

# Confronting Developmental Barriers to the Empowerment of Child Clients

Emily Buss

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# CONFRONTING DEVELOPMENTAL BARRIERS TO THE EMPOWERMENT OF CHILD CLIENTS

*Emily Buss*†

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## INTRODUCTION

There is a growing call for child "empowerment" among those concerned with the legal representation of children. While these champions of empowerment do not clearly define the term, they echo the more familiar call for adult client empowerment, found in the poverty-lawyering literature,<sup>1</sup> and the parallel promotion of "dignitary values," found in the due process literature.<sup>2</sup> As in much of this adult-focused literature, advocates of child empowerment suggest that lawyers are especially qualified, and therefore uniquely obligated, to give their clients a sense of influence over matters affecting their lives. However else the lawyer-client relationship may be compromised by a child's minority, the argument goes, lawyers still can be expected to empower their child clients by fostering this sense of influence. No attention has been given, however, to whether children's minority might compromise their very ability to be empowered by their lawyers.

Child empowerment is promoted most prominently in the context of the highly charged debate—among scholars, advocates, legislators, and courts—over the proper role of the child's lawyer in abuse and neglect proceedings. On one side of the debate, proponents of a paternalistic approach argue that the lawyer should advocate for what she determines to be in the child client's best interests, regardless of whether the child agrees.<sup>3</sup> According to its supporters, the child cli-

<sup>1</sup> See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 52-58 (1990).

<sup>2</sup> See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 160-67 (1985) (presenting a theory of due process focused on "sustain[ing] . . . an appropriate conception of human dignity"); see also Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-75 (discussing the "dignity" and "participation" values of litigation).

<sup>3</sup> This approach appears to be favored by the legislatures that have addressed the subject. See JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 30-31 (1997) ("Thirty-eight statutes explicitly link the role of the representative for the child . . . to the child's best interests"); see also 42 U.S.C. § 5106a(b)(2)(A)(ix)(II) (Supp. II 1996) (tying federal funding for child protective services to a state's provision of a legal representative, who is, in every case concerning an abused or neglected child, "to make recommendations to the court concerning the best interests of the child"). This approach represents the minority position, however, among legal scholars. See, e.g., DONALD N. DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES* 150 (1990) (proposing legislation that would require the child's legal representative to advocate what she determines to be in the child's best interests for all children younger than fourteen); see also NATIONAL CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REP-*

ent's impaired capacity for decision making and the high risks associated with bad decisions in this context justify this approach. On the other side of the debate, "traditional attorney" advocates contend that lawyers should treat children just as they would adult clients and should advocate for what their child clients want.<sup>4</sup> Although much of this debate focuses on disagreements about the extent and implications of children's impaired decision-making capacity, advocates of the traditional attorney role increasingly are promoting child empowerment as an independent justification for their approach.<sup>5</sup>

I confess myself to be a long-time advocate of child empowerment. In my seven years in practice representing children, I strove to give them the message that they were my "boss," that I took direction from them, and that they had an important, influential role to play in a decision-making process that could greatly affect the course of their lives. Over time, however, I became increasingly uncertain that this message was getting through. I came to doubt whether our adult concept of empowerment could translate into the world of childhood.

These doubts have led me to the present inquiry, which begins with an effort to define what empowerment advocates hope to accomplish for their clients and then considers how realistic these aspirations are, particularly for younger children, in light of what we know about child development. Because the aim of empowerment appears to be a change in how clients perceive themselves and how they relate to others, I focus on the development of these social perceptions and interactions. This "socio-cognitive" development is a subject largely ignored by legal scholars, whose forays into developmental psychology have concentrated on the development of logical reasoning skills.<sup>6</sup>

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RESENTATION THROUGH GUARDIAN *Ad Litem* 5-2 (1993) [hereinafter HHS REPORT] (presenting recommendations of Technical Expert Group consisting of attorneys, lay advocates, judges, and academics, which called for representation of the child's best interests).

<sup>4</sup> This approach appears to represent the majority approach among legal academics. See, e.g., *Report of the Working Group on the Allocation of Decision Making*, 64 FORDHAM L. REV. 1325, 1331-35 (1996) (recommending traditional representation for all unimpaired clients, broadly defined); see also STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A-1 (1996) (defining the child's attorney as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client").

<sup>5</sup> See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996). This increased focus on empowerment is also evident, in my view, in the less formal discourse among practitioners on the subject of child representation in child protection proceedings.

<sup>6</sup> See, e.g., Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity To Choose*, 64 FORDHAM L. REV. 1873, 1875-85 (1996) (reviewing how child development theory has approached children's decision-making capacity); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 309-16 (1983) (proposing a standard of legal representation based in part on

Advocates of empowerment seek to give their clients a positive sense of influence over the litigation process at two levels. At its most concrete, empowerment means enabling clients to exercise direct influence over the litigation process and indirect influence over litigation outcomes. At a more abstract level, empowerment means enabling clients to influence the way in which they are perceived by judges, lawyers, other parties, and as a consequence, themselves. My analysis of the literature on socio-cognitive development suggests that even the more concrete, litigation-influencing conception of empowerment makes considerable demands on a child client's capacities. Until the client develops a relatively sophisticated understanding of his own thoughts and actions, and until he develops the capacity to comprehend the unusual relationship between lawyer and client-self, he will not be motivated to give the lawyer a complete and clear sense of his litigation position, nor will he perceive his lawyer's advocacy as a manifestation of his own participation.

The more abstract conception of empowerment, which focuses on a client's influence over the way in which he is perceived by himself and by others, makes even heavier demands on the client's socio-cognition. To experience the taking of positions in litigation as a revelation of self requires a child to perceive himself in primarily psychological terms. This sort of development does not generally occur, if it occurs at all, until adolescence.<sup>7</sup>

This Article concludes that because many children lack the capacity to appreciate their influence over their lawyers or the court, lawyers often will do children a considerable disservice if they premise their representation on the empowerment ideal. I wish to emphasize at the outset that this Article only addresses the ability of children to be empowered through legal representation and participation in the litigation process. It should not be read as an attack on all aspirations to empower children. I start from the premise that giving children respectful opportunities to practice decision making and to exercise responsibility enhances their development and thereby benefits society as a whole. I aim my skepticism more narrowly at lawyers. While ours is a profession heady with empowerment talk, we may be particularly ill-suited to bring this power to children.

This Article begins in Part I with a description of the context in which the goal of child empowerment through legal representation has been articulated. After reviewing the legal literature calling for the empowerment of adult and child clients in Part II and considering the various definitions of empowerment suggested by these discus-

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children's reasoning capabilities and focusing on cognitive development research, as it "is particularly germane to questions about decision making").

<sup>7</sup> See *infra* notes 145-52 and accompanying text.

sions, I turn in Part III to the developmental literature that bears on children's capacity for empowerment. This developmental literature suggests that a child's immature conception of self, of the roles people play, and of his relationship to the people performing those roles will all pose serious obstacles to a lawyer's achievement of the empowerment goal.

The implications of the teachings of this literature are then discussed in Part IV. This Part begins in section A by arguing that children's developmental limitations require lawyers to alter the way in which they define their role and communicate with their clients. Instead of approaching the lawyer-client relationship with the expectation that the client immediately will be in a position to exercise influence, the lawyer should conceive of the relationship as an opportunity to teach children about this potential for influence. Recognizing that gaining the necessary capacities to exercise that influence could take years, lawyers should engage children's processes of development by helping them to learn, in the context of the lawyer-client relationship, what it means to assume control.

Part IV then concludes in section B by noting that my inquiry ultimately has implications for adult clients as well. While capacity limitations are presented most starkly (and studied most extensively) in children, many of the same limitations are likely to obstruct the ability of certain adult clients to experience their involvement in litigation as empowering. These limitations are likely the greatest for adult clients whose exposure to deprivation and stress has shaped the development of their social perceptions in a manner that makes these clients resistant to the intended lessons of legal representation. Unless the lawyer can control how the client perceives her, she cannot control what information the client will derive from her representation. Unless the lawyer can control these perceptions, she (and we) have no reason to expect a client to experience his involvement in the process as empowering or otherwise ennobling. As is so often the case, an initial concern about whether children share the adult capacities required to justify their similar treatment under the law leads to bigger questions about how adults think and act.

## I

### BACKGROUND

In the 1967 landmark case of *In re Gault*,<sup>8</sup> the Supreme Court recognized that a child has an independent right to counsel in delinquency proceedings.<sup>9</sup> Several years later, in response to the Child

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<sup>8</sup> 387 U.S. 1 (1967).

<sup>9</sup> In *Gault*, the Court presented the interests of parents and child as aligned, and as a result the decision is somewhat ambiguous as to whether the constitutional right to counsel

Abuse Prevention and Treatment Act ("CAPTA"),<sup>10</sup> which requires that states provide some form of representation for children in child protection proceedings to receive federal funds,<sup>11</sup> most states enacted laws requiring the appointment of counsel for these children.<sup>12</sup> Together, the *Gault* holding and CAPTA produced an explosion of children's lawyers, which may have helped fuel an increase in courts' reliance on separate counsel for children in the custody arena.<sup>13</sup>

This explosion of legal representation for children has not, however, produced a clear consensus about the role that lawyers should assume in representing children. Least contentious has been the discussion of the lawyer's role in the context of juvenile delinquency proceedings, in which the older age of the minors and the adult-like, liberty-constraining consequences they face offer strong support for the traditional client-driven model of representation.<sup>14</sup> Most conten-

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is purely the child's right or a right shared with the child's parents. See, e.g., *id.* at 42 (discussing "the right to counsel which she and her juvenile son had"). The Court, however, subsequently has interpreted *Gault* as recognizing a child's independent right to counsel in the delinquency context. See, e.g., *Schall v. Martin*, 467 U.S. 253, 263 (1984) (interpreting *Gault* to establish that "certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles" (citing *Gault*, 387 U.S. at 31-57)).

<sup>10</sup> Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5119c (1994 & Supp. II 1996)).

<sup>11</sup> See 42 U.S.C. § 5106 (Supp. II 1996). As originally enacted in 1974, CAPTA required states, as a condition of receipt of federal funds, to "provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings." § 4, 88 Stat. at 7 (originally codified at 42 U.S.C. § 5103(b)(2)(6) (1974)). In 1996, Congress amended CAPTA to define guardian ad litem as either an attorney or a lay advocate. See 42 U.S.C. § 5106a(b)(2)(A)(ix) (Supp. II 1996).

<sup>12</sup> See ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY* 3 & 17 n.24 (1993) (listing states requiring appointment of counsel); see also Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 346-47 (1987) (noting that most jurisdictions in the United States require that children be independently represented by lawyers).

<sup>13</sup> See Linda E. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q. 53, 53 (1992) (noting that although only two states require the appointment of a legal representative in all private cases in which custody is disputed, "nationally the trend inches toward" that requirement in response to growing attention to children's rights).

<sup>14</sup> This is not to say that there always has been agreement on the proper role for lawyers representing minors charged with crimes. See, e.g., Vance L. Cowden & Geoffrey R. McKee, *Competency To Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 636-37 (1994-1995) (documenting three main approaches to representing minors in criminal matters in the wake of *Gault*). Broad consensus now exists within both the delinquency bar and the judiciary that lawyers for minors charged with crimes should take direction from their clients just as they would if their clients were adults. See STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.1(b)(ii)[a] (1980). At least one state, however, directs lawyers representing children in the delinquency system to take a more protective approach. See *In re K.M.B.*, 462 N.E.2d 1271, 1272-73 (Ill. App. Ct. 1984) (holding that a 13-year-old was not deprived of her constitutional right to counsel when her lawyer advocated, against her wishes, for out-of-home placement). Moreover, even when the consensus view applies, individual lawyers

tious has been the discussion of the lawyer's role in the context of child protection proceedings, in which children can be as young as newborns, and in which their very safety is at stake.<sup>15</sup> Because capacity issues are posed most dramatically in this context, and as a corollary, because disagreements about the proper role for a lawyer in these cases are most intense, I focus primary attention on these child protection proceedings. It bears noting, however, that the implications of my analysis extend to the legal representation of children and adults in a broad range of contexts in which similar questions can be raised about clients' capacities and levels of actual performance.

At stake in an abuse and neglect proceeding is the physical and psychological well-being of a child. At the outset of these proceed-

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may be unaware of it or unwilling to operate according to that standard. See Debra Cassens Moss, *In re Gault Now 29, But . . .*, A.B.A. J., June 1, 1987, at 29, 29 (reporting the results of a New York State Bar Association study which found that (1) the majority of lawyers representing juveniles in delinquency proceedings defined their role as representing the best interest of their clients and that (2) only 15% defined their role as analogous to a defense lawyer's).

<sup>15</sup> See, e.g., HARALAMBIE, *supra* note 12, at 5 ("Commentators continue to debate what the role of the child's attorney should be." (emphasis omitted)); Ramsey, *supra* note 6, at 289-91 (noting that in the area of child protection proceedings, "[l]egal scholars disagree about the proper role of the child's representative"). To some extent, the same debate occurs in the context of children's representation in private custody disputes, in which the children can be just as young. See, e.g., HARALAMBIE, *supra* note 12, at 2. The issue, however, is generally perceived as less urgent in that context, and the disagreements are less intense. This distinction in intensity can be accounted for in a number of ways. First, many children do not have lawyers at all in custody proceedings, see John David Meyer, Note, *The "Best Interest of the Child" Requires Independent Representation of Children in Divorce Proceedings*, 36 BRANDEIS J. FAM. L. 445, 446 (1997-1998) (noting that while many states give courts the discretion to appoint an independent representative for the child in private custody proceedings, "courts rarely exercise this power"), whereas children in child protection proceedings are required as a condition of federal funding to the states to be separately represented (usually by a lawyer) in all cases, see *supra* note 11 and accompanying text. Second, although the resolution of private custody disputes clearly has important effects on the children involved, the stakes are not as high as they are for children in child protection proceedings, who face the risks of either returning to a dangerous home or severing their relationship with their entire immediate family. By contrast, the issue in a private custody dispute generally concerns how parental authority and responsibility will be divided between two legally fit and loving parents. Third, parents in private custody disputes are presumed between them to do a reasonably good job of capturing the child's interests, whereas in a child protection proceeding neither the child's parents (because their interests may be directly adverse) nor the State (which is unfamiliar with the child) is in a good position to assess the child's interests. Cf. STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS § 1.1 cmt. at 10 (American Academy of Matrimonial Lawyers 1994) (explaining that in "the absence of a particular reason for assigning representation for a child, the representative frequently will merely duplicate the efforts of counsel already appearing in the case"); Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327, 350 (1983) ("The role of factfinder is generally adequately filled by parents and their counsel.").



ings, a court determines whether the parent<sup>16</sup> mistreated the child, and if so, what intervention is required to protect the child in the future.<sup>17</sup> In most cases, these decisions mark the first in a long series, often extending over several years. The court's jurisdiction lasts as long as the court sees a need for ongoing supervision of the family.<sup>18</sup> During this entire period of oversight, the law entitles the child to representation at every hearing at which the court makes decisions regarding whether, when, and under what conditions a child should remain with, or go back to, his family and regarding what services the State should provide to help parents meet their responsibilities and to ensure that the child receives adequate care.<sup>19</sup> In cases in which a court finds that intervention is needed, the options available to the child are often very poor—typically a choice between a fairly deplorable and potentially dangerous home environment, on the one hand, and an impermanent placement with strangers, away from family, friends, school, and community, on the other. The proper resolution of the issues before the court is thus generally as elusive as it is important.

There are essentially two schools of thought about the role an attorney should play in representing children in abuse and neglect proceedings. According to the "guardian ad litem" or "GAL" school, children's lawyers should make their own assessment about what results are in the child client's best interests and should advocate zealously for those results.<sup>20</sup> According to the "traditional attorney" school of thought, children's lawyers should take direction from their

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<sup>16</sup> Throughout this Article, I will refer to "parents" as shorthand for the entire category of primary caretakers for children.

<sup>17</sup> See DUQUETTE, *supra* note 3, at 71 ("The question before the court is whether the youngster is an abused or neglected child as defined by the state's statute . . . [and whether] the state ha[s] a right to interfere with the privacy and freedom of [the] parents and [the] child.").

<sup>18</sup> See *generally id.* at 87 (discussing review hearings and noting that "[a]fter the court enters dispositional orders, the case is brought back before the court on a regular basis for review").

<sup>19</sup> See, e.g., 42 PA. CONS. STAT. ANN. § 6337 (West 1982) ("Except as otherwise provided under this chapter a party is entitled to representation by legal counsel at all stages of any [dependency or delinquency] proceedings . . .").

<sup>20</sup> See DUQUETTE, *supra* note 3, at 150-51 (proposing legislation that would require the advocates for all children under 14 to advocate what they determine is in the children's best interests); Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 82 (1995) (suggesting that all children should be represented by a GAL, who would have the duty of requesting separate counsel for the "inature child" who disagrees with the GAL); Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 31, 33-35 (1976) (arguing that a child's special interests require the protection of independent representation in the form of a guardian ad litem).

child clients, just as they would from adult clients, about what objectives to pursue in the litigation.<sup>21</sup>

Few take an absolutist position either way. The traditional attorney model assumes, at a minimum, that the child client is old enough to communicate a position, and many proponents of this model attempt to limit its application to children who are able to reason at some level.<sup>22</sup> Similarly, proponents of the GAL model generally recognize that, at some age, children become developmentally indistinguishable from adults in all relevant respects. Accordingly, these proponents attempt to limit the application of their model to children below that developmental level.<sup>23</sup> For the most part, the debate can be recast from one that pits role against role to one that focuses on the age at which the role of counsel should shift. Proponents of the traditional attorney model often draw the line at early childhood,<sup>24</sup> whereas champions of the GAL model draw the line at mid-adolescence.<sup>25</sup>

Advocates of both schools of thought commonly justify their position on developmental grounds. The traditional attorney proponents argue that children exhibit the ability to think rationally by the age of seven and sometimes even younger. They point out that the typical seven-year-old can comprehend information, make causal connections between events, and use these skills to assess the relative attrac-

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<sup>21</sup> See Ramsey, *supra* note 6, at 320 (arguing for the traditional attorney model if the child client appears "capable of making a considered decision"); *Report of the Working Group on the Allocation of Decision Making*, *supra* note 4, at 1331 (recommending that lawyers take direction from unimpaired children, broadly defined); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1614-17 (1996) (rejecting the GAL approach); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259, 278-82 (1995) ("When retained to represent the child, the modern children's attorney has an obligation to zealously advocate the client's position.").

<sup>22</sup> See STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.1(b)(ii)[b] (1980) (tying client-directed representation to the client's possession of "considered judgment"); Martin Guggenheim, *The Right To Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76, 93 (1984) (endorsing child-directed representation when a child is mature enough to be "deemed to be an autonomous individual"); Ramsey, *supra* note 6, at 307 (tying client-directed representation to children's mental and emotional abilities to engage in the decision-making process); Shannan L. Wilber, *Independent Counsel for Children*, 27 *FAM. L.Q.* 349, 357-59 (1993) (same); cf. Federle, *supra* note 5, at 1688 & nn.287-88 (citing sources tying traditional attorney representation in the private custody context to children's ability to reach "a reasoned and intelligent decision").

<sup>23</sup> See DUQUETTE, *supra* note 3, at 150 (presuming that a "child fourteen years of age or older is . . . capable of determining what is in his or her best interests"); Edwards & Sagatun, *supra* note 20, at 82 (calling for independent legal representation of a "mature child" in addition to his representation by a GAL lawyer, if the child disagrees with the GAL lawyer's position).

<sup>24</sup> See, e.g., Ramsey, *supra* note 6, at 320 (proposing that "lawyers operate under a presumption that children age seven and older are capable of decision making").

<sup>25</sup> See, e.g., DUQUETTE, *supra* note 3, at 150 ("A child fourteen years of age or older is presumed capable of determining what is in his or her best interests.").

tiveness of various options.<sup>26</sup> Based on this information, traditional attorney advocates conclude that children can engage in a rational decision-making process concerning matters addressed in the litigation.<sup>27</sup> The GAL proponents counter that children gain the ability to engage in a reasoning process long before they acquire the experience and judgment necessary to ensure that they assign the proper value to the various options.<sup>28</sup> Moreover, while GAL advocates concede that children can reason about concrete matters at an early age, they argue that children's ability to engage in abstract thinking—in particular their ability to think through a range of merely hypothetical solutions—is highly compromised until adolescence.<sup>29</sup> Proponents of the traditional attorney model respond to this argument by pointing to a wealth of data suggesting that even adults generally fail to engage in this more advanced form of reasoning, despite their theoretically greater capacity to do so.<sup>30</sup> Deficiencies in capacity for abstract reasoning cannot serve as the justification for treating children differently, they argue, for a developmentally coherent model of representation cannot demand a higher level of cognitive functioning from children than from adults.<sup>31</sup>

This is the developmental terrain upon which the battle over the legal representation of children has been fought. The discussion focuses almost exclusively on the development of logical reasoning skills—often generically described as cognitive development—and more specifically on the capacity to engage in a rational decision-mak-

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<sup>26</sup> See Ramsey, *supra* note 6, at 312 (citing research suggesting that “children make a major change in functioning at about age seven from an impulsive, noncognitive primary process to a more controlled and logical secondary process”).

<sup>27</sup> See *id.* at 314.

<sup>28</sup> See HARALAMBIE, *supra* note 12, at 6 (suggesting that children's tendency to overvalue short-term interests and their vulnerability to viewpoint manipulation by others support allowing a GAL lawyer “to form an independent position”).

<sup>29</sup> See DUQUETTE, *supra* note 3, at 31-32 (noting that although children have frequently demonstrated some ability to engage in reasoned decision making by age seven, these young children still lack adults' ability to think abstractly and to conceptualize time); cf. Mlyniec, *supra* note 6, at 1915 (directing judges to treat children age 14 or older as adult-like, rational decision makers, to ignore the views of children under 10 as irrational, and to make a case-specific assessment of children's reasoning abilities between the ages of 10 and 14).

<sup>30</sup> See Ramsey, *supra* note 6, at 307-08 (“As more is learned about decision making, it becomes clear that even with adults the existence [of a decision-making] process does not guarantee consistency, coherence, accurate explanation, or the integration of relevant information . . .” (emphasis omitted)).

<sup>31</sup> See STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 8 (1980) (suggesting that one should not tie children's competence to direct counsel to the “capacity to weigh accurately all immediate and remote benefits or costs associated with the available options” because “wisdom of this kind is not required [of adults]”); Ramsey, *supra* note 6, at 308-09 & n.79 (noting that if we required full mastery of all components potentially necessary for good decision making, many adult decisions would fail to meet the standard).

ing process.<sup>32</sup> It is not at all clear, however, why the client's decision-making capacity should determine the lawyer's role. An individual's ability to engage in a rational decision-making process frequently is relied upon to determine whether that individual should be entrusted to make independent decisions on his own behalf.<sup>33</sup> But when the issue is not who should have the authority to determine the ultimate outcome, but who should have an opportunity to attempt to influence the ultimate decision maker (here, the court), reasoning ability should matter much less.<sup>34</sup> In this context, other considerations and values come into play. A child might have a strong interest in being involved in the decision-making process and in being heard by the decision maker, despite the fact that his developmentally based cognitive limitations skew his own assessment of his options.

Increasingly, scholars and practitioners have embraced empowerment as a developmentally neutral value that can be nurtured by allowing children, regardless of cognitive developmental limitations, to participate in the decision-making process.<sup>35</sup> The inclusion of children in the litigation process empowers them, the argument goes,

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<sup>32</sup> This focus on decision-making capacity as the key capacity required for a "normal client-lawyer relationship" is reflected in the commentary to the Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. (1996) ("The 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."). I note that although Sarah Ramsey does not limit her use of developmental psychology to the cognitive developmental literature—she also considers "emotional maturity, language development and information and experience in relation to the decision to be made"—she nevertheless narrowly focuses her inquiry on children's acquisition of decision-making capacity and in light of this focus describes the cognitive literature as "particularly germane." Ramsey, *supra* note 6, at 309-20.

<sup>33</sup> For example, an individual's authority to consent (or withhold consent) to medical treatment is frequently tied to that individual's ability to engage in a rational decision-making process. See Alan Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 442-46 (listing among the tests for competency that courts and legislatures commonly invoke an inquiry into the rationality of the decision-making process or into the rationality of the decision itself).

<sup>34</sup> See, e.g., Ross, *supra* note 21, at 1617 (suggesting that lawyers troubled by the perceived wrong-headedness of their child client's viewpoints should take comfort in the fact that the children are not the ultimate decision makers).

<sup>35</sup> See Federle, *supra* note 5, at 1696-97; cf. HARALAMBIE, *supra* note 12, at 71 ("Giving the child a sense of empowerment in having input into the final decision without having responsibility for the outcome is the other major part of representing the child."); Edwards & Sagatun, *supra* note 20, at 74 (arguing that a child is empowered by having his view presented to the court, even if his representative does not advocate the child's position). Some scholars embrace the same values without using the term. See, e.g., Ross, *supra* note 21, at 1618-19 (concluding that we should give the child a voice and a "sense of autonomous self" through legal representation, even if he is "incapable of making considered decisions"). It is also my sense that practitioners increasingly are championing the value of empowerment in their discussions with one another at professional meetings, continuing education courses, and other events addressing the proper role for lawyers representing children.

even if their judgments about their own best interests are too developmentally impaired to convince the court.<sup>36</sup> Some point to the goal of empowerment to justify giving children authority to direct their legal representation at a very young age, even before they can reason. As soon as they are old enough to have viewpoints and the verbal skills to express them, these empowerment advocates believe that children can gain a beneficial sense of control from their lawyer's demonstration of deference to their views.<sup>37</sup>

The leading proponent of child empowerment, Katherine Hunt Federle, takes the position that considerations of power relationships should entirely displace considerations of capacity in determining the proper role for children's lawyers.<sup>38</sup> In her view, capacity-based theories of rights for children inevitably fail children by reinforcing their subjugation and dependency.<sup>39</sup> Although Federle is most explicit in juxtaposing empowerment and capacity,<sup>40</sup> empowerment advocates generally treat the quest for empowerment as distinct from the inquiry into children's capacities.<sup>41</sup>

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<sup>36</sup> See Wendy Anton Fitzgerald, *Stories of Child Outlaws: On Child Heroism and Adult Power in Juvenile Justice*, 1996 Wis. L. REV. 495, 502 ("Justice requires legal listening to children, whether or not their views prevail, because excluding children and their perspectives from legal discourse reflects only our historical penchant for excluding difference and marginalizing the powerless.").

<sup>37</sup> See Federle, *supra* note 5, at 1693-97.

<sup>38</sup> See Federle, *supra* note 5, at 1656. In fact, Federle pushes the empowerment agenda even further, arguing that our entire formulation of children's substantive rights should be designed with the primary aim of shifting power to children. See, e.g., Katherine Hunt Federle, *Rights Flow Downhill*, 2 INT'L J. CHILDREN'S RTS. 343, 364-68 (1994).

<sup>39</sup> See Federle, *supra* note 5, at 1661-63.

<sup>40</sup> See, e.g., Federle, *supra* note 38, at 365.

<sup>41</sup> My conclusion that the literature suggests that capacity is irrelevant to the empowerment goal is grounded more on my observation of omissions than on scholars' positive assertions. Although most of the writing in this field includes at least speculative consideration of children's decision-making capacity, discussions of children's empowerment include no parallel consideration of capacity. Scholars taking a broad range of positions about the proper role of counsel for children have made this implicit suggestion that children can be empowered regardless of their capacity. Some, like Federle, suggest that the benefits that children derive from exercising control over their legal representation support adopting a client-directed model of representation even if clients lack an adult's decision-making capacity, so long as the child is old enough to form a genuine viewpoint. See, e.g., Ross, *supra* note 21, at 1618-19 (calling for appointment of counsel for minors aimed at developing minor clients' "sense of autonomous self," even for children "incapable of making considered decisions"). Others argue that a child will be empowered if his view is presented to the court, even if that child's cognitive limitations prevent the child's representative from advocating that view. See, e.g., Edwards & Sagatun, *supra* note 20, at 74; cf. Mlyniec, *supra* note 6, at 1907-08 (arguing that children's personal autonomy should be recognized and respected, regardless of the child's age, by allowing the child to express a viewpoint even if the court gives the viewpoint no weight because the child lacks decision-making capacity). Still others advocate client empowerment without engaging at all in the debate about the proper role of counsel. See, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 19-20 (1994); see also HARALAMBIE, *supra* note 12, at 71 (describing client empowerment as a primary goal of the

It is my contention that while a focus on empowerment values may divert our attention from children's capacity for logical thinking, it offers no general escape from all consideration of capacity. Indeed, the invocation of empowerment simply raises a different question about children's development: at what rough age do children develop the capacity to be empowered, particularly through legal representation? Answering this question requires us to explore how children experience their own participation, especially their interaction with their lawyers, in the litigation process. It requires us to determine, wholly apart from our inquiry about decision-making capacity, whether children have the capacity to understand the lawyer-client relationship sufficiently to appreciate their intended influence. This inquiry shifts our attention to socio-cognitive developmental psychology, a branch of developmental psychology largely ignored in the debate over the legal representation of children. It requires us to focus not on how we develop as reasoning beings, but on how we develop as perceivers of self, other, and the relationship between the two.<sup>42</sup>

## II

### DEFINING EMPOWERMENT

Before considering the extent of children's capacity to be empowered, we first must identify what empowerment advocates mean by the term. Champions of child empowerment invoke the goal with little explication. They seem to assume that empowerment is self-defining and intrinsically good. This Part begins with a review of the adult-focused literature on client empowerment (upon which the child empowerment advocates frequently, if not always explicitly, draw) to help put some flesh on the concept. After exploring the concept of empowerment in the context of adult clients, this Part goes on to consider the extent to which this adult-focused concept can aid our understanding of the empowerment advocated for children. Once the empowerment advocates' goals are more clearly defined, I can turn to my consideration of ways in which a child's socio-cognitive development may affect his ability to achieve those goals.

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legal representation of children in a chapter addressing the lawyer's responsibilities, regardless of her role). Although a wide range of scholars invoke the empowerment goal, only those advocating the traditional attorney approach point to empowerment as a justification for their choice of approach.

<sup>42</sup> For a general discussion of the distinction between "social" and "nonsocial" cognition, see WILLIAM DAMON & DANIEL HART, *SELF-UNDERSTANDING IN CHILDHOOD AND ADOLESCENCE* 12-13 (1988); *see also* ROBERT L. SELMAN, *THE GROWTH OF INTERPERSONAL UNDERSTANDING* 14 (1980) (arguing that social and nonsocial cognitions are related but distinct aspects of development).

### A. Empowering Adult Clients

Most of the discussion of adult-client empowerment has occurred in the literature on poverty lawyering.<sup>43</sup> This literature emphasizes a subjective, rather than an objective, conception of empowerment. Empowerment stands for something more than a simple transfer of power, of influence over events and people—although this transfer of influence may be the ultimate goal. Rather, empowerment appears to embody a two-part personal transformation: a transformation of the client's perceptions and a transformation of the actions those perceptions inspire. Stated another way, the literature promoting adult empowerment focuses on how the client *experiences* the opportunity to exercise influence through his relationship with his lawyer. The literature anticipates that a client will be empowered by his legal representation if he both understands the lawyer's offer of influence and embraces the opportunity.

Read in the aggregate,<sup>44</sup> this literature suggests that empowerment advocates have two intended targets for their clients' newfound influence. Empowered clients will seek to exercise (1) greater influence over the litigation itself and (2) greater influence over self-definition in the process. These two transformations are closely interrelated—a change in the client's involvement in the litigation will change how he is perceived by himself and others, and a change in how he presents himself will change his influence in the litigation. Nonetheless, it is useful to maintain the distinction between these dual aspects of the envisioned empowerment experience both because they receive different emphases within different strands of the literature and because they raise different questions for our developmental inquiry.

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<sup>43</sup> One can interpret the focus on "dignity" or "dignitary" values in the due process literature as the institutional complement to the focus on the individual's experience of empowerment in the poverty-lawyering literature. In the due process context, scholars have suggested that affording interested individuals an opportunity to be heard by the decision makers reflects a respect for the individual that serves to legitimate our system of justice. See, e.g., MASHAW, *supra* note 2, at 158-253.

<sup>44</sup> The client empowerment literature has described innumerable variations of this transformation, and a number of scholars have categorized these variations according to different organizational schemes. See, e.g., Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1043-46 (1994) (suggesting that the poverty-lawyering literature reflects two visions of empowerment: one focused on client decision making and expression, the other on client's influence on legal and political outcomes); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 710-15 (1992) (comparing the "new" poverty law scholarship—from the 1980s and 1990s—to the "old"—from the 1960s and 1970s—based on their social orientation, instrumentalism, and the degree of optimism they have inspired about the possibility of wide-scale social transformation). For my purposes, I have chosen a set of categories comprehensive enough to capture these variations but simple enough to lend itself to my child-development-focused application.

### 1. *Transforming Clients' Role in Litigation*

When some of the earliest legal services lawyers first took up empowerment as their rallying cry, they focused on inspiring client activism.<sup>45</sup> These early empowerment advocates were concerned that legal representation of poor clients was reinforcing client passivity, rather than facilitating their involvement in reform efforts aimed at improving their lives.<sup>46</sup> Lawyers would be far more effective, these critics argued, if they devoted themselves to helping their clients take control of their own lives.<sup>47</sup> These critics suggested that lawyers could best empower clients by teaching them how to act on their own behalf in legal and political arenas.<sup>48</sup>

In the legal arena, lawyers were to facilitate empowerment by giving clients direct control over the litigation process and indirect influence over litigation outcomes. Early empowerment advocates directed lawyers to involve their clients much more heavily in the details of their work and to cede to clients decision-making authority over litigation strategy as well as objectives.<sup>49</sup> The clear purpose of empowerment was outcome focused, aimed at inducing clients to change the course of litigation through their participation.<sup>50</sup> To participate effectively, however, clients needed to adjust their concept of self. Thus, by directing lawyers to include clients in the decision-making process, the early empowerment advocates hoped lawyers would teach clients to think of themselves differently, to believe that they

<sup>45</sup> See Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 344 (1980) [hereinafter Bellow, *Legal Aid*] (calling for a change in the delivery of legal services to the poor in an effort to decrease the centrality of lawyers and increase involvement of clients, which in turn might increase client's willingness and ability to participate in larger change efforts); Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 121 (1976-1977) [hereinafter Bellow, *Problems*] (noting empowering effect of involving clients in political decision making and political activities).

<sup>46</sup> Cf. Bellow, *Problems*, *supra* note 45, at 108-09 (bemoaning in the context of public interest practice how lawyers give their poverty-stricken clients little autonomy, thereby furthering the "complex pattern of professional control and client acquiescence").

<sup>47</sup> See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 519-22 (1990) (reviewing 1970s poverty-lawyering literature and noting that this literature advocated lawyers to "focus on increased client participation and empowerment").

<sup>48</sup> In addition to calling on lawyers to increase their clients' involvement in litigation, empowerment advocates encouraged lawyers to expand their efforts to facilitate community organization and the cultivation of political participation. See Bellow, *Problems*, *supra* note 45, at 121-22; Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1052-54 (1970) (arguing that poverty lawyers should focus on community organizing and that collective interests should be given priority over individual legal claims).

<sup>49</sup> See, e.g., DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 147-53 (1977); Bellow, *Problems*, *supra* note 45, at 119-22.

<sup>50</sup> See BINDER & PRICE, *supra* note 49, at 148-49 ("Only when the client's values are known [by the lawyer] can there be a determination of which alternative, on balance, will provide maximum client benefit.").



could exert an influence over litigation and that it was valuable for them to do so.<sup>51</sup>

## 2. *Transforming Clients' Self-Presentation*

While facilitating client control over litigation and policy making remains an important goal in the more recent empowerment literature,<sup>52</sup> a second theme has emerged with increasing clarity: contemporary scholars warn that the very reduction of a client's story to a legal claim has a disempowering effect.<sup>53</sup> They call on poverty lawyers to help clients express their experiences and views in their "own voice."

These scholars argue that the standing in for, the speaking for one's client required of a lawyer engaged in litigation inevitably co-opts and distorts her client's story.<sup>54</sup> This stifling of expression conveys to the client the legal system's fundamental lack of respect, an

<sup>51</sup> See, e.g., Bellow, *Legal Aid*, *supra* note 45, at 344 (suggesting that increasing client involvement in litigation would improve clients' "expectations, confidence, and skill").

<sup>52</sup> See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (advocating the empowerment of clients through community organizing and by encouraging client collaboration in the research, factfinding, and strategizing stages of litigation); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-1988) (advocating the use of welfare litigation as an educational and organizational tool that facilitates client mobilization in other contexts).

<sup>53</sup> Lucie White describes this disempowering effect of litigation as follows:

[T]he majority of poor people perceive litigation as an alien or even hostile cultural setting. The talk and ritual of litigation constitute a discourse and a culture that are foreign to most poor people. Poor people obviously do not speak in the same dialect that lawyers, judges, and elite businesspeople use. Furthermore, their courtroom speech is routinely interrupted by lawyers and judges who use threatening tones in ordering them when not to talk and what not to say. Their stories are interpreted by black-robed authorities on the basis of rules that are rarely explained and norms that they seldom share.

White, *supra* note 52, at 542-43 (footnotes omitted); see also Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 663 (1987-1988) (arguing that traditional legal practices perpetuate "indigent isolation and passivity which sustain and reinforce relations of power oppressive to the poor"); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (describing in considerable detail the disempowering effect of landlord-tenant courtroom procedures and judicial attitudes on the very tenants whose participation is purportedly facilitated by these procedures); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 470 (1995) (contending that litigation is lawyer focused and it employs a set of traditions—in dress, language, and roles—that is foreign to clients).

<sup>54</sup> See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2118-19 (1991) (suggesting that a poverty lawyer and her clients "wage an interpretive struggle" that generally results in the silencing of client voices and squelching of client empowerment in favor of the lawyer's portrayal of her client as a dependent victim); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 861 (1990) (arguing that traditional legal representation is speaking for the client, "presuming and thereby prescribing the silence of the other").

unwillingness to take the client on his own terms.<sup>55</sup> Disempowerment therefore comes not just from the client's failure to influence the litigation process and thereby its outcome, but also from the client's failure to control how he is perceived by others, and as a corollary, by himself.<sup>56</sup>

An interest in outcomes, in part, drives the concern about this silencing of client voices. Clients who are silenced cannot influence a court's decisions because their interests will not be accurately or compellingly presented to the court for consideration.<sup>57</sup> But for many of these contemporary critics, the value of presenting the client's views

The concerns these scholars have about the disempowering effect of the lawyer-client relationship call into question whether lawyers have any place in the client empowerment process. Some of the literature suggests that the lawyer's role should be reduced to a "sideline figure" that is present only to ensure that the client's true voice is heard. See Buchanan, *supra* note 44, at 1038 (describing the lawyering approach that some scholars advocate in which the lawyer's role is reduced to a "shadow figure"). Much of this scholarship, however, reflects uneasy attempts to refashion the lawyer's role to allow her to stay actively involved as an empowerer, rather than subordinator, of her clients. See Alfieri, *supra*, at 2147 (calling for the development of "new methods of interviewing, counseling, investigation, negotiation, and litigation capable of integrating client empowering narratives in lawyer storytelling"); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 639-40 (1995) (advocating "facilitative lawyering," which reflects a compromise between "collaborative lawyering"—rejected for being too "self-consciously political" and poorly tailored to fit lawyers' skills—and "client-centered lawyering"—rejected for assigning lawyers too much control).

<sup>55</sup> See White, *supra* note 1, at 21-31 (recounting how the author's interest in fostering her client Mrs. G.'s dependence on her lawyerly expertise undermined her ability to treat Mrs. G. as her equal and to appreciate the subtlety of Mrs. G.'s negotiation of the welfare system); cf. Bezdek, *supra* note 53, at 595 (describing the denial of personal power that occurs when the rent court judges cut off unrepresented clients in the midst of telling stories that the court determines are irrelevant to the narrow legal issue at hand).

<sup>56</sup> See White, *supra* note 1, at 55 (describing how the "negative cultural imagery of gender, race, and class . . . dwells in the minds of her superiors . . . [and] it is . . . through these images that Mrs. G. understands herself"); cf. Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2144 (1994) (suggesting that by providing legal services without charge, poverty lawyers send the message that "[n]othing you have and nothing you can provide is of any value to me").

Paulo Freire, frequently cited in the contemporary literature on poverty lawyering, explains the connection between the self-concept of the oppressed and the views of the powerful other in these words:

Self-depreciation . . . derives from their internalization of the opinion the oppressors hold of them. So often do they hear that they are good for nothing, know nothing and are incapable of learning anything—that they are sick, lazy, and unproductive—that in the end they become convinced of their own unfitnes.

PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 49 (Myra Bergman Ramos trans., Seabury Press 1973) (1968).

<sup>57</sup> See Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983, 987-88 (1994) (attributing legal victory to the use of the client's own "dramatic, life-enhancing words"); cf. White, *supra* note 1, at 51 (suggesting that the client's departure from her "script" at the hearing may have inspired the welfare agency subsequently to drop its claim against her).

and experiences without (or with minimal) distortion derives less from the client's ability to influence outcomes and more from his ability to influence positively his worth in the eyes of the court.<sup>58</sup> The client who speaks for himself enhances his value by increasing the court's understanding of his plight and its respect for his integrity.<sup>59</sup> A judge who understands what a client has been through and respects how he sees the world may be more easily persuaded to rule in the client's favor, but self-revelation will not always produce this effect, nor are favorable outcomes the central goal of this literature.<sup>60</sup>

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<sup>58</sup> Lucie White cites to psychological literature suggesting that people's satisfaction with the outcome of an official decision, even a negative outcome, is tied to whether they believe they were heard in the decision-making process. See White, *supra* note 1, at 3 n.7 (citing JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 *LAW & SOC'Y REV.* 51 (1984); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103 (1988)).

<sup>59</sup> Lucie White's account of Mrs. G. suggests that whether or not the hearing examiner and witnesses understood or agreed with Mrs. G.'s decision to exhaust her small budget on Sunday Shoes for her children, her off-script "presentation of herself as an independent, church-going woman, who would exercise her own judgment, and was willing to say what she needed [might have made] . . . the men fear her, respect her, regard her for a moment as a person, rather than a case." White, *supra* note 1, at 51.

The due process literature, which speaks of "intrinsic" or "dignitary" values, echoes this interest in showing respect to litigants as individuals. In that context, affording individuals an opportunity to participate in litigation is said to "express[ ] their dignity as persons," even if participation produces no effect on outcome. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (2d ed. 1988); see also MASHAW, *supra* note 2, at 163-64 (describing dignitary theories of due process as those concerned with ensuring a process that sustains rather than diminishes "an appropriate conception of human dignity"); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in 18 *NOMOS: DUE PROCESS* 126, 131 (J. Roland Pennock & John W. Chapman eds., 1977) (describing "nonformal" process aims as those reflecting an individual's interest in being treated as an end—an interacting member of a community—rather than simply as a means to the achievement of others' ends); Michelman, *supra* note 2, at 1173-75 (describing the offense to "dignity values," particularly the loss of self-respect, caused by denying an individual a meaningful opportunity to respond to the government's charges of wrongdoing). Although much of this due process literature focuses on the institutional message conveyed about the value that the government ascribes to the individual rather than on the individual's actual psychological experience of participation (the subject of the empowerment advocate's inquiry), see MASHAW, *supra* note 2, at 170-71, these two goals are necessarily linked. Unless an individual is likely to experience his participation as dignity enhancing, it is at best naïve and at worst disturbingly cynical to suggest that rules calling for that participation manifest a commitment to dignitary values.

<sup>60</sup> Indeed, giving priority to the client's expression of his independent voice may interfere with a lawyer's ability to obtain desired ends in the litigation. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *CORNELL L. REV.* 1298, 1326-27 (1992) (recounting a plan to allow client defendant to conduct cross-examination of a state trooper, despite the risk that this approach would increase the defendant's chance of conviction, in an attempt to achieve the client's more important goal of "restoration of his dignity"). But see Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *HASTINGS L.J.* 947, 959 (1992) [hereinafter Tremblay, *Rebellious Lawyering*] ("[R]ebellious writers have overlooked the risk clients incur in rejecting technical lawyer expertise."); Paul R. Tremblay, *A Tragic View of*

According to this theme, empowerment is still about the positive experience of increased influence, but here the primary influence is over more subtle, psychological states.<sup>61</sup> This notion of empowerment is at least as deeply rooted in a transformation in self-concept (I am who I say I am, and I know how to make myself heard) as it is in the change in attitude that it produces in others.<sup>62</sup>

## B. Empowering Child Clients

Scholars who advocate child empowerment have been less clear in defining client empowerment than have their adult-focused counterparts. Indeed, empowerment has been invoked as a valued end in itself with little consideration of its underlying content. To get a sense of what these scholars have in mind, we are limited to the interpretation of isolated phrases reflecting their assumptions. To a large extent, the blurry picture that emerges mirrors the vision of adult client empowerment. As telling as the similarities, however, are the differences. Descriptions of children's empowerment do not "feel" precisely like their adult counterparts, perhaps in part because of the developmental differences discussed below.

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*Poverty Law Practice*, 1 D.C. L. REV. 123, 134, 136 (1992) [hereinafter Tremblay, *Tragic View*] ("The Critical View literature implies that intrinsic [story telling] and extrinsic [legal outcome] goals are not in conflict and may even dovetail . . . . It tends not to capture the choice at all, in that it sees client collaboration as instrumentally effective as well as intrinsically effective.").

<sup>61</sup> See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1099-1100 (1994) (noting that according to the post-modern concept, the benefits of client empowerment "are often as much psychological as they are material").

<sup>62</sup> See Quigley, *supra* note 53, at 461 (quoting a community organizer who explained that "[e]mpowerment is when a person or a group of people know who they are, accept who they are, and refuse to let people make them anything else"). Lucie White describes a quasi-religious transformation in which clients "were no longer bureaucratic objects—welfare recipients, legal services clients, or even Alliance members[—but rather] human souls, who could attain a state of grace, a transfiguration, through their own language and movement." White, *supra* note 52, at 552. In another article, White describes the transformation of Mrs. G. in these words:

For a moment she stepped out of the role of the supplicant. She ignored the doctrinal pigeonholes that would fragment her voice. She put aside all that the lawyer told her the audience wanted to hear. Instead, when asked to point a finger at her caseworker, she was silent. When asked about "life necessities," she explained that she had used her money to meet *her own* needs. She had bought her children Sunday shoes.

White, *supra* note 1, at 48. White cites to a number of nonlegal sources to support this association between the telling of one's own story and the preservation of one's sense of self-worth. See White, *supra* note 52, at 552-53 n.70 (citing CAROLYN G. HEILBRUN, *WRITING A WOMAN'S LIFE* 43-45 (1988); PAUL G. KING & DAVID D. WOODYARD, *THE JOURNEY TOWARD FREEDOM* 22 (1982); Clare Coss et al., *Separation and Survival: Mothers, Daughters, Sisters—The Women's Experimental Theatre*, in *THE FUTURE OF DIFFERENCE* (Hester Eisenstein & Alice Jardine eds., 1980)).

### 1. *Power Shifts Unexperienced by the Child*

The most striking difference between the literature on adult and child client empowerment is the relative paucity of references to children's *experience* of empowerment. Unlike the adult literature, which focuses on clients' personal transformations,<sup>63</sup> the child empowerment literature makes little attempt to "get inside the head" of the child client. It is only a little unfair to the literature to conclude that empowerment, like so many things, is conceived of as something that others impose on children, whether children are aware of the imposition or not. This is surely not what these scholars intend (hence the unfairness), but the lack of attention to the child's actual experience of empowerment may help account for the literature's failure to grapple with the developmental questions raised by their approach.

Before crying developmental foul, it is worth considering whether these advocates simply seek a brand of empowerment that is limited to shifts of power that can occur without children's awareness and therefore without regard for children's capacity accurately to perceive those shifts. If the child's experience is irrelevant to his empowerment, then it certainly does not matter what the child is able to do and understand. Arguably, an increase in the influence that children's viewpoints have on official decision making might (objectively) shift power to children even if the children are (subjectively) unaware of that influence.<sup>64</sup>

In theory, a court could consider a child's viewpoint, even give it controlling weight, without the child's knowledge.<sup>65</sup> The heavy focus

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<sup>63</sup> See *supra* text accompanying note 43.

<sup>64</sup> Another power shift that could occur without a child's awareness would be the enhancement of children's substantive rights. An interpretation of the Constitution that affords identical rights to children as to adults would be a dramatic example of such a shift. Indeed, one of Katherine Federle's goals is to empower children by making their rights co-extensive (or at least closer to co-extensive) with the rights of adults. See Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1340-68 (1995). Federle criticizes the Supreme Court's approach, articulated most clearly in *Bellotti v. Baird*, 443 U.S. 622, 634-35 (1979), which relies on children's special vulnerabilities, limited decision-making capacity, and dependence on their parents to justify imposing limitations on their rights—limitations that the Court has held unconstitutional when applied to adults. See Federle, *supra*, at 1336-40. In particular, Federle challenges restricting children's liberty through juvenile-only curfews. See *id.* at 1328-40. To the extent that Federle's program envisions empowerment to encompass the mere transformation of the law, it arguably empowers children without their awareness. Even in the context of shifts in substantive rights, however, children's awareness of the shifts (and of the new rights) will dramatically increase their power because awareness creates the opportunity for children to assert their rights when confronted or threatened with infringement. Without that awareness, children are left to rely passively on others' exercise of restraint in avoiding infringements.

<sup>65</sup> Some expressly advocate this approach in the private custody context as a means of soliciting children's views without forcing them to take an express position about which parent they prefer. Under this approach, the judge engages the child on a range of subjects in an effort to glean indirect information about how the child views his relationship

on listening to children, on including children's perspectives, and on respecting children for who they are,<sup>66</sup> accompanied by the near absence of any exploration of children's experience of this viewpoint influence, might be read to support the conclusion that children's empowerment advocates, unlike their adult counterparts, are concerned only with influencing decision makers and not with transforming children. Perhaps, in stark contrast to the adult literature's emphasis on a subjective conception of empowerment, the children's empowerment literature is aimed exclusively at an objective conception of the term. If unexperienced influence is all the empowerment advocates aim for, we might be confident of lawyers' ability to empower their child clients, regardless of those clients' capacities.

As a practical matter, however, participation without awareness is a highly questionable business. Children do not have a single, fully formed viewpoint that adults can access simply by asking the right questions. As I have discussed elsewhere, a child's understanding of how the adults will use the information he provides will affect the nature and scope of the information provided.<sup>67</sup> This understanding will affect whether the child is truthful, intentionally deceptive, or unwittingly led,<sup>68</sup> whether he is expansive or reserved in the provision of supporting facts, whether he is specific or vague about what he wants, whether he is consistent from question to question and interview to interview, and whether he seeks out the listener to keep her updated when facts and viewpoints change. Because children's articulation of

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with each parent. See RICHARD A. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION 171-75 (1982) (suggesting numerous lines of questioning that an examiner can pursue to elicit information about the child's custodial preferences while not forcing the child to confront the question directly); see also Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1047-50 (1988) (surveying judges' views about and approaches to indirectly interviewing children in chambers in an effort to discover the children's preferences).

<sup>66</sup> The literature frequently anticipates that the expression of children's viewpoints will change other parties' perceptions of them, which if envisioned in terms of the children's experience would track the transformation of self-presentation captured in the adult literature. See, e.g., Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585, 1594-96 (1995) (suggesting that empowerment enhances respect and leads to the recognition of one's independent value as a human being); Fitzgerald, *supra* note 36, at 499-500 (suggesting that empowering children would have the effect of "humanizing" them and "resurrect[ing their] self-worth and heroism"); Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 347 (1994) (describing the disempowering approach to child custody determinations as "denigrat[ing to a child's] personhood"). The echoes of contemporary poverty law scholarship are unmistakable and sometimes purposeful. See, e.g., Fitzgerald, *supra* note 36, at 499 (discussing the storytelling tradition in feminist and critical race theory).

<sup>67</sup> See Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1712-14 (1996).

<sup>68</sup> For a brief discussion of children's vulnerability to suggestion, see *infra* text accompanying notes 128-32.

viewpoints is intimately connected with their understanding of the purpose of the articulation, "participation" without awareness is neither legitimate nor reliable.

Therefore, even if the shift in power itself does not depend upon a child's perceptions of that shift, the extraction of information needed to achieve the power shift cannot be divorced from those perceptions. Once children's perceptions become a relevant part of our inquiry, we are back in a world in which capacities—particularly perceptual capacities—matter.

## 2. *Power Shifts Experienced by the Child*

In fairness to the genre, the children's empowerment literature does not ignore children's experience of empowerment altogether. It makes indirect reference to children's experience of participation by suggesting that children are likely to be more committed to and satisfied with judicial outcomes if they believe the court heard and seriously considered their views.<sup>69</sup> On occasion, the child empowerment literature is even explicit in its embrace of an adult-like, transformative conception of empowerment.<sup>70</sup>

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<sup>69</sup> See Federle, *supra* note 66, at 1604 (suggesting that a child who participates in neglect proceedings "may be more likely to express satisfaction with the outcome of the case because she will feel empowered by her participation in the dispute resolution process").

<sup>70</sup> See, e.g., *id.* at 1600-01. Federle discusses the case of Ashley, a second-grader whose parents are divorcing. In distinguishing Ashley's objective empowerment ("First"), gained through her status as a party and through her legal representation, from her more subjective experience of empowerment ("Moreover"), Federle writes:

From an empowerment rights perspective, Ashley's experience of the divorce process would be very different. First, Ashley would have a right to participate as a party. Procedurally, this would mean that Ashley would be represented by a competent and independent attorney who would advocate Ashley's interests and wishes about her future relationships with her parents. Moreover, ensuring independent representation for Ashley will have an empowering effect on the child: if Ashley has an opportunity to be heard, I think she will take that opportunity. Certainly, based on my own experiences as an attorney for children, I am persuaded that even very young children may articulate a preference if given the opportunity. But we should be careful not to confuse a child's refusal to tell us her preferences with having no preference at all. Because we really do not respect children, we often do not listen to what they have to say; children know this and often do not express their desires because they recognize their own powerlessness.

*Id.* at 1600 (footnote omitted). Clearly, Ashley's experience of attention and respect represents a part of the empowerment picture. Although Federle takes note of the possibility that Ashley or her younger counterparts may not have a preference, or at least may not express one (suggesting certain developmental limitations), she shows no hesitation in assuming that Ashley is developmentally prepared to feel empowered by the opportunity to express a preference. We will return to the question of developmental prerequisites to empowerment after a more detailed consideration of what the concept of empowerment is intended to encompass.

To the extent that scholars do contemplate child empowerment as an experience of personal transformation, the transformation seems to encompass changes in the child's sense of control over the targets identified in the adult literature—over both the process and outcome of litigation<sup>71</sup>—and over how he is perceived. Empowered children, the scholars project, will participate more actively and effectively in litigation,<sup>72</sup> and they may even bring their own legal claims.<sup>73</sup> Furthermore, empowered children will tell their own stories, which in turn will “help adults in power to value children *as children*” and “help children attain childhoods fulfilling unto themselves.”<sup>74</sup> Although the exploration of the children's *experience* is extremely thin, the broad categories of changes that this literature expects empowerment to effect roughly parallel the categories contemplated in the adult-focused literature.

In the analysis below, I choose to give the term “empowerment” a fixed, simple meaning: empowerment through legal representation means the transformation of the child client's perception of his influence in the litigation process and the creation of an appetite for the exercise of that influence. The influence in question has two targets:

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<sup>71</sup> The children's empowerment literature concentrates almost exclusively on litigation, *see, e.g., id.* at 1599-1604 (suggesting that the implementation of the empowerment rights perspective would lead to children's participation in litigation addressing their interests); Christina Dugger Sommer, Note, *Empowering Children: Granting Foster Children the Right To Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200 (1994) (calling for child empowerment through participation in litigation); *but see* Fitzgerald, *supra* note 36, at 497-98 (advocating children's participation in legislative hearings as well as in court), while the adult-oriented literature considers client participation in both litigation and the political process. *See supra* note 48. This near-exclusive focus on litigation is due at least in part to the fact that the political arena is effectively closed to children who lack the years to vote or the resources to lobby.

<sup>72</sup> *See, e.g.,* Federle, *supra* note 5, at 1696 (“[B]y empowering the child in the attorney-client relationship, the lawyer also enhances the child's ability to participate in the legal system.”). One advocate argues for the complete cession of control over custody decisions to children six-years old and older. *See* Kandel, *supra* note 66, at 301; *see also* Federle, *supra* note 66, at 1604 (arguing that under an empowerment view, the State should not remove a child from his parents based on allegations of neglect, absent his consent); Leonard T. Gries, *Helping the Abused Child: A Prescription for Therapy and the Foster Care System—1992 Update*, in CHILD ABUSE, NEGLECT, AND THE FOSTER CARE SYSTEM 283, 293 (PLI Litig. & Admin. Practice Course Handbook Series No. 163, 1992) (suggesting that the foster care system should enhance abused children's sense of control by allowing their participation in case reviews and by ensuring that they appreciate that their “feelings and opinions help to determine some aspect of the ensuing treatment plan”).

<sup>73</sup> *Cf.* Sommer, *supra* note 71, at 1214-19 (arguing that “foster children should be granted the right to initiate termination proceedings, and hence the opportunity to make out a prima facie case for severing the rights of their natural parents when those responsible for their welfare fail to do so”).

<sup>74</sup> Fitzgerald, *supra* note 36, at 505; *see also* Federle, *supra* note 5, at 1696 (concluding that there is an independent value in letting a child client “speak in her own voice” and ensuring that her voice is heard); Ross, *supra* note 21, at 1619-20 (advocating the traditional model of representation to, among other things, “affirm [children's] personhood” by giving them a voice).



(1) the process and outcomes of litigation and (2) the perceptions of the client held by the client and others. This definition of empowerment derives from my interpretation of both the adult and child empowerment literature, but it does not purport to capture every subtle variation of the concept discussed in that literature. I choose to keep my definition simple for two reasons. First, applying developmental knowledge to a more nuanced, varying definition of empowerment would be prohibitively cumbersome. Second, this simple definition captures what in my view is the core of the empowerment advocates' legitimate concern. Whatever conclusions we ultimately reach about children's capabilities, it is certainly worth considering whether children can benefit from lawyers' offering them control over important decisions affecting their lives.

### III

#### THE DEVELOPMENTAL LITERATURE

##### A. An Initial Caveat

Children develop over time, and they acquire various capacities as they develop. This simple truth does not mean, however, that all children move lock step through the various stages of development at the same ages,<sup>75</sup> nor does it mean that children manifest capacities uniformly and consistently in all aspects of their lives. Life experiences, as well as biological forces, play an important role in development.<sup>76</sup> Particularly notable for our purposes is the research indicating that abused and neglected children tend to trail behind other children in a range of developmental spheres.<sup>77</sup> In addition to this variation among children, researchers also have observed consid-

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<sup>75</sup> See Donald M. Baer, *An Age-Irrelevant Concept of Development*, 16 MERRILL-PALMER Q. OF BEHAV. & DEV. 238 (1970) (challenging reliance on chronological age as the primary organizing variable in developmental psychology); Marion Glick & Edward Zigler, *Self-Image: A Cognitive-Developmental Approach*, in THE DEVELOPMENT OF THE SELF 1, 8-9 (Robert L. Leahy ed., 1985) (suggesting that mental age provides "[a] better indicator of a child's cognitive structure and thus developmental level" than chronological age); Aletha Huston-Stein & Paul B. Baltes, *Theory and Method in Life-Span Developmental Psychology: Implications for Child Development*, in 11 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 169, 176-77 (Hayne W. Reese ed., 1976) (arguing that life-span developmental theory undermines the focus on chronological age in the study of development).

<sup>76</sup> A comparison of children's development across cultures most dramatically demonstrates the effect of experience on development. See MARY ELLEN GOODMAN, THE CULTURE OF CHILDHOOD 2 (Teachers College, Columbia Univ. 1970) (1964) (demonstrating that anthropologists' findings of inter-cultural variation in the behavior of children undermine the "fallacy of universal age/stage linkage").

<sup>77</sup> See Martha Rodeheffer & Harold P. Martin, *Special Problems in Developmental Assessment of Abused Children*, in THE ABUSED CHILD 113, 113 (Harold P. Martin ed., 1976) (recognizing the "high incidence of developmental delays and deficits in [abused] children"). See generally THE ABUSED CHILD, *supra* (relating numerous studies and clinical experiences that deal with the special developmental issues that abused children face).

erable variation in manifested capacity within an individual child.<sup>78</sup> Not surprisingly, research has shown that children perform best in contexts that are familiar to them and devoid of stress.<sup>79</sup>

Moreover, no dramatic shift in development occurs between childhood and adulthood, despite the law's suggestion to the contrary.<sup>80</sup> Increasing attention to "life-span development" has emphasized the continuing nature of development from birth through old age.<sup>81</sup> Although the importance of ontogeny (biologically driven change within an individual) may decrease and the importance of socio-cultural influences may increase over the course of a lifetime, life-span developmental theory highlights the interrelationship between these two sources of development throughout life.<sup>82</sup> It is extremely simplistic to compare the generic capacities of children to those of adults. More accurately, we would describe gradual trends in development over time and an increased prevalence of certain capacities (within a given individual and among individuals) as we age. All of us, adults and children alike, perform at a higher cognitive level in familiar, unstressful contexts. Similarly, all of us labor, at least at times, under some of the same cognitive limitations that burden younger children to a greater degree.<sup>83</sup> For this reason, my inquiry into children's capacity to be empowered through the legal process has much to say about adults' openness to empowerment as well.

Developmental psychology does not offer what lawyers would most like: definitive, fixed information upon which to ground simple, age-based rules. What the discipline does offer is a general picture of how we change as we grow up. We then can use this general picture to assess what we might reasonably expect of children and how we might enhance certain valued capacities in specific contexts for specific children. It is then our place as lawyers to determine when bright-line rules are justified despite the lack of developmental clarity,

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<sup>78</sup> See Kurt W. Fischer et al., *Putting the Child into Socialization: The Development of Social Categories in Preschool Children*, in 5 CURRENT TOPICS IN EARLY CHILDHOOD EDUCATION 27, 52 (Lilian G. Katz ed., 1984) (describing the "absence of unitary cross-situational abilities" in children).

<sup>79</sup> See *id.* at 52-53.

<sup>80</sup> See Huston-Stein & Baltes, *supra* note 75, at 176-77 (describing a theoretical basis for rejecting the focus on chronological age as the "primary organizing variable in developmental psychology").

<sup>81</sup> See generally Symposium, *Implications of Life-Span Developmental Psychology for Child Development*, in 11 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR, *supra* note 75, at 165 (discussing how life-span development has affected the entire field of child development).

<sup>82</sup> See Huston-Stein & Baltes, *supra* note 75, at 173-76.

<sup>83</sup> For example, while adults' ability to engage in abstract thinking is frequently cited to distinguish their capacities from those of children, there is considerable evidence suggesting that adults frequently fail to manifest this capacity. See Michael J. Chandler, *Social Cognition and Life-Span Approaches to the Study of Child Development*, in 11 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR, *supra* note 75, at 225, 229-30.

when society is better off with discretionary standards that defer to the decision maker's assessment of an individual child's capacity, and to what extent extrad developmental considerations also should be given weight. While the developmental inquiry offers no quick fixes or easy answers, it offers the best means of testing whether the legal system's goals appropriately and realistically reflect the life experiences of the children subject to those goals.

In applying knowledge about children's development to a legal context, however, it is hard to avoid the temptation of attaching ages to particular developmental advances. For example, Jean Piaget, who himself did not focus on the correlation between age and developmental stages,<sup>84</sup> is relied upon by legal scholars to support the proposition that children acquire the ability to engage in rational thinking (Piaget's state of "concrete operations") at the age of seven and abstract thinking (Piaget's "formal operations") by the age of fifteen.<sup>85</sup> On the other hand, a refusal to attach any ages to discussions of capacities would reduce the usefulness of the developmental inquiry dramatically. My uneasy solution is to speak for the most part about general trends, which I will tie to rough age markers when the research supports that level of specificity.<sup>86</sup> The reader should bear in mind, however, that even when age ranges are provided, they reflect an average, rather than a universal, and that life experience as well as other contextual considerations may have an important effect on the age at which any particular child achieves the developmental milestone in question.

All that being said, my aim is not to answer the developmental questions, but merely to raise them. I am in no position to conclude, for example, that lawyers can empower children in middle childhood but not in early childhood. Rather, I limit myself to the more modest task of urging empowerment advocates to account for the developmental literature, of pressing traditional attorney advocates to reflect harder and in more child-specific terms about what they mean by children's empowerment and to put that more subtle understanding to work in their representation of child clients.

## B. The Capacity for Empowerment

My specific developmental inquiry considers children's acquisition of the capacities necessary to experience power shifts to them-

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<sup>84</sup> See DAVID WOOD, *HOW CHILDREN THINK AND LEARN* 21 (1988) (describing Piaget as "not over-concerned with 'dating' his stages").

<sup>85</sup> See Mlyniec, *supra* note 6, at 1878-90 (providing a succinct overview of Piaget's theory and attaching ages to Piaget's four stages of development).

<sup>86</sup> When appropriate, I will make use of the following terms to refer to the respective age groupings: infancy: 0-2; early childhood: 3-6; middle childhood: 7-9; late childhood/preadolescence: 10-12; early adolescence: 13-15; late adolescence: 16-18.

selves through legal representation—particularly the enhanced influence over litigation and perceptions of self contemplated in the legal literature. Although developmentalists have given some attention to the broad question of children's experience of empowerment (if not always in those words),<sup>87</sup> they have not addressed the question in the context of legal representation. In light of the relevance of context, generally, and the uniqueness of the lawyer-client relationship, particularly, the broader literature is of limited usefulness. At best, it tells us that some children in some contexts have demonstrated a capacity to comprehend and profit from their experience of increased control. It does not answer the crux of our question: Is there something about the lawyer-client relationship that makes the lawyer uniquely well- or ill-suited to empower a child?

To answer this question, we must look to the developmental literature that considers how children's understanding of and participation in relationships change as they grow. Our ability to gain developmental insights about children's capacity to be empowered by their lawyers depends upon our ability to approach the question from this socio-cognitive perspective and to apply general observations about socio-cognitive development to the very unusual lawyer-client relationship.

### 1. *Children's Developing Understanding of Self and Other*

To get a better sense of what the socio-cognitive literature brings to our inquiry, consider the following scenario:

Jane, a two-year-old,<sup>88</sup> is accustomed to getting milk with every meal, whether she wants it or not. One day, Jane is surprised to hear her mother ask whether she wants milk or juice. She chooses juice, and that is what she gets. At every meal thereafter, Jane is given the same choice, and her choice determines what she drinks.

Even at two, Jane experiences some connection between her expressed choice and the drink provided. Does this experience constitute empowerment? If so, can we conclude that two-year-olds are capable of empowerment in any context in which an adult offers them

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<sup>87</sup> Much of the relevant literature speaks in terms of children's "locus of control." See, e.g., *infra* notes 89-91. The locus of control literature focuses on an individual's perceptions about the extent to which the individual (as opposed to chance or some powerful "other") controls relevant outcomes. While a more internalized locus of control—a perception that one's own actions affect outcomes—generally has been associated with greater motivation and achievement, the causes of greater or lesser internalization and how the child experiences these causes are not well understood. One therefore can read the locus of control literature to provide fairly strong support for the conclusion that empowerment at least in some contexts benefits children, but less information about how empowerment is accomplished.

<sup>88</sup> I choose the age of two to capture a verbal child with the least-developed socio-cognitive skills.

a choice and their choice is honored? Empowerment advocates assume that the answer to both questions is yes.<sup>89</sup> I will challenge both assumptions. Although certainly relevant to our inquiry, the first assumption draws me far from my legal expertise, so I will address it only briefly and tentatively. I will focus the bulk of my attention on a challenge to the second assumption, particularly as it applies to the child's experience of control in the context of the lawyer-client relationship.

It is easy to assume that Jane's experience of control mirrors our own, but in all likelihood it does not. Jane knows that her expressed choice matches what her mother serves her, and she also knows that this is a change. In at least three important respects, however, Jane's underdeveloped conception of a psychological self may prevent her from perceiving this exercise of choice as a reflection of any significant personal transformation. First, she may not understand that she has any control over her own preferences.<sup>90</sup> If Jane conceives of her preferences as random or imposed by some external source, she will not experience her response to her mother's inquiry as the *making* of a choice or the *taking* of control. In other words, she may not experience the voicing of the response "juice" as an affirmative, self-determined act. Her understanding that what she says is what she gets does not necessarily translate into an appreciation of the role of her will in the process.

Second, Jane may not understand that her own preferences are distinct from those of her mother. Very young children do not understand that their thoughts and preferences are unique to themselves. They conflate their views with those of the authority figures in their lives, most commonly their parents.<sup>91</sup> If Jane does not differentiate between her views and those of her mother, she will not experience her mother's granting of her expressed preference as an act of defer-

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<sup>89</sup> See Federle, *supra* note 5, at 1693-96 (expressly arguing that children can be empowered, regardless of their maturity level, by being offered an opportunity to make their own choices and implicitly suggesting that the experience is context-neutral by taking no account of context-based limitations).

<sup>90</sup> See DAMON & HART, *supra* note 42, at 129-36 (noting that young children perceive the development of their thoughts and actions as nonvolitional); cf. SELMAN, *supra* note 42, at 104-05 (suggesting that it is not until late in childhood that a child begins to perceive himself as an "active psychological manipulator of [his] inner life").

<sup>91</sup> See WILLIAM DAMON, *THE SOCIAL WORLD OF THE CHILD* 179-80 (1977) (suggesting that such conflation of viewpoints is not found in children older than four); see also ELEANOR E. MACCOBY, *SOCIAL DEVELOPMENT: PSYCHOLOGICAL GROWTH AND THE PARENT-CHILD RELATIONSHIP* 262 (1980) (describing one young child who believed her mother could share her experience of taste and another who expected her parent to "remember" her dreams). In the context of exploring children's conception of authority, Damon has noted that children's failure to distinguish their views from those of their parents leads them unreflectively to mold their own desires to fit those of their parents and to interpret the desires of their parents consistently with their own. See DAMON, *supra*, at 179-80.

ence, but rather as her mother's fulfillment of her own wishes. If Jane so perceives things, then she will not experience her expression of a preference as an influential event.

Third, even if Jane recognizes that her views are unique to herself, she may not understand that she has control over whether her mother knows them. Very young children blur the physical with the psychological and tend to believe that their thoughts are readily accessible to observers, particularly their parents, regardless of whether they express them.<sup>92</sup> If Jane assumes that her mother always has known what she has wanted (because her mother can see her thoughts), she may be less inclined to perceive the change in practice as a change in her own role (now she speaks, and that produces a result). Rather, Jane may focus on what she perceives to be a change in her mother's attitude about the relevance of what she wants. Although this conception still allows for Jane's recognition of her own influence, the shift in emphasis is significant. The less Jane experiences the change as self-driven, the worse seems the empowerment fit.

I start with an example of a two-year-old, which represents one extreme of the developmental spectrum, to capture in stark form two interrelated elements of socio-cognitive development relevant to our inquiry. The first piece is the development of one's sense of self (Who am I? How do my actions and thoughts relate? What is most important to me?). The second is the development of one's sense of how that self relates to others (How am I distinct? What parts of me are accessible to others? What roles do others play, and how do I interrelate with those others?). In different ways, both of these developmental pieces affect children's ability to be empowered through legal representation.

By the end of early childhood, Jane's social understanding will have developed to the point at which she will have some sense of herself as the originator of her own views, and she will know that her thoughts are invisible to others.<sup>93</sup> Her understanding of self and

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<sup>92</sup> See SELMAN, *supra* note 42, at 96 (noting that a young child's ability to understand that he can conceal facts (for example, whether he ate a cookie) precedes his ability to understand that he can conceal his thoughts and feelings); cf. MACCOBY, *supra* note 91, at 261 (demonstrating, with the example of the three-year-old child who told the examiner that her thoughts could not be seen by others because "the skin's over it," that even as children begin to understand that their thoughts are invisible, they continue to have trouble distinguishing between the physical and the psychological).

<sup>93</sup> See SELMAN, *supra* note 42, at 38 (finding that by middle childhood, children gain an awareness that every person has a unique, covert psychological life). Even after children come to understand that their thoughts are invisible, their understanding of the distinction between inner experience and outer appearance continues to develop. See *id.* at 100 (finding that most children do not acquire the ability to engage in the manipulation of their outward appearance to conceal their inner thoughts until middle or late childhood).

other will continue to undergo profound change, however, through adolescence.<sup>94</sup> These developing understandings in turn will affect if and how she experiences control in various contexts. Before exploring the development of socio-cognitive understanding in greater detail, we should give some attention to how these issues relate to our particular inquiry: What questions about self and other confront a child in the legal process and, more particularly, in the course of legal representation?

## 2. *Children's Understanding of Self and Other in the Legal Process*

Our consideration of Jane's experience of choice and control raises questions about whether very young children can be empowered in any context, even a context as simple and familiar to a child as mealtime. When we shift contexts to the complexity and unfamiliarity of the legal process, children's prospects for empowerment grow considerably dimmer.

In lieu of Jane at the supper table, let us now consider an unrepresented John in court. The judge, like Jane's mother, is the ultimate decision maker: instead of dispensing drinks, she arranges families. Like Jane's mother, the judge could ask John for his preference (where and with whom he would like to live). If John is only two or three years old, he is likely to experience the same confusion about his psychological self—what controls his views, whose views they are, and how others access them—that obstructed Jane's ability to experience the voicing of a preference as an empowering event. But the legal context adds an additional impediment to John's empowerment: unlike Jane, two-year-old John probably will not understand the choice he is being asked to make. For most toddlers, the concept of changing homes and families will be too abstract for them to contemplate as a real possibility. Lacking understanding of the significance of the judge's questions, two-year-old John may answer the judge freely and even casually, without experiencing any sense of control over real choices.

As John gets older, he will develop, like Jane, a clearer concept of his psychological self (as the originator and publisher of his own ideas). He also will begin to appreciate the significance of the judge's questions. At this point, John, like his maturing Jane counterpart, may understand enough to perceive his influence. But what exactly is his influence? Jane learns that the preference she expresses invariably determines what she will drink. If her mother asked for her preference, but only gave her what she asked for some fraction of the time,

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<sup>94</sup> See JOHN HATTIE, SELF-CONCEPT 118-39 (1992) (reviewing self-concept literature that explains the ongoing change in self-concept between infancy and adulthood).

Jane would be much less confident about whether she had any control over the drink choice. Similarly, unless the judge gives John everything he asks for (an outcome that even the staunchest empowerment advocates do not support),<sup>95</sup> John can have little confidence that his expressed preferences have any influence at all.<sup>96</sup> Far from feeling empowered, an unrepresented John is likely to experience the solicitation and rejection of his choice as a disempowering event.

The claim of empowerment advocates is not, of course, that children are empowered merely by reporting their views to the court, but by having those views zealously advocated by lawyers. The simple, lawyer-free scenario set out above focused attention on the relevance of the general legal context (which decisions are being made and by whom) to the child's ability to perceive control. With these general effects in mind, we now can consider the more specific effects on John of introducing his lawyer into the scenario.

When John is introduced to his lawyer, he is confronted by an adult stranger whose race and socio-economic status likely differ from his own.<sup>97</sup> He is told by this commanding stranger that despite all appearances to the contrary, he (the child) and not she (the lawyer) controls what action she will take on his behalf. In an effort to induce an exercise of this control, the lawyer typically will attempt to engage the child in a conversation about the events and feelings that are the most private and awkward for the child to discuss, to probe into the world of "family secrets" at the heart of any abuse and neglect case.

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<sup>95</sup> Randy Kandel's proposal to let children control private custody decisions and Katherine Federle's proposal to allow children to veto State decisions to remove them from neglectful homes come the closest to ceding children absolute control. In both contexts, however, the cession of control is qualified: Kandel expressly suggests that a child should not be able to choose to live with an abusive or neglectful parent, *see* Kandel, *supra* note 66, at 370, and Federle appears to imply, by limiting veto power to instances of parental neglect, that a child would not have authority to insist on staying in an abusive home, *see* Federle, *supra* note 66, at 1603-04.

<sup>96</sup> *Cf.* HERBERT M. LEFCOURT, *LOCUS OF CONTROL: CURRENT TRENDS IN THEORY AND RESEARCH* 126 (1976) (suggesting that an individual's control expectancies ("loci of control") can be induced to become more internal (that is, individuals can come to perceive themselves as more in control of outcomes) if they experience a consistent connection between their actions and particular outcomes); Stephen Nowicki, Jr. & Jarvis Barnes, *Effects of a Structured Camp Experience on Locus of Control Orientation*, 122 *J. GENETIC PSYCHOL.* 247, 251 (1973) (reporting study results indicating that children who participated in a camping program emphasizing the connection between the campers' behavior and the consequences they experienced showed a more internal perception of control after one week in the program).

<sup>97</sup> Although the overall rate of child maltreatment does not appear to differ by race, differences in rates of referral, investigation, and service allocation have produced a disproportionate number of children of color in the child protection system. *See* ANDREA J. SEDLAK & DIANE D. BROADHURST, NATIONAL CTR. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT* 4-30 (1996).



Empowerment advocates appear to assume that the lawyer's explanation of her role as an advocate of the child's expressed views will be readily understood by the child as an offer of power.<sup>98</sup> This view fails to account for the hurdles, imposed by the unusualness of the lawyer-client relationship, that stand between the child's holding of preferences and the child's experiencing the expression of those preferences to his lawyer as empowering. Whatever benefit the lawyer brings to the child, she also forces the child to form and sustain a relationship of the most peculiar sort. Clearly, the introduction of a lawyer complicates the socio-cognitive picture considerably. Examining the effect these complications may have on a child's ability to be empowered takes us to the next level of our developmental inquiry.

a. *The Capacity To Experience Influence over the Litigation*

The presence of a child's lawyer in court is intended to increase the child's opportunity for empowerment by enhancing the degree to which his preferences influence the court. The lawyer's advocacy might change the outcome of the case (the best evidence of influence). Short of actually changing the outcome, the lawyer's presence at least will ensure that the judge attends and demonstrates her attention to the child's views. The lawyer will engage the court in a formal exchange through the presentation of facts and legal argument. In this sense, the lawyer puts the child on an equal footing with the other parties, each of whom has his own attorney engaged in the same formal process. At least theoretically, a child who would gain no sense of control from a direct conversation with the judge about his preferences still could experience a sense of empowerment when he observed his preferences amplified and legitimated by his lawyer's conduct. A number of developmental obstacles, however, may prevent a child from perceiving this lawyer-enhanced presentation of his viewpoints as empowering.

i. *The Problem of Distortion*

In the context of adult representation, critics of traditional lawyering focus considerable attention on the distorting effects of lawyers' "translations" of client narratives.<sup>99</sup> These critics argue that when the lawyer alters the client's story to fit it into a familiar legal framework, the client experiences his legal representation as silencing rather than

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<sup>98</sup> I base this conclusion not on any affirmative statements made by these advocates, but on their willingness to move from the means of offering traditional attorney representation to the ends of child client empowerment without considering whether any impediments might lie between means and ends.

<sup>99</sup> See *supra* notes 53-54 and accompanying text.

empowering.<sup>100</sup> Barriers of race, class, and professional conventions all prevent the client's true story from getting through. For children, immaturity will only exacerbate this distortion problem. In communicating with their attorneys, children face all the adults' barriers compounded by the daunting barrier of age.

At a simple linguistic level, children often come into the legal process lacking the vocabulary to help them understand their lawyer's explanations or to articulate their own questions and views.<sup>101</sup> Lawyers tend to talk over the heads of their child clients both because the legal issues in question are often difficult to reduce to simple, familiar language<sup>102</sup> and because lawyers frequently are unaware of the difficulties their politely nodding clients are having following what they are saying.<sup>103</sup> Furthermore, children, particularly abused children, struggle to capture their views in words at all.<sup>104</sup> These linguistic defi-

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<sup>100</sup> See *supra* notes 55-57 and accompanying text.

<sup>101</sup> See HARALAMBIE, *supra* note 12, at 146 ("A child's way of communicating is considerably different from that of an adult and varies according to his or her developmental level."); Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 CREIGHTON L. REV. 1369, 1383-84 (1985) (discussing barriers to children's understanding of lawyers' language).

<sup>102</sup> See Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 LAW & HUM. BEHAV. 523, 532-33 (1990) (reporting study results suggesting that younger children did not understand the majority of the legal terms presented and on many occasions substituted the nonlegal meaning of the word, even when this meaning made no sense in the context of the sentence in which the term appeared); cf. Anne Graffam Walker, *Questioning Young Children in Court: A Linguistic Case Study*, 17 LAW & HUM. BEHAV. 59, 67 (1993) (suggesting that "three potential areas" arise when lawyers examine child witnesses: "age-inappropriate words and expressions, syntactic constructions, and general ambiguity" (emphasis omitted)).

<sup>103</sup> Children who do not understand their lawyers will commonly not inform their lawyers about this lack of understanding. See HARALAMBIE, *supra* note 12, at 146 ("The child may misinterpret questions and will seldom say that he does not understand."). This tendency is in part because of the intimidating context of the conversation. See Perry & Teply, *supra* note 101, at 1385 (stating that "children who are in a state of anxiety" when asked to confirm a lawyer's understanding of their story "may be quite willing to agree to anything"). In addition, children may not realize that their confusion stems from a misunderstanding of terms. See Saywitz et al., *supra* note 102, at 532-33. Saywitz and her co-authors found that younger children often equated unknown legal terms with similar-sounding familiar words ("Evidence is the place where God lives") or the nonlegal meaning of the same term ("Parties are places for getting presents"). *Id.* at 532. These children therefore failed to perceive their own lack of understanding of the legal terms. The authors also found that older children, though less likely to make this kind of error, were also less inclined generally to admit to a lack of understanding of terms. See *id.* at 531-32.

<sup>104</sup> See Perry & Teply, *supra* note 101, at 1384-86 (discussing children's difficulty expressing themselves to their lawyers); Rodeheffer & Martin, *supra* note 77, at 119 (noting that abused children have great difficulty with finding the correct words and organizing them, particularly in response to questions). This difficulty with articulation has a cognitive, as well as a linguistic, dimension. The ability to put one's views in words requires not only an adequate vocabulary but also an ability to think about one's own thoughts. The capacity for self-reflection is a relatively sophisticated socio-cognitive skill. See *id.* (noting that "[v]erbalization is an important step in cognitive development and learning in that it re-

ciencies greatly increase the chance that a child's true views will be lost, quite literally, in translation.

Children's special problems with lawyer-client communications do not derive exclusively from these linguistic difficulties. To a large extent, we can trace the problems to children's underdeveloped understanding of themselves, of others, and of their relationships with others.

Children develop a sense of self slowly—particularly self in relation to others. Only over time do they come to understand themselves as complex psychological beings. More specifically, at least three aspects of the development of self-understanding bear on a child's ability to understand his role in the lawyer-client relationship. First, a child must come to understand his viewpoints and beliefs as unique, invisible, and self-generated. We already have explored, through Jane, how a very young child's concepts of his views are detached from any coherent view of self. Very young children perceive their views as produced by outside sources and shared with, or at least readily accessible to, others.<sup>105</sup> Until a child can understand both that his views are unique to him and therefore distinct from those of his lawyer and that his lawyer will not know his views unless he states them, a child may see no reason to express his views—at least not with the care and completeness that would come with this understanding.

Second, a child must be able to appreciate the complexity of his viewpoints. Even a child mature enough to understand the uniqueness and privacy of his own mind may lack the sophistication to appreciate the conflicts and ambiguity in his views.<sup>106</sup> Lacking this appreciation, he will not be in a position to present these qualifications and uncertainties to his lawyer. Instead, the child likely will communicate only a part of the picture or a caricatured version of his views, presented as absolute and certain answers to the lawyer's questions. Such incomplete communications can significantly undermine the lawyer's ability to engage in effective counseling, which can further diminish the accuracy of the lawyer's interpretation of the child's litigation objectives.

Third, a child must have some ability to perceive himself as in control of external outcomes, or in the words of psychologists, the

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quires an abstracting procedure that primary thinking does not" and that abused children often lack the experience necessary to develop this cognitive skill).

<sup>105</sup> See *supra* notes 92-94 and accompanying text.

<sup>106</sup> See SELMAN, *supra* note 42, at 132-34 (suggesting that until middle or late childhood, children have difficulty comprehending that they may have simultaneous, conflicting thoughts and feelings).

child must have a relatively "internalized locus of control."<sup>107</sup> Children are more likely than adults to "externalize"—to attribute the cause of relevant events to sources other than themselves.<sup>108</sup> Furthermore, while children generally become increasingly internalized as they develop, this external orientation has been shown to be exaggerated and prolonged for children from disadvantaged backgrounds,<sup>109</sup> particularly children who have suffered abuse and neglect.<sup>110</sup> An externalized locus of control decreases a child's motivation to speak fully and frankly with his attorney because he will not expect his words to translate into a change in results. Ironically then, this expectation of powerlessness discourages the child from engaging in precisely the

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<sup>107</sup> Julian B. Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement*, 80 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1966) (setting out the theory of locus of control and discussing its implications for learning theory).

<sup>108</sup> LEFCOURT, *supra* note 96, at 113-14 (reporting a number of studies that concluded that children become increasingly internal with age); Stephen Nowicki & Bonnie R. Strickland, *A Locus of Control Scale for Children*, 40 J. CONSULTING & CLINICAL PSYCHOL. 148, 149 (1973) (finding a trend toward greater internalization with age); Morris Rosenberg, *Self-Concept and Psychological Well-Being in Adolescence*, in THE DEVELOPMENT OF THE SELF, *supra* note 75, at 205, 228 (noting that an individual's sense of personal control becomes increasingly internalized with age and reporting research results, which suggest that children's sense of personal control increases substantially between the 10th and 12th grades).

<sup>109</sup> See LEFCOURT, *supra* note 96, at 109-10 (reporting a correlation between greater externalization and a lack of access to opportunities and concluding that "the less responsive and less opportune milieu surrounding the poor, the ostracized, and the deprived creates a climate of fatalism and helplessness which is reflected in the [high external] scores that individuals obtain on locus of control measures").

<sup>110</sup> See Robert M. Barahal et al., *The Social Cognitive Development of Abused Children*, 49 J. CONSULTING & CLINICAL PSYCHOL. 508, 513 (1981) ("Locus of control measures showed the most striking differences between abused and nonabused groups, with the maltreated children having little confidence in their power to impact and shape their experiences, especially those experiences that are unpleasant and frustrating."); Harold P. Martin & Martha Rodeheffer, *Learning and Intelligence*, in THE ABUSED CHILD, *supra* note 77, at 93, 98 (suggesting that abusive or neglectful parents may respond inconsistently and irrationally to their children's expression of needs and as a result fail to instill in their children any sense that their own actions can produce responses in others); see also Anne McIntyre, *Attribution of Control and Ego Development: Marker Variables for a Model of Foster Care Risk*, 12 J. APPLIED DEVELOPMENTAL PSYCHOL. 413, 414-18 (1991) (reporting study results suggesting that adolescents in foster care had more externalized loci of control than home-reared adolescents due to the instability of their relationships); cf. John S. Carton & Stephen Nowicki, Jr., *Antecedents of Individual Differences in Locus of Control Reinforcement: A Critical Review*, 120 GENETIC, SOC. & GEN. PSYCHOL. MONOGRAPHS 33, 43-44 (1994) (reporting that children who described their parents as "more rejecting, neglectful, punishing, and less accepting" were found to have more external control expectancies).

In general, greater life stresses during childhood correlate with more externalized control expectancies. See *id.* Indeed, developing a more externalized locus of control may in some circumstances reflect a healthy adaptive response to negative (and externally imposed) life experiences. See, e.g., Stephen B. Hillman et al., *Externalization as a Self-Protective Mechanism in a Stigmatized Group*, 70 PSYCHOL. REP. 641, 641 (1992) (finding a greater externalization of locus of control among African Americans and suggesting that this externalization might reflect a self-protective strategy developed in response to the experience of being stigmatized). Such a response, while healthy, nevertheless may interfere with a child's ability to perceive himself in a controlling role.

discourse that could lead to an empowering experience of representation for the child.

As a child's understanding of self develops, so does his understanding of others.<sup>111</sup> Children's initial perceptions of others make minimal distinctions by role or by situation. Young children perceive only very basic categories of the most familiar roles (such as parents, doctors, and teachers), and they have difficulty understanding even those roles in purposive or situation-specific terms.<sup>112</sup> In making sense of roles, young children focus on the most concrete attributes associated with a role and generally fail to conceive of the doctor, for example, as an individual who exists independent of his role as a doctor.<sup>113</sup> As children develop, they begin to appreciate role distinctions not only among people, but also within a single person (for example, they recognize that a doctor also can be a mother and a daughter).<sup>114</sup> By middle childhood, most children have learned to abstract their understanding of roles from the people who fill them, at least for roles whose purposes can be conceived in relatively concrete terms (such as the role of the doctor who helps make sick people feel better).<sup>115</sup> Until a child can engage in this role abstraction, it is very hard for him to come to understand a novel role. The difficulty is greatest when the appearance and behavior of the person filling the novel role matches the appearance and behavior associated with another role already familiar to the child (perhaps that of a parent or a teacher).<sup>116</sup>

Several aspects of legal representation generally, and representation in the abuse and neglect context more specifically, may make children particularly resistant to understanding their lawyers' role.<sup>117</sup>

<sup>111</sup> These two concepts are clearly interrelated. We come to understand ourselves in large part by how we are distinct from others. See DAMON & HART, *supra* note 42, at 125 (describing "knowledge of the self's . . . distinctness" as one of the conceptual underpinnings of personal identity).

<sup>112</sup> See Fischer et al., *supra* note 78, at 40-43; Malcolm W. Watson, *Development of Social Role Understanding*, 4 DEVELOPMENTAL REV. 192, 195, 200-05 (1984); Malcolm W. Watson & Kurt W. Fischer, *Structural Changes in Children's Understanding of Family Roles and Divorce*, in THE DEVELOPMENT AND MEANING OF PSYCHOLOGICAL DISTANCE 123, 127-30 (Rodney R. Cocking & K. Ann Renninger eds., 1993).

<sup>113</sup> See, e.g., Watson & Fischer, *supra* note 112, at 130 (describing this phenomenon using a young child's perception of the role a mother plays).

<sup>114</sup> See Fischer et al., *supra* note 78, at 41-43, 59-63; Watson, *supra* note 112, at 200-07; Watson & Fischer, *supra* note 112, at 130.

<sup>115</sup> See Watson, *supra* note 112, at 201-05 (describing Step 5, in which "the child combines similar categories of action for similar agents").

<sup>116</sup> See Fischer et al., *supra* note 78, at 43.

<sup>117</sup> This suggestion represents a significant qualification of my previous assertion that children should have the developmental capacity to understand their lawyer's role by the age of seven or eight. See Buss, *supra* note 67, at 1752. Although both positions rest on a somewhat speculative application of developmental literature to the question, it is now my view that my earlier conclusion failed to take adequate account of the contextual distinctions between research focused on (1) the understanding of the roles of familiar figures by

First, it is difficult to reduce the role of a lawyer to the kind of concrete terms that would make the role more comprehensible to younger children.<sup>118</sup> One can tell a child that lawyers help people, but explaining how lawyers help people and distinguishing a lawyer's help from the help provided by doctors, teachers, and parents is difficult to do in terms that a young child can understand. Second, in the vast majority of abuse and neglect cases, a child sees his lawyer very little.<sup>119</sup> This paucity of contact dramatically reduces the likelihood that the child client will learn to distinguish the role of the lawyer from the roles of the many other adult professionals addressing family problems, such as caseworkers and counselors, with whom the child interacts far more frequently. Third, a child's introduction to his lawyer in child protection proceedings coincides with his introduction to many other legal professionals—the judge, the other party's lawyers, and other court personnel. Thus, the child is asked to sort out not just one but several new roles whose similarities may be more apparent to the child than their differences.<sup>120</sup> Finally, some evidence suggests that abused children's understanding of role taking develops at a slower rate than that of their nonabused counterparts.<sup>121</sup>

William Damon's exploration of children's evolving conception of authority illustrates, in a context useful for our consideration of empowerment, the way in which children's role perceptions develop.<sup>122</sup> In the eyes of young children, Damon concludes, authority is derived from who one is, rather than from the role that one plays in particular circumstances.<sup>123</sup> Young children initially tend to associate authority with greater "size, strength, or social position,"<sup>124</sup> all of which the child associates with enforcement power, and later they associate authority with greater expertise.<sup>125</sup> But children generally do not perceive authority as situation-specific (e.g., recognizing that a

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children with unremarkable life histories and (2) the understanding of the unfamiliar and unusual role of the lawyer by children who have suffered abuse or neglect.

<sup>118</sup> Cf. Watson, *supra* note 112, at 201-05, 208 (finding that children's ability to appreciate family roles at an abstract level is not manifested until adolescence).

<sup>119</sup> I base this conclusion on my own observation and on informal reports from attorneys representing children in a wide range of jurisdictions.

<sup>120</sup> In addition to speaking the same language and wearing similar clothes, this band of legal professionals who share a caseload as well as the stressful experience of litigating in child protection proceedings tend to become quite friendly with one another. A child who observes the interaction among these professionals in court is likely to conclude that his alignment with his lawyer is not as strong as his lawyer's alignment with the other professionals.

<sup>121</sup> See Barahal et al., *supra* note 110, at 511 ("Control children were more effective in comprehending increasingly complex social roles than were abused children . . .").

<sup>122</sup> See DAMON, *supra* note 91, at 167-226.

<sup>123</sup> See *id.* at 187 (noting that for children ages five and six, authority is derived from "legitimizing personal attributes").

<sup>124</sup> *Id.*

<sup>125</sup> See *id.* at 190-92.

teacher is in charge in class, but has no authority over her students at the grocery store) until they reach middle to late childhood.<sup>126</sup>

A lawyer is an adult, a (relatively) big person who projects considerable authority. A good lawyer conveys to her client that she is someone who "gets things done." The fact that she gets things done for the client by relinquishing her authority to the client demands an understanding of situation-specific authority that is likely to be lost on her younger clients.

Clients who miss that lesson will respond to their lawyers in a manner befitting the lawyers' apparent authority and the children's conventional (and well-rehearsed) lack thereof.<sup>127</sup> Children have spent much of their young lives learning the appropriate ways to behave around adults, and they have suffered the consequences at the hands of these authority-bearing adults when they failed to learn fast enough. A child is therefore likely to show considerable deference to his attorney, voicing agreement with the attorney's expressed viewpoints, whether or not he really agrees, and saying little when the attorney leaves control of the conversation to him.<sup>128</sup> Again, this confused deference is likely to be exaggerated in children who have

<sup>126</sup> See *id.* at 197-98; see also William Damon & Daniel Hart, *Self-Understanding and Its Role in Social and Moral Development*, in *DEVELOPMENTAL PSYCHOLOGY* 421, 442-43 (Marc H. Bornstein & Michael E. Lamb eds., 3d ed. 1992) (positing that by late childhood, "children believe that the authority relationship is constituted of two fundamentally equal individuals; one person is in the position of authority only in contexts in which that person has special expertise and knowledge").

<sup>127</sup> See AARON M. BROWER & PAULA S. NURIUS, *SOCIAL COGNITION AND INDIVIDUAL CHANGE* 14-15 (1993) (applying schema theory to the development of social cognition and suggesting that although the development of schemata assists individuals in making sense of their social world, problems arise when individuals try to plug an unfamiliar role into poorly matched schema); HANS G. FURTH, *THE WORLD OF GROWN-UPS: CHILDREN'S CONCEPTIONS OF SOCIETY* 14 (1980) (hypothesizing that children make sense of social situations by comparing them to situations with which they are more familiar); GOODMAN, *supra* note 76, at 49 (noting that younger children grasp rules of behavior tied to basic categories of relationships, including age-related categories); Jacqueline Smollar & James Youniss, *Adolescent Self-Concept Development*, in *THE DEVELOPMENT OF THE SELF*, *supra* note 75, at 247, 261 (noting that younger children are less likely than adolescents or adults to differentiate the self across relationships); Gary B. Melton, *Psychological Effects: Increased Autonomy for Children*, *EDUC. PERSP.*, Winter 1980, at 10, 14 (noting that attempts to give children increased control are likely to be met with the most resistance when experience tells them that they have very little choice).

<sup>128</sup> In fact, this inclination to say the right thing may increase during childhood, as children become more aware of the disparity between real self and the self as perceived by others and as a child's interest in conforming behavior to others' expectations increases. See MACCOBY, *supra* note 91, at 292 (noting that children's abilities "to anticipate how others will react to what they do, and . . . to tailor their actions for different audiences" reflect a major developmental advancement, which brings with it a more guarded approach to self-disclosure); Robert L. Leahy & Stephen R. Shirk, *Social Cognition and the Development of the Self*, in *THE DEVELOPMENT OF THE SELF*, *supra* note 75, at 123, 145 (suggesting that this increased awareness and desire for conformity appears at roughly 10 years of age).

suffered abuse and neglect. In response to this traumatic history at the hands of adults, these children frequently become "hypervigilant" of external cues of others' expectations.<sup>129</sup>

Deference may work to undermine a child's ability to convey his views to his lawyer in a more insidious way as well. Although research on child testimony suggests that young children have the capacity to remember and report events with considerable accuracy,<sup>130</sup> other studies demonstrate that children are highly vulnerable to suggestion,<sup>131</sup> particularly when the suggestion comes from a person perceived to have authority. The ability of a lawyer to skew a child's perception of past reality, even inadvertently through her questioning or her flawed recharacterizations of her client's statements,<sup>132</sup> further undermines the child's ability to "hold his own," to convey an accurate, self-generated representation of his views.

To summarize, younger children's less-developed language skills and their immature understanding of themselves, their lawyers, and the relationship between the two all serve to distort children's reporting of their viewpoints to their lawyers and the lawyers' interpretation of those viewpoints. Although the lawyer can perform as a forceful advocate in court, she should have no conviction that her performance is based on a complete and accurate assessment of the child client's wishes. To the extent that a child observes his lawyer's performance in court, he may experience every distortion of his wishes as a disempowering event. Instead of feeling a new sense of control, the child client may be struck by his lack of control; instead of feeling understood, he may be dismayed to see how little the decision maker knows of who he really is.

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<sup>129</sup> See Harold P. Martin & Patricia Beezley, *Behavioral Observations of Abused Children*, 19 DEVELOPMENTAL MED. & CHILD NEUROLOGY 373, 375 (1977) (reporting "unusual [ ] hypervigilance" in 11 of 50 abused children studied); Harold P. Martin & Patricia Beezley, *Personality of Abused Children*, in THE ABUSED CHILD, *supra* note 77, at 105, 106 (reporting that they found hypervigilance in 22% of the abused children they studied); Rodeheffer & Martin, *supra* note 77, at 116-17 (noting that abused and neglected children's previous experience with adult-child interactions causes them to see a threat and therefore seek to comply whenever "under close surveillance of an adult").

<sup>130</sup> See, e.g., Perry & Teply, *supra* note 101, at 1386-89 (noting that because children's observations are less likely to be skewed by interpretation than adults', children can make very effective witnesses).

<sup>131</sup> See, e.g., Stephen J. Ceci, *False Beliefs: Some Developmental and Clinical Considerations*, in MEMORY DISTORTION 91 (Daniel L. Schacter et al. eds., 1995) (reporting the results of a number of studies reflecting children's vulnerability to suggestion).

<sup>132</sup> See Perry & Teply, *supra* note 101, at 1396 (noting the danger that lawyers will "elicit what they think a child has seen or heard rather than what the child actually saw or heard"); cf. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A-1 cmt. (1996) ("The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients." (typeface altered)).



ii. *The Problem of Misattribution*

Even when a child succeeds in conveying his true and complete viewpoints to his lawyer, his lawyer's advocacy of those viewpoints in the litigation may not empower him. The suggestion that a lawyer's representation in these circumstances inevitably empowers her child client rests on two assumptions—one factual and one developmental—that do not hold true for many children. The factual assumption is that children are always present to observe their lawyers in court. In fact, in many jurisdictions children rarely are brought to court or, if brought to court, rarely are allowed to observe the proceedings themselves.<sup>133</sup> And even when children are present in the courtroom during the hearing, the court often conducts the proceedings with a kind of insider's informality that makes them difficult for any outsider, particularly a child, to follow.<sup>134</sup> In the absence of an opportunity for meaningful observation, children have little sense—positive or negative—about their role in the process.

The second unsupported assumption is that a child given a meaningful opportunity to observe his lawyer in action will recognize that the lawyer is presenting the child's viewpoints and not those of his lawyer. Even if a child has an opportunity for observation, his socio-cognitive understanding may not yet be sophisticated enough to allow him to discern this distinction, particularly if the lawyer presents his viewpoints with the conviction characteristic of a zealous advocate. If a child fails to attribute the lawyer's arguments to himself, he will have no sense of influence in the process. This confusion of attribution in turn will increase the potential for distortion in his future communications with his lawyer, as discussed above.

Robert Selman's seminal work on the development of social perspective taking suggests that a child's understanding of the relative viewpoints of self and other becomes increasingly sophisticated as he grows up.<sup>135</sup> As we already have seen, very young children do not comprehend viewpoints as person-specific<sup>136</sup> and therefore do not conceive of their own views as distinct from the views of others. By

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<sup>133</sup> See HHS REPORT, *supra* note 3, at 6-13 (reporting study results indicating that "very few children appeared in court at all").

<sup>134</sup> Because many of these cases are disposed of by agreement, the hearing itself often consists of a summary presentation of that agreement to the court. See *id.* at 6-14 (noting that "many cases are settled out of court through stipulations and agreements that are presented later to the court for approval").

<sup>135</sup> See SELMAN, *supra* note 42. Selman describes his inquiry as the study of the "developing understanding of how human points of view are related and coordinated," *id.* at 22, and he offers a "developmentally integrated account of changes in understanding of relations between persons and of changes in concepts of relations within persons," *id.* at 34.

<sup>136</sup> See *supra* notes 92-94 and accompanying text; see also SELMAN, *supra* note 42, at 37 (suggesting that young children distinguish themselves from others on purely physical terms and do not perceive that others may have viewpoints different from their own).

middle childhood, most children understand that each person is a unique psychological entity with his own viewpoints.<sup>137</sup> It will take further socio-cognitive maturation, however, before a child can appreciate that the other (here, the lawyer) not only has her *own* view, but also that she can perceive and be influenced by the child perceiver's view.<sup>138</sup> Until a child understands all this, he is unlikely to perceive the lawyer's zealously advocated position as anyone's position but the lawyer's. To the extent that those views coincide with the child's, so much the better because this coincidence increases the child's chance of achieving his favored outcome. But unless the child understands that the lawyer is expressing those views *because* the child holds them, the child has little reason to feel empowered by the coincidence.<sup>139</sup>

Applied in reverse, we might expect the disempowering effect of distorted representation to be similarly blunted for the child who assumes that the lawyer is advocating her own position rather than the child's. But perhaps there is a difference: A child whose position is not articulated by anyone—by neither the lawyer who has misperceived the position nor the other parties, who do not share it—may feel affirmatively *disempowered* by this absence. He may discover a frustrated will to speak and to persuade precisely because no one has pressed for the position he favors. When his position is presented, however, he will not feel affirmatively empowered by its presentation unless he knows it is presented as his own.

The discussion to this point has focused on the potential empowering effects of children's participation in the litigation itself, in which the lawyer might serve as a facilitator of that participation. The lawyer-client relationship also may offer a more direct source of empowerment: simply giving children authority over their lawyers may prove empowering, regardless of whether and how it affects litigation out-

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Abused children's development of perspective-taking skills are likely to lag behind their nonabused peers. See Barahal et al., *supra* note 110, at 511.

<sup>137</sup> See SELMAN, *supra* note 42, at 38 (finding that by middle childhood, children gain an awareness that every person has a unique, covert psychological life).

<sup>138</sup> See *id.* at 39 (finding that children gained the ability to take a third-person perspective on the relationship between the viewpoints of self and other in late childhood or in adolescence).

<sup>139</sup> Cf. Rotter, *supra* note 107, at 1 (noting that the effectiveness of reinforcement to learning depends upon a person's perception of a causal relationship between his own behavior and the reinforcement). In some instances, the fact that the lawyer is speaking on behalf of the client will be more clear: the lawyer may say, "John wants X." But in many cases, stressing the fact that the lawyers position is driven by the child client's wishes, right or wrong, may not be the most effective rhetorical or legal strategy. Rather, a lawyer generally will do better at achieving the client's desired ends if she focuses on the legal correctness of the client's position. In the context of protective services cases, a lawyer frequently will argue that the position she advocates serves the best interests of the child. The child's most natural interpretation of such an argument would be that the lawyer believes that the position she advocates is in fact what is best for the child and that this belief, rather than the child's views, motivates her advocacy.

comes. Because children rarely control the actions of adults, particularly authoritative, professional adults, the extraordinary degree of control that their lawyers offer them, and as a corollary, the manner in which their lawyers interact with them might be expected to give children a sense of power that they rarely experience. Although this source of empowerment is analytically distinct from the participation source, in practice these sources scarcely can be disentangled. The child's real authority over his lawyer comes from his direction of the lawyer's trial participation. If the child fails to perceive as his own the viewpoints that the lawyer espouses (either because his views are distorted in their communication to the lawyer or because the child misattributes the source of the views expressed in court), he certainly will not perceive himself as in control of his lawyer's actions.

If anything, deriving a sense of empowerment from the lawyer-client relationship itself demands a greater degree of developmental sophistication. A child requires even greater socio-cognitive maturity to understand not only that the lawyer is voicing the child's views (thereby empowering him through participation), but also that the lawyer will voice these views even if she vehemently disagrees with them (thereby empowering him through the relationship). Appreciating this cession of control requires the child to understand not only that every individual has his own viewpoints and not only that another can perceive the child's viewpoints, but also that the other can subjugate her preferred view to the child's view out of deference to higher principles (here the principles captured in the professional ethics governing the lawyer-client relationship). This multitiered appreciation requires the capacity for highly complex social understanding that is inaccessible to many until at least adolescence.

b. *The Capacity To Experience Influence over Perceptions of Self*

The preceding discussion suggests that a child cannot be empowered unless he experiences some influence over outcomes (including the lawyer's strategies and positions and the ultimate judicial decision). But we have learned from the contemporary poverty law scholars that empowerment need not be about influencing outcomes. It can focus instead on the client's influence over people's perceptions, on the client's control over how he is understood. One might expect John,<sup>140</sup> by having the opportunity to express himself before his lawyer or the court, to be as empowered as Lucie White's now famous Mrs. G.<sup>141</sup> Here again, however, we cannot assume that children and adults experience "being heard" in the same way.

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<sup>140</sup> See *supra* text accompanying notes 95-97.

<sup>141</sup> See White, *supra* note 1.

We already have considered how a child's socio-cognitive confusion about his own role and that of his lawyer can lead to distortions in how his viewpoints are articulated and how they are understood. Clearly, a child will not experience his expression of views in the litigation process as an opportunity to influence people's understanding of his identity if that very expression and subsequent transmission by his lawyer distort what he wants and why he wants it. But even to the extent that the views the child expresses accurately and completely reflect his choices and values, his immaturity nevertheless may prevent him from experiencing those views as self-revelatory and thereby empowering.

In the story of Mrs. G., White speculates that Mrs. G.'s unrehearsed and unexpected statement that she spent the extra public assistance in question on "Sunday shoes" for her children (rather than on legally favored essentials, as traditionally defined)<sup>142</sup> could be interpreted as Mrs. G.'s declaration of her individuality and as a demand to be perceived on her own terms. White suggests that Mrs. G.'s apparently candid account of how she spent the money conveyed the message that she was a woman who makes her own decisions about what is important and who places considerable emphasis on dressing properly for church.<sup>143</sup> White's interpretation rests on the assumption that Mrs. G. experienced her statements as a declaration of self and that she understood this self-presentation to be at odds with what others expected of her. It is her very awareness of the discord between her self-knowledge and others' expectations that would allow her to experience speaking as influencing, and it is her sense of connection between what she says and who she "is," at a fundamental level of principle, that would make the influence important. Experiencing the expression of one's own views as influential and self-defining is likely to have a transformative, empowering affect on the speaker.

But what if there is no awareness of discord? And even more significantly, what if the expression of views is not associated with a declaration of individuality? Experiencing the mere declaration of views as empowering may require the integration of two developmental trends in an individual's conception of self—an increasing awareness of the disparity between one's own self and others' concept of self and an increasing focus on psychological attributes of self—that generally does not occur until late in adolescence, if it occurs at all.

As previously discussed, the ability to take the perspective of another about any matter represents a developmental advance.<sup>144</sup> And perspective taking in the context of self-understanding may be partic-

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<sup>142</sup> See *id.* at 31.

<sup>143</sup> See *id.* at 48-51.

<sup>144</sup> See *supra* notes 135-38 and accompanying text.

ularly complex, for it requires the child to objectify the most subjective of experiences—the experience of self-hood. Until a child recognizes that the views and expectations that others have of him differ from his own, he will not be in a position to confront those views and expectations, as Mrs. G. did.

Children begin to work through this puzzle by late childhood.<sup>145</sup> By then, most children are aware that their conceptions of who they are and how they behave may not match the conceptions that others have of them. By late childhood, most children should be able to experience a revelation of their true selves as an influential event.<sup>146</sup>

How a true self is revealed, however, depends upon how the self is conceived, and these conceptions also develop over time. Although developmentalists believe that children have some conception of self (as distinct from others) from infancy,<sup>147</sup> that self is conceived in largely concrete terms for the first several years of life.<sup>148</sup> At this stage, self-revelation might consist of self-description (“I am big, smart, and a good runner”)<sup>149</sup> or an actual demonstration of physical abilities (the

<sup>145</sup> See Leahy & Shirk, *supra* note 128, at 146 (suggesting that over the course of adolescence, an individual becomes increasingly aware that others may have “inaccurate impressions of the self”); cf. DAVID ELKIND, *CHILDREN AND ADOLESCENTS: INTERPRETIVE ESSAYS ON JEAN PIAGET* 78 (1970) (noting that the way in which the self is perceived by others becomes a central focus in adolescence).

<sup>146</sup> I do not mean to suggest that children necessarily would seek out such revelations. As frequently noted in the context of moral development, mid to late childhood is a period during which children strive to conform their behavior to the expectations of important others in their lives. Cast in terms of self-concept, pre-adolescent children frequently will seek to hide the evidence that their true selves do not conform to expectations. See Robert L. Leahy, *The Costs of Development: Clinical Implications*, in *THE DEVELOPMENT OF THE SELF*, *supra* note 75, at 267, 278 (“[W]ith an increasing awareness that the self may be an object of others’ thoughts, the adolescent becomes more self-conscious and attempts to prevent others from knowing the ‘true’ self.”). Of course, children’s disinclination to reveal themselves to others does not necessarily indicate that they would not find such revelations empowering. Part of the goal of empowerment, however, is to develop an individual’s comfort with and therefore appetite for a kind of influence that he has not discovered how to exercise on his own.

<sup>147</sup> See MACCOBY, *supra* note 91, at 251 (suggesting that at a very early age, children have a cluster of sense impressions that “defines the bodily self”). See generally MICHAEL LEWIS & JEANNE BROOKS-GUNN, *SOCIAL COGNITION AND THE ACQUISITION OF SELF* (1979) (describing the development of self-understanding in infancy).

<sup>148</sup> See STANLEY COOPERSMITH, *THE ANTECEDENTS OF SELF-ESTEEM* 20-21 (1967) (noting that young children, who have “little experience and only limited capacity to abstract,” perceive themselves in terms of “highly localized and specific parts of the body”); John Broughton, *Development of Concepts of Self, Mind, Reality, and Knowledge*, in *SOCIAL COGNITION* 75, 82 (William Damon ed., 1978) (concluding that children under eight years old conceive of themselves in primarily physical terms, often associating the self with a body part, most commonly the head); Leahy & Shirk, *supra* note 128, at 140-43 (reviewing the literature suggesting that young children define themselves in concrete and nonrelational terms).

<sup>149</sup> See DAMON & HART, *supra* note 42, at 59-60 (recounting examples of young children’s descriptions of themselves, which include “I have blue eyes,” “I sweat a lot,” and “I play baseball”).

classic "look Mom!"). Later in childhood, children become increasingly focused on interpersonal relationships.<sup>150</sup> At this stage, self-revelation might consist of a description or demonstration of certain relational qualities, such as being nice, or of an expression of concern about how one is fitting in.<sup>151</sup> It is not until adolescence, however, that most of us conceive of our identities in predominantly psychological terms, organized around fundamental beliefs and values.<sup>152</sup> Accordingly, until this stage it makes little sense to interpret a child's declaration of views and their underlying justifications as a form of self-revelation.

As a child casts his self-concept in increasingly psychological terms, he also discovers the unique, private nature of this psychological experience; he realizes that his own perceptions of self differ not in detail but in kind from others' perceptions about him.<sup>153</sup> During adolescence, a child discovers that no matter how much he explains himself to others, others' perceptions of him can never match his own because others cannot share his experience of emotions, sensations, and thoughts.<sup>154</sup> In this sense, my separate treatment of children's developing perception of viewpoint discord, on the one hand, and of

<sup>150</sup> See *id.* at 64-65 (describing late childhood to early adolescence as the period during which children's primary focus is on the interpersonal implications of self); Daniel Hart & William Damon, *Contrasts Between Understanding Self and Understanding Others*, in *THE DEVELOPMENT OF THE SELF*, *supra* note 75, at 151, 163 (same).

<sup>151</sup> See Hart & Damon, *supra* note 150, at 163 (noting that children functioning at this level value personal attributes that make them popular and offering examples of self-descriptions that focus on social skills, such as "I am friendly and get along well with people").

<sup>152</sup> See Robert M. Bernstein, *The Development of the Self-System During Adolescence*, 136 *J. GENETIC PSYCHOL.* 231, 232, 242-44 (1980) (finding a transition in adolescence from an action-based conception of self to a psychological conception); Leahy & Shirk, *supra* note 128, at 141-42 (summarizing literature suggesting that between early childhood and mid-adolescence children's understanding of self develops from a focus on observable, external, "peripheral" qualities to the "central" qualities of personality, beliefs, interests, and attitudes about the self). Damon and Hart suggest that children of all ages have some form of physical, social, and psychological self-concept, but what changes is which dimension is dominant. See DAMON & HART, *supra* note 42, at 67-68. In their view, "belief systems, personal philosophy, and the self's own thought processes" do not become dominant until late adolescence, which is when a "consciously systematic conception of self is first achieved." *Id.* at 67-69; see also Hart & Damon, *supra* note 150, at 160-65 (suggesting a shift from a physical and active self to a social and psychological self as children approach adolescence).

<sup>153</sup> Cf. Hart & Damon, *supra* note 150, at 164-65 (contrasting self- and other-understanding by suggesting that self-understanding consists of a "me" (objective) dimension (reflecting the self as known) and an "I" (subjective) dimension (reflecting the self as knower), whereas other-understanding is limited to the objective dimension).

<sup>154</sup> See DAMON & HART, *supra* note 42, at 74-76 (concluding that only in late adolescence does children's sense of the distinctness of self focus on their "unique subjective experiences and interpretations of the world"); Hart & Damon, *supra* note 150, at 172-73 (noting adolescent's understanding that one cannot know another's psychological qualities and growing realization that their own psychological selves may be misperceived); Leahy & Shirk, *supra* note 128, at 140 (noting that during adolescence individuals become increasingly aware of the distinctive, uncommunicable quality of their own concept of self).

their developing sense of self, on the other, proves artificial. As children develop an increasingly psychological sense of self, they discover the depth and permanence of viewpoint discord between self-perception and others' perception of self.

But how does the discovery of the inevitability of this viewpoint discord relate to children's ability to be empowered through self-expression? If empowerment comes from the experience of influence (here, an influence over the lawyers' and judges' perceptions of the children themselves), then surely children's discovery that their influence is inherently limited will *diminish* their chances for empowerment. Stated another way, we might wonder how Mrs. G. can be empowered by her self-declarations if she realizes these declarations will be insufficient to replace others' perceptions about her with her own. Perhaps the quest to empower clients through the facilitation of self-expression is doomed to founder between a developmental Scylla and Charybdis: individuals old enough to experience viewpoint expression as self-declaration also may be too old to experience that declaration as influential.<sup>155</sup>

Two arguments can be made in defense of a person's capacity to be empowered through self-expression, despite her awareness of her limited capacity to influence the perceptions of others. First, to acknowledge that one's experience of self cannot be communicated in its entirety to another is not to concede that attempts at communication will have no influence at all. Mrs. G.'s expressions of self can be expected at least to improve the court's and parties' understanding of her, even if these revelations do not perfect that understanding.

More interestingly, we might argue that our very understanding of the uniqueness of our self-perceptions can *facilitate* our empowerment: when we declare our views, when we foil others' expectations with our litigation stance, we are celebrating the fact that we know ourselves better than anyone else and that we are comfortable being guided by our own, better understanding of who we are. Empowerment of this sort ultimately is not just about influencing others' views about our identities. Rather, this empowerment also is about declaring our freedom from the constraints imposed by others' perceptions. It is ultimately about asserting our uniqueness, about asserting our control over our own lives. Mrs. G.'s power derives in part from the

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<sup>155</sup> The fact that these two developmental advancements may not occur simultaneously opens, at best, only a small developmental window—a small period during adolescence when the individuals whose understanding of self has outpaced their appreciation of the uniqueness of self-understanding could experience their viewpoint declarations as both self-revealing and influential. In other words, while there may be room for some children to escape Scylla without being pulled immediately into Charybdis's vortex, this offers little hope for self-definition-focused empowerment advocates, for it is only a matter of time before Charybdis sucks them down.

fact that no one, not even her admiring lawyer, knew for sure why she said what she said nor how she experienced her declaration. The very enigmatic nature of her declaration helped drive home the fact that Mrs. G. was calling the shots.

Pre-adolescent children predictably will be hampered from associating their expressions of viewpoints with declarations of self at two levels. First, they are unlikely to perceive their views as the stuff of self-revelation because they do not yet perceive themselves primarily in terms of these views and the principles that produce them. Second, even if these children do equate viewpoint expression with self-revelation, they may not perceive these self-revelations as declarations of independence from outside constraints on their identities. A child who masters the first concept but not the second still may feel empowered, but in a narrower sense than the more developed adult. A child who has mastered neither concept may not feel empowered through the experience of viewpoint expression at all.

To the extent that pre-adolescent children generally lack the capacity to perceive the link between expressing a viewpoint and revealing their true identity, they seem poor candidates for the self-concept-focused form of empowerment. Indeed, because this form of empowerment is grounded in a relatively sophisticated psychological understanding of self and other, only the oldest children are likely to experience it. There is some suggestion in the legal literature that empowerment through the experience of control over self-definition may be particularly accessible to young children—a suggestion apparently based on the assumption that the experience of control flows directly from giving a child a respectful hearing.<sup>156</sup> To the contrary, however, the socio-cognitive literature suggests that children are likely to develop the capacity to experience this form of empowerment later than they develop the capacity to be empowered through their experience of outcome influence in the court process. For most children, the ability to perceive their influence over lawyer behavior and judicial decisions likely will proceed their ability to perceive their influence over the more abstract concept of self-definition.

I do not mean to suggest by this hypothesis that younger children will derive no benefit from a respectful hearing from a lawyer or judge. Such a hearing very well may enhance children's sense of self-

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<sup>156</sup> See, e.g., Edwards & Sagatun, *supra* note 20, at 74 (suggesting that a child's knowledge that his view was presented to the court will be empowering, regardless of whether that view prevails); Federle, *supra* note 5, at 1696 ("[T]here is value in allowing a [child] client to speak in her own voice and to determine her own goals. This is the essence of empowerment and of ethical lawyering."); Fitzgerald, *supra* note 36, at 501-05 (calling for child empowerment through the act of listening to children's stories).



worth.<sup>157</sup> Children can feel valued and important even in a context in which their dependency is absolute. When listening to children reflects caring but not deference, and when children experience adult listeners as respectful but uninfluenced, children may feel valued but not empowered.<sup>158</sup>

### 3. *From Understanding to Execution*

This Article's developmental inquiry focuses on children's capacity to understand that their lawyers are offering them an opportunity to exert control and to understand the significance of that opportunity. Without this twin understanding, it is hard to see how children could experience the offer of control as empowering. This understanding is not, however, the only developmental prerequisite for empowerment. A child mature enough to understand what it means to take control may decline the opportunity, or if he takes it, may suffer rather than profit from the experience. While a detailed consideration of these potential problems associated with a child's exercise of control exceeds the scope of this Article, I offer some brief speculations about them here.

#### a. *The Capacity To Act*

In assessing children's capacity to be empowered, we must consider not only what children are able to understand, but also what children are able to do. Even a child developmentally advanced enough to understand what is expected of the lawyer-client relationship and the child's role in the court process may lack the capacity to act in conformity with those expectations. Moreover, a child who understands that he has been offered control but who fails to take control surely will not be empowered by his understanding. Indeed, an awareness of this failure is likely to have, if anything, a disempowering effect on the child.

A consideration of how children actually will behave in the legal context raises a very different kind of capacity question, focused not so much on cognitive limitations as on emotional ones: children may refuse to express their true viewpoints and take control of their representation because of their discomfort with that role, their confusion

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<sup>157</sup> See COOPERSMITH, *supra* note 148, at 178-79 (suggesting that the amount of respectful, accepting, and concerned treatment that children receive from significant others affects their sense of self-worth); MORRIS ROSENBERG, *Self-Concept and Psychological Well-Being in Adolescence*, in *THE DEVELOPMENT OF THE SELF*, *supra* note 75, at 205, 215 (suggesting that children's psychological health is tied to a number of factors, including the feeling of mattering, of being noticed, and of being an object of concern).

<sup>158</sup> Cf. ROSENBERG, *supra* note 157, at 209-10 (noting that self-esteem reflects self-acceptance and self-respect and need not derive from a sense of self-efficacy (the self's sense of control)).

about their own viewpoints, or a more pointed unwillingness to hurt or to anger parents or other interested parties.<sup>159</sup>

All of these sources of resistance can be accounted for, at least in part, in developmental terms.<sup>160</sup> Children are emotionally, physically, and legally dependent upon their parents.<sup>161</sup> Children's intense emotional attachment to their parents starts in infancy and is relied upon by children to ground and organize much of their development.<sup>162</sup> Children's dependence on parents to meet basic physical needs, such as food, clothing, and shelter, increases the intensity of the attachment and may make children particularly loath to put the relationship in jeopardy. Moreover, until children reach adolescence, their parents, who both define right and wrong and control enforcement, shape children's moral universe to a considerable degree.<sup>163</sup> Even when children understand that they have an opportunity to oppose their parents through their direction of counsel, they may resist this opportunity for fear of being alienated from this defining authority.

In my experience, a child who affirmatively wishes to avoid taking control, or who simply feels paralyzed by his position in the family, will find ways to thwart his lawyer's efforts to give him that control. The child may refuse to take a position or to discuss matters with his lawyer altogether, or he may confuse and mislead his lawyer about relevant facts or about his objectives. When the child strategically misleads his lawyer to achieve his desired ends, the child has taken a kind of control and accordingly could be said to be empowered through his legal representation (though certainly not in the way the lawyer intends).

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<sup>159</sup> Children's desire not to hurt or offend parents might be inspired by loyalty, fear of reprisal, or some combination of the two. See DUQUETTE, *supra* note 3, at 30 (asserting that children's expression of wishes may be skewed by "guilt, loyalty conflicts, or fears of potential retribution . . . [or] by anger at parents that may be unrelated to the specific alleged abuse"); Scott et al., *supra* note 65, at 1049 (reporting that judges deciding private custody disputes believed that the primary reason for children's reluctance to express a preference for one parent or another was a desire not to hurt or alienate either parent).

<sup>160</sup> This is not to say that one can account for children's resistance to taking control in purely developmental terms. Children also will resist taking positions, particularly positions that threaten the well-being of family members or the stability of the family unit, for many of the same reasons adults would hesitate. The point here is simply that developmental differences impose additional constraints on children's ability and willingness to assume control.

<sup>161</sup> See COOPERSMITH, *supra* note 148, at 201 ("The combination of unequal capacities and a dependency that is necessarily prolonged leads to a vesting of power and authority in parental hands.").

<sup>162</sup> Cf. MARY ANN MASON ET AL., ALL OUR FAMILIES 11 (1998) (describing "attachment" theory, which suggests that the relationships children form with key adult figures enable them to function effectively in their lives generally and that severing these relationships causes children to suffer "a substantial psychological loss").

<sup>163</sup> See Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order: Sequence in the Development of Moral Thought*, in SOCIAL AND PERSONALITY DEVELOPMENT 388, 390-91 (William Damon ed., 1983) (tying young children's sense of morality first to punishment avoidance and later to securing the approval of important others).

But it is at least as likely, in my view, that the child is giving the lawyer chaotic, inconsistent information not to engineer a desired end, but to dodge the offer of control altogether. This dodge might be consciously engineered (I've sent my lawyer in one direction, now I'll undermine her effectiveness by altering my position), or more likely, it simply might reflect the child's confusion (I really don't know what position I want my lawyer to take, so I'll correct whatever error I may have made in past conversations by taking a different position today).

Children who wish to avoid taking control may be forced to resort to this obfuscation, whether conscious or unconscious, because unlike adult clients they generally will not be permitted to decline representation—appointment of counsel is automatic and in most jurisdictions mandatory.<sup>164</sup> Additionally, it is extremely difficult for children to change counsel, let alone reject representation altogether.<sup>165</sup>

### b. *Valuing Control*

Even children old enough to understand the nature of their role as directors of the representation and otherwise able, at their lawyer's direction, to play that role may not feel empowered. Empowerment implies experiencing the exercise of control as a good. For reasons closely related to those that might lead children to opt out of the traditional client role, children who accept that role nevertheless may experience its performance as a painful burden. We can think of this phenomenon as another piece of the capacity puzzle—children's emotional and psychological development renders them uniquely dependent upon their parents, which undermines their ability to experience the exercise of control over decisions negatively affecting either parent as a good. This consideration also raises a different kind of developmental issue: to what extent does imposing the empowerment experience on children interfere with their emotional and psychological development in a way that actually causes them significant harm?

Although commentators have questioned the potential trauma caused by imposing decision making of this nature on children,<sup>166</sup> no

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<sup>164</sup> Federal funding is premised on the appointment of legal representation for the child, and no provision is made for the child to opt out of the representation. See 42 U.S.C. § 5106a(b)(2)(A)(ix) (Supp. II 1996) (requiring states as a condition of federal funding to provide "in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem . . . to represent the child in such proceedings").

<sup>165</sup> Many children will assume that they have no choice in who represents them, and even those children who seek to change counsel may lack the authority or money to exercise that choice. See, e.g., *In re A.W.*, 618 N.E.2d 729, 733 (Ill. App. Ct. 1993) (documenting the resistance faced by a child seeking to retain separate, pro bono counsel from the lawyer appointed to represent her as both guardian and counsel).

<sup>166</sup> See Melton, *supra* note 127, at 13-14 (suggesting that when the choice is between bad options or is exceptionally complex, the need to make a choice might itself provoke anxiety for a child); see also Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures, and Profes-*

study yet has addressed the question, particularly in the context of child protection proceedings.<sup>167</sup> Without an answer to this question, lawyers should take care not to oversell the value to child clients of giving them control.

c. *Confining Empowerment*

Even for children for whom all pieces of the capacity puzzle fall into place, we still might worry whether empowerment is a developmentally healthy goal. A child who successfully experiences empowerment in the litigation context may attempt to exercise a similar control outside this context, where such an attempt would be inappropriate. Again, it helps to consider the more thorough exposition of the concept of empowerment in the context of adult legal representation. In that context, empowerment describes a transformation in attitude and actions that transcends the particular circumstances that engender it.<sup>168</sup> A truly empowered client's discovery of his capacity for influence will inspire him to attempt to exert that influence in other forums and over other aspects of his life. Indeed, the absence of such a generalized effect might call into question whether the context-specific experience of control reflects the sort of genuine personal transformation demanded by empowerment advocates.

For adults, few would contest the value of such a broad transformation. Adults who take greater control of their social, legal, and political lives are likely to improve their fate. But for children, the picture looks very different. Under the law and as a matter of social convention, children have little authority over the important decisions in their lives. The State tells them to go to school, and their parents tell them what religion to practice, what activities they may pursue,

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*sions in the Representation of Children*, 64 *FORDHAM L. REV.* 1975, 1986 (1996) (“[S]ome decisions may be too large a burden for a child to make . . .”).

<sup>167</sup> The issue has received modest attention in the context of private custody disputes. See, e.g., Scott et al., *supra* note 65, at 1068-69 & nn.121-22 (summarizing literature suggesting that pre-adolescents were more anxious about and less inclined to express a preference between parents than were adolescents); Susan Scott Meehan, *Child Custody Disputes: The Experiences of Children and the Implications for Social Policy* 84-86 (1982) (unpublished Ph.D. dissertation, Stanford University) (on file with Stanford University) (finding that children age nine to 12 often experience the solicitation of their custody preferences as unwelcome because it forces them to confront loyalty conflicts).

<sup>168</sup> See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 *VA. L. REV.* 1103, 1170 (1992) (suggesting that through representation of client groups, lawyers could help “disadvantaged people . . . grow into spearheads of much broader community activity”); White, *supra* note 52, at 546-63 (recounting the experience of groups identified through litigation efforts that subsequently went on to engage in independent self-empowering group activities, namely a homeless theatre group and “speak out sessions” about their welfare experiences); cf. Cahn, *supra* note 56, at 2144 (suggesting that the time-dollar method of paying for litigation, in addition to having a direct empowering effect on clients, would foster empowering, community-building activities by clients).

and with whom they may associate. In fact, parental control is not limited to these important decisions. Parents, particularly of pre-adolescents, often control such routine decisions as what their children eat, when they eat it, what they wear, and when they sleep. If empowerment means increasing children's commitment to controlling their own fate outside the judicial proceeding, it could spell disaster in the form of developmental maladjustment.<sup>169</sup>

Perhaps children can learn to distinguish between the litigation arena and the rest of life, but this distinction also requires developmental sophistication about roles and contexts. Moreover, this contextual distinction seems intuitively incongruous. It asks children to exercise control over the most important, adult-like decisions (e.g., who will take care of them, how their parents will be treated) but to defer to others in controlling the more trivial aspects of their lives. In my experience, the children who truly understand and value their control in the litigation process make no context-specific distinctions. They try, by invoking the help of their lawyers, to exercise that control in all aspects of life, from choosing an afternoon snack<sup>170</sup> to attempting to alter their living arrangements.

This confusion, this inability to contain empowerment to the judicial context may contribute to very bad outcomes for children: In my experience, some children's awareness that they have their own lawyers translates into a greater willingness to thwart the authority of their caretakers. This willingness in part may reflect children's misperception that the lawyer in some sense has displaced the caretaker as an authority figure. It also may reflect a correct perception of the lawyer's role applied to the wrong context. Any defiance of authority can lead indirectly to the disruption of a living arrangement (where,

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<sup>169</sup> Of course, it may be developmentally healthy for caregivers to offer children more control over many of these decisions at home. *See infra* notes 174-76 and accompanying text. The problem arises when the parents are not open to this shift in control, but the child nevertheless demands it, based on his experience in the court process.

<sup>170</sup> I once litigated aggressively on behalf of a 10-year-old client who did not want to live with his step-father. The client watched me present evidence and make arguments against his step-father's competence as a parent and challenge the step-father's emotional commitment to my client. The judge was not persuaded (in part because of a lack of good placement options) and awarded custody to the step-father. The following day, I received an agitated call from my client (to whom I had given my business card with an invitation to call me if problems arose, which had helped me to convey to him that he was in control of the representation). His step-father, he complained, would not let him eat an ice-cream sandwich after school. In the background I could here the yelling of the step-father, who was clearly furious that his attempt to exercise parental control was being undermined by my client's "I'm calling my lawyer" attitude. I was forced to choose between undermining my relationship with my client to protect his relationship with his step-father or interfering with that relationship to preserve ours. With much discomfort, I chose the former, and I did my best to "re-educate" my client—counseling him that his step-father was now in charge, that he made the rules, and that there was absolutely nothing the child client or I could do to counter that authority.

for example, a foster mother gets fed up with the child's increased refusal to follow her rules and requests the child's removal<sup>171</sup>). Furthermore, the child intentionally may orchestrate such a disruption (by leaving or credibly threatening to leave). Either way, the child's behavior may have been inspired by his (correct) understanding that he has a lawyer whom he can direct and his (incorrect) belief that this lawyer, through effective advocacy, can always get him what he wants.

In fact, circumstances directly related to the child client's dependency often tie the lawyer's hands. Unlike an adult client, the child client does not have the option of setting up a household for himself.<sup>172</sup> He has to be placed in some adult's custody, and that adult has to be both willing and, in the eyes of the State, able to provide the child with basic care and support. A child who disrupts a placement in the hope that he will get to live with a caretaker of his choice often will find himself with no place to go. Lawyers can affect the range of options only at the margins (by arguing in court that a willing caretaker is indeed acceptable or by trying to persuade an unwilling caretaker to take the child). For the most part, however, the availability of these alternatives is beyond the lawyer's control.

Children's difficulty confining their newfound empowerment to the designated context also may undermine familial relationships in more subtle ways. To some extent, the alliance between the lawyer and the client, particularly an alliance that champions the child's viewpoint in the face of a conflicting parental viewpoint, drives a wedge between parent and child.<sup>173</sup> It fosters estrangement that in some cases may be healthy, but in many will be destructive, and there is no reason to expect that lawyers will have either the information or the expertise to know which cases are which.

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<sup>171</sup> Foster parents generally have absolute authority to terminate their obligations to a foster child. See, e.g., *Smith v. Organization of Foster Families for Equal. and Reform*, 431 U.S. 816, 826 & nn.14-15 (1977) (noting that New York's foster care arrangement—described as “characteristic of foster care arrangements in other states”—allows foster parents to cancel their agreement with the state “at will”).

<sup>172</sup> Although state law may allow older adolescents to be emancipated, emancipation does not secure for the child the full range of adult rights, including the right to contract, that would assist a child in establishing independence. Moreover, in many states, considerable substantive and procedural hurdles make even this limited independence difficult to obtain.

<sup>173</sup> See JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 123-26 (1979) (arguing that once the court has designated a caretaker, the child's lawyer should play no further role because to do otherwise would undermine family integrity by obstructing the caretaker's and the child's ability to relate with one another directly and by diminishing the caretaker's authority); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 *BYU L. REV.* 605, 651-52 (arguing that recognizing children's independent rights may undermine their parents' authority, which could threaten the children's psychological well-being).

#### 4. *The Limits of Lawyering*

My survey of the socio-cognitive developmental literature raises serious questions about how effective children's lawyers can be in their efforts to empower their clients, particularly their younger clients, through legal representation. Nothing in the literature suggests, however, that affording children opportunities to exercise some control over matters in their lives is generally problematic. Indeed, many studies suggest that affording children these opportunities can have a strong positive effect on children's development: it has been shown to increase self-esteem, motivation and performance, to improve children's ultimate decision making and exercise of control as adults,<sup>174</sup> and in general, to produce happier children in stronger relationships.<sup>175</sup> What may make lawyers particularly poorly suited to em-

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<sup>174</sup> See, e.g., Melton, *supra* note 127, at 11 (noting that developmentalists and learning theorists have linked giving children decision-making autonomy to resolve ethical dilemmas with improved moral development).

<sup>175</sup> See JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY § 3.26, at 319-24 (1966) (finding that children's belief in their control over their own destiny was a major determinant of school achievement); COOPERSMITH, *supra* note 148, at 211 (finding that children raised in "democratic" households, where they enjoyed opportunities to make choices within the confines of clearly established family standards, generally had higher self-esteem than those children whose parents believed that children should not have any role in planning and decision making); Thomas A. Brigham, *Some Effects of Choice on Academic Performance*, in CHOICE AND PERCEIVED CONTROL 131, 135-37 (Lawrence C. Perlmuter & Richard A. Monty eds., 1979) (noting a link between increased student choice of arithmetic activities and improved performance in math); Susan Harter, *Competence as a Dimension of Self-Evaluation: Toward a Comprehensive Model of Self-Worth*, in THE DEVELOPMENT OF THE SELF, *supra* note 75, at 55, 95-96 (noting that even in infancy, a sense of self-efficacy appears to be linked to a sense of self-worth); Charles E. Lewis et al., *Child-Initiated Care: The Use of School Nursing Services by Children in an "Adult-Free" System*, 60 PEDIATRICS 499, 502-04 (1977) (reporting study results suggesting that allowing children to access health services on their own through the school nurse reduced children's perception of the severity of their health problems and increased the value children placed on self-care).

There is considerable indirect support for this positive association between empowerment and feelings of self-worth in the locus of control literature, but the issue generally has been addressed in two parts in that context. First, researchers have considered the correlation between locus of control and success, and second, researchers have considered what environmental influences tend to produce which kind of control orientation. There is a great deal of research supporting the conclusion that in most contexts individuals with a more internalized locus of control tend to be happier, more motivated, and more successful. See, e.g., Virginia C. Crandall & Beth W. Crandall, *Maternal and Childhood Behaviors as Antecedents of Internal-External Control Perceptions in Young Adulthood*, in 2 RESEARCH WITH THE LOCUS OF CONTROL CONSTRUCT 53, 53-54 (Herbert M. Lefcourt ed., 1983) (summarizing results of studies that suggest that an internalized locus of control facilitates many attributes including: learning, memory recall, achievement, interpersonal skills, emotional adjustment, and contentment). There is also considerable (although less definitive) research suggesting that greater internalization is correlated with (and possibly caused by) children's exposure to greater opportunities to exercise independent decision making. See Carton & Nowicki, *supra* note 110, at 48 (summarizing literature suggesting that children whose parents are nurturing and foster their children's independence show more internalized control expectancies); Catherine E. Rosen, *The Impact of an Open Campus Program upon*

power their child clients is a combination of the complexity of the lawyer-client relationship, the foreignness of the legal context to the child,<sup>176</sup> and the intense emotional content (tied with the seriousness of the consequences) of these proceedings<sup>177</sup>—all of which require a more sophisticated level of socio-cognitive development to comprehend and negotiate.

These three factors are conspicuously absent in studies that report both success in teaching children to exercise control and evidence of beneficial effects from the experience. In these studies, children are offered control in a context that is familiar to them and in which the consequences of bad decisions (and hence the anxiety produced by decision making) are minimal.<sup>178</sup> Furthermore, the demands placed on children's interactional skills are minimal, either because the children's exercise of control occurs through their simple, independent action,<sup>179</sup> or if it occurs in the context of a relationship, because the relationship is one in which the child has considerable experience and in which the child operates comfortably, such as the parent-child relationship.<sup>180</sup> In these familiar, unthreatening contexts, children have been shown to profit from their opportunities for

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*High School Students' Sense of Control over Their Environment*, 14 PSYCHOL. SCH. 216, 218 (1977) (concluding that students who were given freedom of movement on and off school campus demonstrated a more internalized locus of control).

<sup>176</sup> See DAMON, *supra* note 91, at 337-38 (noting that children are likely to show reduced social sophistication when asked to address adult concerns).

<sup>177</sup> See SELMAN, *supra* note 42, at 259 (noting that anxiety can lower children's functioning in interpersonal domains). Some authors have suggested that the very exposure of children to stressful environments can undermine a child's development of a sense of autonomy. Cf., e.g., Rudi Dallos, *The Construction of Autonomy: Some Paradoxes of Socialisation*, in CHILDREN IN CHARGE: THE CHILD'S RIGHT TO A FAIR HEARING 204, 205 (Mary John ed., 1996) (noting that "[c]hildren's development of autonomy can become stunted when they become immersed in the . . . stresses preoccupying their parents").

<sup>178</sup> See, e.g., MACCOBY, *supra* note 91, at 286 (suggesting that a parent's responsiveness to an infant's signals about matters such as eating rhythm promotes attachment, which in turn encourages the infant's exploration); Jacqui Cousins, *Empowerment and Autonomy from Babyhood: The Perspective of 'Early Years' Research*, in CHILDREN IN CHARGE: THE CHILD'S RIGHT TO A FAIR HEARING, *supra* note 177, at 191, 200-01 (describing how giving children control over the small things (such as whether to keep a security blanket) that are the "stuff of childhood" can facilitate an experience of personal power and independence at a very early age); Elsa Dawson, *Children and the Right To Play: Lessons from Peru*, in CHILDREN IN CHARGE: THE CHILD'S RIGHT TO A FAIR HEARING, *supra* note 177, at 174, 174-75 (invoking extensive literature suggesting that play facilitates creativity and, by implication, independence); Cathy Kiddle, *Representing of Ourselves: The 'Voice' of Traveller Children*, in CHILDREN IN CHARGE: THE CHILD'S RIGHT TO A FAIR HEARING, *supra* note 177, at 67, 69, 76 (describing the empowering effect on Gypsy children of providing them with an opportunity to capture their lives in photographs).

<sup>179</sup> See, e.g., Brigham, *supra* note 175, at 135-37 (describing beneficial effects on children of being given authority to choose math activities on their own).

<sup>180</sup> See, e.g., COOPERSMITH, *supra* note 148, at 211 (reporting success of a parenting model that affords children circumscribed decision-making authority on matters affecting the family's plans). Of course, relationships with which children are familiar can in fact be very complicated, but children need not perceive those complications. Through the fre-



enhanced control. Indeed, though rarely so described, these children seem to reflect the kind of life-improving transformation captured in the term "empowerment," which is advocated by the very legal advocates for whom the goal may be elusive.

#### IV IMPLICATIONS

My consideration of the developmental literature suggests that lawyers cannot assume that ceding control over litigation to children will be experienced by them as empowering. The implications of this conclusion and of the developmental observations on which it is grounded are considerable. They bear, most obviously, on the discussion of the proper role for a lawyer to assume in representing children. They also may bear, I will speculate, on our consideration of the legal representation of adult clients.

##### A. Implications for the Representation of Children

Those convinced by my argument to doubt whether children will routinely be empowered by the offer of control over representation may be inclined to abandon the client-directed model of representation in favor of the guardian ad litem, protectionist model, but this conclusion would draw too much from the argument. What is most clear, in my view, is that the goal of empowerment does not, as some suggest, free traditional attorney advocates from considerations of capacity. The ability to be empowered through legal representation develops with age, just as does the ability to engage in reasoned decision making. Experiencing a positive sense of influence in the litigation process still can be an achievable goal for the more socio-cognitively developed children, and for those for whom it is not achievable, we must separately consider what the incapacities that stand in the way of this experience likely indicate about children's ability to reap the other anticipated benefits of the traditional attorney model. After exploring these issues in this section, I conclude that my analysis of children's socio-cognitive development raises serious questions about the validity of applying the traditional attorney model, as currently conceived, to the representation of children. It is my determination, however, that modifying this model to address its inadequacies would serve children better than abandoning the approach in favor of the guardian ad litem, or best interest, approach.

We have seen that children are likely to develop the capacity to experience the different forms of empowerment contemplated in the

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quent interactions that produce familiarity, the child has an opportunity to develop an understanding of these relationships that fits the child's developmental level.

literature at different ages.<sup>181</sup> Only the oldest children can be expected to experience the declaration of their views as self-revelatory and thereby empowering, while somewhat younger children (at least children in their late childhood, roughly ages 10-12) may be able to experience their more concrete participation in the decision-making process as empowering. Neither form of empowerment is likely to be accessible to children in early childhood, who generally are also considered too young to engage in rational decision making about the subject matter of the litigation. The empowerment goal, therefore, fails to offer the support that some suggest for extending the traditional attorney approach downward to younger children. The question remaining is whether what we have learned through our developmental inquiry about children's socio-cognitive capacities argues for raising the floor even higher than the age at which children demonstrate basic reasoning skills. To answer this question, we should consider, first, whether the traditional attorney model depends on an empowered client for its coherence, and second, whether the same developmental barriers that obstruct the achievement of empowerment may impose other barriers to an effective lawyer-client relationship.

Empowerment advocates do not claim that clients must be empowered in order to direct counsel, but rather that the opportunity to direct counsel will empower clients.<sup>182</sup> But can an unempowered client participate appropriately in the traditional lawyer-client relationship? If empowerment encompasses the positive experience of influence over the litigation process, it is hard to imagine what it means to direct counsel in the absence of an appreciation of that influence. The apparent circularity of the analysis suggests that more apt than the empowerment advocates' positive claim is the negative corollary: while engagement in a traditional lawyer-client relationship cannot guarantee an empowered client, a client unempowered by the relationship, who does not experience and value a sense of influence over the litigation, likely will fail to engage successfully in the relationship.

Disentangling the empowerment goal from other justifications for the traditional attorney model, we discover that the same socio-cognitive sources of confusion can undermine these other justifications as well. In my discussion of developmental obstacles to empowerment, I discussed how children's immature understanding of themselves, of their lawyers, and of the expected relationship between them could prevent clients from giving lawyers full and accurate information about their goals in the litigation or about relevant underlying

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<sup>181</sup> See text accompanying *supra* note 156.

<sup>182</sup> See *supra* notes 69-74 and accompanying text.

facts.<sup>183</sup> I emphasized in that discussion how the failure to convey accurate information would produce misinformed lawyers whose representation would undermine rather than enhance children's sense of influence. I turn now to a consideration of other problems that this same immaturity-induced distortion can create for the traditional attorney model.

Empowerment aside, advocates of the traditional attorney model generally justify their approach in the following terms: (1) Ours is an adversary system in which a judge who has heard all parties' (including the child's) positions zealously argued can make the best decisions;<sup>184</sup> (2) Children often do at least as good a job as the adults in making hard choices among less-than-ideal options, in part because their life experience has given them considerable expertise and in part because they give great weight to emotional attachments, which adults, who are focused on protecting children from physical harm, often undervalue;<sup>185</sup> (3) Children are more likely to accept and therefore comply with the court's decisions if they know that the court considered their views;<sup>186</sup> and (4) Lawyers lack the expertise to make best-interest judgments (again, among far-from-ideal options) on behalf of their child clients.<sup>187</sup> All four justifications rest, at least in part, on the assumption that the child's views will be correctly articulated to the lawyer and to the court.

First, our faith in the adversary system is grounded on the assumption that a neutral decision maker is choosing among options that the interested parties already have sorted and screened, options that reflect the choices that real people have made when faced with the potential consequences of those choices. Unless the lawyer gets accurate direction from her child client, any position she takes in court simply will be one of a large range of hypothetical positions, untested against any individual's assessment of the consequences. Second, the fact that children's life experience and their vulnerability to the consequences of the court's rulings make them highly qualified decision makers only supports a client-directed model of representa-

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<sup>183</sup> See *supra* Part III.B.2(a) (i).

<sup>184</sup> See, e.g., Ramsey, *supra* note 6, at 297 ("[D]ecisions might be more accurate, not necessarily because the child's view was correct, but because another point of view would be presented."); Ross, *supra* note 21, at 1617 ("[Assuming that the] adversary system encourages the best expression of each position . . . and knowing that the judge will decide the matter, a lawyer for a child may pursue the child's preferences without undue angst").

<sup>185</sup> Cf. Douglas J. Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. FAM. L. 217, 234 (1981-1982) (noting that a child's view that an abuse case against a parent should be dismissed may be the "right" decision); Ramsey, *supra* note 6, at 297 ("Another argument in support of representing the child's wishes is that doing so might result in wiser decisions").

<sup>186</sup> See Federle, *supra* note 66, at 1604; Ross, *supra* note 21, at 1619.

<sup>187</sup> See Ross, *supra* note 21, at 1616.

tion if, in fact, the child succeeds in communicating his true, well-grounded views to the lawyer. Third, while there is some evidence to support the claim that clients generally are more willing to accept decisions reached through the judicial process if they believe the court considered their views,<sup>188</sup> there is no reason to expect a child who knows her real views were not, in fact, considered to show deference to the process. Therefore, to the extent that children's underdeveloped socio-cognitive capacities stand in the way of their clear and candid communication with their lawyers, the arguments for the traditional attorney model are sufficiently weakened.

The primary remaining justification for the traditional attorney model is that lawyers are extremely unqualified to ascertain what is best for children, particularly children whose life experience and whose range of options are so far removed from the life experience and options that most of their lawyers have faced. Far from bringing any special expertise to the identification of interests, lawyers may be particularly *unqualified* in light of the usual socio-economic distance between lawyer and client and the lawyers' lack of any deep knowledge of the children they represent. Paired with a notion that children are well-qualified to identify their own interests, this criticism of the lawyer's independent qualifications argues strongly for the traditional attorney role. But for children whose limited socio-cognitive development prevents their wisdom from getting through to their lawyers, this criticism reduces to an argument against the guardian ad litem model ("GAL"). When we can have little confidence that either lawyer-identified or client-articulated objectives reflect competent decision making, both the traditional attorney model and the GAL model seem seriously deficient.

Few who have grappled seriously with the issue of legal representation for children, particularly younger children, will be surprised by my conclusion that both models of representation are highly problematic. The literature does not read this way, however. Instead, scholars addressing the proper role of the child's attorney tend to take a strong position in favor of one model or the other, and devote their analysis to a defense of that position. I suspect that this approach reflects two concerns. First, because the debate about the lawyer's role has become highly polarized, proponents of both schools fear that the other side will attempt to capitalize on any concession of weakness. Second, because lawyers representing children seek clear, unequivocal direction about how to represent their clients, scholars have a strong interest in packaging their positions in as simple and compelling a form as

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<sup>188</sup> See, e.g., Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984).

possible. Acknowledging weaknesses in both models presses me to consider whether there is a better alternative available.

Perhaps children below a certain age or maturity level would be better off (taking into account benefits derived from both the outcome and the process of decision making) if they were represented by someone other than a lawyer.<sup>189</sup> We might look for someone with greater expertise about the relative costs and benefits of the various options to abused and neglected children. Alternatively and in my view preferably, we might look for someone who knows and is known by the child.<sup>190</sup> We still would have to consider what role this nonlawyer representative should play (a mouthpiece for the child or a protector of the child's interests?), but at least we might have reason to hope that this representative would fulfill either role more successfully than a lawyer could. When contrasted with the exceptionally thin knowledge that the lawyer generally has of the client (who may be one of several hundred that the lawyer represents in any given year), the greater expertise or closer relationship to the child of the nonlawyer representative might produce a better read of the child's true wishes or a better substituted judgment on behalf of the child.<sup>191</sup> Indeed, if this alternative representative acted as a mouthpiece, her greater expertise about or intimacy with the child might increase the child's prospects for empowerment by improving communication—about both the child's views and the representative's own role—and thereby reducing the problems of distortion discussed above.<sup>192</sup>

The biggest weakness of this approach, however, is that it would place the child's representative on an unequal footing with other parties' representatives in the courtroom. The courtroom is a lawyer's terrain, and though lay and expert witnesses often do a far better job than the lawyers of making the arguments that convince the judge, lawyers control the process, including who makes it to the witness stand in the first place. Assigning the child a representative less pre-

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<sup>189</sup> CAPTA, the statute imposing conditions on states' receipt of federal funds, now expressly allows for representation by a lay advocate. See 42 U.S.C. § 5106a(b)(2)(A)(ix) (Supp. II 1996).

<sup>190</sup> It might be difficult in some cases, however, to identify a person who knows the child well, who is willing to become actively involved in the litigation as the child's representative, but who does not have her own interests in the litigation.

<sup>191</sup> A version of this approach has received increasing attention and support throughout the country: The Court Appointed Special Advocates ("CASA") program now trains and supervises volunteers to speak on behalf of children (employing the best interest approach) in numerous jurisdictions. See Laurie K. Adams, *CASA, A Child's Voice in Court*, 29 CREIGHTON L. REV. 1467 (1996) (providing an overview of the CASA program and describing its implementation in Nebraska). Although the best among these programs have served children very well, they generally offer neither expertise (training is good, but does not turn volunteers into social workers or psychologists) nor a particularly intimate knowledge of the child.

<sup>192</sup> See *supra* Part III.B.2(a)(i).

pared to exercise that control over the litigation process would undermine the child's interests, however defined. Although at least theoretically, the governing proceedings could be modified to reflect this shift in the child representative's expertise, well-recognized due process rights of parents in this context would stand as a considerable barrier to such reforms.<sup>193</sup>

Another solution to the problem of courtroom imbalance would be to assign a lawyer to represent the nonlawyer representative of the child.<sup>194</sup> This solution, however, puts even more distance between the child and the judge. By the time the nonlawyer representative transmits the child's communications to the lawyer, and the lawyer then transmits them to the court, we should have little confidence that the lawyer's "representation" bears any resemblance to the real thing. This problem exists whether we worry about empowerment (the imposition of an additional intermediary will only exacerbate problems of distortion and misattribution) or whether we simply seek to present the court with well-founded best-interest judgments. A lawyer called upon in court to influence a fluid decision-making process would be severely disadvantaged by the lack of a relationship with the client. In sum, although the better qualified intermediary might derive better information from the client and do a better job of identifying the client's interests as defined by either the representative or the child, bringing in a lawyer to translate those interests into an effective litigation strategy would reintroduce problems similar to those the lawyer faces when she deals directly with the client.

### 1. *The Lawyer as Teacher*

Perhaps a better approach is to maintain the direct relationship between client and lawyer and to alter the lawyer's role to reflect the limitations imposed by the relationship. By interjecting humility into our ambitions for lawyers, we may be able to come closer to fashioning a role that serves children well.

I began my developmental discussion with a warning that I would not identify precise ages at which developmental changes bearing on children's legal representation occur.<sup>195</sup> There is considerable developmental variation among children, which is attributable in large part

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<sup>193</sup> See, e.g., *Stanley v. Illinois* 405 U.S. 645, 658 (1972) (holding that a parent was entitled to a hearing on his fitness before his children could be removed from his custody); see also *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982) (imposing a heightened standard of proof on state actions seeking to terminate fundamental parental rights).

<sup>194</sup> See, e.g., N.C. GEN. STAT. § 7B-601 (1999) (granting primary authority for the representation of children alleged to be abused and neglected to a guardian ad litem, and providing for the additional assistance of an attorney where the guardian ad litem is a nonattorney).

<sup>195</sup> See *supra* Part III.A.

to differences in life experience.<sup>196</sup> Because the pace and direction of development are subject to outside influences, lawyers should consider not only how children's development should affect the lawyers' role, but also how their role may affect children's development.

If lawyers approach their representation of child clients with the expectation that the children will be prepared to assume control of the representation as soon as that role is explained, lawyers likely will fail, and fail most abysmally with the children whose age or negative life experience makes them least prepared for the lawyer-client relationship. If, however, they approach their representation as a teaching opportunity—an opportunity to begin to expose a child to what it means to engage in the decision-making process and take some control—lawyers may achieve a certain modest success.<sup>197</sup> This teaching approach seems particularly appropriate in the context of abuse and neglect cases, in which representation can span the entire course of child development from infancy to adulthood.

The approach I propose can best be understood as a modification of the traditional attorney model. Consistent with that approach, the lawyer would only take a position in court when her client directs her to do so. But contrary to conventional practice, under this model the lawyer would not assume that the articulation of a viewpoint equates with the giving of direction, and therefore the lawyer would not press to elicit a viewpoint as the means of defining how to proceed. Instead, under this teaching approach, the lawyer would be attuned to signs of the child's cognitive resistance to assuming the decision-making role, and in the face of this resistance, she would be prepared not to take any position on behalf of her client in the litigation. The reduction in the lawyer's advocacy activity in court should not be equated with reduced ambitions for the role. The expectation would be that the lawyer would more than make up for her decreased influence over the court process, in the short run, with her increased influence over the child's capacity and appetite for participation, in the long run.

By calling mine a teaching approach, I do not mean to suggest that I expect lawyers to become expert educators. I want to be careful

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<sup>196</sup> See DAMON, *supra* note 91, at 6 (noting approvingly that "current theoretical models portray the child as actively constructing his social knowledge out of an interaction between his own unique experience in the world and his own conceptual abilities and limitations").

<sup>197</sup> This approach can be likened to the "semi-autonomy" approach to recognizing adolescent rights advocated by Frank Zimring. See FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 103-05 (1982). In Zimring's view, adolescents are ill-equipped to exercise full adult rights in large part because they have never had any experience with making decisions about serious matters. See *id.* at 103-15. Zimring therefore favors giving adolescents some opportunity to practice acting autonomously while withholding full autonomy rights until after this adolescent practice period. See *id.*

to avoid the folly of raising serious questions about lawyers' ability to empower, only to make unsupported and unrealistic assumptions about their ability to perform some other role. Although a lawyer's expertise is not in teaching but in lawyering, part of every lawyer's professional obligation is to educate her client about what to expect in the course of representation and to clear up any confusion that the lawyer detects.<sup>198</sup> The obligation is no different when the source of the confusion is the lawyer-client relationship itself, and in one sense, all I am suggesting is that lawyers need to work harder at fulfilling this uncontroversial professional obligation. What makes the proposal sound dramatic is not that the lawyer is called upon to educate the client about the lawyer-client relationship, but that when the clients are children, that process of education could take years. When confusion derives from developmentally imposed obstacles, the lawyer's attempt at clarification must engage that developmental process. Without becoming developmental or educational experts, lawyers can be expected to take account of basic developmental knowledge in fashioning a response.

The response, however, should be a lawyer's response. Much of what I would encourage lawyers to do under this approach mirrors what has been identified as good practice under both the traditional attorney and GAL models of representation. Lawyers should devote time and attention to the development of rapport with child clients, and they should discuss with these clients the nature and outcome of each court proceeding.<sup>199</sup> For the most part, this approach calls for a shift not in the particular acts of the lawyer, but in the lawyer's expectations in engaging in those acts. Lawyers should perceive rapport building as an ongoing project whose completion is tied to the client's gradual mastery of the relationship. Lawyers should not expect discussions about the litigation to ensure the client's understanding, but instead should aim to expose the client to issues, terms, and processes that gradually will become familiar. The lawyer's orientation should shift from achieving to cultivating in order to accommodate clients whose capacities are in flux and whose cognitive processes are focused on learning.

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<sup>198</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1998) ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.").

<sup>199</sup> See HARALAMBIE, *supra* note 12, at 66-78 (emphasizing the importance of the lawyer's frequent contact with a child client in a child-friendly setting to facilitate the development of a lawyer-client relationship and the child's better understanding of the proceedings); KOH PETERS, *supra* note 3, at 77-89 (describing a lawyer's obligation to educate the child client about the law and the lawyer's role and to establish good communication).



Although the shift I am proposing is more one of orientation and expectation than one of behavior, the specific choices that a lawyer makes about where, when, and how to engage a child client surely will influence how effective the lawyer will be in facilitating the client's familiarization with both the lawyer-client relationship and the role that the client is expected to play. Analyzing to what extent and how lawyers can facilitate socio-cognitive development of younger children so that these children might begin to learn what it means to participate effectively in a traditional lawyer-client relationship is an important question that exceeds the scope of this Article. For now, suffice it to say that an awareness of socio-cognitive development, particularly the barriers to understanding that children confront early in their development, should help lawyers who seek to use their representation as a teaching tool in two ways. First, it should help alert lawyers to children's potential confusion and the distortion in client direction that this confusion is likely to produce. Second, it should help lawyers to develop more effective responses when they detect this confusion.<sup>200</sup>

In addition to responses aimed at reducing the confusion, lawyers for children should be more prepared to decline representation (or, more accurately, to step back temporarily from representation that often spans many issues over many years) when all signs suggest that the "representation" would be in name only. It is this aspect of my proposal that most distinguishes it from both the traditional attorney and GAL approaches. If, in the course of the developing lawyer-client relationship, the child client signals that he has not yet mastered the taking of control in the chapter of the litigation in question, the lawyer should inform the court that her client has given her no clear direction and therefore she will take no position. The lawyer still would be obligated to attend all meetings and hearings and would be expected to gather information aggressively to share with the client in the ongoing process of developing their relationship. Lawyers taking

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<sup>200</sup> Lawyers interested in using the lawyer-client role as a teaching tool might anticipate or respond to this confusion in a number of ways. They might have to reduce their short-term litigation effectiveness by focusing more attention on the fact that they are pushing what the child wants *because* the child wants it rather than because the lawyer believes it is the objectively correct result. They also might involve the child more heavily in trial preparation and the formulation of trial strategy than they would if the end was simply to achieve a designated outcome in the litigation. Giving the child multiple opportunities to practice the exercise of control on a smaller, more concrete scale (and at a greater distance from the emotionally laden ultimate questions) would make it more likely that the child would be comfortable with and able to perceive his influence. For the child not yet prepared to engage in decision making in the actual litigation, lawyers could engage in role-playing activities that would help identify and, when the client is ready, work through the child's socio-cognitive confusion. Cf. Mary Marsh Zulack, *Rediscovering Client Decisionmaking: The Impact of Role-Playing*, 1 CLINICAL L. REV. 593 (1995) (discussing the benefits of role playing in helping adult clients make legal decisions).

this approach would see their advocacy more as an option they offer to children than as an obligation they always will fulfill regardless of how much developmental limitations might skew their efforts. Done properly, the very offering of the option might help screen for children developmentally prepared to take on the traditional client role. Done right, the lawyer's deference to the child's response may help the client to learn about his influence in the relationship.

Although refusing to take a position on behalf of a child is not insignificant, it should not be equated with the abandonment of the child's interests in the litigation. By being present at all relevant points in the litigation process and by asking questions about the factual and legal bases for the other parties' actions, the lawyer keeps attention on her client's case and forces a kind of accountability. Indeed, preventing the child client from disappearing into bureaucratic anonymity may be one of the more important functions that a lawyer for children in the protective services system can play, regardless of the role assumed.

A lawyer can bring a particularly valuable form of attention to a case by insisting upon statutory fidelity to the standards established through the democratic process to serve the needs of children and families. Without endorsing any particular outcome (something the lawyer cannot do without taking a position on her client's behalf), a lawyer can call on other parties—particularly the State—to square their proposals with the standards and considerations mandated by law.<sup>201</sup> When the child's lawyer concludes that the State's position complies with the requirements of the law, that lawyer can take no action, absent client direction, even if she disagrees with that position. If, on the other hand, the lawyer concludes that the State cannot justify its position under the law, the lawyer could call the apparent non-compliance to the court's attention, so long as she makes clear that she is limiting her advocacy to ensuring statutory fidelity.<sup>202</sup>

Although the lawyer would have a substantial watchdog role under this approach, the approach would not permit the directed, zealous promotion of a position that both the traditional attorney and guardian ad litem models contemplate unless the child has indicated his readiness to assume control of the representation. Can such an omission be justified? Will any children—let alone the youngest chil-

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<sup>201</sup> Cf. Guggenheim, *supra* note 22, at 150-51 (arguing that, where the law provides for judicial scrutiny of parental decision making, child's counsel should "develop fully all of the possible arguments against granting the relief the parents seek," so as to ensure that the "controversy [will] be sharpened to aid the court's decision.").

<sup>202</sup> The distinction between advocating statutory fidelity, on the one hand, and advocating the lawyer's own objectives, on the other, sometimes will prove elusive. Lawyers should make clear to the court when they are acting without the client's direction to minimize any blurring of interests, whether deliberate or inadvertent.

dren—be better served without such a champion, perhaps for many years? The answer depends on what we think of the child's available champions. I already have argued that the championship offered by a traditional attorney is problematic if the child is too socio-cognitively immature to understand that he is directing the representation. In the section that follows, I argue that the championship offered by the guardian ad litem is equally problematic.

## 2. *Why Not the Lawyer as Guardian Ad Litem?*

My pessimistic picture about children's ability to grasp the traditional attorney role does not lead me to embrace the guardian ad litem approach, even for young children. I continue to reject the GAL model for two reasons—one focused on outcome, and the other focused on child development. First, there are many reasons to lack confidence in the GAL's judgments about her clients' best interests. A GAL generally lacks expertise in assessing how to choose the best among generally unattractive options for children. The socio-economic gulf between lawyer and client further undermines the lawyer's ability to make good, generic judgments on her clients' behalf,<sup>203</sup> and the limited contact she has with any particular client prevents her from developing any child-specific insights into which plan will best serve her client's interests.<sup>204</sup>

Second, the GAL approach reinforces immature socio-cognitive perceptions of the child, particularly the lesson, learned most thoroughly by abused and neglected children, that he should not expect to have any control over his fate. Although many children are not prepared to pull together the entire complicated, socio-cognitive construct required to engage in a traditional lawyer-client relationship, they nevertheless are learning something from their experience in the litigation process every step of the way. If the GAL lawyer communicates to the child, "I am here to figure out what is the right result for you," she will reinforce the child's already well-learned lessons of passivity and obedience.<sup>205</sup> Indeed, many of the very barriers to successful empowerment through traditional attorney representation (barriers that are particularly high for abused and neglected children) may be increased by this additional experience of external control.

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<sup>203</sup> See *supra* note 97 and accompanying text.

<sup>204</sup> Absent any expertise about either what is best for children generally or what will best meet a particular child's idiosyncratic needs, it is my sense that lawyers making best interest judgments tend to focus disproportionate attention on avoiding the risk of physical harm and underestimate the importance of maintaining emotional attachments.

<sup>205</sup> See MARTIN E.P. SELIGMAN, HELPLESSNESS 21-40 (1975) (discussing the phenomenon of "learned helplessness," the inducement of passivity in individuals whose experience has taught them that they have no control over outcomes).

The effect of the GAL approach will be particularly destructive to the process of development if the same lawyer continues to represent the child as he grows up. Under this arrangement, the child will learn from the GAL not only the generic lesson of passivity, but also the specific lesson about his lack of control in the particular relationship. Theoretically, the GAL could begin to cede control to her client when she perceives that the child is developmentally prepared to take control, but this approach fails to take account of the fact that the child's previous experience with passivity in the lawyer-client relationship will have a profound effect on whether and when he ever makes the requisite changes.

In sum, there is no neutral position that a lawyer (indeed, anyone who engages in a relationship with a child) can take. Every approach will send some message, however subtle, to the child. The worry of the traditional attorney is that the complexity and foreignness of the message will make it hard to communicate to the child. The worry of the GAL should be that the message will be heard all too clearly by the child.

In the end, the role I advocate for the child's attorney still can be characterized as an empowering role. It calls on lawyers to facilitate children's understanding of, and ability to exercise, their influence over their lawyers and the judicial process. But it is a far more modest version of the empowerment aim, which builds upon the very developmental barriers standing in the way of the more ambitious aims of the empowerment advocates. Rather than premising the lawyer-client relationship on the immediate shift of control to the child client and expecting empowerment to flow from that shift, the lawyer would offer control to the child, anticipate discomfort with the offer, and focus the development of the lawyer-client relationship on working through this resistance. Empowerment would come slowly and uncertainly to the child, if at all, in response to the lawyer's process of teaching.

#### B. Implications for the Representation of Adults

In discussing the implications of my analysis to adults, my thoughts are necessarily more speculative because the developmental literature on which I have drawn does not speak directly to adults' experience. What we do know from the developmentalists is that there is nothing magic about the age of eighteen (or any other age),<sup>206</sup> that development continues through life, and that the capacities we manifest depend in large part on our life experiences, generally, and the context in which those capacities are tested, particularly.

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<sup>206</sup> See *supra* notes 80-83 and accompanying text.

All of this suggests that it is likely that some of the same sources of resistance to empowerment that we see in children also might impede lawyers' ability to empower adults. We can expect the resistance to be particularly great in stressful situations (including most litigation in which the client is the defendant), when performance, including socio-cognitive performance, is likely to be impaired. We also can expect to see greater resistance among adults whose own negative life experience, particularly negative experience in relationships (perhaps with parents or at school), has impaired the socio-cognitive developmental process. Finally, we can expect to see greater resistance to empowerment in its more abstract form—empowerment through control of self-presentation—because abstract thinking has been shown to continue to elude many of us, at least in some contexts, into adulthood.<sup>207</sup> All of these potential sources of resistance should give lawyers pause in assuming that the experience they offer their adult clients will be perceived as empowering.

In speaking about adults, I am loathe to ascribe the resistance to empowerment to a simple lack of capacity. Although explaining children's failure to perform in certain desirable ways in capacity terms ("he's not mature enough to do X") generally is not perceived as condescending or judgmental, the same cannot be said of such explanations of adult performance. A lack of capacity in childhood is accepted as a biologically rooted, developmentally appropriate, temporary deficiency. A lack of capacity in adulthood, in contrast, is thought to reflect a certain failure of development—a more intrinsic mental deficiency. In fact, however, the notion of absolute capacity—a ceiling established by the brain—oversimplifies the process of development for children and adults alike. As we have seen, life experience, as well as neurodevelopment, has a profound effect on the development of capacities and, more importantly, on the actual performance of children and adults.

In considering children's development, I also have engaged in another form of simplification, for the purpose of clarity, that should be unpacked for my consideration of adults. I have suggested (as legal scholars applying developmental concepts tend to do) that development moves in only one direction, and that if life circumstances or mental deficiencies get in the way, the individual simply will develop less. There is no reason to think, however, that development is always unidirectional. For example, a more internalized locus of control generally is considered preferable and more developmentally advanced.<sup>208</sup> Notwithstanding this generality, feeling personally responsible for important outcomes in one's life is not always healthy

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<sup>207</sup> See *supra* note 83.

<sup>208</sup> See *supra* notes 107-10 and accompanying text.

or adaptive. In some circumstances, learning to perceive one's *lack* of responsibility for outcomes may be a more developmentally sophisticated response to life experience.<sup>209</sup>

Although the influence of neurodevelopment may decrease and the influence of life experience may increase with age,<sup>210</sup> both forces exert considerable influence over socio-cognitive development. Together, they will affect how adults, as well as children, understand themselves and others and how they will relate to those others. We can expect adults who have had negative experiences with authority figures, generally, and who have had little opportunity to engage in relationships in which they exercise control over authoritative, professional adults, particularly, to demonstrate some of the same resistance as children to the understanding of and proper performance in the traditional lawyer-client relationship. We in turn can expect this resistance to stand in the way of the empowerment of adult clients through their legal representation.

This suggestion that socio-cognitive limitations may stand in the way of effective representation links in interesting ways to the concern of contemporary empowerment advocates that a lawyer's representation of a client may obstruct and distort the client's claim.<sup>211</sup> These advocates attribute this distortion in large part to the cultural divide between the lawyer and the court process on the one hand and the client on the other. Empowerment advocates focus on the voice of the client and the value of allowing the client to speak in his true voice, both for its effect on the litigation and on people's perception of the client. Although I share the view that the unnaturalness of the lawyer-client relationship and litigation context will undermine clients' ability to gain a sense of influence through the relationship, I have reservations about the solution that some propose. The best solution, in the eyes of many of these advocates, is for the lawyer to pull back as far as possible and to give the client an opportunity to speak for himself. In speaking for himself the client will be empowered, the argument goes, both by his sense of control over the litigation and by his sense of control over his listeners' perceptions of him.

The notion that lessening the lawyer's involvement in the litigation will facilitate "true speaking" on the part of the client, let alone empowerment, strikes me as implausible. First, as discussed above,

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<sup>209</sup> See, e.g., Hillman et al., *supra* note 110, at 641-42 (finding a greater externalization of locus of control among African Americans and suggesting that this externalization might reflect a healthy, self-protective strategy developed in response to the experience of being stigmatized).

<sup>210</sup> See Huston-Stein & Baltes, *supra* note 75 (discussing the conclusion of several developmentalists that ontogeny is the primary source of development in children, whereas experience is the primary source of development in adults).

<sup>211</sup> See *supra* text accompanying notes 54-56.

the concept of "true voice" is, in my view, a fiction. Like children, but with more sophistication, adults craft their "stories" to fit their conception of their audience. As with children, any confusion about the audience—how it perceives things, what its role is, and what it wants to hear—may produce a distorted message. This message could include falsehoods, or just as problematically, could capture the wrong mix of details, emphasis, and tone. Although eliminating the lawyer might reduce the distortion produced by confusion about the lawyer-client relationship, it would not eliminate the client's need to engage in complex and intimidating relationships. Without the intervention of his lawyer, the client would be forced to engage directly with the judge, the jury, and even other parties' lawyers. There is every reason to expect that confusion and discomfort about these relationships would induce equally troubling distortions of the client's views.

Second, even if the client succeeds in articulating a "truer" version of his claims, there is no reason to think that his expression will be effective.<sup>212</sup> If decreasing or eliminating the lawyer's filtering of client speech reduces the effectiveness of a client's participation, the client might come away from the experience without any sense of empowering influence over the litigation process.<sup>213</sup>

Nor will the client necessarily experience the simple voicing of his views as an empowering opportunity to influence perceptions of himself. As we have seen, this form of empowerment demands the ability to perform at a particularly high developmental level in a particularly stressful situation. Lucie White's account of Mrs. G.'s conduct in court suggests that Mrs. G. had a highly sophisticated, if intuitive, sense of self and how the self is conveyed, which surpasses the self-understanding of many adults.<sup>214</sup> Lawyers certainly cannot expect to induce Mrs. G.'s sort of behavior in other clients simply by instructing them to "tell the judge exactly how you feel, and don't worry about the law." In my experience, clients forced into that position often fail in a manner that hurts their cases and their pride.

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<sup>212</sup> See Tremblay, *Rebellious Lawyering*, *supra* note 60, at 959 ("[R]ebellious writers have overlooked the risk clients incur in rejecting technical lawyer expertise."); Tremblay, *Tragic View*, *supra* note 60, at 134-36 ("The Critical View literature implies that intrinsic [story telling] and extrinsic [legal outcomes] goals are not in conflict and may even dovetail. . . . It tends not to capture the choice at all, in that it sees client collaboration as instrumentally effective as well as intrinsically effective.")

<sup>213</sup> Lucie White suggests that the influence of these clients could be enhanced if lawyers and judges were "educated about the risk that race- and gender-linked speech habits will impact on credibility assessment." White, *supra* note 1, at 55. Of course, only part of the question is whether a client, speaking for himself, will be believed and taken seriously. Even the client given a respectful, credible hearing may not convince the judge that his tale entitles him to legal relief.

<sup>214</sup> See *id.*

Sometimes the only influence they perceive is discouragingly negative.<sup>215</sup>

It is my sense that even Mrs. G. would not have profited from a declaration of deference from her lawyer or from encouragement to choose her own approach. Such encouragement in all likelihood would not have increased the chance that she would make the choice she did. Indeed, it might have discouraged her. As discussed earlier, at least a part of what appears to have motivated Mrs. G. was her sense that she had something to defy.<sup>216</sup> In the end, the story of Mrs. G. is a tribute to an empowered client, not a prescription of how to bring power to clients who lack it.<sup>217</sup>

The client who is not fortunate enough to be Mrs. G. will have a better chance of experiencing some positive influence over the litigation with the active assistance of a lawyer. As with children, however, this experience requires the cultivation of a relationship that takes account of the client's socio-cognitive preparedness for the relationship. Indeed, I see no reason why the approach to representation that I propose for children should not apply to adults as well. While lawyers for adults surely would find many more of their clients prepared to assume control of decision making from the outset, they would be under the same obligation as children's lawyers to identify a new client's socio-cognitive resistance to the assumption of that role and to assist the client in overcoming that resistance. Similarly, lawyers for adults would be under the same obligation to avoid taking positions in the litigation absent a clear indication from the client that he was embracing the directing role.

As with children, the lawyer's failure to ensure the client's preparedness to engage in the lawyer-client relationship before taking positions on the client's behalf will seriously undermine the value of that relationship to the client and the overall value of clients' partici-

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<sup>215</sup> See Bezdek, *supra* note 53, at 596 (dividing the courtroom speech of unrepresented tenants into successful "empowered" speech, in which the client's voice aligns with the expectations of the court, and unsuccessful "powered" speech, in which the tenant speaks out in court in her own vernacular and is ignored or considered disruptive). In my experience, I have seen numerous parents called upon to speak without counsel present. On occasion, their statements to the court have been moving and persuasive. On at least as many occasions, however, their statements reflected their anger, despair, and confusion at being called upon to behave in a manner in which they felt unqualified to behave, particularly in a context in which the stakes were so high. These adults chose their own words, but those words conveyed nothing but desperation, humiliation, and indeed, powerlessness.

<sup>216</sup> See *supra* text accompanying notes 142-43, 155.

<sup>217</sup> This observation is consistent with White's reflections on the case, which represents, she concedes, "a fragile victory, more attributable to the mysteries of human character than to the rule of law." White, *supra* note 1, at 52. However, White does criticize herself for "exclud[ing] Mrs. G.'s voice" from her development of an advocacy plan, which suggests that she believes that had she taken a different approach, she could have induced Mrs. G. to share her strategic instincts in the planning process. See *id.* at 47.



pation to our system of justice.<sup>218</sup> While the legal literature is full of assertions about the value of this participation, that participation is ultimately only as valuable as the client experiences it to be.

#### CONCLUSION

Lawyers have a great deal of power, which they are expected to use to serve clients' ends. What better end than to shift the power itself to the clients and let them participate more directly in the decision making that affects their lives? And what group more deserving of a sense of power than children, who are generally at the mercy of powerful parents and the State? Although lawyers may be in a particularly good position to perceive the value of empowerment for children, they may be in a particularly bad position to facilitate its achievement.

My initial skepticism, grounded in experience, of lawyers' and legal scholars' claims that lawyers could and should empower even very young clients by ceding them control brought me to the developmental literature. This literature in turn suggests that empowerment through the highly unusual lawyer-client relationship requires an understanding of self and of one's relationships with others that many children will not acquire until late in their development. As I stated at the outset, however, my goal is not to provide definitive answers about whether, when, and under what circumstances lawyers can empower their child clients. If such definitive answers can be provided, they will require the expertise of developmentalists and the trustworthiness of empirics.<sup>219</sup> My goal is rather to press those who advocate empowerment to scrutinize their assumptions and to test them against what we know about how children's socio-cognition develops over time.

Careful consideration of socio-cognitive development should prompt lawyers to exercise a great deal of caution, both in the claims they make about the experiences they can induce in their clients and, far more importantly, about how they approach the lawyer-client relationship. Only the lawyer who is well prepared for her client's resistance to his assigned role stands a chance of moving that client, however modestly, in the direction of assuming control.

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<sup>218</sup> For a brief discussion of the systems values of individual participation in legal decision making, see *supra* note 59.

<sup>219</sup> In all likelihood, such an empirical inquiry would conclude that considerable individual variation prevented the drawing of any precise age-based lines.