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## A Paradigm for Determining the Role of Counsel for Children

### Cover Page Footnote

Professor of Clinical Law; Director, Clinical and Advocacy Programs, New York University School of Law. I wish to thank Randy Hertz, Peter Joy, and Madeline Kurtz for their many helpful comments on an earlier draft. I am also grateful for financial support from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law.

## ARTICLES

# A PARADIGM FOR DETERMINING THE ROLE OF COUNSEL FOR CHILDREN

*Martin Guggenheim\**

### INTRODUCTION

THE process of determining the proper role of counsel for a young child is a beguiling one. It appears much easier than it really is. This is not to say that commentators thus far have agreed on the role that counsel should undertake when representing young children. There has been extensive, and often quite heated, debate on this subject. But if one distinguishes the merits from the choice of analytic framework, it becomes apparent that there has been little attention thus far to the means by which the merits are to be determined. Commentators proceed directly to the merits, assuming that we already know how one goes about resolving an issue of this sort.

The thesis of this Article is that we have skipped an important step, in that there is much work that still needs to be done to resolve the proper mode of analysis. This Article explores the relevant considerations and offers an analytic framework or paradigm for determining the role of counsel for "young children." For these purposes, the term "young children" will be defined to mean children so young that they cannot articulate their preferences to counsel (e.g., newborns to children ages two or three) and children who, though old enough to communicate, would be considered to be "impaired," within the meaning of Rule 1.14 of the Model Rules of Professional Conduct ("Model Rules" or "Rules").<sup>1</sup>

The central reason why the process of determining the proper role of counsel in this context is so difficult is that we lack the guideposts that exist in other fields of practice. The usual starting point for an inquiry into the proper role of counsel is, of course, the profession's articulation of that role in the Model Rules of Professional Conduct and the Model Code of Professional Responsibility ("Model Code" or "Code").<sup>2</sup> But the Rules and Code both presuppose a client who is an

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1. Model Rules of Professional Conduct Rule 1.14 (1983) [hereinafter Model Rules].

2. *Id.*; Model Code of Professional Responsibility (1981) [hereinafter Model Code].

"unimpaired" adult.<sup>3</sup> Unimpaired adults are different from young children in several crucial ways and the law consistently recognizes these differences. With regard to newborns and infants, the obvious physical difference is that these children, unlike adults, are unable to communicate meaningfully with counsel. With regard to older young children, though they have the physical capacity to communicate, their lack of maturity, intelligence, and experience requires that their views be given less weight than the views of an unimpaired adult (or an older child for that matter). For this reason, few, if any, of the rules pertaining to the purpose and duties of counsel for unimpaired adults have any relevance to representing young children.

Although a specialized literature is being developed concerning the representation of "impaired" adults,<sup>4</sup> including the excellent symposium recently published in these pages,<sup>5</sup> few of those principles are helpful when addressing young children. The crucial difference between most impaired adults, such as the elderly, and young children, is that those adults have lived a full life, during which their personalities, values, and preferences became knowable. Young children, in contrast, have not yet reached the point in life when their values have been revealed.<sup>6</sup> For this reason, the proposal that lawyers use "substituted judgment" when representing incompetent adults has little meaning when applied to young children.<sup>7</sup> Peter Margulies, for exam-

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3. See Model Rules, *supra* note 1, Rule 1.14; Model Code, *supra* note 2, EC 7-11 & 7-12.

4. Model Rules, *supra* note 1, Rule 1.14.

5. See *Special Issue: Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961-1428 (1994).

6. Shannan L. Wilber, *Independent Counsel for Children*, 27 Fam. L.Q. 349, 362 (1993). Regarding the ability of the lawyer to understand what the client wants, the author states:

A more realistic concern is whether an attorney can accurately identify that which her young client would do if he were able to direct the litigation. The question is not whether the position identified reflects the correct outcome, but whether it correctly reflects that which the client would choose. Some commentators convincingly argue that substituted judgment does not make sense in the context of immature clients [citing Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran v. Bosze*, 24 Conn. L. Rev. 211, 240-41 (1991)]. Young children, by definition, have never been competent and their past acts or statements are not considered competent evidence. The absence of evidence of past intent makes it difficult to infer intent in the present.

*Id.*

For this reason, telling a lawyer for a young child to "pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to exercise rational judgment on the question" is an invitation to take a Rorschach Test. American Law Institute's Restatement of the Law Governing Lawyers § 35 (Tentative Draft No. 5, 1992).

7. DuFault, *supra* note 6, at 240-41 (stating that young children, by definition, have never been competent and their past acts or statements are not considered competent evidence. The absence of evidence of past intent makes it difficult to infer intent in the present.).

ple, wisely recommends that lawyers representing impaired elderly clients make decisions on behalf of the client by taking into account the client's lifetime commitments, where they can be determined, and the objective fairness of the various alternative decisions.<sup>8</sup> It is not possible to do the same thing on behalf of clients who have no lifetime experience and have not formed, no less revealed, their values to anyone.

Those of us trying to develop principles for representing young children must recognize that the formal ethical rules of the legal profession fail to provide meaningful answers to most of the major questions concerning the representation of young children. These rules are dominated by their focus on representing adults and say virtually nothing about how to represent a young child. The Model Rules of Professional Conduct unhelpfully instruct lawyers representing young children "as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client."<sup>9</sup> The problem, of course, is that it is impossible to maintain the same kind of relationship with a thirty-five-year-old client as it is with a thirty-five-day-old client. Moreover, although it is usually possible to maintain a substantially similar relationship with a thirty-five-year-old as it is with an eleven-year-old, the Rules are unhelpful in clarifying where and how the relationships are to differ.<sup>10</sup> The earlier Model Code of Professional Responsibility does little more than acknowledge that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client."<sup>11</sup>

The differences between adults and children, combined with the failure of the ethical rules to adequately address these differences, leave commentators writing about representing children without the moorings usually anchoring discussions on ethical duties of legal representatives. Most commentators, myself included, have been primarily interested in debating among ourselves the proper role of counsel for young children in a variety of different legal proceedings without tackling the subject systematically.<sup>12</sup> In a sense, we have concentrated on the wrong question. We have jumped too quickly to the admittedly more practical subject of what lawyers should do when representing young children. As I hope to demonstrate, however, what is vitally

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8. Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 Fordham L. Rev. 1073, 1088-89 (1994).

9. Model Rules, *supra* note 1, Rule 1.14.

10. The Model Rules do little more than tell lawyers that when representing a client with a disability, "the lawyer often must act as de facto guardian." *Id.* Rule 1.14 cmt. They are silent on what this means or what precise steps a de facto guardian should take.

11. Model Code, *supra* note 2, EC 7-11.

12. For a list of some of the many articles on representing children published since 1976, see Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 Fordham L. Rev. 1473, 1473 n.1 (1996).

needed is an agreed-upon procedure—a paradigm—for determining the appropriate role of a lawyer for a young person in the wide range of situations for which courts or legislatures have failed to provide the answer.<sup>13</sup>

This Article seeks to develop a methodology for determining the role of counsel for newborns, infants, toddlers, and children deemed to be “impaired” within the meaning of the Model Rules of Professional Conduct.<sup>14</sup> Because such a universally accepted procedure is currently lacking, the current literature lacks the grounding necessary for any serious debate.<sup>15</sup> The debate over the role of a young child’s representative will certainly continue long into the future. It would be substantially enriched when a process for analyzing the issues has been developed. This is the principal task that I hope to achieve in this Article.

Part I addresses the reasons it is essential to develop a methodology for examining role questions for children’s representatives. Part II begins the development of a paradigm for determining the role of counsel for young children. First, it explores the reasons that lawyers for adults are required to follow their clients’ instructions. Then the Article discusses some of the ways in which the law treats children differently from adults and the reasons for this differential treatment. Next, the Article attempts a preliminary examination of the role of counsel in several specific contexts. Part II concludes with a proposed paradigm for ascertaining counsel’s role for young children. Part III applies the paradigm to three areas of the law: criminal and delinquency proceedings in which children are accused of violating the penal law, custody and visitation proceedings arising out of divorce or separation, and child protective proceedings in which parents are charged with unfitness.

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13. See, e.g., *Knock v. Knock*, 621 A.2d 267, 276 (Conn. 1993). The court held: The legislature has not delineated, nor has this court yet been presented with the opportunity to delineate, the obligations and limitations of the role of counsel for a minor child. We recognize that representing a child creates practical problems for an attorney and that this important issue, at some point, needs to be addressed. . . . [H]owever, this case is not an appropriate vehicle for a discussion of the role of counsel for a minor child.

*Id.*

14. No one has, thus far, satisfactorily developed a paradigm for distinguishing between “unimpaired” and “impaired” children. Such an undertaking is, however, beyond the scope of this Article. The Article does not tell lawyers how to determine which children belong in which category. However, in accordance with the principles developed in part II C., *infra*, there are reasons to err on the side of treating children as “impaired” in a number of particular proceedings, such as custody and visitation cases. See *infra* note 43 and accompanying text.

15. As I will elaborate in part III, the failure to apply the paradigm developed in this Article led me to a significant error in Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76 (1984).

### I. THE NEED TO DEVELOP A PARADIGM FOR DETERMINING THE ROLE OF COUNSEL FOR CHILDREN

Imagine that a state legislature recently enacted a law concerning progressive education. The new legislation gives children the right to be placed in an advanced science or math course in the third grade. Under the law, the local board of education is obliged to place children in the advanced class unless the board can demonstrate by clear and convincing evidence why a particular child should not be so placed. The law goes on to spell out the procedural requirements when children are not placed in the advanced class. When the board decides not to place a child in an advanced course, there must be a prompt administrative hearing before a neutral fact finder. At this hearing, the child must be represented by counsel.

The legislative history behind the law's passage makes clear that the law was the product of modern educational theory that children thrive best when exposed to difficult subject matter at an early age and are labeled "advanced" and told that they have the capacity to handle difficult subjects. For several years, the law was merely precatory and delegated to local boards all authority to place children. However, the legislature found that when board decisions were made in the absence of administrative oversight, too many children had been kept out of the advanced course. For this reason, the new law provides for prompt review with counsel appointed for the student. Both the statute and legislative history, however, are silent on the role and purpose of counsel.<sup>16</sup>

Some parents' groups and educators strongly disagree with the premise of the statute and argue that exposing children to too difficult a curriculum at an early age will be extremely detrimental to their self-esteem and will adversely affect their other studies. Not only will these children not do well in the more difficult course, these opponents of the law suggest, but the children will do less well in their other subjects too. Finally, the opponents of the law claim that the students who would ordinarily do well in a class consisting only of very capable students will be adversely affected by teacher's having to lower the instructional level to the lowest common denominator.

Now assume that Jodi, an eight-year-old child who is about to enter the third grade, was not placed in an advanced class. An attorney is assigned to represent her. What should the attorney do and, more importantly at the outset, how should the attorney determine what her role should be?

It is essential that there be a shared understanding of the duties of Jodi's counsel. Indeed, the failure to agree upon these duties would have grave, and ultimately intolerable, consequences. Without an identified task, Jodi's counsel would flounder. She would be free to

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16. This is, unfortunately, a common situation. See *supra* note 13.

define for herself the role to play in the proceeding. Because that role would have no boundaries, it could be shaped in whatever way a particular lawyer chose. That would be the equivalent of chaos; individual lawyers free to determine for themselves the role they want to play in the proceedings. Under such circumstances, it is certain that different lawyers would do drastically different things, even though they would be representing similarly situated children. It is also certain that, over time, lawyers would assign to themselves diametrically opposite roles in indistinguishable circumstances.

By saying that lawyers would do drastically different things, I do not mean that some would be better, more eloquent, more prepared, more skillful, or more knowledgeable of the facts or the law. If that were the only way in which the lawyers could be distinguished from each other, there would be no real reason to complain. Those kinds of differences simply are unavoidable. The law's commitment to equal treatment under law is not lessened by the reality that not all members of the bar are equal. Although some lawyers necessarily will be more effective than others at achieving results, so long as all lawyers see themselves as trying to achieve similar results in identical circumstances, the law's commitment to equality of treatment remains intact.

The different things these lawyers would be doing involve trying to accomplish different results. This is incompatible with any recognizable system of law. Consider its implications when applied to the representation of adults. An adult hires a lawyer to help in a legal proceeding. One lawyer chooses to achieve the objectives sought by the client, whether or not the lawyer agrees that those objectives are proper or beneficial to the client. Another lawyer decides to sabotage the client's objectives because the lawyer thinks the client should not prevail. A third lawyer is willing to help the client achieve what the client wants but insists that all reasons for opposing the client's objectives be fully aired before the fact finder so that whatever outcome is achieved will be based on as full a record as possible. This "system" of law is almost unimaginable precisely because it is so obviously no "system" at all.

Yet these are the very consequences we would face if we fail to identify a role for Jodi's counsel. Thus, whatever else we accomplish, it is imperative to agree upon the role that lawyers should perform. Indeed, this is a crucial purpose served by the professional rules regulating the conduct of lawyers representing adults. A regulatory code of professional behavior is needed for at least four purposes. Though these are interrelated, it is helpful to list them separately. First, a code is needed to tell lawyers what is expected of them, including actions in which they are permitted to engage and prohibited from engaging. Second, a code is needed to tell clients what to expect from the professionals to whom they turn for assistance. From this vantage, a code is crucial to ensure that clients will even bother engaging the profes-



sional. Unless clients know what they are purchasing when retaining a professional, it is not likely that many of them would sign the retainer. Third, a code is needed to establish norms that may be enforced by a sanctioning body. These are all essential features of a code regulating the conduct of any profession. They also serve as the bedrock of both the Model Rules and the Model Code.<sup>17</sup> Apart from these three inter-related purposes, a code is needed to establish uniformity of behavior. Without this, there would be no way to ensure "uniformity of justice and the rule of law."<sup>18</sup>

Law has already succeeded at developing a uniform role of counsel for adults. The challenge remains to develop a process by which such a role is defined. It is my claim that, although the role of counsel for young children and adults turns out to be very different, the route by which one defines these different roles is identical. For this reason, we should begin by studying the process by which the role of an adult's counsel was defined. Once that process has been uncovered, we will be in a position to apply the same principles to the subject of representing children. After that, we will return to the hypothetical and attempt to give direction to Jodi's lawyer.

## II. DEVELOPING THE PARADIGM

### A. *Why Adults Enjoy the Power to Set the Objectives of the Litigation and Direct the Conduct of Their Lawyer*

The role of counsel for an unimpaired adult is immeasurably simpler to identify than the role of counsel for a young child. As we all know, lawyers for adults are obliged to "abide by the client's decisions concerning the objectives of representation"<sup>19</sup> and to use their skill to achieve the objectives sought by the client.<sup>20</sup> But it turns out that this is less a statement about lawyers than it is about the power of unimpaired adults.

Unimpaired adults have the inherent power to make *all* the important decisions concerning their lives. Our commitment to individual

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17. See, e.g., Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 Ark. L. Rev. 1, 4, 7 (1970) (discussing the meaning of professional responsibility).

18. John F. Sutton, Jr., *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 Tenn. L. Rev. 132, 141 (1966).

19. Model Rules, *supra* note 1, Rule 1.2.

20. I recognize of course, that the subject of representing unimpaired clients is considerably more sophisticated than this, and that there is a vast literature both on the counseling function lawyers should perform before clients may or should tell their lawyers what objectives to seek, see Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* 425-32 (1994), and on the duties of lawyers to avoid harm to others, even when their clients wish to inflict such harm. See David Luban, *Lawyers and Justice: An Ethical Study* 157 (1988). Nonetheless, the central function of lawyers representing unimpaired clients is to use their skill to achieve objectives determined by their clients.

autonomy is the central principle from which all issues regarding the role of counsel representing unimpaired adults are discussed.<sup>21</sup> Because adults have the greater right to make all of the important decisions in their lives, they have the lesser right to choose the objectives of all matters that would merit their seeking legal services. There is nothing inherent in the role of counsel that demands they faithfully carry out their adult client's wishes. The lawyer's role is simply the corollary of an adult's rights and powers.

The contours of counsel's role were formed after the powers and rights of adults had already been defined.<sup>22</sup> Consider again what our system of law would look like if lawyers were free not to carry out their client's wishes. If lawyers retained by adults failed to attempt to secure results sought by their clients, the lawyers would deny their clients the power to control their lives. They would, in other words, breach their client's rights. When principals are empowered by substantive law with the right of self-determination, it is essential to require their agents to do the principals' bidding. Unless unimpaired adults could rely on their agents to do their bidding, these adults would be unable to control their lives.

The literature on representing unimpaired clients has not needed to develop a paradigm for answering questions regarding the role of counsel because all have implicitly understood the autonomy rights of adults. Simply stated, only by allocating to clients the ultimate authority to determine the goals of the litigation is it possible for an adult to exercise autonomy rights. This is so basic to our thinking that we sometimes forget how deeply the rules regulating the conduct of an unimpaired adult's counsel's role are framed against this fundamental concept.

But these fundamental concepts are inapplicable with regard to young children.<sup>23</sup> A great many young children are too young even to communicate their views. An even larger number of children are old enough to express themselves but may lack the maturity or competence required before their views ought to dictate their lawyers' con-

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21. The function of an attorney in our legal system is to enable litigants to pursue and protect their legal rights. This approach furthers our system's emphasis on individual rights and personal autonomy. . . . Client-centered litigation reflects society's consensus that individuals should control their own lives and make their own decisions, even if those decisions seem illogical or unwise.

Wilber, *supra* note 6, at 353.

22. The Commentary to Rule 1.14 of the Model Rules of Professional Conduct explains that "[t]he normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is *capable* of making decisions about important matters." Model Rules, *supra* note 1, Rule 1.14 cmt. (emphasis added). More precisely, this relationship is based on the understanding that the client is *entitled* to make decisions about important matters.

23. See generally Laura M. Purdy, In Their Best Interest? The Case Against Equal Rights for Children (1992).

duct.<sup>24</sup> As a result, a much more complex discussion of the role of counsel for young children is necessary.

### B. *The Crucial Differences Between Adults and Young Children*

It is difficult to imagine a more extreme contrast than the one between the autonomy rights of unimpaired adults and the disabilities of young children. Virtually none of the principles described in the preceding section are applicable to young children. As Joseph Goldstein, Anna Freud, and Albert Solnit remind us, "Children are by definition persons in need of adult caretakers who determine what is best for them."<sup>25</sup> Celebrating the right of an adult to autonomy does not, therefore, tell us very much about children's right to autonomy. Law treats children differently than adults in many ways. This differential treatment derives from one fundamental notion: Adults presumptively have the reasoning capacity to make important decisions for themselves; young children do not.

As a result, the law places children in a position of dependency. As the Supreme Court has written, children,

unlike adults, are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.<sup>26</sup>

In 1995, Justice Scalia stressed the limited rights children possess:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.<sup>27</sup>

Our most enlightened laws that are exclusively applied to children would be regarded as repugnant if applied to adults. Requiring adults to attend school for six hours per day, five days a week, for more than forty weeks each year, for example, would obviously constitute a significant restriction on liberty. Yet, compulsory education laws are a prominent example of what we characterize as children's rights.<sup>28</sup> Most children's rights are of this kind.<sup>29</sup>

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24. See Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 Cardozo L. Rev. 1523, 1550-51 (1994).

25. Joseph Goldstein et al., *Before the Best Interests of the Child* 122 (1979).

26. *Schall v. Martin*, 467 U.S. 253, 265 (1984) (citations omitted).

27. *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2391 (1995).

28. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-40 (1973); *Brown v. Board of Education*, 347 U.S. 483 (1954).

29. See Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga. L. Rev. 975, 1010-16 (1988); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255, 260 (1979).

Because of the central differences in the law's treatment and definition of adults' and children's rights, it is essential that the implicit policies behind the rules for representing adults be made explicit when discussing the role of counsel for young children. As we shall see, when ascertaining the role of counsel for a young child, whether law or policy empowers, or refuses to empower children with a prominent role in deciding their own future is a critical distinction. In some circumstances, children possess virtually the same autonomy rights as adults.<sup>30</sup> When this is the case, we need not invent a new role of counsel for children. The role of counsel for adults is all we need to reference. According to this paradigm, in such cases children enjoy the identical right to the kind of counsel as adults.<sup>31</sup>

In most situations, however, children are not empowered to control the outcome of the case.<sup>32</sup> The difference is even sharper. Children are not merely "not empowered"; they are *disempowered*. In these situations, carefully designed rules encourage courts to reach outcomes that directly affect children even if the child would not approve of that outcome.

C. *Identifying the Interests That Should Be Served by the Paradigm:  
A Preliminary Examination of the Role of Counsel in  
Various Contexts*

The differences between adults and children do not invariably require that the representation of young children will never involve enhancing their autonomy. Because of these differences, however, we should not assume such a purpose.<sup>33</sup> Once that assumption is removed, it becomes necessary to articulate the purpose of the representation. If we conclude ultimately that the purpose is to increase client autonomy, that conclusion should be reached through a method of analysis that can be applied to all situations.

To determine whether the role of counsel is to enhance the autonomy of the child, one should first ascertain what the law says about

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30. For example, children possess autonomy rights virtually identical to adults when children are prosecuted for alleged criminal behavior.

31. See *infra* parts II.C.2, III.A.

32. Among the many circumstances in which a young child's views are either considered irrelevant or accorded relatively insignificant weight even though the child's future is directly involved are adoptions, paternity actions, child protection proceedings (at least during the adjudicatory phase when the court must determine whether or not a parent has endangered a child), and child custody and visitation proceedings. Children are also disabled from working in most occupations and even from entering into a legally binding contract in most situations.

33. As will be demonstrated later in this Article, "unimpaired" children within the meaning of the Model Rules have the legal rights to autonomy, at least within the narrow limits of setting the objectives of the litigation. For this reason, the text uses the term "young children" to mean "impaired" children. All unimpaired children have limited autonomy rights to control what their lawyers does on their behalf. The text addresses what should happen when lawyers represent impaired children.

the desirability or appropriateness of enhancing a child's autonomy in the particular proceeding under discussion. This involves a two-part inquiry. First, is the child of sufficient age, intelligence, and maturity to be "unimpaired" as defined by the Model Rules? If the answer is "yes," the inquiry should cease. In these circumstances, children are empowered by established principles to set the objectives of the litigation. If the answer is "no," then it is necessary to continue the inquiry by examining whether and to what degree children are supposed to have autonomy rights in the particular subject matter under consideration. To illustrate this principle, we will return to the case of advanced educational placement discussed in the previous section. After that, we will look at a second example, drawn from the real world.

### 1. The Role of Counsel in the Hypothetical Advanced Placement Case

We left the discussion of the role of the lawyer for Jodi, the third grader who was not placed in an advanced class, with the challenge of developing a paradigm for ascertaining that role. Now we may begin the task of discovering Jodi's lawyer's role in the administrative review process by examining Jodi's rights. If Jodi is considered "unimpaired," no further inquiry is needed. Her lawyer will have no choice but to allow Jodi to set the objectives for the case.

But what should happen when Jodi is considered to be "impaired"? What, in other words, should her lawyer do when the Model Rules do not require that the lawyer seek the objectives Jodi wants? Is the lawyer free to let Jodi decide the goals to be pursued? This question is answerable by examining Jodi's rights in connection with the education case itself. As an eight-year-old, Jodi has no inherent legal right to self-determination. For most purposes, the law presumes that eight-year-olds do not have such rights.<sup>34</sup> The few instances in which children are empowered to make decisions about their future are clearly spelled out in the law.<sup>35</sup> For this reason, to determine whether such an exception exists in Jodi's case, we need to examine the hypothetical education statute at issue.

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34. See Federle, *supra* note 24, at 1550-58 (discussing empowerment of children in divorce proceedings).

35. For example, in many states, children of any age may seek and receive medical treatment for sexually transmitted diseases or substance addiction without notice to or permission from anyone. See, e.g., Colo. Rev. Stat. § 13-22-102 (1987) (allowing child to receive treatment for drug abuse without consent of parent); Conn. Gen. Stat. Ann. § 19a-216 (West 1986 & Supp. 1995) (not requiring parental consent for treatment of minor for venereal disease); Minn. Stat. Ann. § 144.343 (West 1989) (allowing minor to give effective consent for . . . treatment of venereal disease and alcohol or drug abuse); N.Y. Pub. Health Law § 2305 (McKinney 1993) (not requiring parental consent for treatment of a minor with a sexually transmissible disease).

By examining that law, we easily conclude that Jodi has no right to self-determination in this matter. Rather, she has the right to be placed in an advanced class unless the board of education can persuade a neutral fact finder that she should not be so placed. In particular, Jodi must be placed in an advanced class if the board determines that she should be there or if the board is unable to demonstrate that she should not be there. The legislature has thus decided that Jodi belongs in an advanced class even if that might not be best for her. Jodi's substantive right, in other words, is to be in an advanced class, even if she and her parents do not want her to be there and even if the case is close as to whether it is a good idea that she be there. These are her carefully delineated rights as established by the legislature.

We can now begin to discern the responsibilities of Jodi's lawyer.<sup>36</sup> Let us consider three prominent possibilities that her lawyer might consider. One possibility would be to interview Jodi, find out what she would like to do, and attempt to accomplish her goals. A second possibility would be to interview her parents, find out what they would like, and attempt to accomplish their goals (this possibility will appear even more attractive when Jodi and her parents want the same result). A third possibility would be to investigate the case independently, perhaps through expert services, and advocate the result the lawyer concludes is the right one for Jodi.<sup>37</sup>

None of these possibilities, however, would be consistent with the law as the legislature intended it to be enforced. The legislature did not enact the law in order to give children an option to avoid advanced placement when they are opposed to it. Indeed, Jodi does not even have the right to appeal from a board decision placing her in the advanced class. The only reason a hearing is about to take place (and the only reason Jodi is being given a lawyer) is that the board made a decision about Jodi's placement that is contrary to what the legislature ordinarily prefers. The legislation is clear that all children should be placed in the advanced class unless the board can justify not doing so by clear and convincing proof. Moreover, the legislature wants Jodi in the advanced class even when Jodi herself thinks she should not be there. Indeed, Jodi's preference is irrelevant.

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36. We are, of course, assuming that Jodi is an "impaired" client within the meaning of the Model Rules.

37. Model Rule 1.14 fails to give the lawyer sufficient guidance to behave in any particular way. The Comment to this Rule hints that it is appropriate for Jodi's lawyer to give significant weight to Jodi's preference, even if she is impaired because she is likely to have "the ability to understand, deliberate upon, and reach conclusions about matters affecting [her] own well-being." Model Rules, *supra* note 1, Rule 1.14 cmt. At the same time, to the extent that a child's parent can be seen as the equivalent of Jodi's "legal representative," the Comment instructs the lawyer to look to the parents for guidance. *Id.* Finally, the Comment authorizes lawyers to become "de facto guardians," which would allow them to undertake a factual investigation and recommend the outcome that appears most appropriate to the lawyer. *Id.*

For this reason, Jodi's lawyer would be contravening the legislature's judgment by supporting the board's decision based on Jodi's opposition to the advanced placement.<sup>38</sup> First, Jodi's views on the appropriateness of the placement would gain influence even though they are legally irrelevant. It is reasonable to assume for purposes of ascertaining Jodi's lawyer's role that when a lawyer forcefully advocates for a particular outcome, the lawyer will influence the ultimate fact finder in a significant percentage of cases. When this advocacy is the exclusive product of the child's preferences, those preferences have become far more influential—through the indirect route of providing a child with a spokesperson—than the law originally contemplated.<sup>39</sup> Lawyers for children should take into account the weight the law accords a child's view in determining the influence of the child's view in shaping counsel's position. Jodi's lawyer should not give more weight to Jodi's views than the legislature prescribed. When the child's view has no bearing on the outcome, lawyers for children should not advocate their client's preferences.

In addition, no one in the proceeding would be advocating a position opposite the board's initial decision that Jodi should not be placed in the advanced class. The legislature contemplated a meaningful review of the board's decision. When both parties at the hearing support that decision, however, the prospects for meaningful review are substantially diminished.

Some may object that this analysis overlooks the fact that the legislature insisted that Jodi be represented by counsel and that, once counsel is assigned, another set of principles necessarily must prevail. This superseding set of principles is the code of ethical rules concerning the role of counsel and the professional responsibilities of attorneys. Under this approach, the legislature implicitly incorporated all the rules and obligations of counsel when it chose to assign counsel to Jodi and, therefore, Jodi's counsel is expected to look to the Model Code (or the Model Rules) to ascertain counsel's role.

As applied to children who are considered "unimpaired" under the Model Rules, this objection is unanswerable because the law unambiguously authorizes the children to set the objectives for the case. This is consistent with the principle that in determining the role of counsel for children, lawyers should be law enforcers.

There are two sources used in determining when law empowers children to set their own objectives. If either source empowers chil-

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38. Many may regard as extreme my characterization of a lawyer's allowing a young child to set the objectives the lawyer will seek to achieve as tantamount to undermining the law. To these readers, there is a distinction between a lawyer's advocating for particular results based on factors that the law does not recognize and undermining the law. I will address this point more fully in parts III.B. & III.C., *infra*.

39. The specific concern that a child's views will be too prominent when counsel zealously advocates a result sought by the child will be developed more thoroughly. See *infra* note 85 and accompanying text.

dren, then their lawyers must permit them to determine the objectives of the litigation. The first source is the set of professional rules for lawyers. Under those rules, unimpaired children are authorized to set the objectives for cases in which they are represented by counsel. It is immaterial whether another law provides additional authority for children to control their lives. The rules of the legal profession are themselves a substantive source of legal authority. Those rules make clear that unimpaired clients (even those who are under legal disabilities because of age) have the power to set the objectives of the litigation. To this extent, therefore, when courts or legislatures see fit to provide counsel for children, they must accept the ground rules that accompany such representation and recognize that counsel for unimpaired children are obliged by the canons of their profession to vigorously seek to achieve the outcomes dictated by their clients. The only certain way for courts or legislatures to avoid this is to not provide counsel for unimpaired children.<sup>40</sup>

But the same cannot be said with regard to impaired children, such as Jodi. Because the ethical rules do not provide meaningful guidance for lawyers representing impaired clients,<sup>41</sup> it is a circular argument to suggest that lawyers are bound by those rules to represent young children in a particular way. Rather, the only way to determine the degree to which a young client should be empowered to set the objectives of the litigation is to study the second source of law. This is the substantive law controlling the principles by which the case is to be decided. When that law empowers children, as, for example, in the case of juvenile delinquency proceedings,<sup>42</sup> that is the end of the matter: The child can set the objectives.

Lawyers representing impaired children should consider the law and legislative intent. Where the legislature wants a child's own views to be an important factor in the decision-making process, the child's views should become prominent. When the law neither desires nor requires a child's view to be prominent, however, they should not be.<sup>43</sup> When children's views are not substantively important, lawyers

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40. It is unclear whether it is possible for legislatures to appoint counsel for unimpaired children and define counsel's role by instructing counsel not to permit their clients to set the objectives of the litigation. Such a rule probably would violate the lawyer's ethical duty to an unimpaired client.

41. See *supra* notes 10 and 37.

42. See *infra* part III.A.

43. Although this Article does not directly address how lawyers should determine when their clients are "impaired" or "unimpaired," it should be appropriate for lawyers to take into account the substantive autonomy rights children possess in the related subject area. This does not mean lawyers are free to deem unimpaired clients as impaired whenever their clients do not have substantive autonomy rights in the subject area of the case. But it may be appropriate in such cases for lawyers to presumptively treat children as impaired in close cases. See *supra* note 14.



for children should not advocate the outcome sought by the child merely because it is what the child wants.<sup>44</sup>

Neither should the lawyer give more weight to the parents' views than the legislature intended.<sup>45</sup> The legislation was not passed to permit parents to choose which placement their child should receive. The elected officials decided to override parental authority by preferring placement in the advanced class even when the parents believe it would poorly serve their child. It is legally irrelevant whether the parents want Jodi in the advanced class or are opposed to her being there. Jodi's parents may well be opposed to the legislation, but the law was duly enacted anyway. The law left no room for individual parental choice. Its whole purpose was to override such choice by setting uniform rules of placement regardless of the views of parents in full recognition that some parents oppose the law and would not want their children advanced too easily. If Jodi's lawyer now cedes to the parents the very same authority the legislation denied them, the parents would have achieved indirectly through the use of their child's counsel what they were denied directly.

The most complex issue remaining is whether Jodi's lawyer is permitted under any circumstances to advocate that Jodi should not be placed in the advanced class. The lawyer should be barred from doing this, for several reasons. Apart from the absence of any legislative authority for such a role,<sup>46</sup> permitting lawyers this "independence" frequently would not advance, and would occasionally undermine, the law's purposes.

The question remains whether the lawyer should be permitted to oppose the placement because the lawyer has become personally convinced that the placement is unwise and would disserve Jodi's best

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44. Courts and legislatures, unlike members of the bar, are authorized to change the law by shifting to children more influence in outcomes than they previously or currently enjoy under the law. These changes, however, must be made explicitly. Important changes to the substantive law should not be effected indirectly through procedural alterations. Procedure is shaped by substantive rights, not the other way around. One does not have substantive rights because of particular procedural protections; one has particular procedural protections in order to ensure that one's substantive rights are respected. The degree to which a child's views should be a factor in the outcome ought not be enlarged simply because a child is represented by counsel.

In certain proceedings, such as custody and visitation proceedings, a child's preference is one of the factors judges must take into account when deciding the outcome. When the child's views are relevant to the outcome, the child's lawyer must make them known to the court. But making a child's views known is not the same thing as forcefully attempting to secure the outcome preferred by the child.

45. This is so only because we are describing the role of Jodi's counsel. If the parents were entitled to representation at the hearing, their attorney would be obliged to let the clients set the objectives of the representation.

46. The statute says nothing about authorizing randomly chosen members of the bar to become both an investigator and a fact finder.

interests.<sup>47</sup> It is important to emphasize that the Model Rules do not bar Jodi's lawyer from opposing the placement once the lawyer believes that opposition serves the client's interests.<sup>48</sup> These rules explicitly allow lawyers to assume the role of "de facto guardian."<sup>49</sup> As a guardian, the lawyer may choose the best position for a ward and undertake efforts to achieve the position the guardian thinks is best. Although the professional rules allow this, Jodi's lawyer—and all lawyers for young children—should eschew this alternative. Though superficially appealing to assign lawyers the task of being spokespersons for young children and advocating for outcomes on their behalf, such advocacy causes more problems than it solves. Our system of law works best when we discourage lawyers for young children from engaging in such advocacy.

An important assumption is that the advocacy of an adult serving as a child's representative often will directly affect the results of cases. The question naturally follows whether it makes sense to want a child's representative—whether that representative is called "lawyer," "de facto guardian," or "guardian *ad litem*,"—advocating for a particular result. When lawyers advocate for particular outcomes because they believe such results are best for their client, there are reasons to be wary. Guardians are commonly called upon to make decisions on their wards' behalf in a variety of situations.<sup>50</sup> The law should tolerate sparingly adults serving in a role other than a judge to make important decisions about someone else, even a child. Guardians<sup>51</sup> may be useful when they are necessary. Unless indispensable, our system is better off by limiting the circumstances under which randomly chosen professionals may decide important matters for another person.

Law should strive to achieve two goals in creating rules for child advocacy. The first is to ensure uniformity of behavior so that lawyers will know what is expected of them when performing their professional role, clients will receive similar services from their lawyers, and courts will obtain similar benefits from the lawyers' input. The second

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47. Obviously, the least acceptable reason for Jodi's lawyer to oppose placement would be because the lawyer merely thought the law was "wrong." For this reason in particular, we should always be wary of delegating to individual lawyers the power to decide what result to seek for their clients. It would be impossible to know whether the lawyer's choice was the direct or indirect product of the lawyer's own personal view of the wisdom of the controlling legal principles.

48. The Comment to Rule 1.14 states: "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." Model Rules, *supra* note 1, Rule 1.14 cmt. As a "de facto guardian," the Model Rules appear to authorize a lawyer to advocate a position contrary to what the client wants. Presumably, this would permit counsel to decide the best outcome for the client.

49. *Id.*

50. Examples include a fiduciary's decision to cy-pres a trust or a guardian of an insane person's decision to seek the ward's commitment.

51. For these purposes, "guardian" means adults formally charged with the responsibility of making decisions on behalf of wards and seeking results established by the adult.

goal is to maximize the probability of advancement of a child's legal rights.

The former goal is frustrated when lawyers are permitted to advocate for a particular result. When we allow this, once again we have unavoidably entered the chaotic universe of disparate professional behavior. Cases will be decided largely on the basis of the views of the randomly chosen counsel representing the child.<sup>52</sup> Similar cases will be decided differently merely because of assignment of a different lawyer. Some lawyers will end up seeking diametrically opposed results in indistinguishable cases. The only differences in these cases frequently will be the personalities, values, and opinions of the randomly chosen lawyers.<sup>53</sup> If state action were involved—as it often is when counsel is court assigned—this would violate an important principle of due process.<sup>54</sup>

Due process guarantees that like cases receive like process—i.e., a similar mode of consideration. To the greatest extent possible, parties are entitled to procedural regularity and uniformity in the processing that leads to the outcome. The introduction of an attorney whose biases may affect the processing of cases so that like cases are presented for judicial consideration in a different fashion threatens these due process concerns.

A related due process concern arises when lawyers are authorized to engage in a fact-finding mission and then seek to influence a court to reach an outcome that they have concluded is correct. The process by which they reached that conclusion cannot be subjected to meaningful inquiry.<sup>55</sup> Whether the lawyers are more or less risk averse will

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52. See Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Report's Perspective*, J. Am. Academy Of Matrimonial Law. (1995) (forthcoming Feb. 1996). In that Article, I state:

[T]he most serious threat to the rule of law posed by the assignment of lawyers for children . . . [is] the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests. The danger . . . is that this extra person will make a difference in the outcome of the proceeding without providing any assurance that the outcome will be "better" than if no representative had joined the case. . . . [U]nless lawyers assigned to "represent" young children [are] given specific tasks to perform which [do] not depend on the lawyers' values or personal beliefs, [we] would be inviting arbitrary role behavior on the lawyers' part and arbitrary outcomes even in similarly situated cases.

*Id.* (manuscript at 17, on file with *Fordham Law Review*).

53. Were Jodi's lawyer to choose to decide the "correct" result on the basis of the lawyer's personal views about the wisdom of the legislation, some lawyers chosen to represent children in these proceedings would agree with the legislative choice of advancing recalcitrant children. Others, however, would disagree.

54. *Blum v. Yaretsky*, 457 U.S. 991, 1002-05 (1982); *Polk County v. Dodson*, 454 U.S. 312, 319-25 (1981).

55. Due process of law requires that fact finders make their determinations only based on a fully reviewable record. See *In re Gault*, 387 U.S. 1, 72 (1967) (Harlan, J., concurring in part and dissenting in part). This, however, would be impossible if children's lawyers became fact finders.

surely affect their conclusions.<sup>56</sup> Whether they like or dislike a particular individual also has a real but undetectable bearing on their ultimate conclusions. Whether the lawyers observe an event that affects their ultimate conclusion, which is fairly representative of the larger picture about the family or is aberrational, similarly will not become known in virtually any case. These factors are only several examples of countless ingredients that can significantly influence the lawyer's final result. When the lawyers' conclusions influence a judge to rule in favor of their position, the final outcome of the case is the indirect product of an invisible process. Principled adjudication should avoid such dangers whenever possible.

We should be especially wary of using guardians when we cannot be confident that a child's rights will be advanced by liberating her lawyer to advocate the result the lawyer perceives is correct. Consider the problem inherent in assigning two professionals to the same case, each of whom is authorized to reach conclusions about the correct outcome, and one of whom speaks in the voice of the child's lawyer trying to persuade the other (the judge) to reach the conclusions believed by the lawyer to be correct. Particularly with a close case, liberating a lawyer to advocate for the result the lawyer believes is correct invites errors. In such cases, there is the unavoidable danger that the wrong result will be reached because the lawyer argued the wrong outcome. In an unknown number of cases, the lawyer's power will be enhanced at the client's cost.

What, then, *is* the appropriate role for Jodi's lawyer? Simply stated, she should be expected to support the law by advancing Jodi's rights as the legislature and case law have articulated them. This is best accomplished by defining the lawyer's major function as ensuring that the process established by the legislature is faithfully followed or, in the words of the Supreme Court, by "insist[ing] upon regularity of the proceedings."<sup>57</sup>

The process in this situation has two principal components. First, all the reasons for and against the placement should be brought to the attention of the neutral fact finder. Second, the fact finder should

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56. See Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423 (1993). Noting how lawyers may affect the outcome of a case, the author states:

[I]f attorneys with a specific organization often represent children who have been abused, and the goal of the organization is to remove children from abusive situations rather than attempt to reunite the family, then the lawyer with that organization may believe the allegations of abuse by a child even where those allegations are untrue. "If this occurs on a regular basis, the outcome in child protective proceedings will be systematically skewed toward removal."

*Id.* at 452 n.123 (quoting Guggenheim, *supra* note 15, at 106).

57. *Gault*, 387 U.S. at 36.

overrule the board's decision unless she is convinced there are good reasons not to put Jodi in an advanced class.

Jodi's lawyer fully discharges all responsibilities to Jodi when she ensures that the process is carried out as the legislature intended. This means insisting that Jodi be placed in an advanced class unless convincing reasons not to do so are brought to the fact finder's attention. To this end, the lawyer should ensure that whatever reasons the board has for not placing her in an advanced class be brought before the neutral fact finder. It is also permissible for the lawyer to conduct an investigation and bring to the fact finder's attention all facts that would support or oppose Jodi's placement. In addition, Jodi's lawyer serves her well by insisting on a speedy resolution of the matter so that Jodi will know the class in which she belongs as early in the school term as possible. Jodi's lawyer should take whatever steps are feasible to ensure that the proceedings are the least disruptive to Jodi's life. We can be confident that Jodi's rights—as defined by duly enacted officials—are being advanced, however, only when all lawyers agree not to intrude their own views on the matter.

## 2. The Role of Counsel for an Eleven-Year-Old Seeking an Abortion

Janet is an eleven-year-old girl who is in her second month of pregnancy. Janet filed a petition in a Wisconsin circuit court yesterday to terminate her pregnancy. The law requires that before a doctor may perform the abortion, Janet obtain either the written consent of one of her parents or an adult family member, or a judicial waiver.<sup>58</sup> The judge must give her consent to a waiver if the judge finds that Janet is "mature and well-informed enough to make the abortion decision on her own" or if the judge finds that the abortion is in Jodi's best interests.<sup>59</sup> Only if the judge finds that Janet is immature or uninformed *and* that the abortion is not in her best interests, may the judge prohibit the abortion.<sup>60</sup>

Although the meaning of "well-informed" in this context may be inferred from the requirements of "informed consent" for any woman undergoing an abortion,<sup>61</sup> the law does not specify the standards by which judges are to determine "maturity." It is clear, however, that the judge must consider the maturity of a minor—presumably her ability to appreciate the nature of her condition and the risks and benefits of the medical procedure she is seeking—apart from the question of whether an abortion is in her best interests.

A lawyer is assigned to represent Janet. The lawyer is personally opposed to abortions and believes that if an eleven-year-old ever

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58. Wis. Stat. Ann. § 48.375(4)(a) (West Supp. 1995).

59. *Id.* § 48.375(7)(c).

60. *Id.*

61. *Id.* § 253.10.

ought to be allowed to obtain an abortion, her parents should be fully consulted so that she can have the benefit of their guiding hand during a traumatic period in her life. The lawyer meets with Janet and concludes that she would be making a serious mistake if she had the abortion and, at least, her best interests would be served if she discussed this with her parents before having the procedure performed.

What are the lawyer's choices as Janet's counsel? Is she permitted to tell the judge that Janet is not mature and it is not in her best interests to have the abortion? Is she authorized to tell the judge that, in all events, it would be best if Janet's parents had the opportunity to speak with Janet before any final decision was reached?

Perhaps before answering these questions, a few additional "facts" are necessary. Assume that, during the initial interview with Janet, the lawyer told her everything the lawyer was thinking about. Assume that Janet responded by telling the lawyer that she has thought long and hard about her circumstances, that she understands she has a right to have an abortion without involving her parents, and that she wants the lawyer to do her best job to persuade the judge to approve the abortion as quickly as possible.

Having added these facts, we are now in a position to answer the questions about the lawyer's role. The answers are found by looking at the substantive law of abortion. Janet's lawyer has only two choices after unsuccessfully trying as her counselor to dissuade her from seeking judicial consent for the abortion. The lawyer may refuse to represent her, or she must zealously seek Janet's objectives. Moreover, these are the lawyer's only choices, whether or not she chooses to treat Janet as "unimpaired" or "impaired."

As an "unimpaired" client, as defined by the Model Rules, Janet is empowered to set the objectives of the representation.<sup>62</sup> Once her lawyer considers Janet to be "unimpaired," the lawyer is obligated by her ethical duties to zealously seek the outcome Janet has chosen. This straightforward proposition was elaborated upon in the previous section.<sup>63</sup>

The more interesting point is that Janet's lawyer is obliged to seek the objectives set by Janet even if the lawyer considers her to be "impaired." Although the Model Rules do not confer on "impaired" clients the right to set the objectives of a case, Janet is empowered to set these objectives because she possesses a substantive constitutional right to do so. Because she is pregnant, she has the right to seek an abortion even though she may be "impaired" within the meaning of a different law. The substantive law of abortion is that all pregnant minors—both "impaired" and "unimpaired"—have the right to ask a

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62. Model Rules, *supra* note 1, Rule 1.2(a).

63. See *supra* part II.C.1.

judge to allow them to abort the fetus they are carrying.<sup>64</sup> The impaired minor's right to reproductive freedom encompasses not only an entitlement to seek an abortion, but also the corollary right to elect to carry the fetus to term. These rights were given to Janet by the Supreme Court of the United States<sup>65</sup> and the Wisconsin Legislature.<sup>66</sup>

The Model Rules do not grant, nor does a private member of the bar have, the power to overrule or undermine these authorities. That is precisely what would result were Janet's lawyer free to thwart Janet's efforts. This would make the lawyer the polar opposite of the ordinary conception of a lawyer: Instead of enforcing Janet's rights, she would be vitiating them. Janet's lawyer may well be correct in her assessment of what is best for Janet. But part of Janet's constellation of rights is to prefer a result that is bad for her. Not only would the lawyer be vitiating Janet's rights, she would be undermining the law. The law makes clear that Janet has the right to persuade a judge that she is "mature and well-informed enough to make the abortion decision."<sup>67</sup> If she is regarded by the judge as mature and well-informed, Janet has the right to terminate her pregnancy even when her lawyer and the judge think an abortion would disserve Janet's best interests.<sup>68</sup> It is understandable that lawyers will disapprove of laws that do not, in their opinion, serve their young client's best interests. But that is an insufficient excuse for lawyers deliberately changing the law to obtain a result that will make them happier.

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64. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (declaring that "the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women"); *City of Akron v. Akron Center for Reprod. Health.*, 462 U.S. 416, 439-40 (1983) (holding that state may not require the consent of a parent as a condition for abortion sought by a minor); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490-93 (1983) (same); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (concluding that if "the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("The State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor. . .").

65. See *supra* note 64.

66. See Wis. Stat. Ann. §§ 48.375(4)(a), 48.375(7)(c) (West Supp. 1995).

67. *Id.* § 48.375(7)(c).

68. So long as Janet's claim is not frivolous, her lawyer has a duty to advance it. Based on the facts set forth in the text, there would be no basis to regard her claim as frivolous in this case. In order to regard Janet's claim as frivolous, a lawyer would have to reasonably believe that no judge could find she was mature and well-informed, and that no judge could find that authorizing an abortion without parental notice would be in her best interests. To preserve the substantive rights of all clients, including children, and to ensure these rights are not subject to veto by a hostile bar unwilling to allow the law to be applied as courts and the legislature have ordained, it is essential that lawyers be required to seek the lawful objectives of their child clients unless the lawyer concludes that the positions being advanced are frivolous.

If Janet's lawyer were allowed to interfere with Janet's rights, she would change the law dramatically. Under such a new law shaped by her lawyer's values and beliefs, Janet has the right to have a judge find she is mature and well-informed only if her lawyer believes it is in Janet's best interests to enforce her rights. The degree to which this would constitute unprofessional attorney conduct cannot be overstated. Even though the substantive law clearly gives Janet the right to an abortion, notwithstanding a judge's conclusion that the abortion would not serve her best interests, a randomly chosen member of the bar saw fit to transfigure the law to limit Janet's substantive rights by requiring that a lawyer first conclude it is in Janet's best interests to allow the law to be enforced in this case.

#### D. *The Proposed Paradigm*

Having looked at the role of counsel in several different contexts, we are now able to construct the paradigm for determining counsel's role. In all three contexts we examined, including those involving unimpaired adults and the two matters involving children, the role of counsel ultimately depended upon the particular substantive rights of the client. This was just as true when describing counsel's role for adults as for children.

A common error commentators make in divining the purpose of counsel is unduly concentrating on the rule that lawyers for adults must allow their clients to set the objectives of representation. Although this rule is certainly important, what is even more important is its underlying policy. As we have seen, the reason an adult's lawyer must let the adult set the objectives has little to do with an inherent aspect of lawyering. Instead, it has everything to do with the legal rights and powers adults possess.

A lawyer's first role is to enforce and advance her clients' legal rights. Everything else is secondary to this. When clients such as unimpaired adults or pregnant minors have autonomy rights to control their own destiny, lawyers are obliged to let them set the objectives of the case. Moreover, in such circumstances, lawyers are not only permitted, but required, to forcefully advocate for the results chosen by their clients. In dramatic contrast, however, when clients do not have autonomy rights (such as young children in most, but not all situations), lawyers should not allow their clients to set the objectives.

For these reasons, when determining the role of counsel for children it is essential to engage in a careful study of the legal rights and powers children enjoy in the particular subject matter implicated by the proceeding. The role of counsel for young children necessarily will



vary across a variety of legal matters.<sup>69</sup> This is because the role of counsel is not developed in a vacuum. What a lawyer for a young child must or may do will depend directly on the rights of the young child in the particular matter involved. Because lawyers, above all else, are the enforcers of their client's rights,<sup>70</sup> the principal task when determining counsel's role for young children is to examine the relevant legislation and case law in the particular subject area. Once those rights have been identified, the only remaining inquiry is to determine the most effective way to enforce them.

### III. APPLYING THE PARADIGM

#### A. *Criminal and Juvenile Delinquency Proceedings in Which Children are Clients*

The first area of law in which we will apply this paradigm is representing children accused of committing crimes in criminal or juvenile court. One begins, invariably, with *In re Gault*.<sup>71</sup> For one thing, *Gault* announced the constitutional rule that children have a due process right to be represented in these proceedings.<sup>72</sup> That alone would justify careful study of the case to glean the purpose of counsel for children. Interestingly, the Court actually defined the purpose, if somewhat incompletely. It said that children accused of being delinquent need the assistance of counsel in order "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [they have] a defense and to prepare and submit it."<sup>73</sup> Nonetheless, these are not the only reasons to study *Gault*. Moreover, the complete answer to the proper role of counsel is not obtained by studying the Court's language concerning counsel's role, but is only grasped after absorbing other parts of the decision that make no reference at all to counsel.

It ought to be clear to all that, taken literally, the Court's own definition of counsel's role is both incomplete and wrong. It is incomplete because lawyers for accused delinquents are also counselors with a wide range of responsibilities beyond presenting a defense in a proceeding. It is wrong to the extent it suggests that defense counsel

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69. Thus, in 1984, I erroneously concluded that because lawyers for seven-year-olds in delinquency proceedings must abide by their clients' instructions, lawyers for seven-year-olds in all other proceedings must do the same. See Guggenheim, *supra* note 15, at 90-91. I failed to recognize that the crucial differences between the substantive law of juvenile delinquency and certain other proceedings bear directly upon, and may even change, the role of counsel in various areas of the law.

70. This is so even when lawyers waive their adult clients' rights because part of an adult's rights is the right to waive rights.

71. 387 U.S. 1 (1967).

72. *Id.* at 35-37.

73. *Id.* at 36 (citation omitted).

must submit a defense even when a client wants to waive it and plead guilty to some part of the underlying charging document.<sup>74</sup>

The complete key to counsel's role in criminal proceedings in which children are accused of violating the penal law is found in other parts of the opinion. *Gault* held considerably more than that children must be provided with counsel in delinquency proceedings. Before concluding that children are entitled to counsel, the Court declared that children have an anterior, substantive right from which certain procedural rights, including the right to counsel, follow. This more basic right is the right to a limited, but extremely important, kind of autonomy. Although the opinion does not speak of autonomy rights, the Court held that children in delinquency proceedings possess the right to remain silent,<sup>75</sup> a far deeper right than may appear at first glance.

A child's right to remain silent, which courts did not recognize before *Gault*, is an important exception to the general rule that children are disempowered from making important decisions about their own lives. *Gault* liberated children from their usual legal disabilities and empowered them to resist state intervention by choosing to refuse to cooperate with prosecutors or judges. In the limited context of criminal proceedings involving children, it is not a sufficient condition to intervene coercively in a child's life because the child violated the penal law. Even when a child commits the charged offense, unless the child is willing to cooperate with authorities by admitting guilt, no state may convict except upon evidence presented in court. This has enormous implications for the rights of children.

The importance of this exceptional empowerment of children cannot be overstated. Although a generation of lawyers has grown up under *Gault*, it must be remembered that from the beginning of the creation of juvenile court in 1899 until the time of *Gault*, every court and legislature believed it was important public policy to require chil-

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74. The author of the majority opinion, Justice Fortas, was overbroad in his language because a juvenile has the right to waive constitutional privileges. It is conceivable that Justice Fortas believed that juveniles, because of their vulnerability, should not be permitted to waive their rights and that, unlike adults, the Constitution requires aggressive opposition to jurisdiction in every case. However, that has never been the law. Certainly by the time the Court decided *Fare v. Michael C.*, 442 U.S. 707 (1979), that argument was no longer tenable. The Court made clear that juveniles may waive their right to remain silent at the police station—even in the face of evidence suggesting that such waivers are rarely knowing and intelligent. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1152 (1980) (stating that juveniles younger than 15 fail to adequately comprehend their *Miranda* rights). If they can do so before they get to court, obviously they can do so after being in court and after having a lawyer who can counsel the juvenile before any choice is made. See, e.g., *In re D.*, 27 N.Y.2d 90, 97 (1970) (finding that a juvenile has the capacity to admit the charges against him and, therefore, waive certain constitutional rights).

75. *In re Gault*, 387 U.S. 1, 55 (1967) (holding that the "constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults").

dren accused of wrongdoing to explain their conduct to police officers and judges. When the explanation was unsatisfactory, judges were authorized to intervene coercively. This policy was based on the then-important distinction between the purpose of prosecuting adults and children—punishment and rehabilitation. Early reformers argued that a child's own best interests are furthered when adjudging a child delinquent.<sup>76</sup> As the *Gault* Court noted, "[t]he highest motives and most enlightened impulses led to" the creation of the delinquency system.<sup>77</sup> Policymakers concluded that because of these beneficent purposes, children should be required to cooperate with authorities by answering their questions.

*Gault* repudiated these ideas, holding that children possess the same autonomy rights to resist coercive intervention based on alleged criminal activity that adults enjoy. Although children continue to be denied equivalent self-determination authority in most other legal matters, they enjoy it in delinquency and criminal cases.

From this newly recognized power of children follows both the need for and, ultimately, the role of counsel. Because the right to remain silent requires the state to prove its case by presenting evidence in court, the Supreme Court turned its attention to enhancing the fairness of the judicial process. The Court concluded that "fundamental fairness" requires that the evidence presented be competent, holding that children have the right to cross-examine and confront adverse witnesses.<sup>78</sup> Once it is a requirement in these proceedings that children be given the opportunity to challenge adverse evidence, it is easy to appreciate why the Court concluded that unassisted children rarely could effectively use their right to test the state's witnesses. Accordingly, the Court required lawyers. In addition, the Court eventually clarified the strength of the state's case necessary to convict, holding that the evidence must be beyond a reasonable doubt.<sup>79</sup>

From this, then, we can only conclude that young children are empowered to set the objectives of their criminal case to the same degree as an unimpaired adult. This rule may or may not be wise public policy. But that debate will be left to legal philosophers. Certainly, that debate has no place in a discussion on the role of counsel for children. Regardless of one lawyer's view on the matter, indeed, even if the overwhelming majority of lawyers believed it is unsound to so empower children, the only correct view of counsel's role must be based on the law's definition of a child's rights. Lawyers are, first and foremost, law enforcers. They are no more free to act upon their disagreement with the Supreme Court's pronouncements of law in the exercise of their duties when representing children than a government official

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76. *Id.* at 15-16.

77. *Id.* at 17.

78. *Id.* at 56-57.

79. *In re Winship*, 397 U.S. 358, 368 (1970).

is free to refuse to enforce a duly enacted law. Unless children are allowed by lawyers to set the objectives in their cases, they would not only be effectively deprived of a number of constitutional rights, they would be denied procedures that are fundamental to the rule of law. The lawyer, not the child, would decide whether the child should forgo his or her right to remain silent. The lawyer, not the trier of fact, would effectively decide what outcome is in the child's best interests.

What, then, is the role of counsel in criminal proceedings involving children? The same as it is in criminal proceedings involving adults. By this I do not mean there are no differences. Lawyers for children need to be particularly good communicators. They need to be keenly sensitive to the risk that their clients will put too much faith in their advice because the lawyer has even more power to persuade a child client to agree to a particular result than an adult client. In addition, the sentencing structure for juvenile proceedings is dramatically different from their adult counterpart and, as a result, lawyers for children need to pay careful attention to these differences.<sup>80</sup> But these differences are all a matter of detail. The sense in which I mean there are no differences in the representation between children and adults is in the underlying purposes and goals of the representation. Lawyers representing children in criminal proceedings, like lawyers representing adults in criminal proceedings, are ethically obligated to seek the objectives of the case as defined by their clients, whether or not the lawyers think those objectives are sound for the client or for society.<sup>81</sup> Lawyers are free not to work in the field if they do not want to live by these rules but they are not free to change the rules as they see fit.

### B. *Custody and Visitation Proceedings*

Custody and visitation proceedings differ substantially from criminal and delinquency cases. In particular, the law's treatment of children is dramatically different. In delinquency proceedings, children

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80. See 1 Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Court* § 2.01(g) (1991).

81. Both adult defendants and accused juvenile delinquents may be "impaired" in a different sense than we have been discussing in this Article. That impairment would make it impossible for the lawyer to interpose any defense in the case. The right to obtain a fair trial is breached when an accused who by reason of mental disease or disorder is unable to understand the nature and purpose of the proceedings or to consult and cooperate with counsel in preparing and presenting a defense. See, e.g., *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (asserting that a person who "lacks the [mental] capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"); *In re Welfare of S.W.T.*, 277 N.W.2d 507, 511 (Minn. 1979) (finding that the right not to be tried or convicted while incompetent applies even in juvenile delinquency adjudicatory proceedings). For this reason, neither an incompetent adult defendant nor an incompetent accused juvenile delinquent may stand trial or plead guilty to crimes charged during the period of incompetency.

are empowered to choose whether or not to permit state intervention. In custody proceedings, although a child's preference—when the child is old enough to express them<sup>82</sup>—is sufficiently important that it is to be made known to the judge and courts, legislatures have consistently concluded that a child ought not to be able to control the outcome of a custody case. For the vast majority of children, these lawmakers have decided that a child's preference should be at most a small part of the picture a court should take into account when deciding the case.<sup>83</sup> In no jurisdiction is the preference of a child under fourteen-years-old more than one factor among many which the judge is to take into account when determining the child's best interests.<sup>84</sup>

For this reason, it does not advance the law for a child's lawyer to try to effect a result sought by a young child merely because that is what the child wants. Indeed, it may undermine the law for the child's lawyer to be successful based on the child's preferences. Without the child's lawyer, the child's views would have been given some, but not dispositive, weight by the judge. With the child's lawyer aggressively pursuing a result dictated by the child, the child's preferences may have a much greater influence on the outcome.<sup>85</sup> By this paradigm, however, the lawyer is required to advance the client's substantive legal rights. Because children do not have the substantive right to control the outcome, their lawyers are not required to advocate for outcomes sought by young children.

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82. Another important factor that distinguishes delinquency cases from custody and visitation proceedings is that many children in the latter type of proceedings are younger than seven-years-old; indeed, a large number of such children are under three years of age. In delinquency cases in most jurisdictions, children must be at least age seven and most are over ten years old.

83. See *Ariz. Rev. Stat. Ann. § 25-332(A)* (Supp. 1995); *Conn. Gen. Stat. Ann. §§ 46b-56a-46b-56b* (West 1995); *Mich. Comp. Laws Ann. § 722.23* (West 1993 & Supp. 1995).

84. "Today, statutes in many states direct courts to consider the child's preference, often as one among several factors that guide decision making." Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 *Ga. L. Rev.* 1035, 1035 (1988). California, for example, directs the court to give as much weight to a child's preference as the court sees fit when "a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody." *Cal. Civ. Code § 4600(a)* (West 1983).

85. One problem is that advocacy is not moderated by a rheostat. Set a lawyer into motion as an advocate for a cause, and be prepared to pay the consequences. Lawyers simply are not trained to be lukewarm in their efforts to obtain a desired outcome. For most purposes, either a lawyer will meaningfully seek to obtain a particular result or the lawyer will not. Respect for a lawyer's skills as an advocate requires that we limit the circumstances under which lawyers should be permitted to advocate at all.

I am not advancing a personal view here that a child's preference should not be a major factor in deciding a custody dispute. I am merely pointing out that when lawyers advocate for outcomes their young clients have chosen, the child's preference will become a major factor in the decision-making process. If children's preferences should control more cases, this change in the law should come about as a result of legislative or common law changes in the substantive rules, not by a call for counsel.

What are a child's substantive rights in custody proceedings? The obvious answer is they have a right to be placed with the caregiver who will best serve their interests. But, more precisely—and more importantly to a discussion of counsel's role in furthering a child client's legal rights—they have a right to have a judge determine their best interests. A child's rights have been fully furthered whenever a judge makes a considered decision based on accurate information about the child and her parents.

This distinction is important because it separates two ideas that commonly are conjoined within the concept of children's rights. It confuses things to say that children have the right to have their best interests advanced. This is confusing because it is impossible to know when a child's rights have, in fact, been advanced.<sup>86</sup> The only meaningful and enforceable right children have in this connection is the procedural one to have a judge try in good faith to decide the case solely based on the child's best interests. When that is done, the child's rights have been fully served whether or not someone might continue to complain that the child's best interests actually would have been served by a different result. The best interests standard is procedural in nature; it tells judges how they are supposed to think and act. It is not a promise to children that they will live happily after the decision, or even that their lives will be better than if the court decided the case differently.<sup>87</sup>

The question remains: What acts by a child's lawyer are most likely to advance the child's legal rights? Having eschewed the possibility of advocating an outcome based on the child's preference, either lawyers should be permitted to advocate an outcome based on their views about what is best for the child or they must be prohibited from advo-

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86. Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 Creighton L. Rev. 757, 771 (1990). The author states:

[T]he factual foundation for a 'best interests' position cannot be determined. Knowing, advocating, and adopting the position which addresses the best interests of the child requires a prediction of the future of the child, the child's relationships within the family, and the parents' ability to meet the apparent and hidden needs of the child. All of those pieces which make up a 'best interests' analysis cannot be known in any real way. Speculation about a child's best interests does not provide a firm foundation for decision-making, and yet it appears that speculation is precisely what is called for when children's futures are to be decided.

*Id.*

87. This is demonstrated by the fact that parents remain free through the point of final judgment to settle a case without a judge's determining the child's best interests. Parents have extremely wide latitude to resolve custody and visitation arrangements by themselves before and without seeking judicial intervention and even after seeking such intervention by settling the matter. When parents resolve their dispute without court involvement or before a judge decides it for them, the resolution need not meet the standard of comporting with the child's "best interests." See Martin Guggenheim, *The Best Interests of the Child: Much Ado About Nothing?*, in *Child, Parent, and State: Law and Policy Reader* 27, 29 (S. Randall Humm et al. eds., 1994).

cating any outcome whatsoever.<sup>88</sup> The reasons against encouraging counsel to advocate an outcome when representing children disempowered from setting the objectives for their case previously have been discussed.<sup>89</sup> First, empowering lawyers in this way does little to advance the child's rights. When lawyers advance a result they wrongly believe to be best for their client, the problem is that their advocacy may succeed. In such cases, the lawyer's power was enhanced at the client's expense. In addition, allowing lawyers to decide for themselves what outcome to seek would return us to the same chaotic universe we must avoid if the rule of law is to be applied.

The search for an objective, uniform rule that advances the child's legal right to have the case decided by the judge in accordance with the child's best interests leads to the rule recently adopted by the American Academy of Matrimonial Lawyers.<sup>90</sup> Lawyers for young children should make certain that judges are placed in the best position to make a considered judgment about the child's best interests. During the pretrial stage, lawyers "should use all appropriate procedures to develop facts which the decision-maker should consider in deciding the case and which otherwise would not be brought to the decision-maker's attention."<sup>91</sup> In addition, when an evidentiary hearing is conducted, lawyers should strive to "make the decision-maker aware of all facts which the decision-maker should consider."<sup>92</sup> However, this should be done as a nonpartisan who wants "to place the court in the best possible position to decide the case on the basis of the child's best interests."<sup>93</sup>

In addition to placing the fact finder in the optimal position to decide the case correctly, a child's lawyer can perform a number of additional tasks that advance a child's legal interests that are not dependent either on the wishes of the child or the personal beliefs of the lawyer. It is appropriate to expect lawyers to protect children from the pressures and pain associated with contentious litigation and to try to reduce conflict by encouraging parents to focus on the needs

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88. IJA-ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Counsel for Private Parties § 3.1(b)(ii)[b] commentary at 82 (1980). Unfortunately, courts commonly expect counsel to represent the child's "best interests" and to express his or her opinion on the appropriate outcome, even when this opinion is not consistent with the child's. See *In re Marriage of Barnhouse*, 765 P.2d 610, 612 (Colo. Ct. App. 1988), cert. denied, 490 U.S. 1021 (1989); *In re Marriage of Rolfe*, 699 P.2d 79, 86 (Mont. 1985).

89. See *supra* notes 46-54 and accompanying text.

90. See American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings* (1995) [hereinafter Standards]. In the interests of full disclosure, I was the Reporter for the Academy in drafting those standards.

91. *Id.* § 2.12.

92. *Id.* § 2.13.

93. *Id.* § 2.13(a) cmt.

and best interests of the children.<sup>94</sup> In an effort to reduce acrimony, lawyers may attempt to facilitate settlement, so long as their purpose is not to secure a particular result. Finally, of course, a lawyer should strive to ensure that their client is made to feel as good as possible about the case.

In short, counsel for young children should maximize the possibility that the case will impose the least harm possible on the child. This goal is not necessarily advanced at all when counsel advocates a particular result. It is likely to be advanced, however, when lawyers shield their clients from harm, reduce tension between the parties, expedite the proceedings, and see to it that cases are most likely to be decided on the basis of what is best for children.<sup>95</sup>

### C. *Child Protective Proceedings*

Given the importance to the determination of counsel's role of carefully identifying a child's substantive rights in the particular subject matter area in question, we begin by clarifying those rights in the area of child protection. As we shall see, that is not a simple task. One thing, however, is undeniable. As in custody cases, child protective proceedings have virtually nothing to do with empowering children. Children have no more right to insist that the state intervene to protect them from inadequate parents than to insist that the state stay out of their lives. In fact, children have even *less* autonomy in child protective proceedings than in custody matters. In custody matters, a child's view regarding placement is at least one of the factors the court must consider when determining custody. But a child's view regarding placement is totally irrelevant during the initial phase of a child pro-

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94. Wilber, *supra* note 6, at 351. Reflecting on the need to protect children, the author notes:

One critical function is the protection of the child from any unnecessary harm that may flow from the proceedings themselves. Parents engaged in a bitter custody battle or a protracted child abuse proceeding, for example, are often blind to the child's need for a prompt, harmonious resolution. Counsel for the child can oppose unnecessary continuances, move to quash frivolous motions, or request a court order providing counseling or other supportive services for the child.

*Id.*

95. See Standards, *supra* note 90, § 2.6. The Commentary to this Standard states: This Standard requires counsel to take appropriate steps to deescalate all conflict in the litigation. Counsel should try, consistent with the client's instructions on the goals: (a) to resolve the dispute in the least contentious manner; (b) to resolve the dispute in the most expeditious manner; and (c) to expose the child to as little of the controversy as possible. To accomplish this, counsel should attempt to negotiate disputes that have the potential to escalate into harmful conflict. Counsel should also urge the parties and their lawyers to keep the interests of the child paramount, reminding them at various stages of the proceedings how particular actions may affect the child and recommending alternative actions that would better serve the child's interests.

*Id.* § 2.6 cmt. (footnote omitted).



tective case in which the court must determine whether there is a legal and factual basis to consider removing the child from his or her family.<sup>96</sup>

Child protective proceedings accord children special rights to protection from harm imposed by their caregivers.<sup>97</sup> But these idiosyncratic rights require careful study before applying them to determine the role of counsel for young children. Children have distinctive protective rights. Their primary right is to remain in their parents' custody unless their parents have been inadequate.<sup>98</sup> However, children also have the right to be protected from their parents when their parents fall below the minimal standard of care established by law. Their right to state protection, in other words, is conditional. If, and only if, a parent is inadequate, should the state interfere with the parents' and child's right to familial integrity.<sup>99</sup>

It is possible to define a child's substantive rights in this area in one of two ways. We might say that children have a right to live with their

96. Child protective proceedings have two phases: the trial or adjudicatory phase, and the dispositional phase. The latter part of the case is not reached if the court dismisses the matter at the conclusion of a trial, as it must do when the petitioner fails to meet its burden of proving that a parent is unfit within the definition of the neglect or abuse statute.

97. See Wald, *supra* note 29, at 260. As Wald states:

There are four different types of claims under the general rubric of children's rights. While there is some overlap among the categories, each has special characteristics relevant to analyzing whether children should be given such rights. The categories are: (A) generalized claims against the world, e.g., the right of freedom from discrimination and poverty; (B) the right to greater protection from abuse, neglect or exploitation by adults; (C) the right to be treated in the same manner as an adult, with the same constitutional protections, in relationship to state actions; (D) the right to act independently of parental control and/or guidance.

*Id.*

98. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). New York's statutory scheme, for example, states:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive; (ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home . . . ; (iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and (iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child . . . then a permanent alternative home should be sought for the child.

N.Y. Soc. Serv. Law § 384-b(1)(a) (McKinney 1992).

99. See Annette R. 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, 71 (1995); see also *Santosky*, 455 U.S. at 760 (stating that only when the state proves parental unfitness may the court assume that the interests of the child and the parents differ); *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("[P]arents . . . retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and . . . the traditional presumption that the parents act in the best interests of their child should apply.").

parents unless a court finds the parents unfit. Under such a definition, lawyers for children should regard intervention, even to protect children from harm, as an intrusion into their clients' rights to be raised by their parents. This definition of a child's rights, and the corollary role of counsel for young children, I recognize, will trouble many children's advocates. These advocates will assert that this definition of a child's rights is inaccurate. For them, children have the right to be separated from their parents whenever their parents are actually unfit, not just when a judge enters a determination of unfitness. That is, children have the right to be free from harm, not merely to have a judge decide whether they are endangered.

There is much force to this alternative definition. Even when we accept it, however, the challenge still remains to clarify counsel's role. Certainly, it cannot be irrelevant to the determination of counsel's role that the law prefers nonintervention and presumes that children are best off remaining in their parents' custody without coercive assistance.<sup>100</sup> At a minimum, this preference means that children's lawyers cannot presume their clients' interests are served by supporting intervention. Before a child's lawyer should be allowed to support intervention, we may expect that the lawyer has concluded that the child's interests require protection.

We have already seen, however, the dangers created when lawyers are allowed to reach conclusions about facts that are preconditional to arguing an outcome in the case.<sup>101</sup> In the real world, judges rely on the advocacy of a child's lawyer.<sup>102</sup> It is impossible to know, however, whether the lawyer's views advance or hinder the child's rights. Because the child's right to secure state protection is conditional, that right is wrongfully invoked when the predicate facts justifying it do not exist. If a parent abused her child, the child has the right to be protected. But if a parent has not, the child has the right to have the case dismissed without additional intervention. When a young child's lawyer argues that the court should remove the child from her home

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100. If, for example, state law requires that children should be removed from their parents' custody whenever there is some evidence to believe the parents are inadequate, it would not be controversial to suggest that a young child's lawyer's obligation in child protective cases is, except in unusual cases, to forcefully argue for their removal. Similarly, given the substantive law in most states, it should not be regarded as too radical to suggest that lawyers for young children should presume their clients' interests are served by thwarting intervention.

101. See *supra* notes 46-54 and accompanying text.

102. See Patricia S. Curley & Gregg Herman, *Representing the Best Interests of Children: The Wisconsin Experience*, J. Am. Acad. Matrimonial L. (1995) (forthcoming Feb. 1996) (manuscript at 9, on file with *Fordham Law Review*). In the authors' experience in Wisconsin, the recommendation of the child's representative "is commonly the eventual order of the court" whether that result is achieved by settlement or trial. Moreover, they assert that the outcome of emergency hearings usually is based exclusively on the guardian's recommendation. *Id.*

based on the lawyer's incorrect conclusion that the parent is unfit, the lawyer has breached the child's right not to be removed.

In addition, as we have seen also, the lawyer's views on the proper result unavoidably will be the product of a host of factors that will never be the subject of review by anybody.<sup>103</sup> Finally, liberating lawyers for children to advocate results they believe are best for their clients will ensure the randomness and chaos that a rational legal system would avoid whenever possible. It is eminently possible to avoid such chaos in child protective proceedings by the simple device of barring lawyers from advocating an outcome. We should be particularly willing to impose this restriction precisely because there is no assurance in the first place that the lawyer will seek the correct result.<sup>104</sup>

Because lawyers for children should be law enforcers, their role throughout the fact-finding stage of a child protective proceeding is to attempt, in the most objective way, to aggressively enforce the law as it was written by the legislature and interpreted by the courts. They should advocate for particular results, however, only when those results do not depend on ancillary findings of fact. Instead, in accordance with the law in every state, lawyers for children should insist that children not be removed from their parents' custody until a court has determined, based on reliable evidence, that there are statutory grounds for removal. When children are removed, their lawyers should insist, again in accordance with ubiquitous law, that regular and frequent visitation takes place.

As in custody and visitation cases, lawyers for children should ensure that the prosecution of the case not adversely affect the children. Children should be shielded from unnecessary examination and interviews; proceedings should be resolved fairly but expeditiously. Lawyers for children should help level the playing field. When they perceive an inadequate or overworked prosecution office, it will be important for children's lawyers to ensure that all available facts sup-

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103. See, e.g., Hafen, *supra* note 56, at 451 (stating that "it is completely up to the attorney to decide whether to follow the child's wishes").

104. There can be no doubt that lawyers for children seek the best result for children most of the time. I have always believed that. My point is more modest. In most of the cases that lawyers for children seek the best result for their clients, I believe the same result would have been reached anyway. For this reason, in my opinion, the percentage of cases in which lawyers for children were needed for the court to reach the correct result is a much smaller fraction of the total cases of lawyers seeking the correct result. Especially in easy cases—those in which the correct result is fairly clear—it is reasonable to expect that judges would achieve that result without a child's counsel leading them there. Thus, for a large number of cases, lawyers for children are unnecessary. They may not cause much harm but they will do little good.

One might think, therefore, counsel for children can be particularly valuable when they recommend an outcome in hard cases—those in which it is not clear what outcome is correct. Though this may appear attractive, it is precisely in the hard cases that the risks of mistakes increase. In those cases, one cannot be nearly as confident that lawyers will seek the correct result.

porting the agency's case be placed before the judge. As in custody and visitation cases, this should be presented in a nonpartisan manner. Similarly, when the child's lawyer perceives the parent's attorney as inadequate or overworked, it is important for the lawyer to ensure that all facts supporting the parents be presented to the court. Finally, when children enter the foster care system, their lawyers should pay careful attention to their well-being during the entire period they are state wards.

### CONCLUSION

The Model Rules are only one source for ascertaining the role of counsel for young children. Although these Rules are an important part of any analysis of the role of counsel for young children, they cannot be counted upon to answer the most vexing questions on the subject. One must study the entire corpus of laws establishing children's rights in a particular setting before settling on a defined role for counsel. Sometimes lawyers must allow their clients to set the objectives for a case even when the rules of the profession do not require this. At other times, this Article recommends that lawyers be barred from engaging in conduct that the professional rules would allow.

By applying the paradigm developed in this Article, one learns that lawyers for children are obliged by the Model Rules to faithfully follow their clients' instructions whenever children are empowered by any source of law to set the case's objectives. In no other circumstance are lawyers constrained by professional rules of conduct to act in a particular way.

Once lawyers are freed from constraints based on professional rules, it is necessary to search for their role as counsel. Ideally, this search will lead to a role that will be performed time and again by all members of the bar in a comparable manner in like cases. In this Article, I argue that counsel's principal objective should be to become the child client's law enforcer (that is, the precise, uniform service counsel performs when she carries out the instructions of a client authorized by law to set objectives for a matter). The law enforcer role is not furthered, however, when lawyers empower children to set the objectives for a case when the relevant substantive law has disempowered them.

In those cases in which lawyers are not constrained by law, this Article argues that the principle of being law enforcer is better served by assisting the judge to decide the case correctly with a minimum of involvement by the child. The only way to accomplish this and perform a consistent role is for the lawyer to uncover relevant facts that place the judge in the best position to decide the case and to protect the child from harm that may result from the litigation itself. When lawyers perform this role, the danger that the case will be contaminated by the lawyer's values are minimized. At the same time, the

lawyer will have performed a role that is most likely to increase the prospects that a child's rights will be advanced.

