

Columbia Human Rights Law Review  
Summer 2008

## Articles

**\*573 REPRESENTING CHILDREN REPRESENTING WHAT?: CRITICAL REFLECTIONS ON LAWYERING FOR CHILDREN**[Annette Ruth Appell \[FNa1\]](#)

Copyright (c) 2008 Columbia Human Rights Law Review; Annette Ruth Appell

## Abstract

This article 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. More concretely, it critically explores the role of children's lawyers in promoting the individual and systemic interests of their youthful constituents, most of whom receive lawyers because they are caught in systems that predominately serve poor children and children of color. The article first reflects on the indeterminacy and contingency of the category of children, checking our natural tendencies to idealize children and childhood. The second section describes the children's bar, examining its legalistic approach to children's problems and their solutions, which contemplate children in isolation from their families and communities. This approach contrasts to that of attorneys who advocate for social and economic justice, advocacy with more potential to improve the material and social conditions of children and their families. The third section notes the decline in children's well-being, despite the growth of a \*574 children's bar, and 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 final section explores how children's attorneys are beginning to critically assess their dominance and their approaches to the legal representation of children, and to develop methods to ensure that the child's viewpoint is expressed. The article concludes with a suggestion that lawyers pursue different methods for achieving justice for children that are more holistic and reflective of the norms of child clients, their families, and their communities.

Abstract	573
I. Introduction	574
II. Constructing the Child, Children, and Childhood	580
III. The Children's Bar	586

IV. Observations about Children's Attorneys and Norms	595
A. The Indeterminacy of Childhood and the Extraordinary Power of Children's Attorneys	597
B. The Parentified Attorney	602
C. Disparities Between Children's Attorneys and the Clients They Serve	608
D. Links Between Children's Rights Typology and Norm Enforcement	612
E. Limitations of Legal Rights Approaches	619
V. Critical Assessments and Corrections: The Intersection of Children's Rights and Representation	623

### I. Introduction

The designation, over a century ago, of a stage of life called childhood has precipitated a steady growth in the view that children have their own interests anchored to, but distinct from, their parents. [\[FN1\]](#) Since the Progressive era when this view intensified, adults \*575 outside the family have pressed children's interests in courts and before public policy makers with increasing breadth and frequency. [\[FN2\]](#) More recently, the notions that children have individual voices and that their voices should be heard have gained currency through the expressive power of the law, most universally in the Convention on the Rights of the Child (Children's Convention). [\[FN3\]](#) Although the United States, famously, is one of only two countries that have not ratified the Children's Convention, 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. [\[FN4\]](#) For reasons related in part to the attorney-child-client relationship and the tenacity of the best interests of the child guidepost, it is not clear whether this representation promotes children's voice [\[FN5\]](#) or has led to the legal or material improvement of children's lives.

The reasons for these limitations are complex and no doubt related to the fact that children occupy a unique category that neither comprises mini-adults nor incompetents. Instead, children \*576 are complicated subjects embedded in and dependant on families and communities who also serve important cultural and political roles as private and public value carriers and cultural progenitors. At the same time, parents mediate children's experience of and influence on politics, the market, and social capital in a system that privatizes care, dependency, wealth, and need. In other words, families care for and represent children's

interests in the polity and children receive social and material benefits through their parents and communities. In this way, children and parents form an intimate mutual relationship of shared interests and experiences in legal, cultural, material, and political realms.

When attorneys represent children's interests, the balance of this parent-child relationship is disrupted, with strangers assuming portions of the parental role. Like parents, these strangers are adults and fiduciaries who are inclined to protect children from harm and impose their own values on the children. [\[FN6\]](#) As the number of lawyers actively engaged in the defense, creation, definition, and promotion of children's rights has grown in the past forty years, this norm imposition has become significant. [\[FN7\]](#) Moreover, attorneys' advocacy on [\\*577](#) behalf of children does not necessarily go to the heart of children's multiple dependencies. Instead this representation is most often confined to narrowly defined legal issues in terms that frequently are in conflict with the children's parents, community, and larger social and material conditions. Moreover, this representation often occurs in confidential relationships in which attorneys have great power compared to their clients who may be too young and inexperienced to forcefully direct the representation. In this way, the attorney-child-client relationship provides an often hidden site for competing notions regarding justice. Children's representation is thus constrained by legal rights and the isolation of representing dependency without reflecting those on whom the child depends.

By virtue of their social status and relative power, children's attorneys are well-positioned to preserve current regimes, even at the expense of the values, desires, and identities of their child clients. Ironically, while child advocacy wears the mantle of humanization and liberation, so long as children's attorneys press for their own rather than the children's wishes, interests, and values, children may be no freer and no more human than they are perceived to be under their parents' control. [\[FN8\]](#) In light of these dynamics, questions [\\*578](#) regarding who speaks for children and how children's voice informs discussions about childhood, dependency, family, and community are particularly cogent.

This article begins to address some of these questions, assessing how attorneys can best promote the interests and norms of their child clients, rather than those of the attorney or the broader legal and societal norms that inform law and policy. [\[FN9\]](#) This critique builds on the work of social scientists and other students of social movements, "cause lawyering," [\[FN10\]](#) and critical legal ethicists who have examined the roles of social movements and lawyers in promoting social and legal change. [\[FN11\]](#) Unfortunately, these studies have largely [\\*579](#) ignored children's attorneys. [\[FN12\]](#) This article is also indebted to the relatively new 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. [\[FN13\]](#) This critique is also informed by 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 the child welfare and juvenile justice systems. [\[FN14\]](#)

[\\*580](#) Part II first reflects on the indeterminacy and contingency of the category of children, checking our natural tendencies to idealize children and childhood. Part III describes the 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 problems and solutions. After noting the decline in children's well-being despite an increase in the number and scope of children's attorneys, Part IV sketches five thematic observations that might account for this anomaly and that raise questions regarding the efficacy of children's lawyers and the roles that they might occupy. These themes highlight the numerous gulfs between children and their 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 article 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.

## II. Constructing the Child, Children, and Childhood

We have all been children and many of us parent children. It is, therefore, natural for adults to believe we have knowledge and expertise about children and to project our experiences onto them. However, if we view children as subjects and even

authors of their own lives, it is essential to interrupt and examine the foregoing presumptions. This deconstruction is particularly important for adults who are strangers to a child yet find themselves in positions of power that can significantly affect that child's life. This deconstruction is also important for adults who advocate for classes of children.

As an initial matter, it is helpful to explore what we mean or \*581 see when “child” is the referent and an actual child's interests are at stake. “Child” functions as a relational term, a legal status, a descriptive term, 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, a child generally is a human being between the time of birth and eighteen, [\[FN15\]](#) or an adult in relation to a parent in probate and other contexts. [\[FN16\]](#) As descriptive terms, “child,” “childish,” and “child-like” refer to status, disposition, behaviors, or perspectives with positive and negative connotations. [\[FN17\]](#)

The notion of “child” has much less coherence in social and material (as opposed to legal) contexts given that children, like adults, range in age, class, race, gender, sexual identity, sexual orientation, nationality, language, culture, ethnicity, and geography. [\[FN18\]](#) Even developmental norms associated with children are cultural and vary within the category of children. [\[FN19\]](#) Fundamentally though, “child” refers to someone who inhabits a “structural site . . . occupied by ‘children,’” known as “childhood.” [\[FN20\]](#) 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 of children. [\[FN21\]](#) As \*582 such, the construction of childhood “varies considerably across and between cultures and generations, and in relation to . . . children's everyday lives and actions.” [\[FN22\]](#) 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.

In the United States, childhood is a condition of dependency in a system that privatizes care and responsibility for dependents in the family. [\[FN23\]](#) Parents, or other adult kin, are the primary source of children's care, support, and status. In addition to supporting children through sharing or transmitting benefits from wages, government assistance, or other income, parents provide shelter for children and determine the community in which they will live. This location in turn dictates the existence and conditions of parks, playgrounds, schools, safety, transportation, and jobs. [\[FN24\]](#) Even the quality of a child's education (especially for those who attend public schools) depends on where the “child's” adult caregivers live. [\[FN25\]](#) In this sense, schools are privatized because they are largely funded through local taxes that reflect community wealth and--for complicated social, political, and economic reasons--children's education is both \*583 directly related to their parents' race and class and oblivious to it. [\[FN26\]](#)

As a result of this privatized dependency, children receive culture as well as economic and social status and resources from their families. [\[FN27\]](#) Therefore, children experience childhood, schools, health care, child care, and opportunities according to the means of their parents. [\[FN28\]](#) This privatization, which arises out of notions of liberalism, draws its structure from political, economic, and social relationships. [\[FN29\]](#) This structure also masks the political contours of family, markets, and the law while characterizing dependency, wealth, and need as private, individual matters. [\[FN30\]](#) These characteristics, in turn, make social and legal conditions--and particularly childhood and family relations--appear to be natural. [\[FN31\]](#)

Although there may be natural aspects of families and children's dependency, childhood is primarily defined and regulated \*584 by law. This law codifies dominant social, psychological, medical, and political conceptions of who adults and children are and what they need. [\[FN32\]](#) For adults, those dominant norms might include rational, autonomous, independent, white, middle-class, nuclear-family, English-speaking, male, heterosexual, native-born, and financially independent. [\[FN33\]](#) In turn, dominant norms relating to children include young, vulnerable, white, middle-class, two-parented, dependent, obedient, innocent, sexually inactive, English-speaking, unemployed, cared-for and not care-giving, irrational, unformed, and incapable of judgment. Children who do not reflect these norms are considered “other people's children . . . [and viewed] largely as a danger and a threat to societal order and to adult economic and personal security.” [\[FN34\]](#) The law promotes these norms and frowns upon or ignores such phenomena as child labor, [\[FN35\]](#) children caring for family members, [\[FN36\]](#) children's sexuality, [\[FN37\]](#) and children's subjectivity, voice, and agency. [\[FN38\]](#)

\*585 Moreover, in a democratic republic such as the United States, laws defining childhood reflect the views of those with the social, legal, economic, and political power to make law. As people without such power, children have at best an indirect effect on the law. [FN39] Children do not vote and do not hold office. It is the adults, with political power and access, not the children, who identify and turn into law children's existence, needs, and authority. These identifications are a function of the adults' personal values and experiences of their own childhood or the childhoods of children they know. These views also derive from the opinions of experts on childhood, such as doctors, psychologists, social workers, lawyers, and educators; [FN40] these experts, in turn, are informed by their own professional norms and personal experiences.

Children thus inhabit a large and complex category called childhood that serves descriptive, normative, and regulatory purposes. Yet precisely because they are in this category, children have little input in shaping it. Instead, their parents or attorneys identify and advance 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 [FN41] and there are substantial \*586 cultural gaps between the children and the attorneys who might help create the law. [FN42] Given the silence of children in these processes, the contingency of childhood and the cultural diversity of norms, the person that represents a child's interests can make a great deal of difference regarding whether advocacy reflects the child's own values and experiences or those of his or her representatives. Moreover, whether their parents or other extra-familial adults (such as attorneys) represent children in individual and policy contexts is related to the child's conformity with dominant norms. [FN43] In other words, poor children and children of color are more likely to receive attorneys than White middle-class children whose parents continue to press their interests.

### III. The Children's Bar

In individual matters, children's lawyers can affect whether a child will live with his or her family or in foster care, receive probation or a prison sentence, or maintain contact with siblings after family dissolution or change in custody. [FN44] In class action cases, these representatives bring suits affecting the terms of juvenile confinement as well as children's health, education, and welfare services. [FN45] These lawyers and other professionals also engage in national and local policymaking by lobbying for or against laws and regulations affecting matters such as education, family protection, and racial preferences in adoption. [FN46] In these forums, advocates frame both the problems and their remedies. Moreover, there are growing ranks of prosecuting attorneys who do not represent children, but prosecute child abuse, neglect, and juvenile justice \*587 cases on behalf of children and society. [FN47] These attorneys also have a great effect on children in proceedings that specifically require that the child's best interests or welfare be given significant, if not paramount consideration.

Children's attorneys generally seem to be motivated by a desire to help children and thereby do well for them. [FN48] These attorneys want to give children a voice and protect their interests in legal proceedings or to reform the content and application of the laws affecting children. [FN49] In this way, they seek justice for children. Nevertheless, children's attorneys may not be self-conscious about what this justice entails, what their role is in defining justice, or whether promoting justice for children actually helps children. In fact, the children's bar has barely begun to explore attorneys' role in altering children's quality of life, for better or for worse. This is not surprising given the relative infancy of the children's bar itself. [FN50] As children's rights have developed, however, children's attorneys have played a larger role in children's lives and in the construction of childhood 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. [FN51] Only recently have children been viewed as having separate interests and rights apart from their parents and needing attorneys to represent them as individuals. [FN52] At least two major legal \*588 events led to the expansion of the number of children's attorneys in the United States. First, in 1967, the U.S. 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. [FN53] 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, neglect, and dependency) proceedings. [FN54] Since those events, and perhaps related to the expansion of rights movements in general, 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. [FN55] 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. [\[FN56\]](#)

The child welfare bar and the juvenile justice bar are by far the largest and perhaps oldest groups of children's attorneys, probably as a result of the federal mandates for representation in these areas and the existence of juvenile courts for over a century. [\[FN57\]](#) These two bars often view themselves and their roles differently. As a general matter, juvenile justice lawyers are defense attorneys who protect their clients from coercive, punitive state intervention, [\[FN58\]](#) \*589 while child welfare attorneys may be more prosecutorial or paternalistic, frequently viewing themselves as protecting young children from abusive or neglectful parents and other adults. [\[FN59\]](#) The children represented by attorneys in these two legal areas are often from the same neighborhoods and families and this shared client base is disproportionately composed of African-American, Native-American, and Latino children from economically disadvantaged communities. [\[FN60\]](#) Nevertheless, the legal net in which they are caught may well determine the role their attorneys perform.

\*590 Despite the common client bases and a relatively uniform code of conduct that governs attorneys regardless of their clients' age or the substantive area of law they practice, [\[FN61\]](#) these children's bars have developed separate guidelines for representing children. [\[FN62\]](#) These developments are not surprising given the inattentiveness of the uniform codes to youthful clients. [\[FN63\]](#) These codes direct the attorney to further 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. [\[FN64\]](#) These codes, however, say little about the unique challenges of representing children. [\[FN65\]](#)

\*591 That the juvenile justice attorneys and child welfare attorneys developed distinct guidelines from each other probably reflects the narrower age range of children subject to juvenile justice jurisdiction and the wider, though younger, age range of children subject to child welfare proceedings. These distinctions also reflect the two children's bars' different conceptions about the nature and benefits of state intervention. [\[FN66\]](#) Simply put, the child welfare bar is more likely to welcome state intervention, viewing its clients as needing state custody, while the juvenile justice bar views state intervention and custody as detrimental and opposes state intervention. [\[FN67\]](#)

The reasons for these different perspectives are no doubt historical and complex, but may relate in part to the child welfare system's categorization of children as victims and the juvenile justice system's categorization of children as delinquents. [\[FN68\]](#) As victims, children are passive and helpless, in need of state intervention. As delinquents or perpetrators, the juvenile client is an agent, someone who possesses will and freedom which the lawyers must protect. [\[FN69\]](#) In addition, while the juvenile client is usually at least school age, child welfare clients may be as young as newborn so children's attorneys in dependency cases may not have a client who can give them clear direction. [\[FN70\]](#)

Marty Guggenheim attributes this divergence between the two bars [\[FN71\]](#) primarily to the legal designation of wrongdoers in each type of proceeding and the inclination of attorneys to defend the \*592 wrongdoers and protect the victim. [\[FN72\]](#) In juvenile justice proceedings, the child is the offender; while in the child welfare case the parents, not the child clients, are the designated wrongdoers. "When children are accused of wrongdoing, lawyers tend to see their principal function to defend them. However, when the state labels the children as 'victims,' their lawyers no longer see a need to protect their clients from the state. Instead, they see the need to protect them from the people whom the state has identified as harmful to their clients." [\[FN73\]](#)

Whatever their approach, the contexts in which attorneys most often represent children are as individuals in legal proceedings. In this way, children's attorneys are very much like other lawyers, protecting the rights of their clients and giving their clients "voice" in legal proceedings. Children's attorneys also are involved in local and national group advocacy through class action litigation and legislative advocacy seeking to effect systemic change. 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 involved regularly in child welfare legislation at the national level; the latter two organizations are comprised of children's attorneys while the former organization represents child welfare agencies. [\[FN74\]](#) National law offices, including the National Center for Youth Law, the Youth Law Center, Children's Rights, Inc., and the Bazelon Mental Health Center for Mental Health Law litigate class actions to provide better services and representation for children. [\[FN75\]](#)

**\*593** It appears that the majority of those who identify themselves children's attorneys do not engage in broad advocacy for policy change to promote better social services and economic resources for families and communities. [\[FN76\]](#) Instead, they represent individual children or classes of children in isolation from their families and communities. [\[FN77\]](#) Moreover, it appears that the groups that do in fact promote improved conditions for families and communities--advocacy that also supports children-- do not identify themselves primarily as children's attorneys. [\[FN78\]](#) 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*. [\[FN79\]](#) More recently, the Advancement Project has taken on a number of racial, immigrant, and economic justice issues that affect communities, education, and children. [\[FN80\]](#) 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 **\*594** children's rights to education and community-based mental health treatment. [\[FN81\]](#)

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. Yet despite decades of legal representation of children, it is not clear that children are any better off for all of this representation. On the contrary, schools are failing many children academically while serving as pipelines to incarceration; [\[FN82\]](#) children of color continue to be disproportionately targeted for arrest and other coercive state intervention; [\[FN83\]](#) children are “the poorest demographic group in America;” [\[FN84\]](#) a shockingly large percentage of children live in neighborhoods in which it is dangerous for them to play outside; [\[FN85\]](#) and the United States is nearly alone in the world in failing to ratify the Convention on the Rights of the Child. [\[FN86\]](#) This simultaneous deterioration of children's interests and the growth of children's bars commands attention to the role of children's attorneys in legitimating or failing to stem these policies. The following sections may serve to **\*595** illuminate some of the challenges children's attorneys face in identifying and seeking justice for children, challenges which may have some bearing on children's dismal status.

#### IV. Observations about Children's Attorneys and Norms

A major question regarding the representation of children and youth is what interests children's attorneys serve and who defines those interests: the state, the attorney, the parents, or the children themselves. In contrast to parents, attorneys are unlikely to share the same socio-economic background, cultural values, or kin as the children they represent; nor are they likely to know the children better than the children's parents or the children themselves. [\[FN87\]](#) Moreover, as outsiders, attorneys may not have the tools or experience to understand their child clients' interests and needs. [\[FN88\]](#) This professional, rather than familiar, relationship between adult stranger and child creates a private, confidential space between the attorney and client. [\[FN89\]](#) In this space, the attorney may have few guideposts regarding the child's life, experience and, for very young children, the child's objectives. The attorney has relatively free reign to identify and shape the child's interests and little accountability when acting within this attorney-client-child relationship.

Thus, attorneys have extraordinary power to either promote or undermine the norms that determine how their clients' interests will be defined and met. Preliminary studies regarding children's attorneys suggest that attorneys, rather than their child clients, play a defining role in promoting or destroying norms affecting children. [\[FN90\]](#) **\*596** This finding is critical to understanding the role of children's attorneys and shaping this role in the future. Because it is not clear whose interests children's attorneys serve [\[FN91\]](#) and because the interests of children are contested both generally and in individual cases, the heightened power of children's attorneys deserves examination. For if the attorneys are inserting or substituting their own substantive values into the representation, the attorneys may be displacing the values of the child or the parents, who are the traditional arbiters of children's lives and values (especially in middle- and upper-class families). [\[FN92\]](#)

This section sketches some tentative conclusions about how attorneys function in defining children's rights. This sketch is comprised of five interrelated observations about the shifting knowledge and power balance among attorneys, their child clients, and the families and communities in which those children live. 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 closely related, children's rights--particularly those rights that attorneys are retained or appointed to protect--are frequently designed precisely to reinforce and propagate dominant societal norms. Children's attorneys therefore become 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.

#### \*597 A. The Indeterminacy of Childhood and the Extraordinary Power of Children's Attorneys

Much has been written about the power of attorneys in the attorney-client relationship in individual matters, in class action contexts, and in policy arenas. [\[FN93\]](#) 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 actual wishes or rights; (c) attorneys, as adults, feel responsible for children; and (d) the category of child is indeterminate, creating definitional space for attorneys. [\[FN94\]](#) 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 enable the attorney to assume that control.

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. [\[FN95\]](#) 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. [\[FN96\]](#) Alternatively, the attorney might be appointed as a lawyer and be subject to the child's \*598 direction. [\[FN97\]](#) Sometimes, attorneys are required to represent the child's wishes and his or her best interests. [\[FN98\]](#) Ascertaining the attorney's role when the child is too young to direct the representation is an especially difficult challenge. [\[FN99\]](#) Ideally, attorneys in juvenile justice proceedings, whose clients usually are adolescents or preteens, should function as lawyers, listening to their clients' wishes and carrying them out to the greatest extent possible. [\[FN100\]](#) However, studies and anecdotal reports suggest that child welfare attorneys (whose clients span the whole "childhood" spectrum), and even juvenile justice attorneys, tend to be paternalistic toward their clients, frequently to the point of failing to consult their clients on important decisions, disregarding their clients' express wishes, and failing to keep their clients apprised of case developments. [\[FN101\]](#)

Although many attorneys must navigate social and material diversity among clients and between attorney and client, [\[FN102\]](#) the children's bar further struggles with special considerations relating \*599 to the breath and contingency of children and childhood. [\[FN103\]](#) For instance, the apparent naturalness of childhood masks the cultural aspects of youth and obscures the variety of permissible, possible, and appropriate assessments and alternatives. [\[FN104\]](#) This misapprehension, combined with the immaturity or perceived immaturity of children, may lead attorneys to insert themselves and their values into the relationship and the objectives of the representation.

When an attorney represents very young or school-age children whose youth and social development limit their ability to comprehend the issues at stake, the attorney has a great deal of power to make strategy and even goal decisions. [\[FN105\]](#) In this context, the hallmarks of the attorney-client relationship--confidentiality and loyalty--create a private, inaccessible space between the attorney and child. This space shields from view what happens within the relationship and provides the attorney with a mandate to project the child's interests. Although there are positive aspects to this unity between attorney and client, the privacy of this relationship may shield the attorney from accountability to a relatively powerless child and to others in the child's life, including the judge.

The attorney's sometimes unchecked power in the attorney-client relationship is exacerbated because attorneys lack a clear referent for interpreting or determining the child's objectives or interests. Without such a referent, 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. [\[FN106\]](#) For many attorneys, however, legal training and life experience [\[FN107\]](#) do not necessarily prepare them

with the skills needed for representing children, such as cross-cultural competence and knowledge of family \*600 systems and child development. [\[FN108\]](#) Even if attorneys were trained in these areas, their caseloads may well constrain them from utilizing these skills. [\[FN109\]](#) 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. [\[FN110\]](#)

In class action lawsuits and legislative advocacy, the children's attorney's power is particularly unfettered, as the variety of children's material conditions, cultures, and communities makes common solutions difficult. Some generalizations may be possible about age or legal status, such as that newborns cannot survive without assistance or that a state agency is legally responsible for many aspects of rearing children in foster care. But beyond these few generalizations, 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, it might be difficult for an attorney to represent children's generalized interests in the context of legislative advocacy regarding interracial versus in-race adoption. [\[FN111\]](#) This is because children may have very different views regarding the appropriateness of interracial adoption and, indeed, many children may be too young to have an opinion regarding its benefits and detriments. [\[FN112\]](#)

\*601 Similarly, while assessing children individually is relatively straightforward and specific, it is problematic to use that assessment as a basis for generalizing to other children. For example, children's attorneys responding to the situation of infant clients might decide that legislation designed to protect Native-American children's family and tribal relations should be limited. [\[FN113\]](#) In reaching this decision, however, these attorneys might not consider the values, experiences, and wishes of older children and the attorney's own clients who may have contrary views or views which may change over time. [\[FN114\]](#) In any event, even if older children affected by these laws were organized to participate in law reform advocacy, it is unlikely that those children would adequately represent the interests of very young children or other children who were not organized. Thus, the attorney who represents the "Indian child" [\[FN115\]](#) may have few guideposts regarding what positions to promote.

In other words, the challenges facing attorneys and child clients are endemic to the attorney-client relationship and to group \*602 advocacy, but further complicated by the scope of childhood. [\[FN116\]](#) Moreover, children tend not to be politically organized [\[FN117\]](#) and the characteristic that unites them--their childhood--is perhaps even more diffuse than other social categories because "child" includes people from nearly all other social categories. [\[FN118\]](#) 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. [\[FN119\]](#)

## B. The Parentified Attorney

The very act of appointing an attorney for a child assumes, or perhaps more accurately, fails adequately to account for, two issues regarding children's authority: (1) whether the substantive law empowers the child to decide certain issues; and (2) whether the child has sufficient autonomy to direct the representation. Some decisions may belong to the child's parents or guardian, for example determinations regarding the child's custody and the decision whether to contest or plead to charges in dependency proceedings. [\[FN120\]](#) Furthermore, as outlined above, some children are too young or immature to make fully informed decisions about their own well-being. [\[FN121\]](#) 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 \*603 inconsistent. Without ethical direction, attorneys may assume the traditionally parental, judicial, or client role of deciding and weighing the child's interests. Attorneys may also feel morally obliged to protect children rather than to do their bidding. [\[FN122\]](#)

In our liberal constitutional system, parents (or their designees) determine how 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. [\[FN123\]](#) 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. [\[FN124\]](#) 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 con-

structs); this autonomy is in turn necessary to promote democracy. [\[FN125\]](#) 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. [\[FN126\]](#) The freedom to determine what is \*604 best for children belongs primarily to parents and gradually shifts to children as they become more physically autonomous. [\[FN127\]](#)

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:

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? [\[FN128\]](#) Often, an attorney's natural tendency is to protect a child by looking to the attorney's own values, rather than to those of the child's family, to determine what that protection requires. [\[FN129\]](#) Indeed, in many cases it may seem--or be--unprofessional to look to the parent for guidance. [\[FN130\]](#)

\*605 As a functional matter, the attorney-child-client relationship often separates the assessment of the child's interests from those of his or her family. [\[FN131\]](#) This separation is also, in part, a result of the tendency of some lawyers to feel protective of their child clients and to believe they know what is best for them. [\[FN132\]](#) Dissociating the child from his or her family also conceptually isolates the child from his or her social and material conditions, which are themselves rooted in family and community. [\[FN133\]](#) These phenomena of separation and substitution 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. [\[FN134\]](#) As a result, children's attorneys may unselfconsciously insert their own views of what is best for children into the representation of an individual child.

In most child welfare and juvenile justice representation, the attorney's role is to advocate for an individual child client. [\[FN135\]](#) Thus children's attorneys look to their client for direction [\[FN136\]](#) and view the child's interests as separate and often in conflict with the interests of \*606 other adults in the child's life, including his or her parents. [\[FN137\]](#) Moreover, even though the reasons for providing lawyers for people are based on notions of client autonomy, [\[FN138\]](#) children's attorneys are not always able to ascertain and follow their child clients' direction. Moreover, most children, like adults, need assistance in reaching considered decisions. [\[FN139\]](#)

Robert Mnookin's classic collection of case studies on class action litigation on behalf of children critically examines the roles of clients, lawyers, and courts in the advancement of children's rights. [\[FN140\]](#) In that study, Mnookin found numerous problems relating to child clients' control over their attorney-client relationship, attorney's ability to assess their clients' wishes, children's lack of agency in choosing their own lawyers, and the significant overlap in the interests of the lawyers on both sides of each case. [\[FN141\]](#) In short, Mnookin found that very few lawyers in a very small bar, including self-appointed or court-appointed attorneys, sought to represent the interests of children all over the country through class action litigation at the Supreme Court level. [\[FN142\]](#) Although this lawyer hegemony is common in class actions, [\[FN143\]](#) child clients have even less control because of their youth and their lack of financial power over their attorneys. [\[FN144\]](#)

More recently, Marty Guggenheim, who has long brought a critical perspective to child advocacy and was part of the children's bar Mnookin studied, 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 \*607 the 1980s. [\[FN145\]](#) These attorneys were appointed by the court to represent children in individual child welfare and delinquency cases. In these contexts, 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. [\[FN146\]](#) 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. [\[FN147\]](#) Of this transition, Guggenheim found:

[A]s 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. [\[FN148\]](#)

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. [\[FN149\]](#) In fact, judges have reinforced this adversarial stance by removing children's attorneys who advocate against the state's position. [\[FN150\]](#) Guggenheim and others even recalled children's attorneys who ignored their clients' wishes when the client expressed a desire to return home. [\[FN151\]](#) Thus, the attorneys not only submerged the children's views, but also displaced the parents' authority regarding children's interests. Moreover, this state-oriented advocacy occurs in a legal system in which children's \*608 parents do not receive meaningful and adequate representation, even though it is the parents who are the accused. [\[FN152\]](#)

In contrast, children's attorneys who represent older children, particularly in the juvenile justice context, generally bring a more traditional defense approach that is mistrustful of state intervention and seeks to protect children's freedom from the state rather than children's dependency on the state. [\[FN153\]](#) In this context, the attorneys do not represent the parent and may not seek the parent's input. [\[FN154\]](#) Here, the tension revolves around whether and how much to involve the parents in the representation, a determination that is informed as much by legal strategy as competing values between parent and child. [\[FN155\]](#) In any event, attorneys may help to achieve child and community-centered outcomes by being zealous advocates of their child clients' wishes and interests, which are often inextricably related to their families and communities. [\[FN156\]](#) Still, even though the children in juvenile justice proceedings are generally old enough to at least assert their values, [\[FN157\]](#) studies reveal significant problems in the juvenile client-attorney relationship that militate against communication and trust. [\[FN158\]](#)

### C. Disparities Between Children's Attorneys and the Clients 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. Most striking, however, are the class and race differences. As noted above, children in the child welfare \*609 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). [\[FN159\]](#) Attorneys are disproportionately White. [\[FN160\]](#) Furthermore, attorneys are by definition middle or professional class, and few come from poor backgrounds. [\[FN161\]](#) In contrast, the vast majority of children represented by attorneys are poor. [\[FN162\]](#)

These disparities go both to the heart of attorney-client communication [\[FN163\]](#) and the attorneys' competence to represent their clients. [\[FN164\]](#) That is because these disparities create the risk that children's attorneys will not appreciate, or even apprehend, the social dimensions of the presenting legal problems. [\[FN165\]](#) An attorney's lack of familiarity with a child's culture and social systems may, in turn, \*610 lead the attorney to discount the child's clearly stated preferences. [\[FN166\]](#) Thus, attorneys may not understand the consequences of the various available outcomes or decisions they may make. [\[FN167\]](#) For example, the attorney may not be aware that a counseling center to which a child is referred is in rival gang territory. [\[FN168\]](#) Similarly, children's attorneys may not see or understand factors contributing to or even causing other legal problems relating to housing, employment, immigration, or other family issues. [\[FN169\]](#) The fact that children's law offices are litigation-focused and less likely to engage in community outreach and education further removes attorneys from their clients. [\[FN170\]](#)

In addition, children's attorneys often have crushing caseloads that inhibit their ability to spend sufficient time with and on behalf of clients or to conduct recommended investigations into their situation. [\[FN171\]](#) Such pressures make it difficult enough to try to ascertain a child client's wishes, [\[FN172\]](#) let alone conduct investigations on behalf of the child into school-related matters or interview family members and other important people in the child's life who can help the attorney see and understand the material and social conditions that inform the child's life and options. [\[FN173\]](#) These conditions and the \*611 attorney's own life experiences may limit the advocate's ability to identify legal issues related to the child's or the child's family members' language and cultural issues [\[FN174\]](#) or immigration status, [\[FN175\]](#) or simply to establish a meaningful relationship with the child. [\[FN176\]](#)

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 their clients' communities and families. [\[FN177\]](#) Indeed, rules of confidentiality and loyalty to the child client might make such ventures unethical without the child's express permission. [\[FN178\]](#) 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.

#### **\*612 D. Links Between Children's Rights Typology and Norm Enforcement**

A basic children's rights narrative holds that children's rights protect children and their freedom. [\[FN179\]](#) The attorney-client relationship is thought to protect children from the loss of these rights while enabling them to have a voice in decisions about their lives. [\[FN180\]](#) Giving children voice in turn promotes their moral autonomy and, perhaps, leads to better outcomes. [\[FN181\]](#) Children's attorneys promote their clients' norms when they defy attempts to categorize their clients as deviants or law breakers (especially in the juvenile justice arena) and instead treat them as moral agents with their own identities and values. In contrast, children's attorneys promote state norms when they substitute their own views for the client's and when they participate in legalistic and individualistic definitions of problems and solutions. [\[FN182\]](#)

Whose norms children's attorneys promote may relate to which children's rights they are defending. This is because children's rights are generally recognized to include both protective rights and liberty rights, also referred to here as “dependency rights” and “quasi-civil rights,” respectively. [\[FN183\]](#) Each of these two types of rights **\*613** is important, but they are not equally empowering or protective of children's autonomy. Dependency rights promote socialization into dominant norms, while quasi-civil rights promote children's freedom from state interference with the child's liberty. [\[FN184\]](#)

Dependency rights govern the care and custody of children. They 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. [\[FN185\]](#) Dependency rights are largely rooted in the *parens patriae* doctrine, which both protects children and promotes dominant societal norms. [\[FN186\]](#) They exist precisely because children are dependent and are not designed to promote independence or autonomy during minority. [\[FN187\]](#) 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 by the state directly over the child through benefits such as welfare and education. [\[FN188\]](#)

Some dependency rights or benefits do not belong directly to the child, but instead may flow to the child through the parent or guardian. For example, the foundational dependency right is for **\*614** children to be reared by their parents. [\[FN189\]](#) While this right has constitutional dimensions for the child, [\[FN190\]](#) the parents' constitutional right to bear and rear children is clearly fundamental. [\[FN191\]](#) 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 that adults dictate. [\[FN192\]](#)

Quasi-civil rights are those rights that arise conceptually, and historically, out of the civil rights movements. [\[FN193\]](#) These rights aim 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. [\[FN194\]](#) These rights **\*615** include the right to demand or expect from the state equal protection, [\[FN195\]](#) due process, [\[FN196\]](#) freedom of expression, [\[FN197\]](#) and a limited right to seek an abortion. [\[FN198\]](#) With respect to children, these 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. [\[FN199\]](#) For example, the U.S. 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. [\[FN200\]](#) Similarly, the Court has not fully extended free speech to children, but left the decision of what materials children can view to important adults in their communities. [\[FN201\]](#) 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 status as a minor.

**\*616** The intersection of rights and representation may determine whether the representation will serve to reinforce dominant norms [\[FN202\]](#) or whether it will meaningfully bring the values and interests of individual clients to bear. Dependency rights tend to embody dominant values regarding how children should be raised, so advocacy in support of these rights tends to promote dominant norms. [\[FN203\]](#) Furthermore, the very fact of representation separates children's interests from those of their parents and displaces parental assessments of their children's interests. [\[FN204\]](#) Particularly in the dependency rights context, legal representation enables attorneys and other involved professionals to substitute more homogenizing norms for those of the child's family. [\[FN205\]](#) Conversely, representation of children's quasi-civil rights should protect the children from state domination over their person, moral choices, and expressions. [\[FN206\]](#) Thus lawyers representing children's more liberatory rights are less likely to promote dominant norms. [\[FN207\]](#)

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 **\*617** juvenile justice attorneys, who represent children's civil right to due process, tend to be more hostile to state intervention. [\[FN208\]](#) These distinctions are also, no doubt, related to the age differences of children in each type of matter: the child welfare client spans from birth to eighteen (or older), while the juvenile justice client is generally at least middle-school age and even older. [\[FN209\]](#)

It may not be surprising that attorneys for older children are increasingly aware of the justice system's racial and gender assumptions that are designed to control juvenile behavior. [\[FN210\]](#) For example, lesbian, gay, bisexual, transgender, and queer youth are selectively arrested, prosecuted, and sentenced because they diverge from dominant gender norms. [\[FN211\]](#) Once in care, treatment, or detention, these children often experience unchecked harassment. [\[FN212\]](#) Moreover, the juvenile justice system currently and historically [\[FN213\]](#) enforces dominant racial and gender stereotypes against African-American girls while disregarding the social, familial, and material **\*618** conditions that led to the arguably unlawful behavior and arrest in the first place. [\[FN214\]](#)

Both the juvenile justice system and child welfare system view families of color, particularly African-American families, more negatively than White families, thus further transplanting state norms for family norms. [\[FN215\]](#) "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." [\[FN216\]](#) 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. [\[FN217\]](#) 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 their child client and his or her family and community. [\[FN218\]](#)

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 decisions. [\[FN219\]](#) As noted above, [\[FN220\]](#) the racial, ethnic, and economic gaps between children's lawyers and the children they represent challenge these attorneys to understand the social and economic conditions of their clients. Moreover, the perceived naturalness and universality of childhood (as something all have experienced) [\[FN221\]](#) may lead attorneys to project their own experiences and perceptions of childhood onto their child clients. **\*619** Attorneys in these circumstances who do not make special efforts to know and understand their clients and their clients' worlds run the risk of subverting their clients' norms in favor of reflexively relying on their own cultural knowledge and experience, which may be very different than that of their clients.

#### E. Limitations of Legal Rights Approaches

Legal representation is often framed by a single issue or related set of legal issues. For children, legal representation often arises in the context of litigation. [\[FN222\]](#) Litigation primarily is concerned with asserting and enforcing legal rights, which are extraordinarily important, particularly for those who, like children, have few rights or inhabit a place without political power. [\[FN223\]](#) However, as rights are mostly individualistic and individualizing, litigating these rights can be problematic for children who are dependent on and enmeshed in family systems. [\[FN224\]](#) Indeed, it may be counterproductive to divorce a child's welfare and needs from those of his or her family (and community), which are also essential to the child's welfare.

**\*620** Furthermore, legalistic approaches do little to address broader systemic problems that create risks for children, such as racism, poverty, poor schools, and limited economic opportunity. [\[FN225\]](#) On the contrary, as legal rights tend to reinforce existing power structures and socio-economic inequities, [\[FN226\]](#) legalistic approaches may legitimate systemic problems [\[FN227\]](#) and amount to mere tinkering with individual rights within this framework. [\[FN228\]](#) The problems and solutions for youth are personalized, individualized, and pathologized, while the remedies address behavior through penal and medical models, [\[FN229\]](#) rather than community development, job training, better schools, parks, and after-school programs. For example, in the **\*621** juvenile justice and education contexts, where children's rights are focused on the individual child, more money is spent on locking up children than on public schools. [\[FN230\]](#) The schools in turn are increasingly resorting to diagnosis and medication to manage individual students rather than addressing the systemic problems that create the need for such responses in the first place. [\[FN231\]](#) 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. [\[FN232\]](#)

In child welfare or other custody matters, this individuation defines children and their needs in developmental, rather than socio-economic terms. For the individual child, child welfare rights do not seek to remedy socioeconomic risks in the child's community, and too often fail to apprehend the safety in that community. [\[FN233\]](#) Instead, the child's welfare rights require services to be provided in the home to make it safe or for the child to be removed to another home. [\[FN234\]](#) Thus, children's rights litigation does not address important issues such as a living wage for families, public recreation areas, or the distribution of economic and social capital [\[FN235\]](#) and does not frame child welfare in broader terms that might encompass affordable daycare, housing, well-funded schools, and safe communities. [\[FN236\]](#) Instead, such litigation addresses psychological attachments to persons who provide **\*622** conventionally good developmental environments [\[FN237\]](#) and the provision of targeted assistance, such as placement in a different and presumably safer home where the child's individual need for physical and emotional security will be met. [\[FN238\]](#)

The increase in the number 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. [\[FN239\]](#) These policies exacerbate liberal notions of the privacy of wealth and need--in which children's welfare is directly related to their parents' and community's social and economic resources--by relying on the child abuse and neglect system as a primary method of addressing children's welfare instead of directly funding poor families. [\[FN240\]](#) For example, with the advent of CAPTA and the reforms to foster care funding that followed in 1982, [\[FN241\]](#) federal funding was all but removed from poor families and given to state agencies and foster and adoptive families. During the following decade, the Personal Responsibility and Work Reconciliation Act severely limited aid to poor families under the Aid to Families with Dependent Children program. [\[FN242\]](#) That Act essentially forbade poor women to care for their children rather than work for wages at about the same time that Congress enacted the Adoption and Safe Families Act (ASFA), which increased federal incentives for adoption and effectively mandated termination of **\*623** parental rights for most children in foster care longer than one year. [\[FN243\]](#) The ASFA "was widely heralded as a children's rights victory." [\[FN244\]](#)

## V. Critical Assessments and Corrections: The Intersection of Children's Rights and Representation

The deteriorating conditions for children and the apparent failure of children's attorneys to stem this tide raise questions about the role and value of the representation these attorneys provide. While children's attorneys and academics continue to advocate in favor of children's rights and increasing legal representation, there has been little research regarding the relationships among children's rights, autonomy, and legal representation. Indeed, much of the small body of critical analysis of children's rights has occurred apart from discussions regarding the role of lawyers in representing children. [\[FN245\]](#)

Scholars have been studying the substantive aspects of legal rights for children for some time. Some commentators have addressed the benefits of children's rights. [\[FN246\]](#) Others have addressed \*624 the racially and economically regressive and homogenizing aspects of youth and family law, particularly in the child welfare and juvenile justice context. [\[FN247\]](#) These scholars have noted that viewing children in isolation and separating their interests from those of their families and communities, although sometimes necessary, can discount the fullness of their lives. [\[FN248\]](#)

\*625 In the meantime, the children's bar has been identifying its own problems and promoting better practices by children's lawyers. [\[FN249\]](#) They have explored how the attorney-client relationship and its individualistic, rights-based characteristics present challenges to representing children because so often children are not legally empowered to make decisions, but instead are dependent on others, usually parents. [\[FN250\]](#) Like adults, but with less independence, children are socially and materially embedded in families and communities and depend on them for identity, affection, and belonging. These dependencies make it difficult to analyze the child's various rights and responsibilities, as well as the attorney's professional duties. Thus, questions about representation include procedural issues of whether and when children should direct the representation and whether children's youth requires different standards for confidentiality, conflicts, and loyalty. These questions have also triggered inquiry into the substantive issues of the content of children's rights and the role of children's "best interests" in \*626 representing children who are not considered developmentally or legally competent to make decisions about their own lives. [\[FN251\]](#)

Recently, the children's bar, child advocacy organizations, law professors, and other child and youth advocates have begun to address both the procedural and substantive issues by exploring the role of children's attorneys in promoting and perpetuating the inequities of children's law. [\[FN252\]](#) These groups have come together for two gatherings, ten years apart, to examine the ethics of representing children and children's worsening status despite the increase in the number of children's lawyers. [\[FN253\]](#) The first gathering \*627 was at Fordham Law School in December 1995 (the Fordham Children's Conference), [\[FN254\]](#) and the second was at the University of Nevada, Las Vegas, Boyd School of Law in January 2006 (the UNLV Children's Conference). [\[FN255\]](#) The purpose of these historic meetings was to examine critically and prescriptively the role of children's lawyers as legal professionals and as agents of law reform. [\[FN256\]](#)

The conferences were inspired by the observation that the rules of professional responsibility supply little guidance to attorneys representing children. The conference participants took seriously the Model Rules of Professional Responsibility's mandate that when a "client's capacity to make adequately considered decisions in connection with a representation is diminished . . . because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." [\[FN257\]](#) They realized, however, that in practice, such a role may be difficult to maintain because although attorneys may be well-trained in the law, they are not necessarily trained to determine what a normal client-lawyer relationship with a child is [\[FN258\]](#) or when a child is not capable of directing the lawyer. [\[FN259\]](#) Lawyers feared that despite helpful \*628 commentary designed to clarify these questions, attorneys still needed more guidance. [\[FN260\]](#)

The participants at these working conferences were united in their beliefs that "improving professional representation . . . matter[s] to the lives of children" [\[FN261\]](#) and that children's attorneys can make a difference--for better and for worse. The conferences were based on two crucial underlying presumptions: first, that professional standards "influence lawyers' responses" to the types of difficult legal and ethical choices lawyers for children face; and second, 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." [\[FN262\]](#) Therefore, the two conferences aimed to provide that needed guidance.

The lawyers, scholars, and advocates who attended the Fordham Children's Conference sought answers to a number of important questions: what is the role of the child's attorney; what should attorneys do when their child clients cannot speak, express objectives that seem unwise or even dangerous, or have conflicts with others the attorney represented (e.g., the child's siblings, parents, or guardians); what is the role of the child's best interests in the representation; how can an attorney determine a child's best interests; and what does an attorney do when he or she has been appointed to represent the child's best interests. [\[FN263\]](#) The Fordham \*629 Children's Conference answered those questions and more. [\[FN264\]](#) At the conclusion of the conference, the participants produced a set of guidelines (the Fordham Recommendations) regarding allocating decision making between the child client and his or her 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 examining the judicial role regarding appointment of children's attorneys. [\[FN265\]](#)

The Fordham Recommendations resoundingly established that children's attorneys should represent their clients like they would adults, in the sense that lawyers should represent their child client's wishes. [\[FN266\]](#) In other words, a children's lawyer should not assume that the child is incompetent to direct the lawyer if the child wants something the lawyer believes is unwise. For children unable to verbally direct their attorney, the Fordham Recommendations concluded that the attorney should represent the child's legal interests, not the child's best interests. [\[FN267\]](#) For a child of any age, the Fordham Recommendations urged an attorney to get to know his child client as much as possible through frequent contact with the child. Particularly for a child who cannot provide explicit direction, the attorney should learn from important people in the child's life, as well as mental health and other experts who are trained to understand children's developmental needs. [\[FN268\]](#) These and other recommendations were designed to ensure that children's attorneys provide principled representation based on professional standards, rather than substituting themselves for the child as the principal in **\*630** the relationship. [\[FN269\]](#) These mandates are crucial because children are generally powerless "to control or fire the lawyers who act in their name" and it is "only professional norms [that] guide lawyers' conduct." [\[FN270\]](#)

The Fordham Children's Conference brought to child advocacy a strong and necessary consensus regarding the role of the children's bar. [\[FN271\]](#) The Fordham Recommendations were a useful supplement to state professional responsibility rules and provided structure and guidance for lawyers representing children. [\[FN272\]](#) Indeed, the Fordham Recommendations and conference papers have been 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. [\[FN273\]](#)

While the Fordham Children's Conference resolved important issues regarding power and authority in the attorney-child-client relationship, it explicitly left open a handful of questions: 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; whether attorneys should specialize or provide representation over a range of matters regarding the child; what are the most effective and best types of interdisciplinary practice models; and whether lawyers for children should be mandatory reporters. [\[FN274\]](#) In addition, although the Fordham Recommendations addressed 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. [\[FN275\]](#) 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 **\*631** representing children can isolate them from, and even pit them against, their families and communities. [\[FN276\]](#)

In 2006, children's advocates convened another broad gathering at the University of Nevada, Las Vegas, to continue the important discussion regarding representing children begun ten years earlier at Fordham and to address some of that conference's unanswered questions. [\[FN277\]](#) The organizers of the UNLV Children's Conference (which included the two main organizers of the Fordham Children's Conference) [\[FN278\]](#) prioritized the issue of children's attorneys' role in the pursuit of justice and in relation to the children's families and communities. [\[FN279\]](#) The participants in the UNLV Children's Conference produced recommendations (the UNLV 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 the United States. [\[FN280\]](#) The UNLV Recommendations also identified areas of training and types of practice models [\[FN281\]](#) and called on the children's bar to actively reform to reflect the actual needs and wishes of their youthful clients, rather than society's dominant norms. [\[FN282\]](#)

**\*632** At the core of the UNLV Children's Conference proceedings and UNLV Recommendations was a growing consensus regarding "the importance of discerning and presenting children's voice and the limitations of viewing children in single dimensions" [\[FN283\]](#) and the recognition that "children's voice and the solutions to many of their legal problems are grounded

in family and community.” [\[FN284\]](#) Thus, the UNLV Recommendations place the child at the center of the representation, suggesting methods that would encourage children's participation in proceedings regarding their own lives. [\[FN285\]](#) Those methods commend the attorney to reflect on, and curb, his or her own biases and experiences and develop 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). [\[FN286\]](#)

Also in keeping with attempts to respect and promote the individuality, diversity, and participation of children, the UNLV Recommendations identified 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), but 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 child development theories; and knowledge of cultural differences, especially the cultural norms of the child's community. [\[FN287\]](#) Finally, the UNLV Recommendations encouraged children's attorneys to affirmatively promote procedural and systemic legal reforms “to improve the quality and provision of justice for children” based on the needs and interests of children, families, and their communities. [\[FN288\]](#) Attorneys would accomplish these reforms by promoting youth participation and empowerment of children and families, challenging policies and practices that undermine or harm children and families, and working to eliminate bias. [\[FN289\]](#) To accomplish these goals, children's attorneys would expand their \*633 methods of advocacy to include community organizing, policy advocacy, and media campaigns. [\[FN290\]](#)

Along these lines, the UNLV Recommendations also encouraged attorneys to engage in multidisciplinary practice [\[FN291\]](#) to help them provide competent representation to their clients and augment the limitations of legal training and legal frameworks. [\[FN292\]](#) This practice might include consulting mental health professionals, doctors, social workers, education experts, interpreters, and community experts. [\[FN293\]](#) The goal of such consultations would be to help compensate for the limited extralegal training attorneys receive, thereby bridging differences between attorneys and their clients and improving attorney-client communications. [\[FN294\]](#)

Together, the Fordham and UNLV Conferences, their papers, recommendations, and reports reflect an apparent growing consensus that attorneys must listen to their child clients and refrain from inserting themselves into, or overshadowing, their clients' lives and wishes. [\[FN295\]](#) This new critical approach to children's legal representation urges children's attorneys to know and do more, but also to:

[C]abin 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. [\[FN296\]](#)

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

\*634 The conferences' findings and recommendations reflect a view that children's lawyers must meet the highest level of ethics and competence. The conferences also recognized that these standards are elusive and will require both resource-intensive and emotionally-intensive undertakings by those who wish to represent children. [\[FN297\]](#) These high standards have an aspirational purpose meant to communicate the best practice, even if the daily crush of caseloads makes that practice difficult to achieve. [\[FN298\]](#) Fundamentally, these recommendations aim to make children's attorneys self-conscious about what they do and to encourage habits that will promote children's, rather than the attorney's, interests during the representation.

Still, while these prescriptions are straightforward and child-centered, much work remains. Despite the broad-based and growing critique of lawyers' and the law's use of children as vehicles to advance dominant norms, many attorneys persist in using a model of representation focusing on the best interests of the child, particularly in child welfare and custody proceedings. [\[FN299\]](#) 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 interests model. [\[FN300\]](#) The tenacity of this representation model is surprising in light of children's attorneys' increasing willingness to acknowledge that they \*635 do not know and are not trained to know what is best for children. [\[FN301\]](#) It may be, however, that the hubris of attorneys, [\[FN302\]](#) children's vulnerability, and the limited options children's attorneys perceive in the contexts in which they are most likely to represent children combine to push back against this new-found humility.

Yet as the Fordham and UNLV Children's Conferences are evidence that as the children's bar matures, it appears to be able to perceive its own role in the pursuit of justice for children and to be able to separate the attorney's perspective from that of the child. [\[FN303\]](#) This series of critical reflections has begun and will no doubt continue as the children's bar seeks to implement norms that promote the child's voice and identity rather than those of 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 remains to be seen just how such input might influence matters such as education content and funding, a living wage, community development, child labor, and immigration policy, but it will no doubt bring needed perspectives to prevailing notions of childhood and dependency.

[\[FN1\]](#). William S. Boyd Professor of Law and Associate Dean for Clinical Studies, William S. Boyd School of Law, University of Nevada, Las Vegas. The author is indebted to Ngai Pindell, Robert Corrales, Marty Guggenheim, and Peter Joy for their comments on earlier drafts, participants at the Emory University Law School Feminist Legal Theory Conference on Vulnerability and Dependency, and to Boyd law students Tina Bhatia (2006) and Melissa Oliver (2007) for their research assistance.

[\[FN1\]](#). Our contemporary notions of childhood view it as a time of social, psychological, and physical development when children need care, nurture, and education to become functioning, independent adults. David Archard, *Children: Rights and Childhood* 55-56 (2d ed. 2004); Allison James & Adrian L. James, *Constructing Childhood: Theory, Policy and Social Practice* 36 (2004). This notion of childhood as a distinct phase of life and children as dependent became normative in the nineteenth century. Paula S. Fass & Mary Ann Mason, *Introduction to Childhood in America* 1, 2-3 (Paula S. Fass & Mary Ann Mason eds., 2000) [hereinafter *Childhood in America*]. Holly Brewer situates the source of this transformation in the seventeenth and eighteenth centuries when Anglo and American political philosophy shifted from divine authority to consent as the source of political power. Holly Brewer, *By Birth or Consent: Children, Law, & the Anglo-American Revolution in Authority* 7-8 (2005). For additional analysis of the political role of childhood, see Caroline F. Levander, *Cradle of Liberty* (2006).

[\[FN2\]](#). For histories of this movement, see Duncan Lindsey, *The Welfare of Children* 13-14 (2d ed. 2004); Mary Ann Mason, *From Father's Property to Children's Rights* 101-11 (1994) [hereinafter *Mason, From Father's Property to Children's Rights*].

[\[FN3\]](#). *Convention on the Rights of the Child*, opened for signature Nov. 20, 1989, art. 1, 144 U.N.T.S. 123, art. 12 (entered into force Sept. 2, 1990) [hereinafter *Children's Convention*] (requiring state assurances that children have the opportunity to be heard in matters affecting their interests).

[\[FN4\]](#). See, e.g., *In re Gault*, 387 U.S. 1 (1967) (requiring appointment of counsel for juveniles charged with offenses that could lead to a loss of physical liberty); Child Abuse Prevention and Treatment Act of 1974, *Pub. L. No. 93-247, 88 Stat. 4 (1974)* (codified at *42 U.S.C. § 5106a*) (mandating states receiving federal funding to appoint a legal representative for children subject to abuse and neglect court proceedings).

[\[FN5\]](#). I use "voice" to refer to children's literal words and wishes, but also to children's identity, values, and needs.

[\[FN6\]](#). Cf. Martin Guggenheim, *What's Wrong with Children's Rights?* 8 (2005) [hereinafter *Guggenheim, What's Wrong with Children's Rights?*] (discussing the lawyer-driven nature of the children's rights movement); Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 *Nev. L.J.* 692, 719-21 (2006) [hereinafter *Appell, Children's Voice and Justice*] (explaining the ideological disconnect that could result from the fact that advocates in movements for the rights of children and families are not members of those groups); Annette R. Appell, *Uneasy Tensions Between*

[Children's Rights and Civil Rights](#), 5 Nev. L.J. 141, 160-61, 166-71 (2004) [hereinafter Appell, Uneasy Tensions] (examining how dependency rights differ from civil rights in that the former do not deal with the self-determination and empowerment of children); Martin Guggenheim, [How Children's Lawyers Serve State Interests](#), 6 Nev. L.J. 805, 829-34 (2006) [hereinafter Guggenheim, How Children's Lawyers Serve State Interests] (discussing the anti-parent bias that children's advocates often take by virtue of their roles and the assumption that the process of protecting children is inherently adversarial).

[FN7]. Forty years ago, the Court in [In re Gault](#), 387 U.S. 1 (1967), required appointment of attorneys for youth in juvenile justice proceedings, although the realization of that mandate has been less than complete. Robert E. Shepherd, Jr., [Still Seeking the Promise of Gault: Juveniles and the Right to Counsel](#), 18 Crim. Just. 23, 25-27 (2003-04). In 1974, federal law mandated appointment of guardians ad litem for children in child protection cases. Child Abuse Prevention and Treatment Act of 1974, [Pub. L. No. 93-247, 88 Stat. 4 \(1974\)](#) (codified at [42 U.S.C. § 5106a](#)) and most United States jurisdictions comply with this requirement. Jean Koh Peters, [How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study](#), 6 Nev. L.J. 966, 1015 (2006). The directory of children's pro bono legal projects compiled by the American Bar Association Section on Litigation's Children's Litigation Committee (formerly the Task Force on Children) lists approximately 200 law offices and law school legal clinics that provide representation to children in a wide variety of legal areas. Am. Bar Ass'n, [Directory of Pro Bono Children's Law Programs \(2007\)](#), [http://www.abanet.org/litigation/committees/childrights/docs/publications\\_directory.pdf](http://www.abanet.org/litigation/committees/childrights/docs/publications_directory.pdf). Children's lawyers have organized centers and bar associations that affect practice and policy. See, e.g., Am. Bar Ass'n Ctr. on Children and the Law, <http://www.abanet.org/child> (last visited Feb. 16, 2008); Nat'l Ass'n of Counsel for Children, <http://www.nacchildlaw.org> (last visited Feb. 16, 2008); Nat'l Juvenile Defender Ctr., <http://www.njdc.info/> (last visited Feb. 16, 2008); see also Linda D. Elrod, [Client-Directed Lawyers for Children: It is the "Right" Thing to Do](#), 27 Pace L. Rev. 869, 870 (2007) (listing bar activities and initiatives on behalf of children's rights and interests).

[FN8]. Children's rights are commonly viewed as an enlightened progression from children's status as chattel under the exclusive control of their parents. See Mason, [From Father's Property to Children's Rights](#), supra note 2, at xii-xiii; Barbara Bennett Woodhouse, [Who Owns The Child?: Meyer And Pierce And The Child As Property](#), 33 Wm. & Mary L. Rev. 995, 1051-52 (1992); see also Chris Jenks, [Childhood 9-10 \(1996\)](#) (when children are viewed as incompetent or otherwise denied agency, "they become nominal ciphers seemingly without an active dimension"). Some commentators have even equated childhood with slavery. See, e.g., James G. Dwyer, [Parents' Religion and Children's Welfare: Debunking the Doctrine of Parental Rights](#), 82 Cal. L. Rev. 1371, 1412-13 (1994) (noting that parental control over children resembles certain aspects of slavery); Katherine Hunt Federle, [Children, Curfews, and the Constitution](#), 73 Wash. U. L.Q. 1315, 1344 (1995) (arguing that the rights afforded to children perpetuate their powerlessness as was the case with slaves); Akhil Reed Amar & Daniel Widawsky, [Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney](#), 105 Harv. L. Rev. 1359, 1364 (1992) (comparing an abused child to a slave child).

[FN9]. These observations are part of a larger work in progress that examines the understudied area of child advocacy, where lawyers are inordinately powerful vis-à-vis their clients, and traces the role of attorneys and other adults in defining, developing, and enforcing children's rights.

[FN10]. See, e.g., Stuart A. Scheingold & Austin Sarat, [Something to Believe In, Politics, Professionalism, and Cause Lawyering 3 \(2004\)](#) [hereinafter Scheingold & Sarat, [Something to Believe In](#)] (defining cause lawyering as "using legal skills to pursue ends and ideals that transcend client service"); Austin Sarat & Stuart Scheingold, [State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction](#), in [Cause Lawyering and the State in a Global Era 13](#) (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter [Cause Lawyering and the State in a Global Era](#)] (characterizing cause lawyers as those who challenge political, social, and legal values and resources); Austin Sarat & Stuart Scheingold, [Cause Lawyering and the Reproduction of Professional Authority: An Introduction](#), in [Cause Lawyering, Political Commitments and Professional Responsibilities 3-28](#) (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter [Cause Lawyering, Political Commitments and Professional Responsibilities](#)] (explaining the concept of cause lawyering).

[FN11]. See, e.g., [Lawyers' Ethics and the Pursuit of Social Justice, A Critical Reader 2](#) (Susan D. Carle ed., 2005) (noting the role of law in promoting social justice); Gerald P. López, [Rebellious Lawyering: One Chicano's Vision of Progressive Law](#)

Practice 66-74 (1992) (explaining the strategies and techniques used by lawyers to promote change); Alexandra Natapoff, [Speechless: The Silencing of Criminal Defendants](#), 80 N.Y.U. L. Rev. 1449, 1469-70 (2005) (describing how the “advent of defense counsel” has diminished a defendant's opportunity to speak and the effects of this phenomenon on the legal system); Lucie E. White, [Seeking “... the Faces of Otherness ...”: A Response to Professors Sarat, Felstiner, and Cahn](#), 77 Cornell L. Rev. 1499, 1502-03 (1992) [hereinafter White, Seeking The Faces of Otherness] (discussing how new theories of power may help lawyers achieve greater social justice).

[FN12]. The existing literature regarding community lawyering and cause lawyering has barely touched on the representation of children. See, e.g., Scheingold & Sarat, Something to Believe In, supra note 10, at 23-50 (examining the history of cause lawyering); Thomas M. Hilbink, [You Know the Type ...: Categories of Cause Lawyering](#), 29 Law & Soc. Inquiry 657, 665-73 (2004) (focusing on cause lawyering in representing the poor and advocating for the rule of law); see generally Cause Lawyering, Political Commitments and Professional Responsibilities, supra note 10 (examining strategies, contexts, conditions, and the organization of cause lawyering in representation dealing with capital punishment, immigration, and poverty in places such as Israel, Indonesia, and the developing world); López, supra note 11 (exploring activist lawyering for social change and related problem solving through fiction and personal experience).

[FN13]. See, e.g., James & James, supra note 1, at 14-27 (analyzing childhood and the role of the child); Allison James et al., Theorizing Childhood 26-34 (1998) (introducing sociological approaches that typify the new social studies of childhood); Berry Mayall, Towards a Sociology for Childhood: Thinking from Children's Lives 112-20 (2002) (providing young people's accounts of their childhood experiences); Rebecca Raby, Across a Great Gulf? Conducting Research on Adolescents, in Representing Youth 39 (Amy L. Best ed., 2007) (noting the inclusion of children in research projects as evidence that young people are social actors); Jenks, supra note 8, at 50-51 (describing the emergence of the sociology of childhood).

[FN14]. Annette R. Appell, [“Bad” Mothers and Spanish-Speaking Caregivers](#), 7 Nev. L.J. 759, 769-72, 777-79 (2007) [hereinafter Appell, Spanish-Speaking Mothers] (examining the child welfare system's homogenizing tendencies and failure to respect linguistic and other cultural experiences of minorities); Appell, Children's Voice and Justice, supra note 6, at 711-22 (assessing whether and how children's attorneys promote child-centered and community-centered justice for children); Appell, Uneasy Tensions, supra note 6, at 145-50 (examining the cultural and legal battles over the appropriate norms for Native-American children); Annette R. Appell, [Virtual Mothers and the Meaning of Parenthood](#), 34 U. Mich. J.L. Reform 683, 765-79 (2001) [hereinafter Appell, Virtual Mothers] (assessing the role of the state and legal regimes in undermining the integrity of poor families and families of color); Annette R. Appell, [Protecting Children or Punishing Mothers: Gender, Race and Class in Child Protection Proceedings](#), 48 S.C. L. Rev. 577, 579, 586-87, 598-99 (1997) (illustrating how the child protection system punishes mothers who are not compliant and places children at risk by focusing on parental conduct rather than children's needs).

[FN15]. Elizabeth S. Scott, The [Legal Construction of Adolescence](#), 29 Hofstra L. Rev. 547, 550-58 (2000).

[FN16]. See, e.g., [Unif. Probate Code § 2-106](#) cmt. (amended 2006), available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm> (describing adult descendants of the deceased as “children”).

[FN17]. This is, of course, a colloquial observation but there is also a growing and very rich body of research exploring the foundational political, social, symbolic and rhetorical roles of the “child” in this country. See, e.g., Brewer, supra note 1, at 1-16 (tracing the political origins of the creation of childhood to support democratic government); Levander, supra note 1, at 1-28 (tracing the rhetorical and symbolic role of the child in constructing race and national identity in the United States); see generally Steven Mintz, Huck's Raft (2004) (tracing the complexity and history of children and childhood in the United States).

[FN18]. James & James, supra note 1, at 1-25; Annie Bunting, Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue, 14 Soc. & Legal Stud. 17, 17-19 (2005); Barrie Thorne, Re-Visioning Women and Social Change: Where are the Children?, 1 Gender & Soc'y 85, 96-98 (1987).

[FN19]. Bunting, *supra* note 18, at 18, 21.

[FN20]. James & James, *supra* note 1, at 14.

[FN21]. See, e.g., Mayall, *supra* note 13, at 5 (“We have to ask, how has it come about that childhood is understood in the ways it is, in this society and at this time?”); James & James, *supra* note 1, at 13, 18-19 (noting that childhood is a biological stage of life, but that the interpretation of biology and identification of needs are socially constructed); Jenks, *supra* note 8, at 5-8 (noting the universality of youth, but the wide variety of children's experiences and norms that govern them).

[FN22]. James & James, *supra* note 1, at 13.

[FN23]. Martha Albertson Fineman, [Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency](#), 8 *Am. U. J. Gender Soc. Pol'y & L.* 13, 14 (2000).

[FN24]. See Robert Garcia et al., [Healthy Children, Healthy Communities: Schools, Parks, Recreation, and Sustainable Regional Planning](#), 31 *Fordham Urb. L.J.* 1267, 1267-69 (2004) (exploring the effect of lack of parks and playgrounds on inner city children's health and welfare); Joe Scantlebury et al., Preparing Vulnerable Youth for Adulthood Through Youth Workforce Development, 39 *Clearinghouse Rev. J. of Poverty Law & Pol'y* 229, 229-30 (2005) (describing the conditions for children in low-income communities).

[FN25]. See [San Antonio Indep. Sch. Dist. v. Rodriguez](#), 411 U.S. 1, 54 (1972) (finding that the fact that benefits and burdens fell unevenly depending on the relative wealth of political subdivisions was insufficient cause to preempt localized school finance schemes). Of course, children can attend schools outside their communities if their parents have the financial or social capital to utilize other schools.

[FN26]. Charles R. Lawrence III, [Who is the Child Left Behind?: The Racial Meaning of the New School Reform](#), 39 *Suffolk U. L. Rev.* 699, 707-09 (2006); see also Lupe S. Salinas & Robert H. Kimbal, The [Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools](#), 14 *Geo. J. on Poverty L. & Pol'y* 215, 216 (2007) (exploring how public schools segregated along race and class lines disregard the unequal outcomes for poor children); Emily Suski, [Actually, We Are Leaving Children Behind: How Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students' Needs](#), 14 *Geo. J. on Poverty L. & Pol'y* 255, 255-59 (2007) (arguing that Title I does not sufficiently force schools to address the unique needs of disadvantaged students).

[FN27]. See Donald J. Hernandez, Demographic Change and the Life Circumstances of Immigrant Families, 14 *The Future of Children* 17, 28-29 (Summer 2004) (explaining how children's developmental, educational, and physical welfare are tied to parental resources).

[FN28]. *Id.*; see also, Emily Beller & Michael Hout, Intergenerational Social Mobility: The United States in Comparative Perspective, 16 *The Future of Children* 19, 27-31 (2006), available at [http://www.futureofchildren.org/usr\\_doc/Volume\\_16\\_Number\\_2\\_Fall\\_2006.pdf](http://www.futureofchildren.org/usr_doc/Volume_16_Number_2_Fall_2006.pdf) (noting increased income disparities and decreased intergenerational mobility).

[FN29]. Appell, *Uneasy Tensions*, *supra* note 6, at 143-46; Angela P. Harris, [From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality](#), 14 *Wm. & Mary Bill Rts. J.* 1539, 1562-67 (2006) [hereinafter Harris, *From Stonewall to the Suburbs?*].

[FN30]. See Robin Stryker, Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies, 3 *Ann. Rev. Law & Soc. Sci.*, 69, 70 (noting that liberal legal theory holds law as neutral and uninvolved in economic, political, and social inequalities) (2007); Harris, *From Stonewall to the Suburbs?*, *supra* note 29, at 1562 (discussing the flawed concept of a division between public and private matters).

[FN31]. Harris, *From Stonewall to the Suburbs?*, supra note 29, at 1561-66.

[FN32]. James & James, supra note 1, at 49-51.

[FN33]. See Appell, *Virtual Mothers*, supra note 14, at 780-86; Appell, *Spanish-Speaking Mothers*, supra note 14, at 761-65, 788.

[FN34]. Nancy Scheper-Hughes & Carolyn Fishel Sargent, *Introduction to Small Wars: The Cultural Politics of Childhood* 1, 12 (Nancy Scheper-Hughes & Carolyn Fishel Sargent eds., 1998).

[FN35]. Compare, e.g., [Prince v. Massachusetts, 321 U.S. 158 \(1944\)](#) (upholding state child labor limitations) with Samuel G. Freedman, *Working Children in Contemporary Chinatown*, in *Childhood in America*, supra note 1, at 275, 275-78 (describing the long hours Chinese immigrant children work every day).

[FN36]. There are no national standards regarding the age at which children can be left alone or care for others, but state laws and other guidelines suggest that children under thirteen years of age cannot care for other children. Nat'l Child Care Info. Ctr., U.S. Dep't of Health & Hum. Servs., *Children Home Alone and Babysitter Age Guidelines* (2006), <http://www.nccic.acf.hhs.gov/poptopics/homealone.pdf>.

[FN37]. See, e.g., Barbara Fedders, [Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth](#), 6 Nev. L.J. 774, 787-99 (2006) (discussing the failures of attorneys and other adults to apprehend and respect children's sexual orientation and sexual identity); Mary E. Odem, *Delinquent Daughters*, in *Childhood in America*, supra note 1, at 494, 495-98 (considering age of consent laws around the turn of the nineteenth century); Maris A. Vinovskis, *The Politics of Parental Notification*, in *Childhood in America*, supra note 1, at 530, 530-32 (discussing the limited right of adolescents to control their reproduction).

[FN38]. This lack of capacity also undergirds and is reinforced by the laws that permit legal representatives to represent children's best interests rather than their wishes. See Koh Peters, supra note 7, at 1000-10 (discussing the prevalence of best interest representation as mandated by CAPTA in spite of the view of the children's bar leaders and the international community which has embraced the Convention on the Rights of the Child's norm that children have a right to be heard); Mary Ann Mason, *A Voice for the Child?*, in *Childhood in America*, supra note 1, at 609, 609-11 [hereinafter Mason, *A Voice for the Child?*] (noting that children have no voice and no power in domestic custody disputes).

[FN39]. This is evident in children's lack of political and civil capacity. See Howard Cohen, *Equal Rights for Children* 42-43 (1980) (listing rights children do not have). This has not always been the case; in pre-modern times when birth, not the development of reason, conferred status, young children held office and could even be king. Brewer, supra note 1, at 18-28.

[FN40]. Appell, *Uneasy Tensions*, supra note 6, at 158-61; Joseph M. Hawes, *The Children's Rights Movement: A History of Advocacy and Protection* 66-79, 99-105 (1991); Lindsey, supra note 2, at 23-40; Bette L. Bottoms et al., *Children, Social Science, and the Law: An Introduction to the Issues*, in *Children, Social Science, and the Law* 1 (Bette L. Bottoms et al. eds., 2002).

[FN41]. See Mary Becker, [Patriarchy And Inequality: Towards A Substantive Feminism](#), 1999 U. Chi. Legal F. 21, 75-76 (noting the lack of representation poor Americans have in the political process); Samuel Issacharoff, [Fragile Democracies](#), 120 Harv. L. Rev. 1405, 1415-23 (2007) (illustrating the U.S. government's structural mechanisms that maintain centrism); Sylvia R. Lazos Vargas, [Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralistic Polity](#), 58 Md. L. Rev. 150, 160-205 (1999) (noting differences between majority and minority world views).

[FN42]. See *infra* Part IV.C.

[FN43]. See *infra* Part IV.D; see also *infra* note 60 and accompanying text.

[FN44]. These outcomes are the subject of child welfare, juvenile justice, and domestic relations cases.

[FN45]. See, e.g., [Schall v. Martin, 467 U.S. 253 \(1984\)](#) (class habeas corpus proceeding challenging pretrial detention of juveniles); [Pennhurst v. Halderman, 451 U.S. 1 \(1981\)](#) (class action challenging conditions in state home for mentally disabled youth and adults); [Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816 \(1977\)](#) (class action brought on behalf of foster families and children (later severed) challenging process of removal of children from foster homes); see also Appell, Children's Voice and Justice, *supra* note 6, at 704-05 (discussing class action litigation on behalf of children).

[FN46]. Appell, Children's Voice and Justice, *supra* note 6, at 699 (discussing policy advocacy).

[FN47]. Juvenile delinquency and dependency proceedings generally are brought by the county or state and prosecuted by a government attorney.

[FN48]. Appell, Children's Voice and Justice, *supra* note 6, at 695. Indeed, children's attorneys are rarely in it for the money--for there are more remunerative areas of the law and wealthier client bases.

[FN49]. *Id.* at 697-705.

[FN50]. Although children did receive representation earlier, it was not until 1899 that special courts developed for children and over 60 years later that children first received the right to counsel. David Tanenhaus, Juvenile Justice in the Making xiii-xv, 23 (2004); see also [In re Gault, 387 U.S. 1, 34-41 \(1967\)](#).

[FN51]. See Mason, A Voice for the Child?, *supra* note 38, at 609-10 ("The idea of legal rights for children apart from those of their parents is relatively new and still very controversial for Americans.").

[FN52]. *Id.* 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 receive systematic oversight outside and apart from the family. Linda Gordon, The Great Arizona Orphan Abduction 197-99, 286-87, 293-94 (1999); Hawes, *supra* note 40, at *passim*; Lindsey, *supra* note 2, at 11-24; Mason, From Father's Property to Children's Rights, *supra* note 2, at *passim*.

[FN53]. [387 U.S. 1, 30, 41 \(1967\)](#).

[FN54]. Child Abuse Prevention and Treatment Act of 1974, [Pub. L. No. 93-247, 88 Stat. 4](#) (codified as amended at [42 U.S.C. §§ 5101-07](#)) (1974) ("CAPTA").

[FN55]. *Supra* note 7; *infra* notes 58-62 and accompanying text.

[FN56]. See generally Stacey Violante et al., Children Still at Risk (Am. Bar Ass'n 2001) (examining broad areas of advocacy for children); see also standards for various doctrinal practice areas, *infra* note 62.

[FN57]. Child welfare and juvenile justice are the two primary areas over which juvenile courts have jurisdiction. Tanenhaus, *supra* note 50, at xxi-xxx (describing the origin and development of the juvenile court and its jurisdiction over dependent and law breaking children). Although children's attorneys also represent children in other legal matters, the bulk of professional

organization and literature focuses on juvenile justice and dependency attorneys.

[FN58]. See, e.g., Kristin Henning, [It Takes a Lawyer to Raise a Child? Allocating Responsibilities Among Parents, Children & Lawyers in Delinquency Cases](#), 6 Nev. L.J. 836, 837-67 (2006) [hereinafter Henning, *It Takes a Lawyer*] (analyzing the tensions between client-directed representation of juveniles and the important role of parents in children's lives and decisions); Kristin Henning, [Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases](#), 81 Notre Dame L. Rev. 245, 246 (2005) [hereinafter Henning, *Loyalty, Paternalism, and Rights*] (noting ethical standards that mandate "zealous advocacy as directed by the client at all stages of the delinquency proceedings" and the fact that "best-interest advocacy" occurs in many cases); Michael Pinard, [The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications](#), 6 Nev. L.J. 1111, 1118-25 (2006) (noting the importance and difficulty of advising juveniles of the legal consequences of various findings and depositions); Abbe Smith, [Defending and Despairing: The Agony of Juvenile Defense](#), 6 Nev. L.J. 1127, 1127-28, 1134-36 (2006) (demonstrating that juveniles should receive the same zealous representation as adults).

[FN59]. See, e.g., Donald N. Duquette, [Two Distinct Roles/Bright Line Test](#), 6 Nev. L.J. 1240, 1241-43 (2006) (arguing for different roles for lawyers depending on the age of the client child); Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 818-27 (contending that offering strong legal representation to children serves the state's interests by masking lack of services to vulnerable families); Robert F. Harris, [A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model](#), 6 Nev. L.J. 1284, 1289-95 (2006) [hereinafter Harris, *A Response to the Recommendations of the UNLV Conference*] (describing how the dual roles of attorney and guardian ad litem enable lawyers to advance the best interests of the child). Indeed, child welfare attorneys are often appointed to represent the child's best interests. Koh Peters, supra note 7, at 996-1021.

[FN60]. See Appell, *Spanish-Speaking Mothers*, supra note 14, at 765-66; Susan Chibnall et al., *Children of Color in the Child Welfare System: Perspectives from the Child Welfare Community 3-8* (2003), available at <http://www.childwelfare.gov/pubs/otherpubs/children/children.pdf> (finding a disproportionate number of poor and Black children in the child welfare system); Nesheba Kittling, [God Bless the Child: The United States' Response to Domestic Juvenile Prostitution](#), 6 Nev. L.J. 913, 918-20, 925-26 (2006) (noting that in cases of sex trafficking, white victims are portrayed primarily as victims while Black victims are portrayed as criminals, and if the victims are girls, as "juvenile delinquents"); Kim Taylor-Thompson, [Girl Talk: Examining Racial and Gender Lines in Juvenile Justice](#), 6 Nev. L.J. 1137, 1140-62 (2006) (remarking that children are likely to be in both the juvenile justice and child welfare systems and that each system disproportionately targets poor Blacks).

[FN61]. Bruce A. Green & Bernardine Dohrn, [Foreword: Children and the Ethical Practice of Law](#), 64 Fordham L. Rev. 1281, 1288, 1291 (1995-96) [hereinafter Green & Dohrn, *Foreword*].

[FN62]. See, e.g., Am. Bar Ass'n, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), <http://www.abanet.org/child/repstandwhole.pdf> (setting forth professional standards for children's lawyers, emphasizing the importance of protecting children's legal rights in abuse and neglect cases); Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001), available at <http://www.naccchildlaw.org/documents/naccrecommendations.pdf> (setting forth professional guidelines for children's lawyers, emphasizing the importance of recognizing children's needs in abuse and neglect proceedings); Am. Bar Ass'n, *Juvenile Justice Standards Annotated: A Balanced Approach* (Robert E. Shepherd, Jr. ed., 1996) (offering guidelines for representation and adjudication in the juvenile justice context). But see [Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham](#), 6 Nev. L.J. 592 (2006) [hereinafter UNLV Recommendations] and [Recommendations of the Conference on Ethical Issues in the Legal Representation of Children](#), 64 Fordham L. Rev. 1301 (1996), reprinted in 6 Nev. L.J. 1408 (2006) [hereinafter Fordham Recommendations] for the results of two conferences at which children's attorneys, judges, and ethicists developed generalized guidelines for attorneys to help account for the special challenges of representing children, no matter what legal proceeding involves the child. These Recommendations and other information about the UNLV Conference, including the working group reports, are also available at <http://rcif.law.unlv.edu/>.

[FN63]. Green & Dohrn, Foreword, *supra* note 61, at 1291.

[FN64]. See Model Rules of Prof'l Conduct R. 1.2(a) (2004) (“[A] lawyer shall abide by a client’s decisions concerning the objective of representation.”); R. 1.6(a) (“[A] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”); R. 1.7(a) (“[A] lawyer shall not represent a client if ... the representation of one 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 lawyer’s responsibilities to another client.”).

[FN65]. Green & Dohrn, Foreword, *supra* note 61, at 1288-90.

[FN66]. Guggenheim, How Children’s Lawyers Serve State Interests, *supra* note 6, at 811-14.

[FN67]. *Id.* at 809; see *infra* Part C.

[FN68]. Guggenheim, How Children’s Lawyers Serve State Interests, *supra* note 6, at 807-14.

[FN69]. This is not to say that juvenile lawyers in fact do their clients’ bidding. See Henning, Loyalty, Paternalism, and Rights, *supra* note 58, at 246-47.

[FN70]. See Henning, It Takes a Lawyer, *supra* note 58, at 840 (noting that juvenile justice clients are school age and tend to be in developmental stages of separation from parents).

[FN71]. Or even the same attorney for the same client in delinquency and dependency proceedings. Guggenheim “observed cases where lawyers were representing the same client before the court in two different cases.... In both cases, the client wanted only to go home and get away from the court. Nonetheless, the lawyer fought to keep his client out of custody in the delinquency and fought for custody the second case.” Guggenheim, How Children’s Lawyers Serve State Interests, *supra* note 6, at 809.

[FN72]. *Id.* at 809-10.

[FN73]. Guggenheim, How Children’s Lawyers Serve State Interests, *supra* note 6, at 809-10.

[FN74]. See Am. Bar Ass’n, Center for Children and the Law, Information About the Center, <http://www.abanet.org/child/aboutus.shtml> (last visited Feb. 8, 2008); Children’s Def. Fund, About CDF, [http://www.childrensdefense.org/site/PageServer?pagename=About\\_CDF](http://www.childrensdefense.org/site/PageServer?pagename=About_CDF) (last visited Feb. 8, 2008); Child Welfare League of America, About CWLA: Fact Sheet, <http://www.cwla.org/whowhat/more.htm> (last visited Feb. 8, 2008); Child Welfare League of America, Advocacy, <http://www.cwla.org/advocacy/default.htm> (last visited Feb. 8, 2008). More study is needed regarding the types of advocacy children’s attorneys perform and who is advocating on behalf of children in legislative and agency fora.

[FN75]. See, e.g., [\*Braam ex rel. Braam v. State\*, 81 P.3d 851, 854 \(Wash. 2003\)](#) (class action by foster children represented by National Center for Youth Law); [\*David C. v. Leavitt\*, 242 F.3d 1206, 1207 \(10th Cir. 2001\)](#) (class action brought by National Center for Youth Law); [\*Kenny A. v. Perdue\*, 356 F. Supp. 2d 1353, 1355 \(N.D. Ga. 2005\)](#) (class action for children in child welfare system brought by Children’s Rights, Inc.); [\*R.C. v. Nachman\*, 969 F. Supp. 682, 684-86 \(M.D. Ala. 1997\)](#) (class action brought on behalf of children by Bazelon Center for Mental Health Law to reform the child welfare system).

[FN76]. Appell, Children’s Voice and Justice, *supra* note 6, at 719-21. In fact, it was a special working group of the American Bar Association, not the ABA Center on Children and the Law, that produced the wide-ranging Report on the Unmet Legal Needs of Children in 1993 (a report that targeted economic and social issues affecting families in addition to the more narrow

topic of children's individual legal needs). American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families, *America's Children at Risk* (1993).

[FN77]. Attorney Marian Wright Edelman, director of the Children's Defense Fund, may be an exception. See generally Marian Wright Edelman, *Why Don't We Have the Will to End Child Poverty?*, 10 *Geo. J. Poverty L. & Pol'y* 273 (2003) (describing broad notions of children's advocacy and justice). In contrast, 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." See Children's Rights, [http://www.childrensrights.org/site/PageServer?pagename=home\\_page](http://www.childrensrights.org/site/PageServer?pagename=home_page) (last visited Feb. 17, 2008).

[FN78]. Appell, *Children's Voice and Justice*, supra note 6, at 719-21.

[FN79]. [Brown v. Bd. of Educ., 347 U.S. 483 \(1954\)](#).

[FN80]. See generally Advancement Project, <http://www.advancementproject.org/ourwork/index.php> (last visited Feb. 17, 2008) (listing projects such as a voter protection program, a felon re-enfranchisement program, and an immigrant rights project).

[FN81]. See generally Bazelon Center for Mental Health Law, <http://www.bazelon.org/about/index.htm> (last visited Feb. 17, 2008) (stating that the Center's mission is "to protect and advance the rights of adults and children who have mental disabilities").

[FN82]. See Monique Dixon, *Combating the Schoolhouse-to-Jailhouse Track Through Community Lawyering*, 39 *Clearinghouse Rev. J. of Poverty Law & Pol'y* 135, 136-41 (2005).

[FN83]. See Chibnall et al., supra note 60, at 53-56; Jessica Short & Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice System 1-10* (2005); Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 35 *Loy. L.A. L. Rev.* 747, 747-48 (2000-01); Rosemary Sarri & Jeffrey Shook, *Human Rights and Juvenile Justice in the United States 17-23* (2003), [http://www.aclu.org/hrc/JuvenileJustice\\_Sarri.pdf](http://www.aclu.org/hrc/JuvenileJustice_Sarri.pdf); Coal. for Juvenile Justice, *African American Youth and the Juvenile Court System*, [http://www.juvjustice.org/media/factsheets/factsheet\\_1.pdf](http://www.juvjustice.org/media/factsheets/factsheet_1.pdf) (last visited Feb. 19, 2008); Child Welfare League of America, *Creating Connected Communities: Policy, Action, Commitment* (2001), <http://www.cwla.org/advocacy/nationalfactsheet01.pdf>.

[FN84]. Janet M. Currie, *The Invisible Safety Net* 143 (2006).

[FN85]. Sam Roberts, *Census Reveals Fear Over Neighborhoods*, *N.Y. Times*, Nov. 1, 2007, at A23. The Census Bureau reported that nearly half the nation's parents feared for their children's safety in their own neighborhoods; while overall more than 20 percent of "children are kept indoors because they live in dangerous neighborhoods," 34 and 37 percent of Blacks and Latinos, respectively, keep their children indoors for that reason. *Id.*

[FN86]. Koh Peters, supra note 7, at 967.

[FN87]. See infra Part IV.C. Of course, as children age, the circle of people who know the child widens to include friends, caregivers, teachers, ministers, and other members of social organizations so they have a wider set of mutually affective relationships outside the family.

[FN88]. See infra Part IV.C.

[FN89]. Ironically, this private space echoes the often maligned privacy of the family and related power of parents over children. See, e.g., Dwyer, supra note 8, at 1413 (critiquing parental rights); Amar & Widawsky, supra note 8, at 1360, 1363-73

(arguing that the Thirteenth Amendment applies to child abuse cases).

[FN90]. See, e.g., Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 807-14, 819-34 (showing how attorneys are unduly influenced by the state, rather than their clients); Koh Peters, supra note 7, at 1010-22 (showing that in many jurisdictions in the United States, children's attorneys represent their client's best interests rather than their wishes); Christine Schnyder Pierce & Stanley L. Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 *Behav. Sci. & L.* 89, 102 (2002) (finding that juveniles did not trust their attorneys to do their bidding).

[FN91]. This is true particularly in the child welfare context where this power is at or near its height and at its most destructive to norms that diverge from dominant culture. See Appell, *Children's Voice and Justice*, supra note 6, at 702-03.

[FN92]. See Appell, *Virtual Mothers*, supra note 14, at 765-79.

[FN93]. See, e.g., Natapoff, supra note 11, at 1450 (explaining how the criminal justice system encourages defendants to remain quiet while lawyers speak on their behalf); Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering during the Enactment of the Americans with Disabilities Act*, in *Cause Lawyering and the State in a Global Era*, supra note 10, at 211 (discussing legislative advocacy); White, *Seeking The Faces of Otherness*, supra note 11, at 1502-03 (considering individual representation); Derrick A. Bell, Jr., [Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation](#), 85 *Yale L.J.* 470, 482-93 (1976) (addressing the lawyer-client relationship in class action litigation).

[FN94]. See Appell, *Children's Voice and Justice*, supra note 6, at 704-05, 711-14.

[FN95]. See supra Part II.

[FN96]. Green & Dohrn, *Foreword*, supra note 61, at 1288. In child welfare proceedings, it is common to appoint attorneys to represent the child's best interests. Koh Peters, supra note 7, at 1010-22.

[FN97]. See also Model Rules of Prof'l Conduct R. 1.14 (2007) (requiring attorney to represent clients with diminished capacity to the greatest extent possible as if the client had full capacity); Robert E. Shepherd, Jr. & Sharon S. England, ["I Know the Child is My Client, But Who Am I?"](#), 64 *Fordham L. Rev.* 1917, 1932-43 (1996) (discussing various roles attorneys play for child clients) (1996); Green & Dohrn, *Foreword*, supra note 61, at 1292 (discussing challenges to fulfilling traditional attorney role for child clients).

[FN98]. Koh Peters, supra note 7, at 1013; see also Harris, *A Response to the Recommendations of the UNLV Conference*, supra note 59, at 1289-91 (defending representation of children's wishes and best interests); Donald N. Duquette, [Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required](#), 34 *Fam. L.Q.* 441, 444, 456-64 (2000) (advocating guardian ad litem model for young children and inhabiting attorney model when child ages).

[FN99]. See UNLV Recommendations, supra note 62, at 609; Fordham Recommendations, supra note 62, at 1308.

[FN100]. See Henning, *Loyalty, Paternalism, and Rights*, supra note 58, at 246.

[FN101]. See *id.* at 259-80 (noting difficulties in maintaining traditional attorney-client relationship with juvenile clients); Shepherd & England, supra note 97, at 1924-29 (reporting on studies finding inadequate representation and little client contact).

[FN102]. See, e.g., Bell, supra note 93, at 471 (noting disparities between the goals of NAACP attorneys and some members of the class they represented); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1, 45-48 (1990) (noting class and race differences between the client and the attorney that interfered

with the attorney's ability to represent her client).

[FN103]. See supra Part A.

[FN104]. See Appell, Children's Voice and Justice, supra note 6, at 711-14 (describing the difficulties children's attorneys face in discerning differences among children and assessing their needs).

[FN105]. Emily Buss, [Confronting Developmental Barriers to the Empowerment of Child Clients](#), 84 *Cornell L. Rev.* 895, 950-55 (1999); Emily Buss, [You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles](#), 64 *Fordham L. Rev.* 1699, 1705-06 (1996).

[FN106]. UNLV Recommendations, supra note 62, at 594.

[FN107]. This is particularly true given the differences in class, age, culture, language, and race between attorneys and child clients. See infra Part IV.C.

[FN108]. UNLV Recommendations, supra note 62, at 601-02; Green & Dohrn, Foreword, supra note 61, at 1286.

[FN109]. Howard Davidson & Erik S. Pitchal, Caseloads Must Be Controlled So All Child Clients May Receive Competent Lawyering 7-10 (Oct. 2006) (working paper, available at <http://ssrn.com/abstract=943059>); Katherine R. Kruse, [Standing in Babylon Looking Toward Zion](#), 6 *Nev. L.J.* 1315, 1319-20 (2006) [hereinafter Kruse, Standing in Babylon]; Shari F. Shink, In Search of a Child's Future, 6 *Nev. L.J.* 1374, 1374-78 (2006).

[FN110]. Appell, Children's Voice and Justice, supra note 6, at 714-16.

[FN111]. Removal of Barriers to Interethnic Adoption Act, [42 U.S.C. §§ 671, 674, 1996b \(2000\)](#) (forbidding the consideration of race when placing children for adoption).

[FN112]. For some different assessments of interracial adoption, see generally Hawley Fogg-Davis, The Ethics of Transracial Adoption (2002) (analyzing the role of transracial adoptees in creating and defining their own racial identity); Ruth G. McRoy & Louis A. Zurcher, Jr., Transracial and Inracial Adoptees (1983) (comparing interracial and transracial adoption); Sandra Patton, BirthMarks (2000) (studying transracial adoption through a multidisciplinary cultural lens); Rita J. Simon & Howard Altstein, Adoption, Race & Identity from Infancy to Young Adulthood (Transaction Publishers 2002) (1994) (studying longitudinally the impact of transracial adoption on families); In the Best Interests of the Child: Culture, Identity and Transracial Adoption (Ivor Gaber & Jane Aldridge eds., 1994) (examining the arguments for and against transracial adoption); R. Richard Banks, [The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action](#), 107 *Yale L.J.* 875 (1998) (exploring the role of adoptive parent racial preference in adoption and its larger political context); see also Annette R. Appell, [Disposable Mothers, Deployable Children, Review Essay](#), 9 *Mich. J. Race & L.* 421, 449-57 (2004) [hereinafter Appell, Disposable Mothers] (contrasting child-centered and adult-centered visions of transracial adoption).

[FN113]. See Indian Child Welfare Act of 1978, [25 U.S.C. § 1901-1963 \(2000\)](#).

[FN114]. See Appell, Uneasy Tensions, supra note 6, at 142, 166 (noting such an example and the contingency of the children's interests or desires depending on their age and situation); Barbara Atwood, The Voice of the Indian Child: Strengthening the Indian Child Welfare Act through Children's Participation, 50 *U. Ariz. L. Rev.* (forthcoming 2008) (manuscript at 26, available at <http://ssrn.com/abstract=1034304>) (noting how a Native-American child's views may change). Indeed, the children's "interests" may be contingent on the identity of their attorney. See [In re Bridget R.](#), 49 *Cal. Rptr. 2d* 507, 515 n.2 (*Cal. Ct. 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

Ziv, *supra* note 93, at 221-31 (describing how the lawyers in the disability rights movement chose to follow the direction of some but not other clients).

[FN115]. See [25 U.S.C. § 1903\(4\)](#) (defining “Indian child,” a category that triggers the application of the Indian Child Welfare Act). [25 U.S.C. § 1911-23](#).

[FN116]. Appell, *Children's Voice and Justice*, *supra* note 6, at 703.

[FN117]. *Id.* at 718-22.

[FN118]. Jenks, *supra* note 8, at 6 (“[C]hildhood ... describes a community that at some time has everybody as a member.”).

[FN119]. UNLV Recommendations, *supra* note 62, at 593.

[FN120]. See Katherine Hunt Federle, [Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings](#), [15 Cardozo L. Rev. 1523, 1553-58 \(1994\)](#) (noting the various roles and rights children have in divorce proceedings, none of which appear to include deciding custody or even vetoing the divorce); Guggenheim, *What's Wrong with Children's Rights?*, *supra* note 6, at 82 (“[C]hildren do not have rights to their custodians that are independent of their custodians' right to them.”). Normally dependency charges relate to parental conduct. However, if the parents do not contest the charges, as a practical matter the child may not be able to contest them. In some states, the child may not even be a party to the proceedings. See, e.g., [Nev. Rev. Stat. § 432B.420\(1\)](#) (2007) (providing that children with attorneys have procedural rights as if they were parties).

[FN121]. See *supra* note 105 and accompanying text.

[FN122]. Appell, *Children's Voice and Justice*, *supra* note 6, at 715; Guggenheim, *How Children's Lawyers Serve State Interests*, *supra* note 6, at 823-24.

[FN123]. Appell, *Virtual Mothers*, *supra* note 14, at 702-07. This liberalism has, of course, laid the foundation for the privatization of wealth and dependency while promoting and naturalizing inequality, a state of affairs that has clearly harmed children. Harris, *From Stonewall to the Suburbs?*, *supra* note 29, at 1547-56, 1564. I do not mean to defend this structure, or its current transformation to neoliberalism, but do recognize the special importance of protecting any private wealth the most vulnerable families have, and that includes their children and their cultures. As I have argued elsewhere, dismantling the privacy on the backs of poor and non-dominant families is particularly unjust in the current political and economic structure. Appell, *Virtual Mothers*, *supra* note 14, at 758-90.

[FN124]. Appell, *Virtual Mothers*, *supra* note 14, at 706. In practice, these political conditions create and maintain inequality through treating as natural and not political phenomena like housing segregation, wildly disparate educational opportunities for children, and an increasingly limited public sphere. Angela Harris, *From Stonewall to the Suburbs?*, *supra* note 29, at 1547-66.

[FN125]. Appell, *Virtual Mothers*, *supra* note 14, at 706-07.

[FN126]. *Id.* at 707.

[FN127]. *Id.* at 702-03.

[FN128]. Robert H. Mnookin, *In the Interest of Children: Advocacy, Law Reform and Public Policy* 43 (1985). Children's attorneys today may take issue with the first sentence quoted above, believing instead that children can speak about their interests. See, e.g., Ann M. Haralambie, [Recognizing the Expertise of Children and Families](#), [6 Nev. L.J. 1277, 1281 \(2006\)](#)

(arguing that children can speak to their interests); Miriam Aroni Krinsky & Jennifer Rodriguez, [Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings](#), 6 Nev. L.J. 1302, 1304-05 (2006) (arguing similarly that children can speak to their interests); Catherine J. Ross, [A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings](#), 6 Nev. L.J. 1362, 1365 (2006) (arguing that attorneys should follow their child client's wishes); Jane M. Spinak, [Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation](#), 6 Nev. L.J. 1385, 1388-90 (2006) [hereinafter Spinak, *Simon Says Take Three Steps Backwards*] (criticizing the Uniform Law Commission for failing to provide solely for client directed representation).

[FN129]. UNLV Recommendations, supra note 62, at 594; see also Haralambie, supra note 128, at 1282-83 (2006) (suggesting that attorneys look to children and parents to direct the representation).

[FN130]. See Model Rules of Prof'l Conduct R. 1.6, 1.7 (2004). But see Christine Gottlieb, [Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests](#), 6 Nev. L.J. 1263, 1267-72 (2006) (arguing that children's attorneys should look to their clients parents to determine the child's interests).

[FN131]. See Model Rules of Prof'l Conduct R. 1.7 (2004).

[FN132]. See Susan L. Brooks, [Representing Children in Families](#), 6 Nev. L.J. 724, 741-43 (2006); Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 813.

[FN133]. Appell, *Children's Voice and Justice*, supra note 6, at 713-14; see also Brooks, supra note 132, at 734-39, 744-46 (describing family systems theory and cultural competence). The down side of this rootedness of children in their communities is the disparate distribution of wealth that ties children's resources to their families; these ties then ensure that some children will live in terrible material conditions while others will have great benefits. See supra Part II. In this context, advocacy issues revolve around whether these disparities will be addressed and if so, whether attorneys will advocate individuated relief like removing children from their high risk communities or seeking to reduce risk and enhance resources in those communities.

[FN134]. Child welfare and juvenile justice proceedings are brought against individual children or families in which contexts lawyers represent individual children or sibling groups when ethically permissible.

[FN135]. This is because attorneys are appointed to represent the children cases brought by the state or county in which the child is a respondent or the subject of the proceedings.

[FN136]. Particularly in the child welfare field, many attorneys represent their client's best interests. I do not address that issue in this article.

[FN137]. See Henning, *It Takes a Lawyer*, supra note 58, at 856-66; Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 821.

[FN138]. See Kate Kruse, [Lawyers, Justice and the Challenge of Moral Pluralism](#), 90 Minn. L. Rev. 389, 403-07 (2005).

[FN139]. See Kimberly Mutcherson, [Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-making and Criminal Responsibility](#), 6 Nev. L.J. 927, 958-64 (2006); see also UNLV Recommendations, supra note 62, at 609-10 (recommending steps the attorney can take to help a child formulate a position).

[FN140]. See Mnookin, supra note 128.

[FN141]. *Id.* at 51-54.

[\[FN142\]](#). *Id.* at 51-55.

[\[FN143\]](#). Appell, *Children's Voice and Justice*, *supra* note 6, at 703-04.

[\[FN144\]](#). Mnookin, *supra* note 128, at 54-55.

[\[FN145\]](#). See Guggenheim, *How Children's Lawyers Serve State Interests*, *supra* note 6, at 807-22.

[\[FN146\]](#). See Appell, *Children's Voice and Justice*, *supra* note 6, 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).

[\[FN147\]](#). Guggenheim, *How Children's Lawyers Serve State Interests*, *supra* note 6, at 809-13.

[\[FN148\]](#). *Id.* at 809.

[\[FN149\]](#). *Id.* at 813.

[\[FN150\]](#). *Id.* at 819-20.

[\[FN151\]](#). *Id.* 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.* at 810.

[\[FN152\]](#). *Id.* at 814-18.

[\[FN153\]](#). See, e.g., Taylor-Thompson, *supra* note 60, at 1162-64 (describing the role of juvenile justice attorneys); Guggenheim, *How Children's Lawyers Serve State Interests*, *supra* note 6, at 807-14 (describing the role of child welfare attorneys). This is not to say that paternalistic children's attorneys do not populate criminal and juvenile justice contexts. See Henning, *Loyalty, Paternalism, and Rights*, *supra* note 58, at 246-47; Kruse, *Standing in Babylon*, *supra* note 109, at 1317-21.

[\[FN154\]](#). Henning, *It Takes a Lawyer*, *supra* note 58, at 837.

[\[FN155\]](#). *Id.* at 839-59.

[\[FN156\]](#). UNLV Recommendations, *supra* note 62, at 606.

[\[FN157\]](#). In practice, this may not be the case and children in juvenile justice may not be able to articulate their needs and interests. Schnyder Pierce & Brodsky, *supra* note 90, at 102-04 (noting the limited trust and understanding some juvenile clients have regarding their attorney's role).

[\[FN158\]](#). Schnyder & Brodsky, *supra* note 90, at 90-91.

[\[FN159\]](#). See *supra* note 60 and accompanying text.

[\[FN160\]](#). 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." Am. Bar Ass'n, [http:// www.abanet.org/leadership/councilondiversity/home.html](http://www.abanet.org/leadership/councilondiversity/home.html) (last visited

Feb. 10, 2008); see also Cristina Quintero & Jeffrey Penn, *Columbia Law School Lawyering in the Digital Age Clinic, A Disturbing Trend in Law School Diversity* (2007), <http://www2.law.columbia.edu/civilrights/> (noting the downward trend of admissions of African Americans and Mexican Americans to law schools since 1992).

[FN161]. Cf. Timothy T. Clydesdale, [A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage](#), 29 *Law & Soc. Inquiry* 711, 712 (2004) (describing the relative ease of entry into the legal profession for young, white, and socially privileged law students); Abiel Wong, Note, “Boalt-ing” Opportunity?: Deconstructing Elite Norms in Law School Admissions, 6 *Geo. J. Poverty L. & Pol’y* 199, 237-39 (1999) (noting that the legal profession’s emphasis on “socioeconomically-linked indicators ... of ‘quality,’ perpetuates the exclusion of those historically disadvantaged, particularly minorities”).

[FN162]. Judith A. Cox & James Bell, *Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice System*, 3 *J. Ctr. Fam., Child. & Cts.* 31, 32 (2001); Child Welfare League of America, *Creating Connected Communities: Policy, Action, Commitment* (2001), <http://www.cwla.org/advocacy/nationalfactsheet01.pdf>.

[FN163]. See [Report of the Working Group on the Role of Race, Ethnicity, and Class](#), 6 *Nev. L.J.* 634, 634 (2006) [hereinafter *Report of the Working Group on the Role of Race, Ethnicity, and Class*].

[FN164]. See UNLV Recommendations, *supra* note 62, at 602.

[FN165]. *Id.* at 593-94.

[FN166]. See *Report of the Working Group on the Role of Race, Ethnicity, and Class*, *supra* note 163, at 635 (noting that the justice systems may consider the child’s preferences in light of race, ethnicity, and class).

[FN167]. UNLV Recommendations, *supra* note 62, at 602.

[FN168]. *Report of the Working Group on the Role of Race, Ethnicity, and Class*, *supra* note 163, at 638.

[FN169]. [Report of the Working Group on Representing Children as Members of Communities](#), 6 *Nev. L.J.* 670, 673-75 (2006) [hereinafter *Report of the Working Group on Representing Children as Members of Communities*].

[FN170]. See *id.* at 670-675 (asserting the need for children’s attorneys to be engaged in and learn from children’s communities); see *infra* text accompanying notes 179 to 181 (discussing individuating aspects of rights).

[FN171]. See Kruse, *Standing In Babylon*, *supra* note 109, at 1319-20 (noting how crowded dockets and high case loads can make individualized representation elusive); Shink, *supra* note 109, at 1376-78 (assessing caseload capacity and rehearsing caseload studies and standards); see also *Report of the Working Group on Race, Ethnicity and Class*, *supra* note 163, at 637 (noting the crushing case loads and limited resources of children’s attorneys); 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, 1353-55 (2006) (describing the tensions in and challenges of such investigations).

[FN172]. Kruse, *Standing In Babylon*, *supra* note 109, at 1319-20.

[FN173]. See, e.g., *Report of the Working Group on Race, Ethnicity and Class*, *supra* note 163, at 637-38 (recommending that children’s attorneys conduct thorough interviews of the client in the client’s environment and investigate the child’s school and community conditions); see also [Report of the Working Group on Lessons of International Law, Norms, and Practice](#), 6 *Nev. L.J.* 656, 658 (2006) [hereinafter *Report of the Working Group on Lessons of International Law, Norms, and Practice*] (“A termination of parental rights’ [sic] proceeding may require interpreters and special cross-cultural sensitivity when it involves a

multilingual and multicultural family.”).

[FN174]. See Report of the Working Group on Race, Ethnicity and Class, *supra* note 163, at 636-39 (2006) (noting the need for attorneys who do not share the same racial, ethnic, and class experiences as their clients need to become familiar with the client's world and with issues relating to language barriers, immigration status, cultural differences, and the Indian Child Welfare Act issues).

[FN175]. See Report of the Working Group on Lessons of International Law, Norms, and Practice, *supra* note 173, at 657 (“Children increasingly live in transnational families by virtue of their parents' citizenship, residence, and other ties. The fate of a juvenile delinquency client may depend on her immigration status.”).

[FN176]. Shink, *supra* note 109, at 1379.

[FN177]. Crushing case loads are a significant barrier to such investigation. See *id.* at 1374-78 (describing the caseload crisis); see also Kruse, *Standing in Babylon*, *supra* note 109, at 1317-20 (noting the practical disparities between aspirational and everyday child advocacy).

[FN178]. See UNLV Recommendations, *supra* note 62, at 594.

[FN179]. See James & James, *supra* note 1, at 83-86; see also David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 *Emory J. Int'l L. Rev.* 967, 975 (2003) (discussing the “paradox of children's rights ... [to] protection and autonomy”); Children's Convention, *supra* note 3, arts. 7-8, 13-15, 31 (setting forth the Children's Convention's individual liberatory provisions, though these provisions are also provided in a broader context of economic and dependency rights).

[FN180]. Katherine H. Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *Fordham L. Rev.* 1655, 1657-63, 1676-80, 1685-87 (1996); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *Fordham L. Rev.* 1571, 1587-1617 (1996).

[FN181]. Appell, *Children's Voice and Justice*, *supra* note 6, at 714-16.

[FN182]. For a discussion of the limitation of children's rights and legal justice, see *infra* Part IV.E.

[FN183]. Appell, *Uneasy Tensions*, *supra* note 6, at 153-61. 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. For discussions of the rich and growing literature regarding children's rights, see generally, Archard, *supra* note 1 (discussing children's rights in philosophical terms); Guggenheim, *What's Wrong with Children's Rights?*, *supra* note 6 (discussing and critiquing children's rights); James & James, *supra* note 1 (discussing children's rights); James G. Dwyer, *The Relationship Rights of Children* (2006) (discussing children's rights to certain relationships); Appell, *Uneasy Tensions*, *supra* note 6 (comparing children's dependency and liberatory rights).

[FN184]. Appell, *Uneasy Tensions*, *supra* note 6, at 153-61.

[FN185]. *Id.* at 156. 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*, 40 *Clearinghouse Rev. J. of Poverty Law & Pol'y* 7, 10 (2006).

[FN186]. Appell, *Uneasy Tensions*, *supra* note 6, at 153-61. The *parens patriae* doctrine originated in England and essentially allows the state (or king) to step in to protect vulnerable citizens such as children and persons with mental disabilities by, inter

alia, asserting wardship over or otherwise protecting them. Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 *Emory L.J.* 195, 195-203 (1978).

[FN187]. However, one aim of providing for children during their dependency is to prepare them to be autonomous and self-supporting adults. Appell, *Uneasy Tensions*, supra note 6, at 153.

[FN188]. *Id.* at 156.

[FN189]. *Id.* (“Dependency rights reflect the mutual relationship between parent and state regarding children in a liberal democracy ... which ... assigns the obligation and freedom of rearing children ... to the parents, while the state oversees and checks this process by ensuring that parents are meeting children's basic needs and that children receive the basic tools to become democratic citizens.”).

[FN190]. See [Santosky v. Kramer](#), 455 U.S. 745, 759-60 (1982); see also [Smith v. Org. of Foster Families for Equal. and Reform](#), 431 U.S. 816, 842-47 (1977) (noting the reciprocal liberty interest children and parents have in the parent-child relationship); [Mabe v. San Bernardino County Dep't of Pub. Soc. Servs.](#), 237 F.3d 1101, 1107 (2000) (noting that the “constitutional right of parents and children to live together without governmental interference is well established”); [Wallis v. Spencer](#), 202 F.3d 1126, 1136-37 (9th Cir. 2000) (noting mutual right to association between parent and child).

[FN191]. See, e.g., [Meyer v. Nebraska](#), 262 U.S. 390, 399 (1923) (noting that parents have a fundamental right to determine the upbringing of their children); [Pierce v. Soc'y of Sisters](#), 268 U.S. 510, 534 (1925) (upholding the “liberty of parents ... to direct the upbringing and education of children under their control”); [Lassiter v. Dep't of Soc. Servs.](#), 452 U.S. 18, 27 (1981) (noting that the “Court's decisions have by now made plain beyond the need for multiple citation that” parents' fundamental right to a custodial and caring relationship to their children is “a commanding one”); [Santosky](#), 455 U.S. at 759-64 (requiring a heightened burden of proof to terminate parental rights); [Smith](#), 431 U.S. at 842-47 (privileging biological parents' interests in their children over foster parents' interests); [Mabe](#), 237 F.3d at 1107 (noting the parental right to children); [Wallis](#), 202 F.3d at 1136-37 (noting parents' rights regarding their children).

[FN192]. Guggenheim, *What's Wrong with Children's Rights?*, supra note 6, at 17-18, 90-91, 130-32.

[FN193]. Appell, *Uneasy Tensions*, supra note 6, at 154-56.

[FN194]. *Id.* Recent United States Supreme Court jurisprudence has cast doubt on the viability of the anti-subordination aspects of civil rights. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, (applying formalistic equality principles to segregation).

[FN195]. See, e.g., [Brown v. Bd. of Educ.](#), 347 U.S. 483, 492 (1954) (upholding educational equality regardless of race); [Levy v. Louisiana](#), 391 U.S. 68, 71 (1968) (establishing the right of non-marital children to recover for wrongful death of biological mother); [Weber v. Aetna Cas. & Sur. Co.](#), 406 U.S. 164, 176 (1972) (deeming it impermissible to privilege marital children over non-marital children in distributing father's worker's compensation benefits); [Gomez v. Perez](#), 409 U.S. 535, 537-38 (1973) (finding it impermissible for the state to require parental support of marital children but not of non-marital children); [N.J. Welfare Rights Org. v. Cahill](#), 411 U.S. 619, 621 (1973) (finding it impermissible for a program to deny non-marital children access to state benefits that marital children receive); [Plyler v. Doe](#), 457 U.S. 202, 210 (1982) (upholding the right of illegal immigrant children to receive public education).

[FN196]. [In re Gault](#), 387 U.S. 1, 34-42 (1967) (affirming the right to counsel for juveniles accused of criminal offenses).

[FN197]. [Tinker v. DeMoines](#), 393 U.S. 503, 506 (1969) (recognizing freedom of speech to protest the Viet Nam War in school because students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

[FN198]. [Bellotti v. Baird, 443 U.S. 622, 642-43 \(1979\)](#) (requiring states to permit minors to obtain judicial, rather than parental, consent to abortion services).

[FN199]. Appell, *Uneasy Tensions*, supra note 6, at 153.

[FN200]. See, e.g., [In re Gault, 387 U.S. 1, 30 \(1967\)](#) (applying the due process clause but not other constitutional criminal justice amendments to minors in delinquency proceedings).

[FN201]. See [Ginsberg v. New York, 390 U.S. 629, 638-39 \(1968\)](#) (holding that the state has authority to shield minors from obscene materials, but parents can permit their own children to view them); [Bd. of Educ. v. Pico, 457 U.S. 853, 863-72 \(1982\)](#) (permitting a school board to engage in limited content regulation of school library collection).

[FN202]. See supra text accompanying note 33 (listing dominant norms).

[FN203]. See Appell, *Uneasy Tensions*, supra note 6, at 150-61.

[FN204]. See Gottlieb, supra note 130, at 1266.

[FN205]. Appell, *Uneasy Tensions*, supra note 6, at 165-66; Jane M. Spinak, [When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate, 41 Fam. L.Q. 393, 404-05 \(2007\)](#) [hereinafter Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit?*].

[FN206]. This is because representation in these proceedings is aimed at protecting the child's physical or moral liberty from subversion by the state. To the extent that the state embodies dominant norms, which law and policy generally do, Yoshinobu Zasu, [Sanctions by Social Norms and the Law: Substitutes or Complements?, 36 J. Legal Studies 379, 385 \(2007\)](#), protecting a child's desire to resist coercive state action promotes his or her liberty against the imposition of dominant norms. See Henning, *Loyalty, Paternalism, and Rights*, supra note 58, at 245-47 (noting that the expressed interests model of representation is preferred in juvenile justice defense).

[FN207]. Of course, attorneys are able to impose their own or dominant norms on clients of any age. See, e.g., Bell, supra note 93, at 489-93, 512-15 (discussing how the attorneys imposed middle class notions of equality on poor families of color); Ziv, supra note 93, at 227-35 (describing the attorneys' choice to promote the movement's dominant position favoring integration rather than accommodation of special needs in segregated space).

[FN208]. See supra notes 66-73 and accompanying text; see also Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 808-14 (describing the evolution of attorneys' perspectives on state intervention in the New York Juvenile Rights Division as the docket changed from delinquency to child welfare cases).

[FN209]. See Henning, *It Takes a Lawyer*, supra note 58, at 840 (noting that most youths in juvenile justice matters are teenagers). In Nevada, for example, although juvenile justice jurisdiction applies to all children under the age of eighteen, [Nev. Rev. Stat. § 62A.030](#) (2007), children under eight cannot be remanded to custody even for non-criminally defined acts, [Nev. Rev. Stat. §§ 62E.510, 62E.520](#) (2007), or punished for a criminal act. See [Nev. Rev. Stat. § 194.010](#) (2007) (listing children under eight years of age as a class of persons incapable of committing a crime). Child welfare jurisdiction extends to all children under eighteen, [Nev. Rev. Stat. § 432B.040](#) (2007), and contains no age floor for substitute custody. [Nev. Rev. Stat. § 432B.480](#) (2007).

[FN210]. Taylor-Thompson, supra note 60, at 1137-40, 1147-62 (describing the justice system's racial and gender assumptions,

as well as issues relating to controlling juvenile behavior); Fedders, *supra* note 37, at 787-99 (same).

[\[FN211\]](#). Fedders, *supra* note 37, at 794-95.

[\[FN212\]](#). *Id.* at 793-94.

[\[FN213\]](#). See Taylor-Thompson, *supra* note 60, 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, *Virtual Mothers*, *supra* note 14, at 770-74 (discussing racial and economic patterns in the child protection system).

[\[FN214\]](#). Taylor-Thompson, *supra* note 60, at 1144-47, 1158-62.

[\[FN215\]](#). See 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 *U. Chi. L. Sch. Roundtable* 139, 142 (1995); Taylor-Thompson, *supra* note 60, at 1158-59.

[\[FN216\]](#). Taylor-Thompson, *supra* note 60, at 1162.

[\[FN217\]](#). See *id.* at 1163.

[\[FN218\]](#). See *id.* at 1163-64.

[\[FN219\]](#). See Appell, *Children's Voice and Justice*, *supra* note 6, at 704, 712-14.

[\[FN220\]](#). See *supra* Part IV.C.

[\[FN221\]](#). Jenks, *supra* note 8, at 6-7.

[\[FN222\]](#). See Appell, *Children's Voice and Justice*, *supra* note 6, at 704. But see, e.g., Garcia et al., *supra* note 24, at 1269 (describing the Center for Law and the Public Interest's work on behalf of children and communities to create recreational spaces and opportunities in inner-city Los Angeles).

[\[FN223\]](#). Appell, *Virtual Mothers*, *supra* note 14, at 765-87 (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*, *supra* note 10, at 9 (noting that lawyers can “use rights claims” to expose inequality and lay bare power disparities and social differences); see Patricia Williams, [Alchemical Notes: Reconstructing Ideals from Deconstructed Rights](#), 22 *Harv. C.R.-C.L. L. Rev.* 401, 416 (1987) (“[R]ights imply a respect ... which elevates one's status from human body to social being.”).

[\[FN224\]](#). See Susan L. Brooks, [Therapeutic and Preventive Approaches to School Safety: Applications of a Family Systems Model](#), 34 *New Eng. L. Rev.* 615, 618 (2000) (applying family systems theory to troubled students); Susan L. Brooks, [Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach](#), 5 *Psychol. Pub. Pol'y & L.* 951, 957-58 (1999) (applying family systems theory to child protection matters); Susan L. Brooks, [A Family Systems Paradigm for Legal Decision Making Affecting Child Custody](#), 6 *Cornell J.L. & Pub. Pol'y* 1, 3-4 (1996) (applying family systems theory to domestic relations matters); Berta Esperanza Hernandez-Truyol, [Asking the Family Question](#), 38 *Fam. L.Q.* 481, 489 (2004) (presenting an argument for placing the needs of children and families at the center of international norm creation).

[FN225]. See Report of the Working Group on Representing Children as Members of Communities, *supra* note 169, at 670-72; see also Robin West, Re-[Imagining Justice](#), 14 *Yale J.L. & Feminism* 333, 340 (2002) (noting how rights discourse side-steps systemic problems and reform); William E. Forbath, Not So [Simple Justice: Frank Michelman on Social Rights, 1969-Present](#), 39 *Tulsa L. Rev.* 597, 602-05 (2004) (rehearsing the ultimate failure of constitutionally-based economic justice litigation and theory); Scheingold & Sarat, Something to Believe In, *supra* note 10, at 105 (noting conservatism of the law and limitations even of political or legislative strategies for achieving distributive justice); Bell, *supra* note 93, 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.”).

[FN226]. 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. Kearns eds., 1995) (claiming that rights depoliticize groups and simply serve to privatize the individual situation while masking 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 *Temp. 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.”).

[FN227]. Carrie Menkel-Meadow, The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in *Cause Lawyering: Political Commitments and Professional Responsibilities*, *supra* note 10, at 31, 49.

[FN228]. *Id.* at 49-50; Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *supra* note 10, at 9.

[FN229]. Lawrence Grossberg, *Caught in the Crossfire: Kids, Politics, and America's Future* 32-35 (2005).

[FN230]. *Id.* at 30-32.

[FN231]. *Id.* at 32-33.

[FN232]. See generally Special Issue, *Deconstructing the School-to-Prison Pipeline*, *New Directions for Youth Dev.*, Fall 2003, at 1 (explaining the school-to-prison pipeline phenomenon); *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* (William Ayers et al. eds., 2001) (examining the consequences of zero tolerance policies in schools).

[FN233]. Indeed, a recent special issue of the *Child Welfare League of America* journal on “Community Building and 21<sup>st</sup> Century Child Welfare” addressed primarily services to families and did not address community well-being. Special Issue, *Community Building and 21st Century Child Welfare*, 84 *Child Welfare* 101, 101-336 (2005).

[FN234]. Kathleen S. Beam, [Reasonable Efforts: What State Courts Think](#), 36 *U. Tol. L. Rev.* 321, 345-46 (2005).

[FN235]. See Appell, *Children's Voice and Justice*, *supra* note 6, at 707, 720 (suggesting what might constitute social justice advocacy for children and exploring what child advocates advocate).

[FN236]. See *id.* at 708-09 (comparing social justice approaches to individualistic approaches toward child welfare).

[FN237]. See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 *N.Y.U. Rev. L. & Soc.*

[Change 347, 364-70 \(1997\)](#) (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).

[\[FN238\]](#). See Appell, *Children's Voice and Justice*, supra note 6, at 708-09.

[\[FN239\]](#). See Appell, *Disposable Mothers*, supra note 112, at 452-55, 456-61; Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 825-27; Guggenheim, *What's Wrong with Children's Rights?*, supra note 6, at 196-201.

[\[FN240\]](#). Appell, *Disposable Mothers*, supra note 112, at 462-65 (noting that the liberal economic system in this country preserves wealth and does little to support those who are poor or dependent and that the child welfare and welfare reforms of the 1990s removed money from parents with dependent children while increasing resources for child welfare agencies and foster care providers).

[\[FN241\]](#). Adoption Assistance and Child Welfare Act, [Pub. L. No. 96-272, 94 Stat. 500 \(1982\)](#) (codified in scattered sections of 42 U.S.C.).

[\[FN242\]](#). The Personal Responsibility and Work Reconciliation Act, [Pub. L. No. 104-193, 110 Stat. 2105 \(1996\)](#) (codified as amended in scattered sections of 42 U.S.C.).

[\[FN243\]](#). Adoption and Safe Families Act of 1997, [Pub. L. No. 105-89, 111 Stat. 2115 \(1997\)](#) (codified in scattered sections of 42 U.S.C.). Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 825-28.

[\[FN244\]](#). Guggenheim, *What's Wrong with Children's Rights?*, supra note 6, at 208.

[\[FN245\]](#). Examples of critiques primarily addressing the substance of children's rights, without much or any attention to legal representation of children include Appell, *Uneasy Tensions*, supra note 6; Appell, *Virtual Mothers*, supra note 14; Annette Ruth Appell & Bruce A. Boyer, [Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption](#), 2 *Duke J. Gender L. & Pol'y* 63 (1995); Theresa Glennon & Robert G. Schwartz, [Looking Back, Looking Ahead: The Evolution of Children's Rights](#), 68 *Temp. L. Rev.* 1557 (1995); Onora O'Neill, *Children's Rights and Children's Lives*, 98 *Ethics* 445 (1988). Examples of substantive critiques of children's rights that do address the procedural aspects include: Guggenheim, *What's Wrong with Children's Rights?*, supra note 6; Emily Buss, [Children's Associational Rights?: Why Less is More](#), 11 *Wm. & Mary Bill Rts. J.* 1101 (2003); Martha Minow, [What Ever Happened to Children's Rights?, 80 \*Minn. L. Rev.\* 267 \(1995\).](#)

[\[FN246\]](#). See, e.g., Elizabeth Bartholet, *Nobody's Children* 33-43 (1999) (arguing for children's rights and the limitation of parental rights); Cohen, supra note 39, at 1-15 (promoting a broad vision of children's rights); Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* 19-46 (1997) (arguing for broad children's rights); Katherine Hunt Federle, [Looking Ahead: An Empowerment Perspective on the Rights of Children](#), 68 *Temp. L. Rev.* 1585, 1593-99 (1995) (discussing how rights can empower children); Minow, supra note 245, at 294-98 (discussing the promise of human rights for children); Gilbert A. Holmes, [The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-like Individuals](#), 53 *Md. L. Rev.* 358, 359-63, 390-411 (1994) (discussing children's rights to relationships with caregivers, especially kin); Barbara Bennett Woodhouse, [Enhancing Children's Participation in Policy Formation](#), 45 *Ariz. L. Rev.* 751, 752-59 (2003) (arguing for an enhanced political role for children).

[\[FN247\]](#). See, e.g., Roberts, supra note 215, at 267-76 (discussing the racially regressive aspects of the child welfare system); Guggenheim, *What's Wrong with Children's Rights?*, supra note 6, at 245-66 (discussing the racially and economically regressive consequences of giving the state the power to protect children's rights); Fedders, supra note 37, at 1-16 (discussing the punitive and homogenizing treatment of queer youth in the child welfare and juvenile justice systems); Appell, *Virtual Mothers*, supra note 14, at 683-90 (discussing the racially and economically regressive and homogenizing aspects of the child welfare system and certain proposed family law reforms); Appell, *Uneasy Tensions*, supra note 6, at 150-71 (exploring the use of

children's rights to promote dominant culture); Jill Chaifetz, [Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care](#), 25 N.Y.U. Rev. L. & Soc. Change 1, 22-24 (1999) (studying how the child welfare system disserves children and disregards their basic needs); Cooper Davis & Barua, supra note 215, at 139-55 (illustrating bias in the child welfare system); Twila L. Perry, The [Transracial Adoption Controversy: An Analysis of Discourse and Subordination](#), 21 N.Y.U. Rev. L. & Soc. Change 33, 77-108 (1993-94) (critiquing the discourse of transracial adoption); Julie Shapiro, [Custody and Conduct: How The Law Fails Lesbian and Gay Parents and Their Children](#), 71 Ind. L.J. 623, 624-27 (1996) (analyzing the legal challenges to lesbian and gay families); Daan Braveman & Sarah Ramsey, [When Welfare Ends: Removing Children From the Home for Poverty Alone](#), 70 Temp. L. Rev. 447, 460-70 (1997) (exploring the conflation of poverty and child abuse and neglect); Taylor-Thompson, supra note 60, at 1137-40 (addressing the homogenizing force of the juvenile justice system); David B. Thronson, [Choiceless Choices: Deportation and the Parent Child Relationship](#), 6 Nev. L.J. 1165, 1173-1214 (2006) (showing how immigration law can disregard the needs of immigrant families and immigrant children).

[FN248]. See, e.g., Susan L. Brooks & Dorothy E. Roberts, [Social Justice and Family Court Reform](#), 40 Fam. Ct. Rev. 453, 455-57 (2002) (exploring whether children's needs can be disaggregated from those of their families); Taylor-Thompson, supra note 60, at 1162-64 (exploring the consequences of viewing child behavior outside the cultural or familial context); Thronson, supra note 247, at 1173-1214 (illustrating how immigration and family law fail to serve both children and their parents).

[FN249]. See, e.g., Jennifer Renne, Legal Ethics in Child Welfare (2004) (defining the legal ethics of child representation in child welfare proceedings); Am. Bar Ass'n Comm'n on Immigration, Standards for the Custody; Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States 18-26 (Aug. 2004) (issuing standards for the custody, placement and care, legal representation, and adjudication of unaccompanied immigrant or trafficked children); 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, 398 (2002) (assessing the legal representation of children); 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, 103-05 (2000) (praising and critiquing standards for the legal representation of children); Jessica Matthews Eames, Comment, [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, 1453-76 (1999) (advocating for the adoption of ABA standards for children's attorneys); Jan C. Costello, Representing Children in Mental Disability Proceedings, 1 J. Ctr. Child. & Cts. 101, 117-20 (1999) (discussing the ethical representation of children in mental health matters); see also Shepherd & England, supra note 97, at 1924-32, 1936-41 (rehearsing studies of children's attorneys and standards of practice).

[FN250]. Appell, Children's Voice and Justice, supra note 6, at 702-03.

[FN251]. Green & Dohrn, Foreword, supra note 61, at 1282-83; Spinak, When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit?, supra note 205, at 403.

[FN252]. See, e.g., Appell, Children's Voice and Justice, supra note 6, at 695-710 (exploring and assessing various approaches to justice taken by children's attorneys); Brooks, supra note 132, at 744-48 (developing a therapeutic framework for promoting children's justice); Fedders, supra note 37, at 799-804 (proposing methods for children's advocacy that are sensitive to and respectful of children's sexual identity and orientation); Green & Dohrn, Foreword, supra note 61, at 1284-90, 1294-98 (explaining the need for more research into the representation of children and setting forth the Fordham Conference's recommendations); Guggenheim, How Children's Lawyers Serve State Interests, supra note 6, at 829-35 (describing how children's lawyers promote state interests); Henning, It Takes a Lawyer, supra note 58, at 839-89 (explaining how children's attorneys should and should not include parents in the representation); Fordham Recommendations, supra note 62, at 1408-09 (providing practical guidelines for children's lawyers); UNLV Recommendations, supra note 62, at 592-93 (giving recommended guidelines for children's lawyers and noting the efforts of advocates in combating inequities in the child advocacy system).

[FN253]. 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, 688-91 (2006); Participants in the Confe-

rence on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1395, 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, 591 \(2006\)](#). Their representatives and many others comprised the conference participants.

[FN254]. Fordham Conference on [Ethical Issues in the Representation of Children, 64 Fordham L. Rev. 1281, 1281-2131 \(1995-96\)](#).

[FN255]. See Bruce A. Green & Annette R. Appell, [Representing Children in Families: Foreword, 6 Nev. L.J. 571, 571 \(2006\)](#) [hereinafter Green & Appell, Foreword] (describing the UNLV Children's Conference). The [UNLV Children's Conference papers, reports and recommendations are collected in 6 Nev. L.J. 592-1407 \(2006\)](#).

[FN256]. Green & Dohrn, Foreword, supra note 61, at 1283; Green & Appell, Foreword, supra note 255, at 571.

[FN257]. Model Rules of Prof'l Conduct R. 1.14(a) (2004). There were, however, a handful of guidelines for such representation. See Shepherd & England, supra note 97, at 1934-41 (reviewing the standards). The conference itself built on work "previously undertaken" to "fill the gaps in the professional codes." Green & Dohrn, Foreword, supra note 61, at 1292.

[FN258]. Green & Dohrn, Foreword, supra note 61, 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.

[FN259]. The comments to Rule 1.14 state in part, "When the client is a minor or suffers from a diminished mental capacity ... maintaining the ordinary client-lawyer relationship may not be possible in all respects .... Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Model Rules of Prof'l Conduct R. 1.14 cmt. (2004).

[FN260]. Although bar associations have provided extra guidance before and since the conferences, these rules still require a level of training and expertise that attorneys may not have without additional training and guidance. See e.g., Los Angeles County Bar Association Professional Responsibility and Ethics Committee, An Attorney's Duty To Follow A Client's Explicit Instruction Not To Disclose Confidential Information In The Context Of A Minor Client's Disclosure Of On-Going Sexual Abuse In Dependency Proceedings, Formal Ethics Opinion No. 504 (May 15, 2000) (requiring both counsel and assessment of a child's ability to make an informed decision not to disclose sexual abuse).

[FN261]. Green & Dohrn, Foreword, supra note 61, at 1284-85.

[FN262]. Id. at 1287.

[FN263]. Green & Dohrn, Foreword, supra note 61, at 1283.

[FN264]. See Fordham Recommendations, supra note 62; [Report of the Working Group on the Allocation of Decision Making, 64 Fordham L. Rev. 1325 \(1996\)](#); [Report of the Working Group on Determining the Child's Capacity to Make Decisions, 64](#)

[Fordham L. Rev. 1339 \(1996\); Report of the Working Group on Determining the Best Interest of the Child, 64 Fordham L. Rev. 1347 \(1996\); Report of the Working Group on Interviewing and Counseling, 64 Fordham L. Rev. 1351 \(1996\); Report of the Working Group on Confidentiality, 64 Fordham L. Rev. 1367 \(1996\); Report of the Working Group on Conflicts of Interest, 64 Fordham L. Rev. 1379 \(1996\); Report of the Working Group on the Judicial Role, 64 Fordham L. Rev. 1389 \(1996\).](#)

[FN265]. See Fordham Recommendations, supra note 62.

[FN266]. Id. at 1301-02.

[FN267]. Id. at 1309-10.

[FN268]. Id. at 1302-05.

[FN269]. Green & Dohrn, Foreword, supra note 61, at 1290.

[FN270]. Id.

[FN271]. Green & Appell, Foreword, supra note 255, at 572.

[FN272]. Id. at 572-73.

[FN273]. Id.

[FN274]. Fordham Recommendations, supra note 62, at 1306-07.

[FN275]. Green & Appell, Foreword, supra note 255, at 575.

[FN276]. 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, *Uneasy Tensions*, supra note 6, at 156-66 (illustrating how advocating for children's dependency rights can separate children from their families and communities); Guggenheim, *How Children's Lawyers Serve State Interests*, supra note 6, at 829-34 (offering examples of children's attorneys in child protection cases presuming conflict between parent and child).

[FN277]. Green & Appell, Foreword, supra note 255, at 573.

[FN278]. The organizers of the UNLV Children's Conference included Professors Bruce Green and Bernardine Dohrn, the primary architects of the Fordham Children's Conference, Annette R. Appell, and Professors Susan Brooks, Marty Guggenheim, and Jean Koh Peters.

[FN279]. Green & Appell, Foreword, supra note 255, at 571.

[FN280]. UNLV Recommendations, supra note 62, at 592.

[FN281]. Id. at 599-605.

[FN282]. Id. at 606-07, 609.

[\[FN283\]](#). Id. at 592.

[\[FN284\]](#). Id.

[\[FN285\]](#). Id. at 594-96.

[\[FN286\]](#). Id.

[\[FN287\]](#). Id. at 600-02.

[\[FN288\]](#). Id. at 605-09.

[\[FN289\]](#). Id. at 606-08.

[\[FN290\]](#). Id. at 608.

[\[FN291\]](#). The UNLV Recommendations defined multidisciplinary practice as practice informed by knowledge of the existence and norms of other disciplines, knowledge of how and when to access those disciplines, and the ability to collaborate with professionals from other disciplines. Id. at 598.

[\[FN292\]](#). Id. at 598-99.

[\[FN293\]](#). Id. at 598-99, 601-02.

[\[FN294\]](#). Id. at 593-94, 596, 600-02.

[\[FN295\]](#). See, e.g., Fordham Recommendations, *supra* note 62, at 1301-08 (recommending that a children's lawyer should allow the child client to direct the representation when he or she is capable to do so).

[\[FN296\]](#). UNLV Recommendations, *supra* note 62, at 593.

[\[FN297\]](#). Green & Dohrn, Foreword, *supra* note 61, at 1298; Green & Appell, Foreword, *supra* note 255, at 589-90.

[\[FN298\]](#). See Kruse, Standing in Babylon, *supra* note 109, at 1317-21 (noting the differences between aspiration and the reality of daily practice, and even the contradictions within the guidelines); Pitchal, *supra* note 171, at 1351 (same).

[\[FN299\]](#). Koh Peters, *supra* note 7, at 996, 1014-19; see also Guggenheim, How Children's Lawyers Serve State Interests, *supra* note 6, at 819-22 (describing a large New York children's law office that de facto utilizes best interests representation); Harris, A Response to the Recommendations of the UNLV Conference, *supra* note 59, at 1289-93 (explaining how the office that represents nearly all of the Chicago metropolitan area's children in child protection proceedings provides best interests representation).

[\[FN300\]](#). Unif. Representation Of Children in Abuse, Neglect, and Custody Proceedings Act § 7 (2007), available at [http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.htm) (last visited Feb. 27, 2007). For a critique of the new law, see Spinak, Simon Says Take Three Steps Backwards, *supra* note 128, at 1385.

[\[FN301\]](#). See Ann M. Haralambie, [Humility and Child Autonomy in Child Welfare and Custody Representation of Children](#), 28 *Hamline J. Pub. L. & Pol'y* 177, 179 (2006) (“By the turn of the twenty-first century, a consensus, born of humility, was

reached within the legal community ... that even specially trained attorneys are not equipped to determine what is in the child's best interests.”).

[\[FN302\]](#). See Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 *J.L. & Soc'y* 411, 425 (2007) (“The combination of the intellectual and technical demands of law, a traditionally elevated social status, the importance of the subject matter, the relatively closed social and professional worlds of lawyers, the peculiarities of legal education and models of professional self-governance, and a range of other factors can contribute to a sense of elitism and arrogance in the legal profession.”).

[\[FN303\]](#). Both the Fordham Recommendations, *supra* note 62, and the UNLV Recommendations, *supra* note 62, encourage lawyers to represent their child client's wishes or legal interests, rather than the child's best interests.

39 Colum. Hum. Rts. L. Rev. 573

END OF DOCUMENT