives.\(^\text{149}\) In the meantime, members of, and organizations within, the children's bar have for sometime been engaged in identifying problems and promoting better practice within the bar.\(^\text{150}\) The attorney-client relationship and its individualistic, rights-based aspects proved to be challenging in the context of child and youth representation because children often are not, as a legal matter, empowered to make decisions, but instead are

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\(^{149}\) Appell, supra note [disp mo 2004], at 115.

\(^{150}\) E.g., JENNIFER RENNE, LEGAL ETHICS IN CHILD WELFARE CASES (2004); AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, STANDARDS FOR THE CUSTODY; PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES (August 2004); Michael D. Drews & Pamela J. Halprin, Determining the Effective Representation of a Child in Our Legal System: Do Current Standards Accomplish the Goal?, 40 FAM. CT. REV. 383 (2002); David R. Katner, Coming to Praise, Not to Bury, the New ABA Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases, 14 GEO. J. LEGAL ETHICS 103 (2000); Jesica Matthews Eames, Seen But Not Heard: Advocating for the Legal Representation of a Child's Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia, 48 EMORY L.J. 1431, 1453, 1460-67 (1999); Jan C. Costello, Representing Children in Mental Disability Proceedings, 1 J. CENTER FOR CHILD & CTS. 101 (1999); see also Shepherd & England, supra note , at 1924-32, 1936-41 (rehearsing studies of children's attorneys and standards of practice).
dependent on others, usually parents. Thus questions about representation surround what the role of children’s “best interests” is or should be in the legal representation of children who are not considered developmentally or legally competent to make decisions about their own lives. Moreover, like adults but with less independence, children are socially and materially embedded in families and communities and dependent on them for identity, affection, and belonging.

More recently, however, the children's bar, child advocacy organizations, law professors and other child and youth advocates, have been addressing these substantive and procedural issues by exploring the role of children's attorneys in promoting and perpetuating the inequities of children's law. Based on widespread concerns regarding both ethical representation of children and the worsening status of children, these groups and others with expertise regarding children, came together for two gatherings, ten years apart, to examine these questions. The purpose of these historic meetings was to critically and prescriptively examine the role of lawyers for children as legal

151 E.g., Appell, supra note [uneasy t]; Green & Dohrn, supra note ; Guggenheim, [2006]; Henning, supra note []; Fordham and UNLV Recommendations, supra note.

152 The gatherings included front-line attorneys, child advocacy leaders, professors, bar associations and child advocacy organizations, plus others with expertise regarding children. Participants in the Conference on Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham, 6 NEV. L. J. 688-691 (2006). Participants in the Conference on Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 1395-97 (1996). The sponsoring organizations for these gatherings represented most of the leaders in legal ethics and child advocacy, including the ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility; ABA Child Custody and Adoption Pro Bono Project; ABA Section of Family Law; ABA Section of Litigation; Home At Last, Children's Law Center of Los Angeles; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; National Juvenile Defender Center; Stein Center for Law and Ethics, Fordham University School of Law; Support Center for Child Advocates; Youth Law Center, and their predecessor organizations. Cosponsors for the Conference on Representing Children in Families: Children’s Advocacy and Justice Ten After Fordham, 6 NEV. L.J. 591 (2006). Their representatives and many others composed the conference participants.
professionals and, perhaps derivatively, as agents of law reform. The first gathering was at Fordham Law School in December 1995, and second at the University of Nevada, Las Vegas, Boyd School of Law in January 2006.

The core aim of these gatherings was to help provide ethical direction to counter unprincipled and overly discretionary legal representation in the children’s bar. The conferences each built on the observation that the rules of professional responsibility supply little illumination for the complexities of representing children, providing perhaps too wide a berth for attorneys who may be well-trained in the law, but not necessarily trained to represent children. The participants at these working conferences were united in their beliefs that “improving professional representation . . . matter[s] to the lives of children” and children's attorneys can make a difference – for better and for worse. The underlying and crucial presumption of these conferences was that professional standards “influence lawyers' responses” to the types of difficult legal


155 Model Rules of Professional Conduct, 1.14. There were, however, a handful of guidelines for such representation. See Shepherd &. England, supra note 30 (rehearsing the standards). The conference itself built on work “previously undertaken" to “fill the gaps in the professional codes.” Green & Dohrn, supra note , at 1292.

156 Green & Dohrn, supra note , at 1286. “Law schools rarely educate students to understand the racial, ethnic, class, and cultural backgrounds of those who comprise the child-client population . . . . Law schools do not prepare lawyers to overcome obstacles these differences present in communicating with children, evaluating children's goals, and understanding children's options.” Id.

157 Green & Dohrn, supra note , at 1284-85.
and ethical choices lawyers for children face and that when “professional standards give clear guidance as to appropriate professional practices, lawyers will strive to uphold them even in the face of pressure to do otherwise.” 158 As such, the conferences set out to provide that needed guidance.

The Fordham Children's Conference sought answers to questions that included what is the role of the child’s attorney, what should attorneys do when their child clients could not speak, expressed objectives that seemed unwise or even dangerous, or had conflicts with others the attorney represented (e.g., the child's siblings, parents or guardians); what was the role of the child's best interests in the representation; how could an attorney determine a child's best interests; and what did an attorney do when he or she was appointed to represent the child's best interests. The Fordham Conference answered those questions and more. 159 The Conference provided guidelines regarding allocating decision making between the child client and attorney; assessing a child's capacity to make decisions; making determinations about a child's best interests; interviewing and counseling child clients; maintaining confidentiality; identifying conflicts of interest; and judicial role regarding appointment of children's attorneys. 160

The Fordham Children's Conference resoundingly established that children's

158 Id. at 1287.


160 Fordham Recommendations, supra note .
attorneys should represent their clients like adults in the sense that lawyers should represent their child client's wishes. In other words, children’s lawyers should not assume that the child is incompetent to direct the lawyer if the child wishes for something the lawyer believes is unwise. For children unable to verbally direct their attorney, the Conference found that the attorney should represent the child's legal interests, not the child’s best interests.161 For children of all ages, the conference recommended that the attorney should know the child as much as possible through frequent contact with the child. Particularly for the child who cannot provide explicit direction, the attorney should learn from important people in the child's life and mental health and other experts who are trained regarding the needs and development of children.162 These, and other recommendations, were designed to mandate that children's attorneys provide principled representation based on professional standards, rather than substituting themselves for the child as the principal in the relationship.163 These mandates are crucial because children are generally powerless “to control or fire the lawyers who act in their name” and it is “professional norms [that] guide lawyers’ conduct.”164

The Fordham Children's Conference brought to child advocacy a broad and needed consensus regarding role and framework for the children’s bar. The conference work product provided structure and guidance for legal representation of children and the Fordham Recommendations were a useful supplement to state professional responsibility

161 Fordham Recommendations, supra note, at 1301, 1312, 1309-10.

162 Fordham Recommendations, supra note, at 1302-9.

163 Green & Dohrn, supra note, at 1290.

164 Id.
rules. Indeed, the *Fordham Recommendations* and conference papers have been extraordinarily influential among child advocates in framing larger questions about children's families and communities; what children need from lawyers; what attorneys' roles are in the lives of children; and what makes attorneys more and less wise than child-clients.

While the Fordham Children's Conference resolved important issues regarding power and authority in the attorney and child-client relationship, it explicitly left open a handful of issues, such as how differences in race, ethnicity, nationality, culture and class might affect attorney-child-client communications; how often and when (in developmental terms) children should attend court hearings; continuity of representation versus specialization; effectiveness and best types of interdisciplinary practice models; and whether lawyers for children should be mandatory reporters.\(^{165}\) In addition, although the Fordham Children's Conference spoke to the core of the attorney client relationship in a way that affirmed the value of children as moral beings, it left open meta questions about children's attorneys and their role in sustaining and challenging regimes that undermine children. These questions included: the limitations of the attorney-client and individual rights models for representation of children; the qualitative benefits and detriments of legal representation; and why representing children can isolate them from, and even pit them against, their families and communities.\(^{166}\)

\(^{165}\) *Fordham Recommendations, supra note,* at 1306-7.

\(^{166}\) See Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition,* 36 B.C.L. REV. 927, 935 (1995) (noting that since *Gault,* the juvenile courts have increasingly abandoned their rehabilitative mission in favor of a retributive approach); Appell, *supra note* [uneast t] (illustrating how advocating for children's dependency rights can separate children from their families and communities); Guggenheim, *supra note* [2006 nlj] (offering examples of children's attorneys in child protection cases presuming conflict
Wishing to move forward the important discussion regarding representing children begun ten years earlier at Fordham and to address some of that conference's book-marked questions, children's advocates convened another broad gathering. The organizers of the UNLV Children's Conference (which included the two main organizers of the Fordham Children's Conference)\(^{167}\) placed at the center of the proceedings the role of children's attorneys in the pursuit of justice and in relation to the children's families and communities.\(^{168}\) The UNLV Children's Conference produced recommendations that built upon those of the Fordham Children's Conference and addressed two primary themes: how attorneys can better reflect and know the identities, needs and desires of their child clients, including what the role of parents and community should or can be in the attorney-child-client relationship; and what competencies children's attorneys should have, particularly in light of the vast diversity among children in this country.\(^{169}\) Both building on and supporting these areas of competencies and prescriptions for attorneys to take less generic approaches in the representation, the UNLV Children's Conference also identified areas of training and types of practice models\(^{170}\) and called on the children’s bar to actively work to reform law in the images and norms of their youthful clients.\(^{171}\)

At the core of the UNLV Children's Conference proceedings and *UNLV*\(^{\text{between parent and child).}}\)

\(^{167}\) The organizers included Professor Bruce Green and Bernardine Dohrn, the primary architects of the Fordham Children's Conference, this author and Professor Susan Brooks, Marty Guggenheim, and Jean Koh Peters.

\(^{168}\) *Green & Appell, supra note*

\(^{169}\) *UNLV Recommendations, supra note.*

\(^{170}\) *UNLV Recommendations, supra note*, pt. II.

\(^{171}\) *UNLV Recommendations, supra note*, pts. III & V.
Recommendations was the growing consensus regarding “the importance of discerning and presenting children's voice and the limitations of viewing children in single dimensions” and the recognition that “children's voice and the solutions to many of their legal problems are grounded in family and community.” Thus, the UNLV Recommendations place the child at the center, suggesting methods for promoting children's participation in proceedings regarding their own lives. Those methods include the attorney reflecting on, and curbing, his or her own biases and experiences and developing familiarity with the child's world, starting with the child and expanding to the child's family and community (with, of course, the child's consent). Along these lines, the UNLV Children's Conference also recommended that attorneys engage in multidisciplinary practice to help augment the limitations of legal training and legal frameworks.

Also in keeping with attempts to respect and promote the individuality, diversity and participation of children, the UNLV Children's Conference recommended a number of competencies that all children's attorneys should have, such as knowledge of their own and other relevant professional norms; a wide range of substantive law that affects children's rights and status (including immigration and international law), which may not be apparent in the presenting legal problem; knowledge of basic psychological, social work and other social science methods and findings, such as family systems theory and

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172 UNLV Recommendations, supra note , p. 592.

173 Id.

174 UNLV Recommendations, pts. I.A-C.

175 UNLV Recommendations, pt. I.E.
child development theories; and knowledge of cultural differences and particularly the cultural norms of the child and the child's community. Finally, the UNLV Children's Conference recommended that children's attorneys, grounded in the approaches and competencies above, affirmatively work to promote law and legal systems reforms “to improve the quality and provision of justice for children” both through procedural reforms and changes in substantive law based on the needs and interests of children, families and their communities. Attorneys would accomplish these reforms by promoting youth participation and empowerment of children and families, including challenging policies and practices that undermine or harm children and families, and working to eliminate bias. To accomplish these goals, children's attorneys would expand their methods of advocacy to include community organizing, policy advocacy, and media campaigns.

Together, these two conferences and the papers, recommendations and reports that they produced reflect an apparent growing consensus on the part of children's advocates that attorneys must listen to their child clients and refrain from insinuating themselves into, or overshadowing, their clients' lives, values, and wishes. This new critical approach to children's legal representation urges children's attorneys to know and do more, but also to:

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176 UNLV Recommendations, pts. II.A-D.
177 UNLV Recommendations, pt. III.
178 UNLV Recommendations, pts. III.A-C.
179 UNLV Recommendations, pt. III.D.
180 See, e.g., Fordham Recommendations, supra note.
cabin themselves to their role as legal experts and to consult children, their families and others with relevant knowledge and expertise regarding the social and material interests of their child clients; and, with the client's permission, not . . . confine legal assessment or services to the particular legal issue for which the attorney was retained or appointed.  

In these ways, children's attorneys seek to both promote their clients' (rather than the attorneys') values and promote laws that affirm and reflect the values of children in all their variety and individuality.  

The findings and recommendations of these gatherings reflect a view that children are valuable and deserve the highest level of representation and competence. The conferences also recognized that such representation is elusive and calls for a resource-intensive, and perhaps emotionally intensive, undertaking. Even so, as a matter of principle and of ethics, these standards are deliberately demanding because representing children is serious and requires special skills. These high standards, like many standards, have an aspirational purpose meant to communicate the best practice, even if the daily crush of caseloads make that practice difficult to achieve.  

These guidelines aim to make children’s attorneys self conscious about what they do and to help them gain an orientation and habits that will promote children’s, rather than the attorney’s, interests during the representation.  

As straight forward and child centered these prescriptions might be, much work remains. Despite this broad-based and growing reflection and critique of lawyers’ and the law’s use of children as norm vehicles, the best interest of the child representation

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181 UNLV Recommendations, supra note, at 593.

182 See Katherine R. Kruse, Standing in Babylon, Looking Toward Zion, 6 NEV. L.J. 1315, 1317-21 Erik Pitchal, Buzz in the Brain and Humility in the Heart: Doing It All, Without Doing too Much, on Behalf of Children, 6 NEV. L. J. 1350 (2006) (both noting the differences between aspiration and even the contradictions within the guidelines).
model persists among many attorneys. In fact, against opposition from the organized children’s bar, the National Conference of Commissioners on Uniform State Laws in 2006 and 2007 adopted a uniform law for the representation of children in child protection and custody cases that includes the best interest attorney model. The tenacity of this representation model is surprising in light of the increasing humility of children’s attorneys; but it is also unsurprising given the hubris of attorneys, children’s vulnerability and the limited options children’s attorneys perceive in the contexts in which they are most likely to represent children.

Yet, as the children’s bar matures and becomes more reflective, it appears to be able to view its own role in the pursuit of justice (and perhaps injustice) for children and to be able to separate the attorney’s standpoint from that of the child. This series of reflections has begun and will no doubt continue as the children’s bar seeks to implement these representational norms that promote the child’s voice and identity rather than the attorneys. This movement, to the extent that it is able to identify and promote children’s own norms, may eventually serve to bring children’s voices to bear on the fundamental issues that affect children, their families, and their communities. It will be interesting to see how such input might influence matters such as education, a living wage, community development, child labor, and immigration policy, to name a few.