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CONSTRUCTIONS OF CLIENT COMPETENCE AND THEORIES OF PRACTICE

Robert Rubinson*

I. INTRODUCTION

The prevailing model of how lawyers should interact with clients—usually called “client-centered lawyering”¹—holds that attorneys should submerge their own perspectives into those of their clients. Although conceptions of client-centered lawyering are far from monolithic, they do tend to assume an authentic client “text” or “voice” that a lawyer can, while remaining as neutral as possible, transform into legal discourse fit for judges and other actors in the legal process.² Thus, attorneys can and should avoid individual value judgments which influence—and thereby taint—their clients’ texts.

However, attorney/client interactions also reflect the tensions and complexities that arise in all social interactions.³ As social actors, both

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1. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). This book is a revision of David Binder and Susan C. Price’s influential text, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

2. See BINDER ET AL., *supra* note 1, at 19-21; Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299-1300 (1992); Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 708-710 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 945 (1992).

3. See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1103 (1994). For especially compelling demonstrations of the complexities and contingencies of legal representation, see William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO.

attorneys and clients internalize assumptions about themselves and each other which then, as negotiated through discourse, produce a fluid, dynamic set of meanings.⁴ This broader context reveals that operative concepts in practice theory—"client voice," "client autonomy," and "attorney neutrality"—tend to obscure important dimensions of experience.⁵

My general method in exploring these issues is to go from the specific to the general. I will examine in detail how one assumption about one class of clients—the assumption that the elderly inevitably experience a progressive decline in competence—influences how attorneys perceive elderly clients and how elderly clients perceive themselves. The elderly are a particularly compelling group of clients for such an investigation. Popular culture is rife with unexamined and legitimized stereotypes about aging and the elderly. The very pervasiveness of these stereotypes renders them largely invisible. Because this is a relatively neglected area in legal scholarship and in political discourse, the discovery that these stereotypes are not a "real" description of the world is shocking. Thus, an examination of elderly clients is a particularly rich vehicle for exploring the implications that these stereotypes have for representing elderly clients, and also for analyzing how well practice theory describes the complex operation of social constructions at play in all attorney/client interactions.

The first section of the article reviews the literature on counseling elderly clients, and the recent emergence of models invoking "context" as the touchstone for representing such clients. Although valuable in conceptualizing how attorneys should approach these clients, these models tend to neglect the profound impact of stereotypes about the elderly and assumptions about the relationship between aging and competence. The second section defines the "idea of decrement"—the assumption that aging inevitably entails a progressive decline in cognitive function. The third section explores how this assumption leads attorneys to interpret much of what elderly clients say and do as the product of cognitive impairment, and sometimes leads elderly clients themselves to construct stories about the world, themselves, and their circumstances in line with the idea of

L.J. 1603 (1989); Jane M. Spinak, *Reflections on a Case (Of Motherhood)*, 95 COLUM. L. REV. 1990 (1995).

4. See *infra* text accompanying notes 58-137.

5. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 221 (1980) ("any consistent set of metaphors will most likely hide indefinitely many aspects of reality—aspects that can be highlighted only by other metaphors that are inconsistent with it"); Lucie E. White, *Seeking " . . . The Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1509 (1992) (recognizing the need for "multiple theoretical lenses, lenses which focus on institutions, on moments of recognition, as well as on the ebbs and flows of interpersonal power").

decrement. The fourth section explores what happens when the two perspectives of attorney and client—informed by the idea of decrement yet drawn apart by it as well—interact in complex ways. Finally, the fifth section explores the consequences of this analysis for client-centered lawyering. While the critical message of client-centered lawyering—the centrality of client perspectives—remains valid and of extraordinary importance to teachers and practitioners, the analysis of how attorneys and elderly clients interact raises questions about the idea that attorneys should remain “neutral” as they seek to unveil an “authentic” client voice free of attorney influence. Rather, legal representation can be conceptualized as a dynamic attempt to construct meaning, and this conceptualization has important advantages for both attorneys and clients.

II. CONSTRUCTIONS OF COMPETENCE

A. “There” or “Not All There”

Prior to becoming a law school teacher, I was an attorney in a civil Legal Aid office that represented elderly people. My clients manifested a broad continuum of competence. Some were plainly “not all there” and appeared obviously incompetent. For example, one client would laugh uproariously at private jokes and fail to remember me even if I had visited him the previous day.⁶ His psychiatrist cited such “inappropriate jocularity” as a prime manifestation of his senile dementia. After meeting with this client many times, I concluded that he did indeed have some cognitive impairment. Nevertheless, to my surprise, he could also, after a great deal of effort on my part, engage in meaningful conversation. He was also a wonderfully exuberant character whom I grew to like.

Other clients appeared to present much closer questions. One ninety-plus client was nearly deaf. In order to be heard, I found myself raising my voice in the exaggerated simplicity and intonation that many adopt when speaking to children. He called me constantly, and his quivering voice was extraordinarily difficult to understand. What I was able to hear, however, *seemed* to make sense. Surprisingly so, I thought, for someone of such advanced years.

6. In this and in succeeding descriptions of clients, I have eliminated identifying factual details in order to preserve client confidentiality.

In another case, a client in her late eighties was embroiled in a long-standing dispute with her landlord. After trying for months to determine why she was not receiving a pension to which she was entitled, I began to suspect strongly that her son was taking the benefits for himself—an example of one particularly pervasive form of elder abuse.⁷ When I asked her about it, she seemed remarkably serene, and simply said I should speak to her son about it; her son, she told me, handled all her finances. My initial reaction was that she was old and could not assimilate the awful truth that her son was taking advantage of her. Although the case was taken over by a new attorney after I left Legal Aid, I have thought about the case for some time, and I have come to suspect—although I can never be sure—that she knew exactly what was going on, and was perfectly at ease with it.

Needless to say, I encountered many clients who were surprisingly “all there.” I would view such clients who were over eighty as especially remarkable for their age.⁸

In all of these cases, I would, of course, seek to understand my clients' circumstances and goals and try to implement them. For clients who appeared to be marginally competent, I would, to the extent possible, try not to impose my own ideas about what was best for the client. When a client whom I perceived to be obviously incompetent was involved in litigation, I would dutifully move for appointment of a guardian ad litem.⁹ Whatever the circumstances of a particular case, however, I found myself freely offering advice to elderly clients, and, on occasion, actively persuading them to follow it. In my mind, this advice-giving was motivated by compassion and a recognition of the extraordinary vulnerability of the elderly.

In fact, my reactions to these clients were suffused with assumptions about the elderly and the aging process. I drew inferences from the age and characteristics of these clients, and these inferences—described more fully below¹⁰—in turn influenced how I viewed the client and the client's problems and thus, ultimately, how I approached the representation.

7. See, e.g., Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 628 (1990).

8. Many studies of the elderly draw distinctions among the “young old” and the “old old.” For example, the World Health Organization describes those people ages 60-75 as “elderly,” those 76-90 as “old,” and those over 90 as “very old.” ALEXANDER P. SPENCE, *THE BIOLOGY OF HUMAN AGING* 7 (1995).

9. As a New York practitioner, I was governed by N.Y. C.P.L.R. 1202 (McKinney 1994).

10. See *infra* text accompanying notes 39-86.

B. Traditional Approaches to Competence

There is virtually no legal literature on how attorneys and the elderly construct their conceptions of competence and how these play out in attorney/client interactions.¹¹ There is, however, a considerable body of literature about the appropriate analysis attorneys should apply in determining how best to counsel clients assuming that they are of “questionable competence.” This literature sets the context for exploring from a different perspective the patterns that emerge when attorneys construe the competence of elderly clients.

Traditional approaches to competence assume that competence is determinate and discoverable. As such, “competence” forms an important link in the “agency” conception of legal representation.¹² Thus, if the client/principal lacks competence, the attorney/agent lacks authority to act on the client/principal’s behalf, thus nullifying an attorney’s authority to represent a client.¹³

However, this approach is fraught with difficulties. A primary problem is the lack of a meaningful definition of competence.¹⁴ The legal concept of “competence” is an either/or proposition: either you have it or you don’t. At first blush, this approach seems reasonable enough given that “competence” has an air of scientific precision. However, psychiatrists do not agree:

11. Although not focusing on attorney/client interactions, one recent article does examine how prejudice against the elderly plays out in courts and legislatures. See Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997).

12. See, e.g., Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What’s an Attorney To Do: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1133 (1994); see also *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 396 (1993) (describing attorney as acting as client’s agent).

13. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 404 (1996) (“principles of agency law might operate to suspend or terminate the lawyer’s authority to act when a client becomes incompetent”). For an elaboration of ethical issues in representing clients with diminished competence through traditional agency principles, see James R. Devine, *The Ethics of Representing The Disabled Client: Does Model Rule 1.14 Adequately Resolve The Best Interests/Advocacy Dilemma?*, 49 MO. L. REV. 493 (1984).

14. See William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and the Courtroom*, 2 ELDER L.J. 1, 17-22 (1994); Herr, *supra* note 7, at 617-18. Indeed, typical legal formulations tend toward the tautological, such as the widely used definition of “incapacitated person” from the Uniform Probate Code: “[A person] impaired by reason of mental illness, mental deficiency, physical illness or disability . . . or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.” UNIF. PROBATE CODE § 5-103(7), 8 U.L.A. 327 (1988). See also Bobbe Shapiro Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, in LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY 212, 217-21 (Marshall B. Kapp et al. eds. 1986) (classifying statutory definitions of incompetence and incapacity).

The law has tended to address competency as a fixed attribute of an individual, a characteristic in itself with an inherent stability. The clinician, on the other hand, knows that what the law calls competency is, in fact, a set of deductions from a variety of clinical data that can be as subject to influence and change as the more basic mental attributes on which it is based.¹⁵

The fluidity of competence is both a clinical and a philosophical conclusion. The commonplace conception of "competence" presupposes that "competence" has an essence and that this essence is static, definable, and discoverable. However, there are a vast array of diminished mental capacities which vary not only from person to person, but within individuals depending on, among other things, the subject matter at issue, the time of day, and/or the person or persons interacting with the purportedly incompetent person.¹⁶ In other words, inquiries concerning competence are intensely contextual and thus not susceptible to a "one size fits all" definition.¹⁷ Given such a conceptual morass, many commentators have given up. Indeed, one has despairingly noted that issues of competence are "the black hole of legal ethics."¹⁸

15. Paul S. Appelbaum & Loren H. Roth, *Clinical Issues in the Assessment of Competency*, 138 AM. J. PSYCHIATRY 1462, 1466 (1981); see also Rein, *supra* note 12, at 1120-25.

16. See Terrie Todd Wetle, *Ethical Aspects of Decision Making For and With the Elderly*, in LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY 258, 264 (Marshall B. Kapp et al. eds., 1986); Gerald K. Goodenough, *The Lack of Objectivity of Physician Evaluations in Geriatric Guardianship Cases*, 14 J. CONTEMP. L. 53, 55-56 (1988).

17. This issue implicates a broader philosophical debate about essentialism. For an interesting discussion of this issue, see DANIEL C. DENNETT, *DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANING OF LIFE* 201-202 (1995).

18. Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1082 (1994). The rules of ethics themselves offer little meaningful guidance on how attorneys should approach whether or not a client is competent. As has been addressed in depth elsewhere, the Model Rules, at bottom, merely highlight potential ethical pitfalls without offering a sense of what factors or facts are relevant in reaching appropriate decisions about whether a client is competent. See Herr, *supra* note 7, at 615-20. The Model Rules, however, unlike the older Model Code, at least do recognize "intermediate degrees of competence" and encourage lawyers "as far as reasonably possible, [to] maintain a normal client-lawyer relationship" with an impaired client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. (1996); see also David F. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, 4 CLINICAL L. REV. 163, 186 (1997).

It is interesting to note the distinction between the issue of capacity and other terms in the law—such as the "reasonable person" standard in tort law—which are classically difficult to define. Absent precise definition by courts or legislatures, any definition of "reasonable person" necessarily entails an exploration of what such a person would do "under the circumstances of the particular case"—in other words, in context. RESTATEMENT (SECOND) OF TORTS § 285 cmt. d (emphasis added). In contrast, the classic view holds that capacity operates independently of context.

There is yet another difficulty with the traditional agency approach to competence. If the principal/agency relationship breaks down, the law provides an alternative: guardianship. However, many observers take a dim view of guardianship for at least two reasons.¹⁹ First, there is no reason to believe that judges are in a better position than anyone else to reach principled decisions about a fluid legal fiction like "competence."²⁰ Second, given inadequate judicial oversight subsequent to the appointment of a guardian, the alleged incompetent person might be subject to the whims of unscrupulous guardians or conservators.²¹

In light of these conceptual and practical considerations, most practitioners and scholars now conclude that although it is not necessarily a good idea for attorneys to err on the side of representing clients of questionable competence—what the Model Rules call "de facto guardianship"²²—it is a worse idea to turn to guardianship.²³ A third alternative—declining or withdrawing from representation—might, of course, be available but unattractive; these clients are often in deep trouble with few or no allies, and declining or withdrawing from representation solves the lawyer's dilemma at the cost of leaving vulnerable individuals unrepresented.²⁴ Thus there is a general presumption in practice, and increasingly in theory, in favor of representing a questionably competent client without going through the elaborate procedures required for a formal appointment of a guardian or other substitute decision-maker.

19. See Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 *FORDHAM L. REV.* 1429, 1436 (1994); see also Herr, *supra* note 7, at 623 (noting that "guardianship has been criticized as outmoded, overused, and harmful").

20. See Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 *UTAH L. REV.* 515, 562-563. Indeed, even though there is a legal presumption in favor of a finding of competence, see STANLEY S. HERR ET AL., *LEGAL RIGHTS AND MENTAL HEALTH CARE* 23 (1983), judges tend to grant guardianship petitions in cases involving the elderly in overwhelming numbers. See Arnold J. Rosoff & Gary L. Gottlieb, *Preserving Personal Autonomy for the Elderly: Competency, Guardianship, and Alzheimer's Disease*, 8 *J. LEGAL MED.* 1, 16 (1986). Tremblay speculates that judges do so because the appointment of a guardian is safer; after all, denial of the appointment might risk "unpaid bills, lack of food and heat, and eviction or foreclosure." Tremblay, *supra* at 562-63.

21. See, e.g., Tremblay, *supra* note 20, at 565.

22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 2 (1996).

23. Indeed, a leading commentator on these issues, Paul R. Tremblay, has acknowledged that he no longer disapproves of the notion of attorneys acting as "de facto" guardians. See Tremblay, *supra* note 19, at 1436 n.25.

24. See Margulies, *supra* note 18, at 1076-77 (noting the "duty to maximize the availability of legal services" to "challenged seniors"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 404 (1996) (stating that while solving the "lawyer's dilemma," withdrawal "may leave the impaired client without help at a time when the client needs it most").

Given that attorneys frequently will represent a client of questionable competence without seeking a guardian, issues of how an attorney should counsel and interact with such clients become highly significant. These issues are characteristically framed in terms of a debate between those who hold that an attorney's role is to advocate on behalf of what a client wants (a view that values a client's "autonomy" above all else), and those who believe that an attorney has a role in actively determining what is in the "best interests" of the client.²⁵ This debate assumes that lawyers have two choices: 1) an attorney should at most facilitate the client in making an educated, "autonomous" choice; or 2) an attorney should reach decisions based upon what the attorney paternalistically believes to be in the "best interests" of the client even if inconsistent with the stated views of the client.²⁶

However, some have argued that autonomy and paternalism may reduce to the same thing: both valorize what is, in the attorney's view, best for the client.²⁷ Thus, attorneys who adopt the "autonomy" view inevitably shade the nature of their advice by choosing the content, style, and order of their presentation based upon their judgment as to what is important for the client to know.²⁸ Attorneys who adopt a paternalistic or "best interests" stance seek to determine what is in the client's "best interests" based upon their knowledge of the client and their own sense of what a client would ordinarily want under the circumstances.²⁹ Although this distinction may reflect important differences in emphasis, these "concepts are far more slippery and intertwined than the more categorical treatment has implied, and . . . relationships are far too complicated and contextual to allocate decision-making power easily in one camp or the other."³⁰

25. Practitioners and scholars who represent children wrestle with analogous questions. See, e.g., Martin Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996); Spinak, *supra* note 3, at 2005.

26. See PETER J. STRAUSS ET AL., AGING AND THE LAW 14-15 (1990). For a leading article on formulating a conception of paternalism, see David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

27. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 222-26 (1991); see also Tremblay, *supra* note 19, at 1442.

28. See Simon, *supra* note 27, at 217-18.

29. See *id.*

30. Tremblay, *supra* note 19, at 1442. See also Herr, *supra* note 7, at 618 ("there are tremendous obstacles to constructing coherent attorney roles in even narrow contexts" among "disabled" populations). But see Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 94 BYU L. REV. 307 (1997) (arguing that theoretical distinctions remain between paternalism and autonomy).

C. *The Contextual Turn*

The result of these debates has been a recent turn away from the dualities of “competence”/“incompetence” and “autonomy”/“best interests” towards “contextual” and “situational” analyses.³¹ For example, Jan Ellen Rein proposes to move “beyond the competency construct” by expanding the factors attorneys should consider when determining whether to make decisions on behalf of questionably competent clients.³² Rein argues that while attorneys should ordinarily and unequivocally take direction from their clients about the course of representation, there is an exception: “interference with individual decision-making is warranted . . . to protect third party or societal interests when, in the particular situation, they are of higher social importance than untrammelled decision-making itself.”³³ Peter Margulies offers an alternative conception of how attorneys should approach representing the elderly of questionable capacity.³⁴ Margulies argues that attorneys faced with such clients should consider how to maximize the “core values” of providing access to legal services, fostering connection among the elderly by representing groups comprised of the elderly, and letting “the client’s voice be heard.”³⁵

Both Rein and Margulies thus embrace a more “situational” and “contextual” approach. In so doing, they reject the over-simplified dichotomies of competence/incompetence and autonomy/best interests. In its place, they propose a series of factors that lawyers should consider when representing clients of questionable competence.

31. These movements toward context reflect broader trends. For example, some recent clinical literature has argued that attorneys need to examine the subtleties of a client’s context—both individual and social—while rejecting more universal, abstract conceptions of attorney/client interactions. See, e.g., Dinerstein, *supra* note 2, at 719; Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 909, 936 (1997); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1739-40 (1993) [hereinafter *Constructions of the Client*]; Ann Shalleck, *Theory and Experience in Constructing the Relationship Between the Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1039 n.97 (1997) [hereinafter *Theory and Experience*]. Such trends, in turn, echo the importance of “context” in other realms of legal scholarship and in philosophical currents such as pragmatism and postmodernism. See, e.g., Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 739-47 (1992); Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

32. See Rein, *supra* note 12, at 1162-75.

33. *Id.* at 1165. This perspective resonates with feminist critiques of the concept of “autonomy” when a client’s autonomy interferes with the autonomy of unrepresented individuals or groups. See Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 48-49 (1994).

34. See Margulies, *supra* note 18.

35. *Id.* at 1076-80.

Margulies' access, connection and voice, and Rein's autonomy and social interests furnish important categories for analysis. However, setting aside questions about the value of their particular analyses and those of others—questions that tend to dominate the academic discourse in this area—an important question remains regardless of which factors one chooses: how do people go about constructing the meaning that gets plugged into these factors? For example, how do we construe, under Rein's analysis, a client's "untrammelled decision making" or, under Margulies' analysis, what "the client's voice" is? After all, a central insight of clinical theory is that underlying facts and the ends and means of representation are not pieces of data prepackaged for examination, but are constructed by attorneys and clients.³⁶ Moreover, this construction inevitably involves building upon assumptions about how the world works. If it were otherwise, life would be, in William James' phrase, "a bloomin' buzzin' confusion."³⁷

A great deal of important work in a variety of disciplines has explored the critical issues surrounding such "construction of meaning."³⁸ Social psychologists, for example, have demonstrated that human beings are "cognitive conservatives," that is, our minds tend to interpret facts to be consistent with what we already believe, and these interpretations are often guided by assumptions and stereotypes.³⁹ Legal commentators have also

36. See, e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 614-15 (1984).

37. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 113 (1970) (quoting William James). Stanley Fish has articulated this idea in another way: "To imagine a world with no background in place, with no prearticulation of the directions one might take, is to imagine a world where there would be literally nowhere to go, where, since every path would be the same path, the notion of doing this rather than that—of acting freely—would be empty." STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES*, 459 (1989). The preeminent proponent of this view in the Western philosophical tradition is Ludwig Wittgenstein, who called such assumptions "forms of life." LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 85, 217 (1958).

38. JEROME BRUNER, *ACTS OF MEANING* 4 (1990) (emphasis omitted).

39. For example, through "confirmation bias," humans "manage knowledge in a variety of ways to promote the selective availability of information that confirms judgments already arrived at." Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOL. 603, 606 (1980). Through "biased hypothesis testing," we subject evidence supporting hypotheses with which we do not agree to greater scrutiny than evidence supporting hypotheses with which we do agree. See, e.g., Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1232 (1984). For a review of the different processes that social psychologists have identified as contributing to these tendencies, see Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 27-29 (1996). For influential inquiries that explore the construction of meaning in other disciplines, see generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (anthropology); MIKHAIL BAKHTIN, *THE DIALOGIC*

explored how stock stories and stereotypes often control the construction of and justification for ostensibly "neutral" legal principles.⁴⁰

The next three parts of this article investigate how a single, pervasive assumption about the elderly—the idea of decrement—exerts a profound influence on how attorneys and the elderly construe competence and communicate with each other.

III. THE IDEA OF DECREMENT

Assumptions abound about the elderly. Many are negative: for example, the elderly are grouchy, unsociable, and sexually inactive.⁴¹ Some are more "positive": for example, the elderly are more "experienced" and better storytellers.⁴² However, one assumption about the elderly is especially preminent: aging entails a "progressive decline in health or competence."⁴³ This view conceptualizes health and competence as an "inverted U" over time, with a steadily increasing level of competence from childhood until adulthood, with a steadily decreasing level thereafter until reaching, once again, a level comparable to that of a child.⁴⁴ This is "the idea of decrement."⁴⁵

IMAGINATION (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) (literary theory); WITTGENSTEIN, *supra* note 37 (philosophy).

40. See, e.g., Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y. 7 (1993); Martha Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688 (1998).

41. See NIKOLAS COUPLAND ET AL., LANGUAGE, SOCIETY AND THE ELDERLY 133 (1991).

42. See MICHAEL W. PRATT & JOAN E. NORRIS, THE SOCIAL PSYCHOLOGY OF AGING 87 (1994).

43. COUPLAND ET AL., *supra* note 41, at 3. This focus also tends to dominate empirical research about the elderly. See *id.* at 7-8.

44. *Id.* at 12.

45. I have chosen to use the terminology adopted by COUPLAND ET AL., *supra* note 41. Although not always called "decrement," this stereotype is often described in the literature on aging and gerontology. See, e.g., Carroll L. Estes, *The Aging Enterprise Revisited*, 33 GERONTOLOGIST 292, 292 (1993) (a social "construction of reality is that the aging process is one of biological, physiological, and cognitive decline"); H.B. GIBSON, THE EMOTIONAL AND SEXUAL LIVES OF OLDER PEOPLE 55 (1992) ("The stereotype that younger people, both professional and lay, have of aging includes a false model of deterioration over time."); George Banziger & Jean Drevenstedt, *Achievement Attributions by Young and Old Judges as a Function of Perceived Age of Stimulus Person*, 37 J. GERONTOLOGY 468, 468 (1982) ("stereotypically . . . old age [is] associated with a perceived diminution of competency"); Marie R. Haug & Marcia G. Ory, *Issues in Elderly Patient-Provider Interactions*, 9 RES. ON AGING 3, 6 (1987) (noting social stereotype which "lump[s] all those 65 and over into one category and characteriz[es] all older people as in declining or ill health . . . and doomed to senility"). Even Shakespeare's Dogberry notes in MUCH ADO ABOUT NOTHING, act 3, sc. 5, that "[w]hen the age is in, the wit is out."

The pervasiveness of the idea of decrement is extraordinary. It surfaces in popular culture, such as jokes and birthday cards which invoke the decremental effects of aging.⁴⁶ It arises in categories that link age with physical or cognitive challenges: Medicare, for example, is called "Health Insurance for Aged and Disabled,"⁴⁷ and Social Security is called "Income for Aged, Blind, and Disabled."⁴⁸ Binder, Bergman and Price construct a similar category by devoting a portion of a chapter on "atypical and difficult clients" to "communicating with aged and infirm clients."⁴⁹

This idea of decrement also controls discourse with and about the elderly. For example, a statement such as "my grandmother is eighty-six, but she's still sharp as a tack" embodies a norm of decrement: the relationship between the two variables underlying the statement—age and mental competence—would not be significant unless most eighty-six-year-olds were *not* believed to be "sharp as a tack."⁵⁰ Such statements that confirm how "with it" an elderly person is reaffirm the norm.

Moreover, as elaborated in more detail below,⁵¹ the idea of decrement operates with particular force when an elderly person does not exhibit specific behavior that undermines age-related stereotypes. For example, the "sharp as a tack" eighty-six year old will likely be judged favorably as "remarkable for her age," but a "normal" eighty-six year old will likely be judged to be consistent with the full range of assumptions underlying the idea of decrement.⁵²

46. See GIBSON, *supra* note 45, at 73; Judith Rodin & Ellen Langer, *Aging Labels: The Decline of Control and the Fall of Self-Esteem*, J. SOC. ISSUES, Spring 1980, at 12, 13.

47. 42 U.S.C. § 1395 (1991).

48. *Id.* § 1381. Linking together these three groups reveals other stereotypes, such as the blind not being "fully able." Surveys have also found that many state statutes link age with incompetence or infirmity. See Whitton, *supra* note 11, at 477-78. It has been argued that the very existence of such "age-segregated categorical services" fosters the perception that aging is a uniform "problem" that requires governmental intervention. See Estes, *supra* note 45, at 292.

49. BINDER ET AL., *supra* note 1, at 245. Although including the caveat that "not every older person will have difficulty recalling and conveying information," the thrust of the section is that "[c]ommon barriers to satisfactory communication include advanced age and medical infirmity." *Id.*

50. The impact of the norm of decrement on discourse will be addressed in more detail in Part V. See *infra* text accompanying notes 117-146.

51. See *infra* text accompanying notes 95-96.

52. See Ellen Bouchard Ryan & Rochelle L. Cole, *Evaluative Perceptions of Interpersonal Communication with Elders*, in COMMUNICATION, HEALTH AND THE ELDERLY 172, 177 (Howard Giles et al. eds., 1990). For a theoretical discussion of the possible operation of this process, see V. A. Braithwaite, *Old Age Stereotypes: Reconciling Contradictions*, 41 J. GERONTOLOGY 353, 358 (1986). Braithwaite speculates that when an elderly person does not exhibit the stereotyped characteristics of decrement, the person "exceeds expectations" and thus is judged more favorably. See *id.*

It is undeniable that aging sometimes undermines aspects of physical and mental health. However, even apart from mounting evidence that these effects are reversible far more often than generally recognized,⁵³ the idea of decrement vastly simplifies the complex processes affecting an extraordinarily large and diverse group of individuals.⁵⁴ In fact, wholesale mental and physical decrement is *not* an inevitable part of the aging process. Instead of progressive decline, the vast majority of “older people function[] at much the same level over quite a long period of time, suffering the usual ups and downs of health that are experienced at all ages, but not deteriorating as is popularly supposed.”⁵⁵ Put simply, the vast majority of the aged *are* sharp as a tack and do not suffer from a progressive decline in competence.⁵⁶

The ultimate point is a simple one: the category “elderly” is a social construction.⁵⁷ The notion that the “elderly” embody an inevitable decremental process is “inevitable” only insofar as members of society— young and old and in-between—take it as the “truth” and define themselves and their relations with others in terms of it.⁵⁸

Needless to say, the idea of decrement affects the attorney/elderly client relationship. At the broadest level, the idea of decrement—like all stereotypes—promotes a homogenized discourse about, with, and by the

53. See *infra* text accompanying notes 73-77.

54. See, e.g., Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 690 (1991).

55. GIBSON, *supra* note 45, at 56. This is also true of physical functions even after a disabling episode like a stroke. See Thomas M. Gill et al., *Predictors of Recovery in Activities of Daily Living Among Disabled Older Persons Living in the Community*, 12 J. GEN. INTERNAL MED. 757 (1997).

56. A range of statistics support this point. To take just a few: 1) only two to four percent of the population over sixty-five have Alzheimer's Disease, see AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 137 (4th ed. 1994); 2) severe psychotic disorders are *less* prevalent among the elderly than among the non-elderly, see Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61, 68 (1988); 3) Ninety-five percent of persons over sixty-five and eighty percent of persons over eighty are not affected by significant cognitive impairment, see Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177, 1181 (1994).

57. See Estes, *supra* note 45, at 292; Whitton, *supra* note 11, at 456 n.4. The influential idea of “social construction” is usually associated with the intellectual movement called “post-structuralism.” For a famous example of post-structuralist analysis, see MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME 1: AN INTRODUCTION* (Robert Hurley trans., 1990).

58. The idea of decrement reverberates in social policy as well. There is, for example, the usually implicit notion that the old have lived their lives, and thus their increasing medical and emotional needs are less legitimate than the needs of other segments of society. See, e.g., GIBSON, *supra* note 45, at 60.

elderly which screens out “dissonant and nonconforming concepts.”⁵⁹ There is a pervasive social presumption in favor of declining competence among the elderly and, as a result, attorneys and the population at large—including the elderly themselves—construct meaning in line with this assumption.⁶⁰

IV. THE INTERNALIZATION OF THE IDEA OF DECREMENT

A. Attorneys

Legal scholars have observed how attorney perceptions of clients are influenced by stereotypes.⁶¹ It should come as no surprise, given the centrality of the idea of decrement, that attorneys who interact with elderly clients risk interpreting their clients’ behavior as demonstrating cognitive decline.⁶²

1. Interpreting Behavior as Demonstrating Declining Competence

The influence of the idea of decrement highlights mental decline as the “obvious” explanation for the behavior of an elderly client.⁶³ Thus, lawyers

59. Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and ‘Feminine’ Style*, 66 N.Y.U. L. REV. 1635, 1643 (1991). For some of the processes identified by social psychologists that contribute to this process, see *supra* text accompanying notes 38-40.

60. For a historical overview of this and other assumptions about aging and how they have changed over time, see W. Andrew Achenbaum, *Societal Perceptions of Aging and the Aged*, in HANDBOOK OF AGING & THE SOCIAL SCIENCES 129 (Robert H. Binstock & Ethel Shanas eds., 2d ed. 1985); Whitton, *supra* note 11, at 458-63.

61. See, e.g., Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 377-91 (1997) (describing the influence of race on an attorney’s perceptions of African-American clients); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 45-48 (1990) (describing the influence of socioeconomic status on attorney’s view of client); see also Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1809-11 (1993) (noting the impact of class, race, ethnicity, age, and other “personal identification issues” in attorney/client interactions).

62. In this and in succeeding discussions, I focus on “intergroup discourse” between elderly clients and younger attorneys because such discourse illustrates in an especially stark way the influence of stereotypes about the elderly. I do not mean to suggest, however, that the elderly do not or should not practice law.

63. There have been empirical demonstrations of this effect. See, e.g., Rodin & Langer, *supra* note 46, at 17-18 (reporting that subjects viewed forgetful behavior by an older person more negatively than comparable forgetful behavior by a younger person). These effects are a consequence of the human tendency towards “confirmation bias” and “biased fact assimilation.”

often will assume that elderly clients have experienced declining competence, and attorneys often will seemingly—but mistakenly—find what they are looking for.⁶⁴

A well-documented example of this phenomenon is the interpretation of forgetfulness among the elderly. Even though it is hardly unusual for people of any age to be forgetful about minutiae such as names, places, and telephone numbers, forgetfulness among the elderly may take on the more sinister cast of creeping senility.⁶⁵ Given the strong link between memory and prevailing social conceptions of competence, forgetfulness—unremarkable in and of itself—may suddenly be transformed into the assumption that an elderly person is “losing it.”⁶⁶

In addition, when counseling an elderly client, lawyers often assume that idiosyncratic decisions are the result of incompetence.⁶⁷ Another interpretation might seem less obvious when interacting with the elderly: idiosyncrasy might be idiosyncrasy. After all, many non-elderly lead lives in ways that stray from the norm, and these non-elderly might well be seen not as incompetent, but as original or bold.⁶⁸

Moreover, an inevitable byproduct of this phenomenon is that, like Sherlock Holmes once observed, “we do not consider especially informative

See supra text accompanying notes 38-40; *see also* Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 338-39 (1987) (“In ambiguous social situations, it will always be easier to find evidence supporting an individual’s assumed group characteristics than to find contradictory evidence.”).

64. This kind of behavior was found in an experiment in which psychotherapists were presented with two case studies describing pathological behavior. *See* Rodin & Langer, *supra* note 46, at 19. The only significant difference between the two descriptions were the ages of the subjects: one was described as young, the other in his or her sixties and seventies. The psychotherapists “showed a greater propensity to diagnose the same psychotic behavior as organically based when the individual was old rather than young.” *Id.* A similar study involving less serious pathology found that psychotherapists far more frequently recommended treatment involving drugs and institutionalization for older subjects. *See id.*

65. *See* PRATT & NORRIS, *supra* note 42, at 87-88.

66. *See id.* at 87-88. This is not a new observation. Dr. Samuel Johnson noted that “[i]f a young man or a middle-aged man, when leaving a company, does not recollect where he laid his hat, it is nothing. But if the same inattention is discovered in an old man, people shrug their shoulders and say his memory is going.” SIEGFRIED KRA, *AGING MYTHS: REVERSIBLE CAUSES OF MIND AND MEMORY LOSS* 4 (1986).

67. *See* Rein, *supra* note 12, at 1126; Rosoff & Gottlieb, *supra* note 20, at 29-30.

68. A useful thought experiment might be to ask whether an elderly person’s action would appear to be irrational if performed by a non-elderly person. *See* Whitton, *supra* note 11, at 455. This strategy recalls Charles Lawrence’s suggestion about how changing “I don’t think of you as a Negro” into “I don’t think of you as white” demonstrates the racism of the first statement. Lawrence, *supra* note 63, at 341-42; *see also* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civil Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 727 (1994) (suggesting that a teacher “[a]sk students if they would have a different view of [a poor client’s] decision if she were a network anchorperson or a lawyer”).

the fact that the dog did *not* bark during the night.”⁶⁹ Thus, elderly clients might engage in a range of perfectly ordinary behavior. Nevertheless, this “normal” behavior may remain invisible while the occasional memory lapse or distracted speech stands out as confirming declining competence.⁷⁰

There is a final manifestation of this phenomenon that deserves mention. A range of common problems among the elderly might hamper their ability to communicate. Decreased tongue maneuverability, dry mouth, and hearing loss all may impede communication.⁷¹ Given the homogenizing influence of the idea of decrement, it is likely that such symptoms—entirely unrelated to mental competence—might lead to an utterly unfounded conclusion of mental impairment.⁷²

2. Actualism

An “actualist” stance holds that only the actual is possible.⁷³ What this means is that certain admittedly “actual” impairments—such as memory loss—are viewed as fixed and irreversible, and thus only subject to further deterioration. The *possibility* that this “actual” state is temporary or reversible disappears from consideration.⁷⁴

In fact, as documented by an enormous body of medical and social science literature, there are numerous causes of symptoms like memory loss unrelated to irreversible, organic cognitive decline.⁷⁵ For example, malnutrition, depression, high or low blood pressure, slow pulse rate, chemical and blood deficiencies, and, most importantly, medications all can cause memory loss.⁷⁶ Similarly, “social isolation, transportation problems, [and] financial insecurity . . . all worsen the functional capacity of older

69. Sir Arthur Conan Doyle, *The Adventures of Silver Blaze* (1892), cited in Lord, *supra* note 39, at 1239.

70. See, e.g., Ryan & Cole, *supra* note 52, at 178 (“there is considerable likelihood that competent behaviours of older adults will be under-utilised in forming the first impressions so critical to initial and subsequent encounters”).

71. See Goodenough, *supra* note 16, at 56. See also Haug & Ory, *supra* note 45, at 26. These conditions afflicted the ninety-year-old client I described above. See *supra* text accompanying notes 6-8.

72. See, e.g., Ryan & Cole, *supra* note 52, at 179.

73. I have borrowed this term from Daniel C. Dennett. See DENNETT, *supra* note 17, at 260.

74. Such a stance reflects the emphasis among gerontologists on accommodative as opposed to restorative approaches in analyzing the needs of the elderly. See Estes, *supra* note 45, at 294.

75. See generally KRA, *supra* note 66; Ellen Bouchard Ryan, *Beliefs About Memory Changes Across the Adult Life Span*, 47 J. GERONTOLOGY: PSYCHOL. SCI. P41 (1992).

76. See generally KRA, *supra* note 66.

people.”⁷⁷ Obviously, attorneys are not qualified to medically examine clients to determine possible causes of mental impairment or memory loss, but the *possibility* of reversible causes might have an enormous impact on how attorneys construct their interpretation of the mental states of the elderly.

3. The Complexity of Competence

The idea of decrement not only homogenizes a diverse population, but also an extraordinarily complex idea: cognitive functioning.⁷⁸ In addition to contributing to the continuing misconception that competence is a definable, either/or proposition,⁷⁹ the idea of decrement also presumes that cognitive impairment in one area signifies cognitive impairment in all areas. This is especially true of memory loss,⁸⁰ which (assuming it is permanent) does not necessarily mean that the client cannot function in other domains or is incapable of carrying on meaningful conversation.⁸¹

Moreover, an elderly patient who suffers an organic loss of short-term memory because of a stroke or other illness may deny that such a loss has occurred.⁸² The client may thus construct a fantasy that fills in blanks left by an impaired memory. For example, if a client does not recognize or has forgotten that she is hospitalized, she may say, “this is a jail—I have to break out.” However, even though she misidentifies her location, her *attitude* towards her location—her plainly stated desire to leave it—is unequivocal.⁸³ In other words, the client *does* view the hospital as the equivalent of jail, and her notion that it *is* a jail literalizes a metaphor that a non-impaired person might employ. This attitude is real, and, at a minimum, should not be summarily discounted as the mere product of an impaired mental state.

77. Howard Waitzkin et al., *Narratives of Aging and Social Problems in Medical Encounters with Older Persons*, 35 J. HEALTH & SOC. BEHAV. 322, 342 (1994). One researcher concluded that 75% of the disabilities of the elderly are “sociogenic,” that is, the result of social attitudes and stigmatization. ALEX COMFORT, *A GOOD AGE* 140 (1976).

78. See *supra* text accompanying notes 14-18.

79. See *supra* text accompanying notes 15-17.

80. As previously noted, conventional wisdom considers memory to be a foundation of competence. See *supra* text accompanying notes 66-67. See also PRATT & NORRIS, *supra* note 42, at 87-88.

81. See Wetle, *supra* note 16, at 264. For example, even the 2-4% of the population over 65 who suffer from Alzheimer’s Disease first experience impairment only of “short-term memory and concentration, while sparing long-term memory, values, convictions, and personality.” Rosoff & Gottlieb, *supra* note 20, at 7.

82. See Smith, *supra* note 56, at 71.

83. See *id.*

4. "I'm Not Impaired, So The Client Must Be"

The idea of decrement implies a gulf between the elderly client and the younger, presumably more "with it" attorney. This leads to a process best described by a cartoon in which one figure says to the other: "Senile dementia? Isn't that when elderly clients disagree with you about what's best for them?"⁸⁴

This cartoon captures a classic error on the part of those who work with the elderly, including attorneys: any disagreements about what is best for a client are not "real" disagreements because the client's position must be distorted by mental impairment.⁸⁵ Thus, the idea of decrement furnishes a particularly "logical" interpretation of client intransigence.⁸⁶

This line of reasoning plays out in many contexts. For example, some elderly clients relish the safety of *not* making decisions.⁸⁷ Such a client might willingly cede decision-making responsibility to an attorney, family member, friend, or member of the clergy.⁸⁸ This is not to say, of course, that an attorney should accept such a delegation at face value, particularly when the possibility of physical, mental or financial abuse exists. However,

84. Reproduced in BERNARD INEICHEN, *SENILE DEMENTIA: POLICY AND SERVICES* (1989).

85. For a discussion of "paternalism" under such circumstances, see Luban, *supra* note 26, at 466-82.

86. Anthony Alfieri alludes to a related phenomenon when he describes how "[p]overty lawyers fail to apprehend the meaning of their clients' struggles, preferring to search client character for evidence of pathology." Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2134 n.96 (1991).

87. This tendency might be related to the importance that dependency has on the elderly. See *infra* text accompanying notes 115-16.

88. William H. Simon describes a case which illustrates this point. See Simon, *supra* note 27, at 214-16. Simon represented a sixty-five-year-old woman in a criminal case involving a traffic accident. Despite Simon's best efforts, the client and her minister insisted that Simon was "the expert," and thus should tell her what to do. See *id.* at 215.

One study found that at least in doctor-patient interactions, older people are significantly more likely to defer to authority than younger people. See Marie Haug, *Doctor Patient Relationships and the Older Patient*, 34 J. GERONTOLOGY 852, 854-57 (1979) (elderly found to have "greater adherence to traditional authority relationships"). One explanation for such deference is that the elderly are from a "societal milieu" which fostered "an unquestioning belief in physician altruistic expertise" and "respect for authority." Marie R. Haug, *Elderly Patients, Caregivers, and Physicians: Theory and Research on Health Care Triads*, 35 J. HEALTH & SOC. BEHAV. 1, 2-4 (1994). It is thus possible that some clients—especially elderly clients—are particularly comfortable with the "professional in charge" paradigm that is anathema to the conception of lawyering as "client-centered." See Haug & Ory, *supra* note 45, at 29-30 (some elderly patients "could conceivably be more comfortable with the 'old-fashioned' familiar style of 'doctor in charge'"). However, there are obvious dangers in ascribing a unitary "social milieu" to a large group of people of strikingly different backgrounds. See Howard Giles et al., *Communication, Health and the Elderly: Frameworks, Agenda and a Model*, in COMMUNICATION, HEALTH AND THE ELDERLY 1, 10 (Howard Giles et al. eds., 1990) ("the elderly emanate from different historical periods with their own cohorts, values and predispositions").

at the same time, an attorney should not assume that “impairment” is the only, or even primary, explanation for this behavior.

Along the same lines, it seems inconceivable that a client might wish to stay in a filthy apartment, cohabit with an exploitive relative, or otherwise prefer the status quo when potentially available alternatives seem economically and qualitatively superior. However, some elderly individuals are acutely vulnerable to environmental instability.⁸⁹ Given the accumulating losses of income, friends, relatives, and occupation, these clients may relish stability—however seemingly ill-advised or trivial—wherever and however they find it.⁹⁰ In this light, it is possible that such behavior might be perfectly “rational” and “competent” under the client’s circumstances.

B. The Elderly Client

The elderly are an extraordinarily diverse population. Each elderly person, like everyone else, has a unique set of life experiences and a unique personality. This is always critical to keep in mind: when describing groups, such as the elderly, that are the subject of stereotyping, there is always the risk of replacing one stereotype—here the idea of decrement—with another equally misleading and simplified stereotype, such as the idea that all elderly are fully competent and healthy.⁹¹ This raises the inevitable difficulty of, as Deborah Rhode has put it, “theorizing from experience without homogenizing it.”⁹² Even with this caveat, it is nevertheless critical to study patterns that emerge across categories of individuals, such as the elderly, as a means to examine social domination and stereotyping.⁹³

In fact, the idea of decrement influences many elderly clients as well as attorneys, even to the extent of sometimes creating “real” behavior that, in the end, generates mental impairment.⁹⁴ While not all elderly clients will uniformly internalize the idea of decrement and some react against “elderly

89. See Howard B. Gelt, *Psychological Considerations in Representing the Aged Client*, 17 ARIZ. L. REV. 293, 300 (1975). See also Haug & Ory, *supra* note 45, at 14 (noting “the salience of person-environment fit in the elderly’s sense of well-being”).

90. See Gelt, *supra* note 89, at 300-01.

91. See, e.g., *Theory and Experience*, *supra* note 31, at 1023 (arguing that the construct “battered woman” submerges the complex and fluid circumstances of victims of domestic abuse into “a single, uniform experience”); Alfieri, *supra* note 86, at 2122 (arguing against “an essentialist vision of the voices and narratives of impoverished clients” even when inconsistent with prevailing narratives).

92. Rhode, *supra* note 33, at 42.

93. See White, *supra* note 5, at 1504, 1506 (arguing for inquiry into “recurring patterns of domination” as well as a more Foucaultian focus on the “microdynamics of everyday life”).

94. See *infra* text accompanying notes 98-116.

identity roles and styles and deny stereotypic attributions in their own and in others' talk,"⁹⁵ some elderly clients will internalize the idea of decrement and thus "sound, look, feel, think, and act older."⁹⁶ It is these clients who are especially at risk of appearing incompetent.⁹⁷

1. The Elderly Client's Internalization of the Idea of Decrement

Stereotypes influence the thoughts and self-image of the targets of stereotypes. Recent studies have detailed how insidious and pervasive these effects can be. For example, Claude Steele's work on a process he calls "stereotype vulnerability" demonstrates that victims of stereotypes have a tendency to perform in accordance with the expectations generated by the stereotypes.⁹⁸ Legal scholars also have explored similar ideas, especially in the areas of race and gender.⁹⁹

It is extraordinarily difficult for the elderly to avoid internalizing ideas about cognitive decline. The elderly often navigate through a world consisting of the "aging enterprise"—the "programs, organizations, bureaucracies, interest groups, trade associations, providers, industries, and professionals that serve the aged in one capacity or another."¹⁰⁰ This "enterprise" has a profound impact on how the elderly view themselves and the world. Although it is unfair to indict the whole enterprise as ageist, much of this enterprise seeks to *accommodate* the purported progressive decline of aging as opposed to *restoring* the quality of life of the elderly.¹⁰¹ In this, the "aging enterprise" embodies the idea of decrement.

95. Giles et al., *supra* note 88, at 11.

96. *Id.* at 10. See also Elias S. Cohen, *The Elderly Mystique: Constraints on the Autonomy of the Elderly with Disabilities*, GERONTOLOGIST, Supp. June, 1988, at 24 (in some settings, "the elderly themselves have bought into an elderly mystique which holds that the potentials for growth, development, and continuing engagement virtually disappear"); Ryan, *supra* note 75, at P41 (stating the cognitive function of some elderly diminish because of low social expectations).

97. See *supra* text accompanying note 52.

98. See, e.g., Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 808 (1995).

99. See Jacobs, *supra* note 61, at 378-79 (describing research exploring how expectations induce the objects of those expectations to act in accordance with them); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1189 (1988) (stating "[a]s both experimental and longitudinal studies have repeatedly demonstrated, low expectations of achievement frequently become self-fulfilling prophecies."); *Theory and Experience*, *supra* note 31, at 1056 (noting that a victim of domestic violence "herself may be affected by the understandings of domestic violence that she finds in the legal system and the rest of her world"). For a probing examination of the internalization of oppression, see Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

100. CARROLL L. ESTES, *THE AGING ENTERPRISE* 2 (1979).

101. See Estes, *supra* note 45, at 294.

Moreover, the home life of some elderly persons fosters a sense of dependency and helplessness:

In some families, all responsibilities and chores are taken away from the elderly patient. He or she no longer has to make decisions or be concerned about planning a meal. This can happen in a home environment and to a greater extent in a nursing home. When one is shut into a silent world surrounded by people of the same generation and having no outside stimuli, there is no necessity to use one's memory or the imaginative or constructive instinct of earlier years.¹⁰²

The elderly may thus view themselves in line with prevailing stereotypes, especially the idea of decrement.¹⁰³ A simple manifestation of this will likely be familiar: although it is rare for adults to mention their age in ordinary conversation, the elderly do so regularly.¹⁰⁴ One study found many examples, such as "well I'm almost eighty and I can't expect much."¹⁰⁵ This recalls the "my grandmother is eighty-six, but she's still sharp as a tack" example discussed earlier.¹⁰⁶ As with that earlier statement, age disclosure among the elderly reflects an assumed link between advanced chronological age and physical and emotional decline. The prevalence of such age disclosure demonstrates that many elderly construe their own well-being in terms of the idea that aging is a decremental process.¹⁰⁷

2. Consequences

While, at a minimum, the idea of decrement is a significant challenge to older people's morale and confidence,¹⁰⁸ its potential consequences are pervasive.

Memory Loss—The non-elderly are not alone in interpreting forgetfulness among the elderly client as manifesting cognitive decline; the elderly may do the same thing.¹⁰⁹ As one researcher has put it, "[a]ge-based memory beliefs may sensitize older persons to be more aware of the same everyday memory failures that they have experienced all their lives."¹¹⁰ Especially when

102. KRA, *supra* note 66, at 4.

103. See Rodin & Langer, *supra* note 46, at 15; Cohen, *supra* note 96, at 24.

104. See COUPLAND ET AL. *supra* note 41, at 59.

105. *Id.* at 138.

106. See *supra* text accompanying note 50.

107. See COUPLAND ET AL., *supra* note 41, at 150.

108. See *id.* at 24; Estes, *supra* note 45, at 293; Ryan, *supra* note 75, at P41.

109. See *supra* text accompanying notes 65-66.

110. Ryan, *supra* note 75, at P41.

coupled with the lack of stimulation that afflicts the day to day lives of some elderly people, this "reality" becomes reality, and there really can be memory loss.¹¹¹ Such memory loss, however, is not organic, and may be remedied by correcting situational factors contributing to these problems.¹¹²

Helplessness—A primary component of the idea of decrement is its purported inevitability. In the face of this, some elderly may "see themselves as unable to manage their environment" which, in turn, promotes feelings of helplessness and loss of control.¹¹³ Some elderly people attribute problems to the irreparable ravages of age, and not to specific situations which may be subject to change.¹¹⁴ Such an attribution has important consequences for an attorney/client relationship: attorneys are situational problem-definers and problem-solvers, and elderly clients might thus view lawyers (and everyone else) as powerless to stem the inevitable emergence of age-related problems.

Dependency—Related to the notion of helplessness is that some elderly view themselves as dependent upon others for their financial, physical, and emotional well-being. As with all aspects of a category as broad as "elderly," the degree of an individual client's dependency varies enormously.¹¹⁵ Nevertheless, perceived or actual dependency in certain realms may render elderly clients reluctant to offer their perspectives or to participate actively in their own representation. Such dependency is not necessarily inevitable but, rather, "an as yet undetermined (but significant) amount of dependency is modifiable, preventable, or reversible."¹¹⁶ Such a culture of dependency renders some elderly clients reluctant to take the lead in offering their perspective and in structuring their own legal solutions.

111. See *id.* (asserting that "[l]ower self-evaluations of memory, based in part on negative social expectations, can lead to poorer memory performance through their indirect impact on decreased effort, less use of adaptive strategies, avoidance of challenging situations, and failure to seek medical attention for disease-related symptoms of forgetfulness"); Rodin & Langer, *supra* note 46, at 24-25.

112. Rodin & Langer, *supra* note 46, at 24-26.

113. John M. Wiemann et al., *Communication with the Elderly: Implications for Health Care and Social Support in COMMUNICATION, HEALTH AND THE ELDERLY* 229 (Howard Giles et al. eds., 1990); Rodin & Langer, *supra* note 46, at 22-26.

114. See, e.g., Haug & Ory, *supra* note 45, at 13 (explaining that as a result of "ageism," the elderly "may be apt to attribute many of their complaints to the inevitable results of old age"); Wetle, *supra* note 16, at 260 (describing "learned helplessness" among the elderly).

115. See, e.g., Frolik & Barnes, *supra* note 54, at 698-703.

116. Estes, *supra* note 45, at 293 (citations omitted).

V. THE DISCOURSE OF DECREMENT

Any conversation between the elderly and younger interlocutors—like any conversation between two human beings—is an extraordinarily complex and dynamic process. It inevitably involves numerous strategies with varied and sometimes contradictory motivations which are, in turn, subject to diverse interpretations depending on the strategies and motivations of the person doing the listening. While “discourse analysis” focusing on the microdynamics of conversation recently has become the subject of serious inquiry in legal scholarship,¹¹⁷ other scholars within the last decade also have engaged in groundbreaking explorations of “intergroup discourse” between the young and the old.¹¹⁸ These analyses yield further insights into how the idea of decrement influences attorney/client interactions.

A. “Overaccommodation” by Younger Interlocutors

Given the assumption that the elderly are “relatively incompetent, slow, old-fashioned and inflexible,”¹¹⁹ younger interlocutors “frequently overaccommodate their speech to stereotyped expectations of an elder’s communication needs, as opposed to actual needs.”¹²⁰ The result is likely to be patronizing. The classic example is the use of “babytalk” when speaking to an elderly person¹²¹—an explicit reinforcement of the assumption that old age is a “second childhood.” However, even if not full-fledged babytalk, overaccommodation typically employs one or more modifications of “ordinary” discourse, such as “slower speech rate, exaggerated intonation,

117. For application of “discourse analysis” to interactions between lawyers, clients, and (in some cases) judges, see JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); Davis, *supra* note 59, at 1635; Felstiner & Sarat, *supra* note 3; Gay Gellhorn et al., *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 *CLINICAL L. REV.* 245 (1994). Although the amount of such research is increasing, there is relatively little exploring attorney/client discourse in contrast to, for example, physician-patient interactions. See Gellhorn et al., *supra*, at 247-48. For a review of discourse analysis and the related fields of inquiry that use it, see *id.* at 251-55.

118. See, e.g., COUPLAND ET AL., *supra* note 41, 152-71; Justine Coupland & Nikolas Coupland, ‘Old Age Doesn’t Come Alone’: *Discursive Representations of Health-in-Aging In Geriatric Medicine*, 39 *INT’L J. AGING & HUMAN DEV.* 81 (1994); Howard Waitzkin et al., *supra* note 77, at 322.

119. COUPLAND ET AL., *supra* note 41, at 31.

120. Ryan & Cole, *supra* note 52, at 173; see also COUPLAND ET AL., *supra* note 41, at 31.

121. *Id.* This conversational strategy reflects the “inverted U” model of mental competence over the lifespan. See *supra* text accompanying note 44. I employed this strategy when speaking to one of the elderly clients I described in Part I. See *supra* text accompanying notes 7-9.

use of high pitch, increased loudness, more repetitions, tag questions, altered pronoun use, and simplification of vocabulary and grammar."¹²²

The impact of overaccommodation on an elderly interlocutor is often equivocal. Such "nurturing" talk might "convey warmth and caring" attributes which are usually valued by an elderly person.¹²³ At the same time, the same client might view such talk as demeaning.¹²⁴ Moreover, the intent of such strategies is to foster communication, such overaccommodation might foster "a sense of helpless dependence" on the part of the elderly client,¹²⁵ and thus promote dependence and feelings of incompetence.¹²⁶ Indeed, one study showed that elders preferred speech to be "simple," but that simplification might, at the same time, be viewed as disrespectful or patronizing.¹²⁷

B. Discursive Strategies by the Elderly

Interactions are necessarily joint affairs, and focusing on the stereotypical assumptions of younger interlocutors overlooks how discourse is inevitably a negotiation of reality on the parts of all interlocutors.¹²⁸ In fact, elderly speakers employ strategies in conversation for a variety of reasons, and these strategies, in turn, often reinforce stereotypes about the decremental process of aging.

1. Age-Marking and Self-Handicapping

The elderly often "mark" themselves in conversation as members of a social category called "elderly." These conversational strategies will likely

122. Ryan & Cole, *supra* note 52, at 173; *see also* COUPLAND ET AL., *supra* note 41, at 36.

123. PRATT & NORRIS, *supra* note 42, at 176; Ryan & Cole, *supra* note 52, at 174, 184-85.

124. *See* PRATT & NORRIS, *supra* note 42, at 176; Ryan & Cole, *supra* note 52, at 174, 184-85.

125. Ryan & Cole, *supra* note 52, at 187-188; *see also* *Theory and Experience*, *supra* note 31, at 1056-57 (describing how attorney/client interactions risk imposing on a victim of domestic violence "the understandings of domestic violence that she finds in the legal system and in the rest of her world").

126. *See* PRATT & NORRIS, *supra* note 42, at 176; Ryan & Cole, *supra* note 52, at 174. As one nursing home resident observed: "Why do you think the staff insists on talking baby talk when speaking to me? I understand English. I have a degree in music and am a certified teacher. Now I hear a lot of words that end in 'y.' Is this how my kids felt? My hearing aid works fine. There is little need for anyone to position their face directly in front of mine and raise their voice with those 'y' words." Whitton, *supra* note 11, at 473.

127. *See* Ryan & Cole, *supra* note 52, at 184-85.

128. *See* COUPLAND ET AL., *supra* note 41, at 37; *see also* Felstiner & Sarat, *supra* note 3, at 1449-50.

be familiar. As noted above,¹²⁹ many elderly freely disclose their age, even though such disclosures at initial meetings are viewed as socially taboo among the non-elderly.¹³⁰ The elderly may also explicitly refer to themselves as “old” or “elderly,” or appear to be self-obsessed.¹³¹ While such “self-handicapping” strategies appear to be classic signs of feeble-mindedness, they may be motivated by needs that are common to all ages and that have nothing to do with cognitive decline. These strategies might, for example, be designed to: 1) elicit patience or sympathy; 2) elicit compliments or praise by the younger speaker that the older person is, for example, “remarkable for her age,” thereby bolstering an older person’s self-esteem; or 3) act as “a means for gaining compliance or services.”¹³² However, the impact on the younger interlocutor might be that the elderly person is seen as self-centered, selfish, or “not all there.”

2. Off-Topic Verbosity

From the perspective of the non-elderly, it is common for the elderly to become obsessed with seeming trivialities. For example, researchers transcribed the following conversation between an eighty-five year old woman (“D”) and a younger woman (“JC”). Although suffering no cognitive impairment, D was effectively homebound after an operation and partially blind.¹³³

D: but in *all* ways prices are crazy(.) now(.) er for example at breakfast(.) I never could eat breakfast(.) a couple of biscuits are all I like for my breakfast

JC: mm

D: I like a plain biscuit I like an Osbourne biscuit(.) well, Edna got them for me(.) um(.) oh until about oh about two or three months ago(.) she said to me well she said(.) I had a *real* shock today(.) she said she had always got the biscuits at such and such a place but she went into *another* supermarket that she doesn’t often go into(.) and the *same* packet of biscuits(.) Osbourne biscuits which she had been paying twenty-five pence for(.) in this shop

129. See *supra* text accompanying notes 104-107.

130. See COUPLAND ET AL., *supra* note 41, at 56.

131. See *id.* at 60.

132. *Id.* at 49.

133. See *id.* at 39.

were fifteen (1.0) now(.) a *packet* of biscuits(.) and *ten pence* variation on them

JC: gosh (.) that's a lot isn't it?

D: I think there should be some price control

JC: mm(.) mm(.) there isn't though(.) is there?¹³⁴

Interestingly, JC—a researcher in elderly discourse—found D's conversation to be “mundane” and “overassertive.”¹³⁵ It might not be unusual for D to launch into another discussion of biscuits, a trend “that is all too easy to ascribe vaguely to cognitive decrement.”¹³⁶ However, alternative explanations exist:

It is entirely understandable that [D] should take whatever limited opportunities she has to be conversationally assertive and that, through a combination of limited topic repertoire, infrequent social contacts, and a largely non-changing milieu, she should misjudge the newsworthiness of the issue to her interlocutors.¹³⁷

Thus, under this interpretation, ostensibly decremental behavior might actually be one of the few modes of assertiveness left to D.¹³⁸ JC's vague responses betray a sense of not knowing how to interpret all of this.

A related strategy sometimes employed by the elderly is “time-shifting—into the past, from focus on the present or recent past.”¹³⁹ The past is a time necessarily unknown to a younger interlocutor, and, as a result, furnishes a means to assert control in conversation. Once again, this is hardly the stuff of mental impairment.

134. *Id.* at 42-43. The punctuation of this passage follows the conventions of discourse analysis: the parentheses with a period signify a brief pause; a number in parenthesis describes the length of a pause in seconds; and italicized syllables were heavily stressed by the speaker. *See id.* at 200.

135. *Id.* at 42.

136. *Id.*

137. *Id.* at 43. The negotiation of conversational assertiveness or, put another way, “topic and floor control,” is a critical element in discourse generally and has been studied in the context of attorney/client interactions. *See, e.g.,* Gellhorn et al., *supra* note 117, at 283-88; Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the “Traditional” Interview and the “Client-Centered” Interview*, 1 CLINICAL L. REV. 541, 561-64 (1995).

138. Other interpretations are equally plausible. Perhaps most obviously, D might simply have always been conversationally assertive—hardly an unknown trait among the non-elderly—and has remained so as she has grown older.

139. *See* COUPLAND ET AL., *supra* note 41, at 63.

This analysis merely hints at the complexity of elderly discourse. Although conversational strategies employed by the elderly might well have nothing at all to do with the supposed decremental process of aging, they may resonate with this idea and thus lead to an assumption that the person actually suffers from cognitive decline.

C. Warning Signs

Given that intergroup discourse is rife with complexities and potential misunderstandings, an elderly client might be dissatisfied or seemingly never satisfied with legal representation. As a result, a client may act in ways that are disquieting to the attorney. The idea of decrement might once again lead an attorney to conclude that the client is impaired—an interpretation that conveniently absolves the attorney of responsibility for working to better meet the needs of the client.¹⁴⁰

In fact, such disquieting behavior by clients should act—at least in the first instance—as a warning sign that the attorney needs to further explore what might be motivating or concerning a client. Two circumstances in which this frequently arises are with clients who repeatedly contact the attorney, and with clients who do not comply with ostensibly agreed-upon activities to further the goals of the representation.

1. “Keeping Contact”

Sometimes the failure to address underlying issues facing an elderly client or a concern about abandonment might lead such clients to “fear interruption of contact and bring up new concerns . . . in order to continue as clients.”¹⁴¹ This phenomenon has been called “keeping contact.”¹⁴² From the attorneys’ perspective, these clients are nuisances. They call repeatedly, seemingly viewing the attorneys’ time as limitless. While non-elderly clients may exhibit such behavior, attorneys are especially likely to view it as demonstrating a mental impairment when the clients are elderly.

Attorneys may transform examples of “keeping contact” into indictments of the client’s mental state.¹⁴³ However, such behavior should spur attorneys

140. Racial stereotyping might also lead attorneys to characterize clients as “difficult.” See Jacobs, *supra* note 61, at 355.

141. Haug & Ory, *supra* note 45, at 19.

142. *Id.*

143. This recalls the problem of “I’m not impaired, so you must be,” noted at *supra* text accompanying notes 84-90. In that earlier instance, a client’s seemingly incomprehensible goals are

to revisit their working conception of their client's needs. Such an enterprise might generate a richer understanding of what is "really" concerning the client.¹⁴⁴

2. Noncompliance

Clients sometimes agree to perform certain activities designed to promote the clients' goals, such as conduct factual research, drop off relevant papers, or provide information over the telephone. Often to the attorney's surprise, clients fail to complete what they have agreed to do. Again, while such a "tactic of resistance" has been observed among clients generally,¹⁴⁵ when the client is elderly, attorneys might presume mental impairment, and suspect that the client is somehow sabotaging the success of the representation because of an inability to follow directions or understand consequences. Instead of the convenient interpretation of mental impairment, such behavior might—like "keeping contact"—mean that the attorney may have seriously misconstrued—or at least could understand more about—issues facing the client.¹⁴⁶

VI. IMPLICATIONS FOR PRACTICE THEORY

The preceding discussion has explored how a single social assumption—the idea of decrement—influences the ways attorneys and elderly clients think and act. This discussion, of course, has vastly simplified the many circumstances that may influence such interactions. However, even this simplified discussion raises important questions about how best to conceptualize what attorneys can and should do when they represent elderly clients.

This section will first consider these questions by discussing a cornerstone of client-centered lawyering—the process of "empathic understanding"—and the impact of this technique on elderly clients in light of the preceding

dismissed as a product of mental incompetence—a far easier conclusion to reach than to consider alternative, "rational" explanations for the client's behavior.

144. It is also possible that "keeping contact" is motivated by what would appear to an outsider to be a disproportionate anxiety about some "small" matter. Again, while this may appear to manifest cognitive decline, a more likely explanation is simply that isolation has diminished the scope of the "world" of the client, and thus what occurs within that world is especially significant to the client. See *supra* text accompanying notes 133-39.

145. See, e.g., Felstiner & Sarat, *supra* note 3, at 1467-70; White, *supra* note 61, at 44-52.

146. See Haug & Ory, *supra* note 45, at 27-28 (noting that failure to take medication among the elderly might be an assertion of independence).

discussion. Next, this section will draw upon this analysis in order to explore more generally assumptions underlying client-centered lawyering.

A. *The Virtues and Pitfalls of Empathic Understanding*

“Empathic understanding” is fundamental to client-centered lawyering.¹⁴⁷ Binder, Bergman and Price firmly believe in the power of this technique; they quote Carl Rogers who wrote that empathic understanding is a means to “enter[] into the experience of clients in order to develop a feeling for their inner world and how they view both this inner world and the world of people and [events] around them.”¹⁴⁸ In the context of representing elderly clients,¹⁴⁹ empathic understanding may be especially useful. Given social isolation and devaluation, some elderly clients exhibit presumed mental impairments because of a fear of loneliness. Indeed, such clients may crave “empathic understanding” to such an extent that the technique may reveal complexities and ambivalences in a client’s perspective that would otherwise remain concealed.¹⁵⁰

147. BINDER ET AL., *supra* note 1, at 40-42. Binder, Bergman and Price suggest the technique of “active listening”—a “process of picking up a client’s message and sending it back in a reflective statement which mirrors what you have heard”—as the best way to promote empathic understanding. *Id.* at 41, 52. The centrality that Binder, Bergman and Price ascribe to this technique has not been without its critics. *See, e.g.*, Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 1005-1010 (1992). In a related vein, some commentators have argued that client-centered lawyering is not the apolitical set of neutral techniques that it purports to be. *See, e.g.*, William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 548-50 (1980). *See generally* Jacobs, *supra* note 61 (arguing that client-centered lawyering may reproduce racial prejudice).

148. BINDER ET AL., *supra* note 1, at 40.

149. Binder, Bergman and Price suggest that the client-centered approach cannot be used “in instances where a client . . . suffers from mental incapacity.” *Id.* at 20 n.17, 285 n.63. This is, of course, true in instances of patently severe mental impairment (although, as noted *supra*, text accompanying notes 73-77, even such “severe” cases may result from reversible causes). However, jettisoning the whole approach when clients are *questionably* incompetent necessarily begs the question of how best to explore issues of competency within a client-centered framework.

150. This idea received particular attention in the literature addressing doctor/elderly patient interactions. *See* Waitzkin et al., *supra* note 77, at 342 (in a medical context, arguing for “supportive listening” during which “doctors should let patients tell their stories . . . in an open-ended way”); Haug & Ory, *supra* note 45, at 29 (“an empathetic manner signals respect for the concerns of the patient” and is “an essential element in satisfactory doctor-elderly patient relationships.”). Empathic understanding can sometimes yield important insights. For example, the psychiatric literature describes one elderly patient who claimed that she had received a call from her doctor claiming that she did not need surgery—a call which, in fact, had never taken place. *See* Appelbaum & Roth, *supra* note 15, at 1463-64. However, during a second interview, while maintaining that the telephone call took place, the patient also described a profound fear of abandonment as a result of the surgery. This led her consulting psychiatrist to conclude that the patient’s “psychotic response to the recommendation for surgery was an attempt to draw those

However, “empathic understanding” also entails significant risks. This sort of response—an “accommodating” or “high attuning” behavior—may reinforce social norms about aging¹⁵¹ and may promote dependency.¹⁵² As three leading researchers on the discourse of the elderly have put it:

[T]hose elderly who see themselves as ‘old and of declining health’—and from our own data this is not at all uncommon—may seek out and cue sympathetic and attuned responses from their interactants. This can be *non*-supportive in the longer term to the extent that they may reinforce ill and aging identities. . . .¹⁵³

The consequences of such a scenario for attorney/client relationships are troubling. Some elderly clients may attribute difficulties—a negligent landlord, an abusive relative—to their advanced age, not to the actions of individuals who can legally be forced to modify their behavior.¹⁵⁴ Under this circumstance, “empathic understanding” might reinforce damaging stereotypes about aging on the part of both the attorney and client.

Alternatives to “empathic understanding” carry their own advantages and disadvantages.¹⁵⁵ For example, a more active, “critical lawyering” approach might challenge client assumptions and affirmatively convince the client that situational factors—not the progressive decline of old age—lie at the root of a problem. Such a strategy might combat dependency and foster independence. Indeed, one study has shown that such a strategy tends to motivate formerly disengaged individuals to be more active and social at least in a non-legal context.¹⁵⁶ These effects obviously could be significant when negotiating an attorney/client relationship and promote a more active stance on the part of the client.¹⁵⁷

around her into deeper involvement.” *Id.* In the end, “[w]hen these concerns were pointed out to her and empathized with, she indicated that although she still feared the surgery, she would accept it.” *Id.*

151. See Giles et al., *supra* note 88, at 13-17.

152. See *id.* at 13-14.

153. *Id.* at 17 (citation omitted).

154. See Rodin & Langer, *supra* note 46, at 23; see also Banziger & Drenstedt, *supra* note 45, at 472.

155. These questions are also analyzed in psychological literature more generally. Much of the client-centered lawyering literature draws upon the work of Carl Rogers, who emphasized empathy and “unconditional positive regard” in psychotherapy. See Simon, *supra* note 147, at 511-16. However, other approaches to psychotherapy adopt a far more active—even challenging—role for the therapist. See Ellmann, *supra* note 147, at 1011.

156. See Rodin & Langer, *supra* note 46, at 24.

157. See *id.* at 25 (“restructuring the environment to make it more demanding, and then motivating elderly people to increase their cognitive ability, leads to improvements in memory that are generalizable”).

Of course, such a stance potentially creates problems. If, as noted above, some conversational strategies by the elderly are designed to elicit sympathy,¹⁵⁸ clients might grow to dislike such a “low-attuning” stance and the attorney who employs it. Given the internalization of the idea of decrement, the elderly client might be offended by the attorney’s socially inappropriate lack of sympathy for the conventional effects of aging. Moreover, the great risks of the “traditional” non-client-centered approaches to lawyering might emerge: the imposition of an attorney’s value system, further disempowering already disempowered groups, and shutting down dialogue.¹⁵⁹

B. Consequences for Theory

The two-edged nature of empathic understanding when representing elderly clients furnishes a point of entry for considering some of the premises underlying client-centered lawyering. This exploration must be undertaken with care; an important qualification in the literature on client-centered lawyering is that its principles might require modification or might not apply with respect to certain clients or certain cases.¹⁶⁰ That said, however, the influence of the idea of decrement raises questions about some settled ways of talking about client-centered lawyering.

Client-centered lawyering holds that the client’s perspective is the touchstone of enlightened advocacy.¹⁶¹ This approach embodies a set of

158. See *supra* text accompanying notes 129-32.

159. See Dinerstein, *supra* note 2, at 720; BINDER ET AL., *supra* note 1, at 16-24.

160. For example, a commonly accepted observation is that unlike poor or “outsider” clients, corporate or wealthy clients are not likely to be subject to attorney domination. See, e.g., Dinerstein, *supra* note 2, at 720. Binder, Bergman and Price also recognize that a client-centered lawyer need not be a “blind instrumentalist” when “a client’s values conflict with fundamental moral precepts or positive legal rules.” BINDER ET AL., *supra* note 1, at 18-19.

161. See BINDER ET AL., *supra* note 1, at 17; Smith, *supra* note 137, at 543. This approach has attracted criticism. Some critiques hold that the standard version of client-centered lawyering does not go far enough in promoting the autonomy of the client. See, e.g., Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996) (advocating that attorney and client explicitly “negotiate” the terms of the attorney/client relationship). Conversely, some of the criticism is directed at how theories of client-centered lawyering go too far in valorizing the client’s goals to the exclusion of broader social and moral principles that might be at stake in the representation. See, e.g., Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97 (1985); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 748-49 (1987). There also have been recent stirrings that client-centered lawyering and the standard critiques of it do not capture the complexities of how the mind works as explored by cognitive science. See Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 317 (1995); Steven L. Winter, *Cursing the Darkness*, 48 U. MIAMI L. REV. 1115,

strategies that rests upon certain assumptions. "A client-centered conception assumes that most clients are capable of thinking through the complexities of their problems. In particular, it posits that clients are usually more expert than lawyers when it comes to the economic, social and psychological dimensions of problems."¹⁶² Client-centered lawyering thus recognizes "the importance of clients' expertise, thoughts and feelings in resolving problems."¹⁶³ In elaborating this notion, some commentators have adopted the metaphor of "lawyer as translator" through which attorneys should seek to translate client stories in order to educate and persuade legal decision-makers.¹⁶⁴

The client-centered lawyering model and its elaborations have been and continue to be critical in seeking to supplant the hidden (or sometimes not so hidden) premise that lawyers know what is best for clients.¹⁶⁵ This perspective also has produced fascinating scholarly narratives about lawyers directing a course of litigation in accordance with conventional legal categories—and doing a good job of it under those terms—yet fundamentally misapprehending what clients want and how clients want to get what they want.¹⁶⁶

The insidious influence of the idea of decrement demonstrates how useful a client-centered lawyering model can be. Operating under the sway of the idea of decrement, attorneys may systematically misapprehend the needs of elderly clients. Such situations are classic examples of lawyers unthinkingly applying their own norms while another set of equally valid norms—the client's—are silenced. This highlights the difference and "otherness" between attorney and client, and how attorneys need to guard against what seems to be "natural" and "obvious" when defining the means and ends of representation.¹⁶⁷

However, the influence of the idea of decrement also points to how prevailing conceptions of attorney/client interactions simplify aspects of interviewing and counseling, thus impoverishing a lawyer's sense of complexity and possibility when representing clients. These simplifications include the notion that there is a single client "story" or "voice," that there

1129-32 (1994). For an overview of some of these critiques and others, see generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

162. BINDER ET AL., *supra* note 1, at 17.

163. *Id.* at 18.

164. See, e.g., Cunningham, *supra* note 2, at 1331-39; Gilkerson, *supra* note 2, at 914-18.

165. See Dinerstein, *supra* note 2, at 700; Smith, *supra* note 137, at 542-43.

166. See, e.g., GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Cunningham, *supra* note 2; White, *supra* note 61.

167. See Davis, *supra* note 59, at 1643.

is such a thing as an “autonomous” client, and that there is such a thing as a “neutral” attorney. I will address each of these simplifications in turn.

1. The Unitary Client “Story” or “Voice”

Given that client-centered lawyering hopes to control attorneys’ inclinations to dominate discourse and misapprehend or ignore client perspectives, discussions of client-centered lawyering sometimes presuppose a single and authentic “story” or “voice.”¹⁶⁸ However, as every practitioner knows, problems faced by clients rarely come in neat packages; at any point in time, client perspectives—like the perspectives of everyone else—are rife with competing concerns, ambiguities, and ambivalences, and thus are not unitary.¹⁶⁹ These dissonances and instabilities are not merely risks of interviewing and counseling, but in many ways define these very processes.¹⁷⁰

In addition, perspectives of both lawyers and clients are shot through with assumptions like the idea of decrement. These assumptions play out in a multitude of ways. Sometimes meanings cohere, sometimes not, but any client “story” is inevitably the product of a complex set of shifting meanings negotiated through dialogue.¹⁷¹

2. The Autonomous Client

Client-centered lawyering values client “autonomy” in order to preserve the integrity of client perspectives.¹⁷² By reaching out to clients through

168. See, e.g., Cunningham, *supra* note 2, at 1335-38; Gilkerson, *supra* note 2, at 897; Margulies, *supra* note 18, at 1079-80.

169. See Alfieri, *supra* note 86, at 2119; Naomi Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2485-93 (1993); Dinerstein, *supra* note 2, at 715-16; *Theory and Experience*, *supra* note 31, at 1032-33.

170. See Dinerstein, *supra* note 2, at 716 (criticizing “the unfortunate message that the counselor’s role is the technical one of laying out options and alternatives rather than participating fully in the often messy process of making real world decisions”); Gellhorn et al., *supra* note 117, at 248 (criticizing the conception of client interviews as “dominated by administrative tasks, and by fact gathering”). For an insightful treatment of the complexities of attorney/client interactions in the context of divorce cases, see generally Felstiner & Sarat, *supra* note 3.

171. See *supra* text accompanying notes 117-46.

172. See BINDER ET AL., *supra* note 1, at 261; Beverly Balos, *The Bounds of Professionalism: Challenging Our Students, Challenging Ourselves*, 4 CLINICAL L. REV. 129, 131 (1997). “Autonomy derives from the Greek roots ‘auto’ for self and ‘nomos’ for law, literally self-ruling.” Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 73 n.128 (1996) (citing Joel Feinberg, *Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 27, 32 (John Christman ed., 1989)).

techniques such as empathic understanding, the idea of client autonomy minimizes attorneys' tendencies to overwhelm clients' values and perspectives. This, in turn, frees clients to explore their own values and circumstances.

Autonomy, however, also entails troubling simplifications and inconsistencies that render its descriptions of attorney/client interactions problematic. In the context of practice theory, the idea of autonomy presupposes that clients have some authentic core that is distinct from external influences.¹⁷³ This in turn, presupposes first, that this core can and should remain stable as clients talk to attorneys, and second, that such a core is independent of the social world inhabited by attorneys and clients. Such a view fails to take into account that *both* attorneys and clients are constrained and influenced by assumptions about each other, and that these assumptions play out as attorneys and clients interact. It is uncertain what constitutes a client's authentic core, given that the core itself is made up of social assumptions and interactions, including interactions with attorneys.¹⁷⁴

Even setting aside this conceptual difficulty, a narrow focus on "autonomy" raises troubling questions. If an attorney's role is to preserve client autonomy by elaborating and translating the client's perspective without changing it,¹⁷⁵ an attorney may choose to empathize with and thereby affirm, for example, an elderly client's feeling of helplessness in the face of feared cognitive decline.¹⁷⁶ While fearing to taint the client's perspective, this attorney risks reaffirming the disempowering force of stereotypes applied to the elderly and others—a result that is not only disturbing, but that turns the values of empathic understanding and client-centered lawyering on their heads.¹⁷⁷

173. See, e.g., Gilkerson, *supra* note 2, at 918 (stressing the importance of "[p]reserving and advancing the integrity of the client's story"); Alfieri, *supra* note 86, at 2146 (the primary task of poverty lawyers "is to restore integrity to the voices and stories" of clients); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336-345 (1987). The notion of autonomy and authenticity appears in other contexts as well. See, e.g., Kupfer, *supra* note 172, at 71 (applying notion "of a true identity, of an inner voice" to ethical decision-making).

174. See Winter, *supra* note 161, at 1129.

175. Clark Cunningham captures this idea of autonomy when he notes that "[t]he good translator does not alter the speaker's meaning without the speaker's consent." Cunningham, *supra* note 2, at 1300.

176. See *supra* text accompanying notes 147-59.

177. In a related vein, some commentators have argued that client-centered lawyering is not as neutral as it purports to be. See, e.g., Simon, *supra* note 147, at 548-50; see generally Jacobs, *supra* note 61, at 345 (arguing that client-centered lawyering may reproduce racial prejudice). Ann Shalleck recently advocated an active role for attorneys in counteracting pervasive stereotyping—albeit well-meant stereotyping—of battered women. See *Theory and Experience*, *supra* note 31, at 1033-36.

3. The Neutral Attorney

The same virtues and shortcomings of the idea of autonomy apply to the idea that attorneys should remain “neutral” when interacting with clients.¹⁷⁸ Binder, Bergman and Price cite “the importance of neutrality” by again quoting Carl Rogers: “[lawyers] must, to the best of their abilities, put aside their own biases, prejudices, and points of view in order to understand as clearly as possible the points of view of their clients.”¹⁷⁹ The term “neutrality” captures how critical it is for lawyers to recognize the power of their influence, and to counteract this influence by empathizing with clients.

“Neutrality,” however, simplifies the meaning-making process of attorneys just like “autonomy” simplifies the meaning-making process of clients. The purportedly “neutral” attorney makes sense of the world through cultural assumptions and hidden premises like the idea of decrement. After all, attorneys who hear clients’ stories—just like clients who hear attorneys’ stories—cannot help but situate stories within the attorney’s own experience.¹⁸⁰ It is thus uncertain what, if anything, would be left of meaning, even assuming attorneys could “put aside their own . . . points of

Ironically, the choice of whether or not to challenge stereotypes might be illusory given that the most rigid client-centered lawyer who understands the internalization of oppressive social stereotypes like the idea of decrement would almost certainly seek to disabuse clients of the destructive force of such stereotypes, even if only through subtle cues in conversation. William Simon has written extensively about how attorney perspectives on what is “right” for the client inevitably, if subtly, color how attorneys counsel clients. See Simon, *supra* note 3, at 1102-04; Simon, *supra* note 27, at 213; see also Geoffrey C. Hazard, Jr., *Doing the Right Thing*, 70 WASH. U. L.Q. 691, 700 (1992) (“the notion that advice can be given unshaped by the adviser’s own ethical values is absurd in fact”); *Theory and Experience*, *supra* note 31, at 1056 (describing how “words, actions and attitudes [of attorneys] affect the client’s understanding of herself, her ability to take action, and her choice of what to do and how to present herself in the world”). A related and burgeoning area of inquiry addresses “therapeutic jurisprudence,” which, among other things, examines how legal practices inevitably promote or inhibit the psychological well-being of actors in the legal process. See, e.g., Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 798-99 (1997).

178. See BINDER ET AL., *supra* note 1, at 288.

179. *Id.* at 40; see also Dinerstein, *supra* note 161, at 580-81 (recognizing that “such neutrality is inevitably false,” but noting that the idea of “neutrality” still has value as long as attorneys recognize that it “is a goal they will never quite achieve”).

180. For commentators who have noted how attorneys’ expectations influence the interpretation of a client’s situation, see BAKHTIN, *supra* note 39, at 291; Cahn, *supra* note 169, at 2490 (describing how the author’s “story of what happened to my client is informed by my own expectations”); Cunningham, *supra* note 2, at 1336-38; Lopez, *supra* note 3, at 1613-14; Margulies, *supra* note 68, at 709-11 (discussing the operation of stock stories and stereotypes in assessing clients in a law school clinic); White, *supra* note 61, at 45-48.

view,” given that all meaning has a “point of view.”¹⁸¹ This is true even with the usual caveat that attorneys should be neutral “to the best of their abilities” or “as much as possible” because even these qualifiers assert that there is a way to approach meaning apart from our own assumptions and “points of view.”¹⁸² In this frame, attorney “neutrality”—conceptualized as a goal that can be approached but never attained—may cause more harm than good by setting forth a goal that has no meaningful content.¹⁸³

4. Complexities

The influence of the idea of decrement demonstrates the importance of learning how stereotypes influence how attorneys think about clients. By understanding the operation of such assumptions, attorneys might take a more nuanced, complex view of clients and their situations.

However, this seemingly incontrovertible point carries the risk that now that the scales have fallen from our eyes about the idea of decrement, we are finally in a position to truly understand elderly clients. This type of trap assumes, first, that the stereotype operates equally among all members of the group, and, second, that the identification of one stereotype unmask the “real” client.

In fact, not all elderly people internalize the idea of decrement, and not all do so in the same way.¹⁸⁴ The idea of decrement is merely one idea among the multitudes that define how we think about and act in the world. Consider what this article has not addressed. It has not addressed the impact of gender¹⁸⁵ or race,¹⁸⁶ the impact that divergent or similar personalities

181. Alfieri, *supra* note 86, at 2121 (criticizing a “perspectiveless” theory of practice); see also *supra* text accompanying notes 36-40. Analogous conceptions of “neutrality” in the realm of judicial decision-making have long been under attack. See Rubinson, *supra* note 39, at 14.

182. Stanley Fish placed the issue of “neutrality” into a larger frame. Fish argued against what he calls the possibility of “critical self-consciousness.” FISH, *supra* note 37, at 436-67. “Critical self-consciousness” holds that we can rise above “interests, preferences and biases” and avoid “prejudgments” through some combination of self-awareness and tentativeness about our own beliefs. According to Fish, this process “is itself an ‘interested’ act, that is, an act performed within a set of assumptions—concerning what is and is not evidence and what are and are not criteria for judgment—that is, constitutive of and inseparable from some *partial* view of the world.” *Id.* at 439. Skepticism is not the answer because skepticism itself operates “within—and not outside of—the already structured field that is consciousness.” *Id.* at 440.

183. It is worth noting as well that social scientists have found that exhortations to be “unbiased” and “impartial” have no impact on the human tendency to view facts as confirming what is already believed. See, e.g., Lord et al., *supra* note 39, at 1239.

184. See *supra* text accompanying notes 91-97.

185. It has been noted how social attitudes toward elderly women differ from social attitudes toward elderly men, and that elderly men might negotiate the process of aging differently than

might have on attorney/client discourse,¹⁸⁷ the significance of the socio-economic status of the client or of the attorney,¹⁸⁸ the impact of an elderly client's surroundings (such as a nursing home),¹⁸⁹ the impact of an attorney's or client's appearance,¹⁹⁰ the implications of how attorneys might assume that their individual experiences with the elderly are generalizable to the elderly population at large,¹⁹¹ and how other assumptions might be related to the idea of decrement, such as the idea that the elderly are less deserving of attention because they have already lived the bulk of their lives or because they receive a disproportionate share of societal resources.¹⁹²

Of course, this list could continue indefinitely. As the philosopher Daniel Dennett has noted, "[i]ndividual styles are truly unique, the product of untold billions of serendipitous encounters over the ages, encounters that produced first a unique genome, and then a unique upbringing, and finally a unique set of life experiences."¹⁹³ This bewildering complexity insures that there is never a point in time when two socially situated actors—each with unique "individual styles" described by Dennett—truly "understand" each other, especially in a task as involved and ill-defined as legal

elderly women. For a sampling of some lines of inquiry on this important distinction, see GIBSON, *supra* note 45, at 75-77; PRATT & NORRIS, *supra* note 42, at 88-89; Marilyn Helterline & Marilyn Nouri, *Aging and Gender: Values and Continuity*, 6 J. WOMEN & AGING 19, 19-23 (1994).

186. See Appelbaum & Roth, *supra* note 15, at 1466; Giles et al., *supra* note 88, at 15-17; see also Jacobs, *supra* note 61 (addressing the impact of race in counseling).

187. See Appelbaum & Roth, *supra* note 15, at 1466.

188. See White, *supra* note 61, at 45-48.

189. See John F. Nussbaum, *Communication and the Nursing Home Environment: Survivability as a Function of Resident-Nursing Staff Affinity*, in COMMUNICATION, HEALTH AND THE ELDERLY 155 (Howard Giles et al. eds., 1990). For example, "given the fact that many nursing home residents are impaired in cognitive function, all residents are thus assumed to be similarly impaired." Wetle, *supra* note 16, at 264.

190. See Charles Stangor & James E. Lange, *Mental Representations of Social Groups: Advances in Understanding Stereotypes and Stereotyping*, in 26 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 357 (Mark P. Zann ed., 1994).

191. Social psychologists have explored the human tendency to overestimate the "normativity" of individual experience. See, e.g., Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, in 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 319, 337-38 (Mark P. Zann ed., 1991).

192. See Wetle, *supra* note 16, at 260-63; Whitton, *supra* note 11, at 469-74.

193. DENNETT, *supra* note 17, at 450. This basic idea has been expressed in many ways in many different disciplines. See, e.g., BAKHTIN, *supra* note 39, at 290 ("In any given historical moment of verbal-ideological life, each generation at each social level has its own language; moreover, every age group has as a matter of fact its own language, its own vocabulary, its own particular accentual system that, in their turn, vary depending on social level, academic institution . . . and other stratifying factors."); FISH, *supra* note 37, at 30 ("each of us is a member of not one but innumerable interpretive communities in relation to which different kinds of belief are operating with different weight and force");

representation.¹⁹⁴ While this view raises questions about ideas like “neutrality” and “autonomy,” it also highlights the importance of greater understanding and recognition of the complexity of attorney/client interactions.

C. Consequences for Practitioners and Teachers of Practice

Client-centered lawyering remains a vital way of conceptualizing attorney/client interactions, but one that simplifies important dimensions of the lawyering enterprise. A greater recognition of these complexities, however, does not mean that practitioners can or should spend endless hours “exploring meaning” with their clients. The pressures of practice render this goal impractical.

Nevertheless, a greater emphasis on these additional dimensions of experience will have several benefits. First, client-centered lawyering, by invoking the power of certain techniques and the goal of “attorney neutrality,” tends to send the message that an attorney can reach a reasonably full understanding of client perspectives. This fosters the illusion that there comes a point in time when an attorney has “got it,” thus deadening an attorney’s ability to be alive to possibilities of meaning at all points during the representation. Ironically, by recognizing that such a point of understanding is never possible or even conceivable, attorneys might gain a greater, more nuanced understanding of client perspectives, the central goal of client-centered lawyering.

Second, while attorney/client interactions are sometimes viewed either as a minefield of potential threats to attorney neutrality and client autonomy or as a dry and technical process of data collection, their complexity insures that they are neither. Attorney/client interactions are, in fact, far more exciting and fascinating—messy dialogues between two human beings whose senses of each other and the world are fluid and dynamic. Coming to terms with this aspect of lawyering may not only promote more effective representation, but may also foster greater engagement in a profession that sorely needs to counteract pervasive alienation and dissatisfaction.

Third, at least in certain contexts, an understanding that stereotypes are internalized by lawyers and clients opens up the possibility for progressive

194. See Blasi, *supra* note 161, at 317 (“At bottom, lawyering entails solving (or making worse) problems of clients and others, under conditions of extraordinary complexity and uncertainty, in a virtually infinite range of settings.”).

social change through individual representation.¹⁹⁵ If attorneys come to view the social webs and cognitive processes that define and structure meaning as integral to practice and worthy of study, attorneys would be in a better position to learn through clients and to help clients learn through them. This approach offers the possibility of enriching our conception of legal representation by emphasizing “mutual education,”¹⁹⁶—a process of transformation to be experienced by both attorneys and clients.

VII. CONCLUSION

The idea of decrement constitutes an invisible premise in how both attorneys and elderly clients view “competence.” This assumption, in turn, defines how attorneys and elderly clients view the world and each other. This raises questions about the content of ideas like client voice and autonomy, and attorney neutrality—foundational concepts in discourse about attorney/client interactions. Moreover, given that the idea of decrement is one assumption among the multitude that define how we interpret the world, this analysis highlights the extraordinary complexity of any undertaking through which attorneys hope to “understand” the perspective of others and, through that understanding, to act on their behalf.

This analysis in no way delegitimizes client-centered lawyering or proves it “wrong.” To the contrary, the tendency of so many practitioners and law students to believe that they really know what is best for the client demonstrates the utility of a strong—albeit simplified—theory that emphasizes the values of client perspectives. Similarly, issues of attorney power—whether defined in terms of cultural and class distinctions especially important in poverty law practice, or defined in terms of the power of possessing an arcane body of knowledge not available to a layperson—argues in favor of constant vigilance against overwhelming clients’ perspectives. At the same time, a greater recognition of the extraordinary complexity of the lawyering enterprise holds the promise of promoting a more nuanced conception of client perspectives while, at the same time, rendering the process of lawyering more engaging and more transforming.

195. This perspective resonates with recent scholarship on how “power” is constituted through individual interactions, and thus how progressive social change can (or, as some would say, must) be sought on these individual levels. See, e.g., Steven Winter, *The Power Thing*, 82 VA. L. REV. 721 (1996).

196. White, *supra* note 99, at 743.