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ARTICLE: THE RIGHT TO BE REPRESENTED BUT NOT HEARD: REFLECTIONS ON LEGAL REPRESENTATION FOR CHILDREN.

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BIO:

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LEXISNEXIS SUMMARY:

... In the wake of *Gault*, many courts and commentators have argued that the Constitution requires counsel for children in other types of legal proceedings as well. ... Part III, therefore, attempts to define the role of counsel for very young children by exploring traditional legal sources, including the Model Code of Professional Responsibility, case law, and statutes; it delineates two roles that counsel might play, that of "Champion" and that of "Investigator." ... The traditional solution to the problem of a client incapable of instructing counsel has been to appoint a guardian ad litem. ... But neither of these roles, characterized as "Champion," and "Investigator," respectively, allows the attorney to do what he knows how to do best: advocate the positions his client tells him to advocate. ... Unlike the Champion, the Investigator does not explicitly advocate an outcome. ... Nevertheless, appointing a Champion rather than an Investigator does not alleviate the objections to court-appointed counsel for children in custody adjudications. ... While the consequences to the child of an adjudication of neglect may not differ materially from those resulting from a delinquency adjudication, this similarity in outcome does not dispose of the question whether due process requires counsel for children in protective proceedings. ...

HIGHLIGHT: *In Professor Guggenheim's view, the function of an attorney is to pursue legal objectives chosen by the client; it is the client, not the attorney, who should direct the course of the litigation. Given this client-centered view of the litigation process, the author asks, what is the proper role of counsel appointed to represent children who are too young to direct their attorneys? Professor Guggenheim argues that the two roles most frequently adopted -- that of a Champion, who advocates the position that he believes is in the child's best interests, and that of a neutral Investigator, who gathers and presents to the court as much information about the case as he can -- raise serious questions about the value of appointing counsel for young children. For instance, in divorce-custody and child protective proceedings, a Champion usually adopts a position already taken by one of the parents or by the state. Because the Champion purports to represent the child's interests, his decision to side with one of the parties may play a decisive role in the judge's deliberations. Professor Guggenheim argues that this phenomenon undermines the adversary process by making the outcome too heavily dependent on the personal views of the child's attorney. The role of Investigator presents a different but equally serious problem. In theory, the author observes, the judicial process can only benefit from additional information about the parties and their dispute, but he questions whether the Investigator's contribution to the litigation process justifies the accompanying interference with the parents' right of privacy. Professor Guggenheim then examines each of these roles in the context of several types of proceedings and recognizes that their value varies accordingly. On balance, however, he urges judges, legislators, and practitioners to reconsider the need for appointed counsel whenever the client is too young to provide effective guidance.*

TEXT:

[*76] INTRODUCTION

Seventeen years ago, the United States Supreme Court held in *In re Gault* n1 that juveniles accused of being delinquent have a constitutional right to court-assigned counsel. In the wake of *Gault*, many courts and commentators have argued that the Constitution requires [*77] counsel for children in other types of legal proceedings as well. n2 Indeed, some commentators have even suggested that children have a constitutional right to counsel in all cases in which they are directly involved. n3

In this Article, I will appraise this call for children's counsel and suggest that the appointment of counsel is not the panacea its proponents believe it to be. My focus will be on very young children, those too young to control their own attorneys. While I admit that there may be sound reasons for providing mature children with court-appointed counsel in judicial proceedings affecting their interests, I believe that appointment of counsel creates major difficulties when the child is too young to direct his own attorney. For example, I have found that giving counsel to young children introduces a critical element of arbitrariness into our legal system. With the child's attorney acting as a third party litigant in every case involving children, like cases no longer come out alike. I also believe that appointing attorneys for young children undermines legitimate parental interests in privacy and autonomous decisionmaking. Furthermore, these ill effects occur without producing any significant benefits for the child, for the litigation process, or for society as a whole.

Unfortunately, courts and legislatures only rarely identify the benefits they hope to achieve by conferring a right to counsel on young children. They even less frequently examine the problems that will ensue from giving children that right. After exploring both the possible benefits and the inevitable problems, I conclude that, on balance, the appointment of counsel for children is appropriate in only a limited number of situations.

The Article is divided into four Parts. The first two, which serve as a prologue to the remainder of the Article, describe and analyze the role of counsel in our legal system. Specifically, Part I discusses the role played by counsel when the client is an adult and notes that, in [*78] such cases, counsel is bound by the client's instructions and acts to achieve the client's stated legal objectives. This Part attributes the strong commitment to client control to the rights-based nature of our legal system and to a fundamental American belief in personal autonomy and individual decisionmaking. Part II extends the discussion of the attorney-client relationship to cases in which the client, although legally a child, is mature enough to be able to guide his attorney's actions. In light of the Supreme Court's opinion in *Gault*, this Part concludes that children over the age of seven should have the power to direct counsel in delinquency

proceedings and, moreover, that this conclusion applies to other types of legal proceedings affecting children.

Part III takes up the main issue of this Article: the role of counsel for clients too young to direct their own attorneys. n4 Many children are too young to instruct counsel. Infants, of course, are incapable of communicating their preferences to the lawyer. On the other hand, while slightly older children may possess the linguistic capability to express their wishes, few of us would want attorneys to follow their instructions faithfully; lacking a developed capacity to make intelligent judgments, these children require the guiding hand of an adult to protect their welfare. Part III, therefore, attempts to define the role of counsel for very young children by exploring traditional legal sources, including the Model Code of Professional Responsibility, case law, and statutes; it delineates two roles that counsel might play, that of "Champion" and that of "Investigator."

Part IV then applies the framework set out in the preceding discussion to several particular types of proceedings affecting children: divorce-custody cases, child protective proceedings, constitutional class actions, and cases in which parents seek judicial approval for medical treatment of their children. While Part IV attempts to provide concrete guidelines for the lawyer who is assigned to represent a young child in each of these types of cases, its broader purpose is to ask whether children who are too young to guide counsel really need attorneys in the first place. The Part concludes that young children [*79] should not be assigned lawyers except in a limited number of identifiable cases in which appointed counsel would serve a valuable function.

Lawyers are accustomed to doing their client's bidding. The lawyer who represents the young child, however, finds himself in a new, and rather intoxicating, situation. Now it is he, and not the nominal client, who has the power to control the course of the litigation. How he ought to use that power is the ethical dilemma to which this Article is dedicated.

I

LEGAL REPRESENTATION OF ADULT CLIENTS

Before analyzing the role that counsel for children might play, we must first examine the nature of legal representation for adult clients. Perhaps the best place to begin exploring this topic is with the American Bar Association's Model Code of Professional Responsibility. n5 The Model Code suggests that the function of counsel in our legal system is to enable individual litigants to enforce, protect, and preserve their own legal rights. n6 In carrying out this function, a lawyer is expected to "represent [his] client zealously within the bounds of the law." n7 He must assiduously study the facts of the case, thoroughly research the law, and present both facts and law vigorously to the tribunal. n8 A lawyer's responsibility to his client includes informing the client of all considerations relevant to the conduct of the case. n9

[*80] The lawyer, however, will make few of the important decisions that affect the course of the litigation on his own. According to the Model Code, "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." n10 Thus, in a civil case, it is the client, and not the lawyer, who decides whether to accept a settlement offer. n11 Similarly, in a criminal case, the decision whether to plead guilty and thereby waive the right to trial rests with the client. n12 Although the degree of control that the client exercises over other, less fundamental litigation decisions is difficult to define precisely, n13 for present purposes it is sufficient to note that the client is given an important degree of control. As one commentator has remarked, "[o]ne of the ideological bases of the adversary system is a strong commitment to client control of decision making" n14

Why is the client given such power over his attorney's conduct? The answer lies in the purposes served by giving litigants attorneys in the first place: client control furthers our legal system's commitment [*81] to personal legal rights. Imagine a typical criminal case. A man is arrested and charged with rape. His court-appointed attorney firmly believes that he is guilty. The defendant, though, insists on going to trial. He has learned that, in the jurisdiction in

which he is being tried, the defense is allowed to introduce evidence about the alleged victim's sexual reputation. The defendant gives the lawyer the names of a number of reliable witnesses who are eager and willing to testify to the victim's "loose" moral character.

What should the lawyer do? He personally believes that this type of evidence is generally irrelevant and constitutes a gross and unwarranted invasion of the victim's privacy. And his dilemma is intensified by his belief that his client is guilty. Nevertheless, he knows that calling these character witnesses might very well lead to an acquittal.

If the lawyer were allowed to ignore his client's wishes and forgo calling the witnesses, little would remain of his client's putative right to introduce this type of evidence; the defendant now would hold his "right" at the discretion, or the whim, of his lawyer. n15 Furthermore, allowing the attorney to control the litigation in this manner would threaten to usurp the functions of legislature (or judge) and jury in two interrelated ways. First, it would tend to transfer the function of making or interpreting the law from legislature or judge to lawyer. In the hypothetical, for example, the attorney's decision to forgo calling the witnesses turned, in great part, on a personal assessment of the relevancy of such testimony and of its effect on the privacy interests of the victim. But these are the very same factors that the legislature balanced when it created the right in the first place. The lawyer has thus arrogated to himself the power to "correct" the legislative judgment; the power to determine the scope of legal rights and obligations now effectively lies in the lawyer's hands. Second, as the hypothetical also reveals, replacement of client control with attorney control threatens to transfer the factfinding function from jury (or judge) to lawyer. The defense lawyer believed his client to be guilty and shaped his defense (or lack thereof) accordingly. But surely the determination of guilt is for the factfinder, and not the lawyer, to make.

Client control also reflects another facet of the American legal system: its emphasis on personal autonomy and individual decisionmaking. [*82] n16 Allowing the client to control the litigation is consonant with our belief that individuals should be allowed to make the important decisions about their lives for themselves, even though the decisions they make may be unreasonable or shortsighted. While an attorney may counsel his client against a particular decision, ultimately he must allow the client to take responsibility for his own fate. For in the end, client autonomy reflects a deeply held belief that, just as we jealously guard against the paternalistic state, so, too, we find repugnant the paternalistic lawyer. n17

II

THE ROLE OF COUNSEL FOR CHILDREN OVER SEVEN YEARS OF AGE

The question whether children old enough n18 to make decisions concerning their own welfare are entitled to counsel, either on constitutional [*83] or policy grounds, is beyond the scope of this Article. Nevertheless, by virtue of case law and statute in many jurisdictions, many older children today do have counsel in proceedings affecting their legal interests. n19 Before turning to the central issue of this Article, namely, the role of attorneys for very young children, it may therefore be helpful to examine briefly the role attorneys for older children play.

My central concern in this Part is, once again, with client control: Should an attorney be ethically bound to follow the directions of an older child client, or should the attorney be allowed to decide for himself, perhaps in consultation with the parents, what is in the child's best interests? For example, should counsel for an adolescent charged with delinquency be allowed to refuse to mount a defense because he believes his client's interests would be served best by sending him to a state institution, even though the client vigorously opposes such a course of action? The preceding Part pointed out that the client's power to control his own attorney reflects, in large measure, the rights-based nature of our legal system. n20 It also noted that client control is consonant with our system's commitment to personal autonomy and decisionmaking. n21 Resolving the question at what age children should be accorded the power to control their own attorneys therefore depends on the answers to two more fundamental questions: At what age should society first accord a child particular legal rights? At what age should society recognize a child to be autonomous for the purpose of making certain kinds of legal decisions? n22

Clearly, to answer these questions, we would have to look both to the conclusions of modern social science and to the teachings of moral philosophy. While it is not my purpose in this Article to give definitive [*84] answers to these questions, a few general observations are in order. Today, most people would recognize that, at some point before they reach the age of majority, children are entitled to make certain kinds of decisions about their own lives. n23 Furthermore, our legal system confers on older children a variety of rights and powers. Thus, children below the age of eighteen are granted legal authority to make such decisions as whether to go to school, n24 work, n25 drive a car, n26 or [*85] obtain an abortion. n27 Similarly, children also have important rights against the state, including the rights of privacy and of free speech. n28

As reflections of the moral autonomy of children, these legal rights and powers suggest that children under the age of eighteen are entitled to direct the course of their attorneys' actions. n29 The particular age at which children are accorded this power, however, is only of secondary importance to my argument; n30 to a great degree, the age society first confers rights and powers on children will be arbitrary. n31 But at some age under eighteen, children ought to have as much power as adults to instruct their attorneys. At some age, paternalism must give way to autonomy.

[*86] In the context of delinquency proceedings, a strong argument can be made that attorneys should always be bound by their young clients' instructions. Since in most jurisdictions, a child under the age of seven cannot be prosecuted for delinquency, n32 this view would generally accord children seven years of age and older the power to direct their own counsel in delinquency proceedings.

To develop this argument, we must look to the Supreme Court's opinion in *In re Gault*. n33 In addition to the right to counsel, n34 *Gault* gave the juvenile accused of delinquency other important rights, including the rights to remain silent, n35 to confront and cross-examine witnesses, n36 and to notice of the charges. n37 These rights would be rendered illusory if the child were not given the power to direct his own counsel. If the child were not given this power, for example, the attorney who believed that his young client was guilty and that incarceration would benefit the child would be able to hasten the process of rehabilitation by waiving the child's right to remain silent. Similarly, consider the attorney who believes that the Supreme Court's decision in *Gault* was misguided and gave too little weight to the state's interest in the welfare of minors; he would now have the power to implement his constitutional interpretation by waiving his client's fifth amendment right in every case.

To give the attorney power to make these types of decisions would make a mockery of the holding in *Gault*. No longer would the juvenile client have the right to remain silent; instead, the attorney would have the power to choose whether or not the child remains silent. Furthermore, as this example shows, attorney control would allow the attorney to usurp the judge's (or jury's) factfinding function and the Supreme Court's lawmaking function. n38 Whether the child is guilty is for the factfinder to decide; whether juvenile defendants ought to have a right to remain silent is for the Supreme Court to decide. But the power given to the attorney in the hypothetical would [*87] allow him to displace the jury's, the judge's, and, ultimately, the Supreme Court's roles in our legal system.

Furthermore, a view that would deny the child the power to instruct counsel in delinquency proceedings would be inconsistent with the spirit of *Gault*. As the Court noted, delinquency proceedings are often viewed as rehabilitative, rather than punitive, in nature; thus, early reformers argued that society, in adjudging a child delinquent, was acting in part to further the child's own best interests. n39 Indeed, the Court asserted that "the highest motives and most enlightened impulses led to" the creation of the delinquency system. n40 Nevertheless, the Court held that the alleged delinquent had a right to counsel and other due process rights. n41

The fact that the state may have acted in the child's best interests was thus insufficient to deny Gerald Gault his right to due process. Yet those commentators who would deny juveniles the power to instruct counsel are in effect asserting the very same theory that was rejected in *Gault*. They argue, in essence, that the child is either incapable of knowing his own best interests or is not entitled to determine for himself where those interests lie; as a result, they reason, the child must be denied an active hand in the litigation in order to assure the outcome most beneficial to himself. Thus, they would simply replace the paternalism of the state with the paternalism of the lawyer. Nothing

could be further from the spirit of *Gault*, n42 especially when the state appoints the child's counsel.

Finally, consistency and equity demand that the child be allowed to direct his own counsel in delinquency proceedings. The decision to prosecute children seven years of age and older for acts of delinquency reflects a legislative judgment that these children are mature enough and autonomous enough to be held responsible for their own actions. It would be both inconsistent and unfair to treat the child as a morally responsible actor who must suffer the legal consequences of his own delinquent acts and yet, at the same time, deny that he is autonomous enough to be capable or entitled to instruct counsel in the adjudication of those same acts.

[*88] Commentators, however, have continued to debate the issue of who should direct counsel in delinquency proceedings. Many still assert that, in such a proceeding, counsel should be guided by what he perceives to be in the child's best interests, rather than by the child's explicit instructions. n43 In their influential book, *Before the Best Interests of the Child*, n44 Goldstein, Freud and Solnit have advanced a different view: The attorney should be guided neither by his own opinion of the child's best interests nor by the child's instructions, but by the wishes of the parents. n45 Goldstein and his co-authors acknowledge that "*Gault* means that a child in a juvenile delinquency proceeding will not be deprived of the right to legal representation because his parents are financially unable to afford counsel." n46 But they view this "right to counsel" not as a personal right belonging to the child, but as a collective right of the family designed "to prevent juvenile 'justice' from usurping parental functions." n47 The authors sum up their view as follows:

Rather than extend the authority of juvenile court judges or other state agents to act as parent to the child, *Gault* reaffirms the right of a child to have his own parents make decisions about what he needs. There is no hint in *Gault*, and it would run contrary to its tenor, that an attorney could independently represent the child over the parents' objection and prior to their disqualification as the exclusive representatives of his interests. Protection of the family, protection of the child from the state -- not from his parents -- is central to the holding in *Gault*. . . . n48

The authors' interpretation of *Gault* leads them to conclude that it is the parent, and not the child, who decides whether counsel is necessary or desirable and, if so, who directs the duties of the attorney. n49

[*89] This reasoning misses the force of the holding in *Gault*. n50 *Gault* stated that it is the "juvenile [who] needs the assistance of counsel" n51 and that "*the child* and his parents must be notified of the *child's* right to be represented by counsel." n52 If *Gault* merely reaffirmed the parents' right to retain counsel for a child, the Court certainly used anomalous language when it repeatedly referred to the *child's* right to an attorney. n53

There are additional reasons for disagreeing with Goldstein, Freud, and Solnit. As noted earlier, n54 *Gault* gave the juvenile defendant rights in addition to the right to counsel. In particular, *Gault* held that the constitutional privilege against self-incrimination applied in delinquency proceedings, n55 describing this fifth amendment privilege as preventing "the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." n56 And three years after *Gault*, the Supreme Court held in *In re Winship* n57 that the state must prove its case beyond a reasonable doubt before adjudicating a juvenile to be delinquent. n58

The Supreme Court's emphasis on these due process rights is significant. These rights are ultimately bottomed on the constitutional interest in personal autonomy. In particular, *Winship's* reasonable doubt standard seeks to ensure that the factual predicate required by the Constitution in order to deprive an individual of personal autonomy and liberty is satisfied; n59 in this way, the procedural holding in [*90] *Winship* furthers the Constitution's underlying substantive vision of individual freedom. Similarly, the right to remain silent represents another facet of personal autonomy: freedom from forced disclosures. It is the child who stands to lose his personal freedom as a result of the delinquency proceeding, and it is he, not his parents, who possesses the right to remain silent. Only by a sleight-of-hand, then, can Goldstein, Freud, and Solnit turn these procedural protections of *personal* autonomy into rights protecting *family* autonomy.

Finally, at least one court has rejected Goldstein and his coauthors' interpretation of *Gault*. Recently, the New Hampshire legislature proposed a statutory amendment requiring the assignment of counsel to a juvenile accused of being a delinquent only if the court is satisfied that "the minor and persons liable for his support . . . are financially unable to obtain counsel on their own." n60 The Supreme Court of New Hampshire declared the amendment to be unconstitutional: "A juvenile's right to counsel during every stage of the proceedings against him cannot be made to depend upon the financial status of persons liable for his support . . . or their willingness to fulfill that support obligation" n61

We have thus far confined our discussion to delinquency proceedings. At what age should children be allowed to instruct counsel in neglect, abuse, termination, divorce-custody, and other types of cases affecting their interests? n62 There is no obvious answer to this question. First, unlike the delinquency context, courts and legislatures have not generally accorded children due process rights, other than the right to counsel, n63 in these other types of proceedings; the need for client control in these cases is consequently lessened. Second, the equity argument employed in the delinquency context -- that, if a child is deemed mature enough to be held legally responsible for his actions, it is unfair to deny him the power to instruct his counsel on the ground that he is too young n64 -- is not directly applicable to these other types of legal proceedings.

Nevertheless, *Gault* does have some relevance outside of the delinquency context. n65 For example, the purposes of delinquency and [*91] protective (i.e., neglect and abuse) proceedings and their effects on the life of the child are similar. While some jurisdictions now recognize that delinquency proceedings serve a punitive function, n66 the official rationale for both child protective and delinquency proceedings is to help the child. n67 Similarly, both child protective and delinquency proceedings may result in removing the child from his parents' home; thus, to the child who wants to stay with his parents, the effects of both types of proceedings are indistinguishable and equally traumatic. n68 Accordingly, at least for protective proceedings, we should recognize a child's power to instruct his counsel once he attains the age of seven, the age at which a child has power to direct counsel in delinquency proceedings. n69

[*92] This conclusion is buttressed by other considerations. Delinquency can result from an inadequate home environment. If a neglected child commits a delinquent act, and if the state is successful in its efforts to prosecute the child for that act, the judge may decide that the child's interests will be served best by placing him in a group or foster home, or in an institution. On the other hand, the state may remove him from his family by means of a child protective proceeding; in that proceeding, the judge may similarly decide that the child's best interests demand that he be placed in a group or foster home, or in an institution. The potential outcome in both cases may well be the same; yet in one case, the child will be able to direct counsel, while in the other, he will not. Surely, the child's power to direct his counsel and thereby make his own views and preferences known to the judge and jury should not turn on fortuities such as whether the state has decided to proceed by way of a delinquency proceeding rather than by way of a protective proceeding.

Finally, allowing the child's power over his attorney to vary according to the type of proceeding would introduce a significant and unexplained inconsistency between the powers of adult and of juvenile clients. While the Model Code suggests that the attorney's role may vary depending on whether he represents the client in an adjudicative or a legislative proceeding, n70 the Code does not distinguish among different types of adjudicative proceedings. n71 Rather, according to the Code, "[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client." n72 As long as a client is capable of making a "considered judgment on his behalf," n73 the client's wishes must guide counsel's actions. Thus, it is the capacity of the client and not the type of proceeding that determines the nature of the attorney-client relationship in the adult context. There is little reason for adopting a different rule where a juvenile client is involved.

The question of when a child is old enough to instruct this own counsel in other types of proceedings ultimately depends on those mixed social-scientific/moral questions with which we began: When is a child mature enough to be accorded the type of rights n74 that only client control can preserve and protect? When can he be deemed to be [*93] a morally autonomous individual? n75 However we answer these questions, it is clear that, as we consider progressively younger children, we reach an age below which a child cannot be deemed to be an autonomous

individual. I will now turn to the case of such children.

III

THE ROLE OF COUNSEL FOR CHILDREN UNDER SEVEN YEARS OF AGE

In this Part, I will explore the nature of legal representation of children under the age of seven. My central concern will be with role definition: What roles are available to the attorney whose client is too young to control the course of the litigation? In attempting to answer this question, I will examine a variety of traditional legal sources, including case law, statutes, and the Model Code of Professional Responsibility. Ultimately, though, I will suggest that only two, somewhat unconventional roles remain open to a lawyer representing a young child: the role of partisan Champion and that of neutral Investigator.

A. The Attorney's Role: In Search of a Definition

Part I of this Article n76 examined the American legal system's strong commitment to client control. That discussion revealed that lawyers in our adversarial system advocate those positions, and only those positions, that their clients instruct them to advocate. But what happens when the client is unable to instruct the lawyer?

This, of course, is the central dilemma of the lawyer representing a young child. Infants, for example, lack even the linguistic capacity to instruct counsel. Slightly older children, on the other hand, are capable of directing an attorney; nevertheless, to allow a child of age five to instruct counsel would be problematic. As attorneys experienced in the field are aware, many young children equivocate when [*94] asked about their preferences or views on a matter; thus, having an attorney take his guidance from the child may result in practice in the attorney's taking whatever position he himself thinks best. More fundamentally, very young children lack the capacity to make considered and intelligent choices. n77 While the attorney need not and should not ignore the child's wishes in the litigation, most readers would agree that the attorney ought not be bound by those wishes.

The traditional solution to the problem of a client incapable of instructing counsel has been to appoint a guardian ad litem. A guardian ad litem, acting as a fiduciary, is empowered to decide what is in the best interests of his ward and to determine what position should be taken in the litigation; in carrying out his duties, the guardian may ignore even the express wishes of his ward. n78 If necessary, the guardian has the authority to retain counsel for his ward, n79 and in such cases, the attorney will take his instructions only from the guardian. n80

The typical case in which a guardian ad litem has traditionally been assigned is one in which the guardian seeks to enlarge or to preserve property belonging to the ward. In such cases, where the ward is either a plaintiff seeking damages or a defendant from whom damages are being sought, the guardian's role is relatively straightforward. The ease with which a guardian has been utilized in such cases may lead us to advocate the appointment of guardians in child welfare cases. The substantial differences between these two types of cases, however, should make us hesitate before doing so.

In traditional cases, what is best for the ward is relatively obvious. In child welfare cases, by contrast, not only is the best interest of the child in doubt, it is often the very issue being litigated. In order to play an active role in the litigation, the guardian first must determine who ought to prevail on the merits. There is simply no analogue to this problem in the traditional case. We are comfortable with using guardians in traditional cases precisely because the guardian's duty is so easily defined. It is probable, however, that, if the guardian's fiduciary responsibilities were as vague and open-ended in traditional cases as they are in child welfare cases, courts would have appointed guardians with much less frequency.

[*95] Regardless of a guardian's potential role, an attorney can take his orders from a guardian only if one has been appointed; in the post-*Gault* era, however, courts and statutes requiring counsel for children frequently have ignored the necessity of appointing a guardian ad litem. The lawyer is thus often on his own.

Where should the lawyer placed in this situation turn for guidance? Most of the potential sources of guidance turn out to be unhelpful. n81 For example, if the lawyer looks first to case law, he will find that neither *Gault* nor any other Supreme Court case has ever addressed the role of counsel for children under the age of seven. n82 Nor do the state and lower federal court decisions requiring counsel for children offer any assistance. n83 In general, these cases have not distinguished between younger and older children; instead, they have simply held that all children, regardless of age, have a right to counsel in a particular type of proceeding. n84 It is therefore not surprising to find that, in each of these cases, the court appears to have been unaware of the distinctive problems presented by the child too young to instruct his lawyer. What is surprising, however, is these cases' utter failure to have delineated concretely the role that counsel for children, irrespective of age, are expected to play in litigation.

For example, in *In re Orlando F.*, n85 the New York Court of Appeals ruled that, "in the absence of the most extraordinary of circumstances," trial courts must appoint attorneys to represent children in proceedings to terminate parental rights. n86 In reaching this conclusion, the court pointed out that New York courts "have been sensitive to the expanding rights of children, including the right to be heard" n87 and that attorneys are needed because "'the child cannot obviously speak for herself.'" n88 While the court thus implied that [*96] counsel's role was to speak for the child, it failed to give the attorney any guidance in fulfilling this role. The child in *Orlando F.* was four years old. If four-year-olds have a right to be heard but cannot speak for themselves, how is the attorney for the child to determine what is to be said on the child's behalf? The New York Court of Appeals made no effort to answer this question except by unhelpfully reminding counsel "to protect and represent the rights and interests of the child in controversy." n89

Similarly, in *Sims v. State Department of Public Welfare*, n90 a three-judge federal court held that a child has a constitutional right to counsel in a termination of parental rights proceeding. n91 Like the court in *Orlando F.*, the *Sims* court reasoned that a right to counsel is necessary to effectuate the child's putative due process right to be heard. n92 Once again, however, the court failed to flesh out the role counsel was expected to play. n93

The Model Code of Professional Responsibility also furnishes the lawyer representing a young child with little guidance. The Model Code does not specifically address the issue of child-as-client; rather, it directs that, where "the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client." n94 This standard, however, is unhelpful, for it is not clear how the attorney is to determine what interests of a child client need to be safeguarded. n95

[*97] If court decisions and professional rules are unhelpful, the lawyer in search of a role might logically expect statutes authorizing counsel for children to provide some guidelines. Unfortunately, these statutes also provide little or no guidance about the proper role of counsel. The New York statute authorizing the appointment of counsel in delinquency, protective, supervision, and parental rights termination proceedings, for example, offers no guidance whatsoever. n96 Similarly, of the many jurisdictions that provide for assignment of counsel in divorce proceedings, only six provide any instructions regarding the representative's role. n97 That statutory guidance, however, is uninformative; two statutes, for example, simply mandate that the "attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify" before the court. n98

Next, the lawyer might look to the commentators. n99 The authors of the American Bar Association's Juvenile Justice Standards, for example, support independent representation for children in "*any* proceeding that may affect their custody or status, including those involving neglect, dependency, custody or adoption," n100 reasoning that "independent representation for the child whose future is largely at issue seems desirable." n101 Although the authors recognize that "two opposing counsel will already be involved in many of these cases," n102 they conclude that neither of the two parties'

interests can safely be assumed to coincide entirely with the child's. Each may bring a distinctive perception of social reality to the [*98] matter. . . . For tactical or other reasons, factual propositions may be developed only selectively or not at all. Similarly, personal or institutional considerations may unduly constrict the dispositional

alternatives investigated and presented to the court. n103

Unlike the other sources examined thus far, the authors of the Juvenile Justice Standards were well aware of the difficulties involved in representing a child too young to "judge where [his] 'best interests' lie or even communicate [his] desires to counsel." n104 They counsel the lawyer in such cases to seek the appointment of a guardian ad litem. n105 Where no guardian has been appointed, however, the authors instruct counsel to "inquire thoroughly into all circumstances that a careful and competent person in the juvenile's position should consider in determining the juvenile's interests with respect to the proceeding" n106 and suggest that the lawyer advocate "the position requiring the least intrusive intervention justified by the juvenile's circumstances." n107 But such a standard is not only vague, it is probably meaningless as well. Since the juvenile is by definition not a "careful and competent person," it means little to say that the attorney should determine what such a person would decide if he were in the juvenile's position. n108

Finally, with the exploration of case law, statutes, Model Code, and commentary having been to no avail, the lawyer representing a young child might seek guidance from other, more experienced practitioners in the field. In the City of New York, for example, the Juvenile Rights Division of the Legal Aid Society has represented virtually every child appearing before the Family Court as a suspected abused or neglected child for the past thirteen years. In its practice manual for staff attorneys, Legal Aid has immodestly designated its appropriate role

[*99] to see that a child who does not need the intervention of the court is kept free of that interference in his or her life, that a child who does not need to be separated from his parents is not separated, that a child who does need court intervention receives it, that a child who does need to be removed is removed, that a child is dealt with only by a due process of law . . . and that a child receives all the services to which he is entitled and of which he is in need. n109

But this description merely tells the attorney for the child that his role is to do just the right thing in every case; imagine the sense of responsibility felt by the staff attorney obliged to live up to this standard. In essence, this position merges the traditional roles of guardian ad litem and attorney. The lawyer is expected to determine for himself what is best for the child and then to advocate that position in court. But the objection to the Juvenile Justice Standards voiced earlier n110 applies here as well. In particular, it is unlikely that the attorney will be able to resolve effectively the often complex and value-laden issue of what is best for the child. n111

Even if the Legal Aid position ultimately offers little guidance for the attorney representing a young child, it does suggest the topic of the next Section, the two roles counsel for young children may potentially play in litigation. The Legal Aid position is a classic statement of one of those roles -- that of the Champion. It is to an examination of those two roles that we now turn.

B. Possible Roles for Counsel of Children Under Seven

In the preceding discussion, we saw that traditional legal sources provide little guidance to the attorney who has a young child as a client. Attorneys, accustomed as they are to following the directions of an adult client, suddenly find themselves in an uncomfortable position when they are asked or are appointed to represent a child under the age of seven. In such cases, two principal roles are available to the [*100] attorney, neither of which is completely consonant with our adversarial system of litigation. The lawyer can either be a partisan advocate, litigating the case in an effort to achieve the result he thinks best, or he can be a neutral investigator, seeking to provide the court with the greatest possible quantity and quality of relevant information. n112 The former role in effect requires an attorney to act simultaneously as guardian ad litem and as counsel. n113 The latter role requires the attorney to act as an impartial factfinder, instead of as an advocate. But neither of these roles, characterized as "Champion," n114 and "Investigator," respectively, allows the attorney to do what he knows how to do best: advocate the positions his client tells him to advocate. I will now examine each of these roles in greater detail. n115

1. Counsel as Champion

The function of the Champion is to advocate what he believes to be the appropriate outcome. In neglect proceedings, for example, the Champion first decides for himself whether the child's interests will be best served by removing the child from his parents' home or by allowing him to remain there; the Champion then advocates that position in court. Similarly, in divorce custody disputes, the Champion determines which parent should have custody of the child and urges the court to adopt his determination. Supporters of the Champion role believe that, through such advocacy, the court's ability to render the correct decision will be enhanced. n116

[*101] The role of Champion may seem a sensible choice for the attorney representing a young child. But one important aspect of the role is troubling: by requiring the lawyer to advocate the position he thinks most appropriate, the Champion role apparently contravenes the traditional prohibition against lawyers expressing their personal views to the factfinder. Thus, Ethical Consideration 7-24 of the Model Code of Professional Responsibility states:

The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. n117

The purposes underlying this prohibition are rooted in the structure of our system of litigation. The American legal system empowers the factfinder to sort out facts from falsehoods and misstatements, and requires it to apply the relevant legal rules and principles to those facts. Our adversarial system is intended to further this process by sharpening the presentation of issues. By pointing out inconsistencies in testimony and by revealing witness bias and prejudice, the attorneys in the case help the factfinder to separate truth from untruth. Similarly, the lawyers aid the judge in determining the content of the applicable legal principles by vigorously advocating conflicting interpretations of the law. n118

[*102] Allowing the attorney to present his personal views of the case to the factfinder would not assist the courts' deliberations. The fact that the attorney personally believes that a certain witness is telling the truth or that a certain legal rule applies to the case is simply irrelevant to its deliberations. For example, a prosecutor's belief in a defendant's guilt tells the jury nothing about the ultimate issue in the case -- whether the defendant is in truth guilty.

But this partisan advocacy is not merely irrelevant; it is also potentially destructive of our legal process. Allowing the attorney to testify about what he believes to be the appropriate outcome in the case encourages the factfinder to abdicate its responsibilities to the lawyer. Instead of making its own judgments, the factfinder soon comes to rely on the judgments of the attorneys. Instead of independently examining the facts and the law, the factfinder asks only what the lawyers think. n119

A recent student note has suggested that these fears of lawyers' usurping the factfinder's role are not chimerical. n120 Based on a study of Connecticut attorneys who had acted as counsel for children in divorce-custody cases, the note reported that "[t]he lawyers almost uniformly expressed the view that in cases resulting in a contested hearing the judge relied heavily on their investigations and recommendations." n121 More empirical research is necessary, of course, before we can conclude with confidence that factfinders in cases affecting children are deferring to Champions on a regular basis; nevertheless, the possibility of such a phenomenon needs to be explored further if courts and legislatures are to continue appointing such Champions.

Some readers might argue that my concerns about lawyer usurpation are exaggerated. These critics would note that many, perhaps most, cases affecting children already include testimony by a psychologist, social worker, or other trained professional. The purpose of this testimony, these critics would suggest, is to urge the factfinder to **[*103]** reach a particular outcome in the case; furthermore, it is probable that factfinders frequently defer to the judgments of these experts. Thus, in terms of purposes and effects, there is no difference between allowing a Champion to participate in the case and allowing a psychiatrist to do so.

This argument, however, overlooks a critical difference in the roles played by lawyers and by psychiatrists and

other experts in cases involving children. In particular, expert witnesses are subject to cross-examination by the other party's counsel. Under a skillful cross-examination, the expert's knowledge and competence will be tested, and his prejudices and biases, if he has any, will be revealed to the factfinder. The lawyer, however, is not subject to cross-examination. He may be every bit as qualified as the expert and equally free from prejudice; in the absence of cross-examination, however, there is no way to ensure that this is the case. n122

Other readers might raise a different objection to my argument. They would suggest a confusion in my premise that the Champion role allows the attorney to present his personal views to the factfinder in contravention of the traditional injunction against such advocacy. They would point out that what Ethical Consideration 7-24 n123 prohibits is the lawyer's expressly informing the factfinder of his personal beliefs. Under this view, then, a lawyer is free to shape litigation strategy according to his personal views as long as he does not argue to the factfinder that it should reach a conclusion because he has done so. Thus, the lawyer in a neglect case, having decided that the child should be removed from the parents' home, would remain free to call a psychiatrist to testify to that effect.

But even if this argument is correct, lawyers should nonetheless not be free in cases involving children to shape the litigation according to their own lights. This conclusion becomes apparent if we compare the structure of the typical case involving adult parties with that of a case in which a young child is involved. The former case generally involves two parties, a plaintiff and a defendant, whose adverse interests ensure the sharp presentation of issues. The typical case involving a Champion, however, involves three parties. Thus, in a divorce-custody dispute, the father, mother, and child will each have a lawyer; similarly, in a neglect case, the parents, the state, and the child will be represented. Generally, the child's attorney will not advocate a [*104] position completely adverse to both parties; instead, his position will simply duplicate the position already urged by another party. n124 This redundancy, of course, is frequently inevitable given the issues ultimately in dispute in the case. For example, in a custody dispute, the lawyer for the child may argue in favor of awarding custody to either the father or the mother; he cannot, however, urge the court to award custody to both parents, or to neither one. If this lack of adversity between the child's position (as determined by his lawyer) and that of another party resulted only in duplication of effort, we would have little to complain about. But couple the phenomenon of redundancy with that of deference to the Champion's position noted earlier, n125 and we have a significant problem. Some examples should make this problem clear.

Consider the case of a custody dispute in which the mother, a lesbian, wants to live with her lover and have custody of her two children, a six-year-old boy and a four-year-old girl. n126 The court assigns an attorney to represent the children. The attorney meets with all parties, including his young clients, and is impressed by the children's father, who appears to be a fine, able, and concerned parent. The attorney concludes that custody should be awarded to the father and vigorously presses for this result in negotiations with the attorneys for each of the parents and in chambers with the judge; at trial, he critically cross-examines the mother while supportively cross-examining the father.

Now assume that a different attorney had been assigned to represent the same children. This attorney similarly meets with all parties, including the children. Impressed with the mother, he concludes that the children will be served best by having them remain in their mother's custody. The attorney vigorously presses for this result in negotiations with the attorneys for the individual parents, in chambers with the judge, and at trial in supportive cross-examination of the mother. Moreover, the attorney presents an expert witness of his own, allegedly "for the children," who testifies that exposing young children to homosexuality has no bearing whatsoever upon their sexual preferences.

It seems likely that the outcome of this hypothetical case will depend on which position the child's attorney adopts. The judge may [*105] be impressed by the number of advocates supporting each parent's cause (two against one) or may believe that the particular outcome sought by the children's attorney is what the children themselves desire. Or the judge, viewing the attorney as the children's spokesperson, may simply defer to his "informed" judgment about what is best for the children. Moreover, the structure of the case may be radically altered even before the trial begins. Thus, the parent who lacks the children's attorney's support, knowing what lies ahead, may be more willing to settle the case without a trial.

The appointment of a Champion may therefore inject a critical degree of arbitrariness into the outcome of cases involving children. n127 [*106] Which party wins in such cases will depend less on the factual and legal arguments made to the court than it does on the position taken by the Champion. n128 Furthermore, the more difficult a case is, the more unclear the proper outcome appears and the more likely it is that there will be an arbitrary result. In the hard cases, the judge is most unsure of the appropriate outcome and will consequently be most tempted to rely on the Champion's judgment. But for every Champion who advocates a particular result, one can easily find a different Champion who would urge the opposite outcome. In the end, it will be the child's attorney, and not the judge, who decides the case.

It may be argued that these major difficulties notwithstanding, the Champion may still play a constructive role in cases involving children. Even when judges take seriously their official obligation to determine for themselves what is in the child's best interests, they may unconsciously allow irrelevant considerations to affect their deliberations; alternatively, judges may conclude prematurely what is best for the child, believing that one and only one outcome in the case could be appropriate. In such cases, the argument goes, a Champion may serve to focus a court on the important considerations, pointing out irrelevant factors and improving the chances that the judge will apply the law properly. Moreover, the Champion's advocacy may make the judge more self-conscious and self-critical in considering which outcome [*107] will most benefit the child. n129 In all these ways, the probability that the judge will reach a correct decision will be enhanced.

I question, however, whether appointing a Champion will produce these benefits. n130 First, when the litigation focuses on the "best interests" of the child, the scope of relevant considerations often cannot be meaningfully limited; the best interests standard is simply too subjective and open-ended. In these cases, the Champion's ability to eliminate extraneous matters from the scope of judicial inquiry is of little significance. Second, and more fundamentally, appointing a Champion would not appear to be necessary to produce these benefits. Given the phenomenon of redundancy discussed earlier, n131 it is extremely likely that another party already in the litigation will be fulfilling the function ascribed to the Champion.

In the end, then, we have much to lose, and nothing to gain, by adding the Champion to litigation involving children. The positions the Champion advocates generally will replicate those already urged by another party. His involvement in the case may result in usurping the factfinder's role. And widespread use of Champions may lead to increased arbitrariness in the outcomes of cases.

If the Champion's role appears unsatisfactory, there is another role counsel may play -- that of Investigator. I will now explore that role in some detail.

2. *Counsel as Investigator*

Unlike the Champion, the Investigator does not explicitly advocate an outcome. Instead, the attorney qua Investigator ferrets out all the facts in the case, uncovers the legal issues, and fills the gaps left by other parties. n132 Earlier in this Article, I noted that our litigation system is adversarial in nature: the job of lawyers is to advocate [*108] opposing positions. n133 What is most striking about the Investigator, then, is that he is not an advocate. The role and purpose of the Investigator is to uncover information. His "client" is "truth."

In using the Investigator in litigation involving children, our legal system has moved away from the adversarial model and towards an inquisitorial approach to litigation. But this hybrid inquisitorial-adversarial process presents the same danger that a fully inquisitorial system would: the risk of subordinating the importance of the public trial to out-of-court, pretrial discovery proceedings. n134 Since it is likely that the factfinder will base its decision largely on the results of the Investigator's pretrial investigations, very real danger exists that the case will already have been decided before it comes to trial. Furthermore, such a transformation in the structure of litigation would represent a shift in effective decisionmaking power from the factfinder to the Investigator.

I do not mean to imply, of course, that the factfinder will render a judgment based on secret information; all of the Court's findings will be placed in the record and can be challenged on appeal. But the information will have been colored by the Investigator's values, by his sense of what is relevant and what is not, before it is ever heard in open court; to an undetectable degree, the evidence will already have been processed and evaluated before alternative assessments can be offered. n135 To some extent, the decisionmaking process will have been closed before the parties have had an opportunity to present their arguments in court. Accordingly, the opportunity to be heard, to have a day in court, becomes less meaningful.

It must also be emphasized that the Investigator is no more an attorney for the *child* than a district attorney's homicide investigator is an attorney for the deceased. When courts and commentators propose that children be given Investigators, they are really proposing a new form of court-ordered discovery; they are not, however, increasing the legal representation of young children by one iota.

Up to this point, we have examined only the impact of appointing Investigators on the litigation process. Many readers might not be disquieted by the changes in the process resulting from such appointment. [*109] They would argue that the Investigator will contribute to a more complete understanding of the facts in child-related cases, especially where the parties' retained counsel do not advocate their positions as vigorously as they might. These readers would suggest that the court may be better able to reach an informed judgment with the Investigator's revelations than without them.

But even granting this point, there is more to be said. As Monroe Freedman has noted in a related context, "[w]e are concerned . . . with far more than a search for truth." n136 We are also concerned with rights that "serve independent values that may well outweigh the truth-seeking value." n137

Although the Investigator may serve the truth-finding function of the judicial system well, his appointment may undermine legitimate parental interests. In particular, in at least two types of proceedings -- divorce-custody and child protective -- the use of Investigators may infringe on the privacy and autonomy rights of the parents. n138 It therefore remains to be seen whether, on balance, court-ordered appointments of Investigators to "represent" young children are beneficial or harmful to our litigation process. Because the attorney qua Investigator effectively functions as an agent of the state, however, we must examine the state's interest in protecting young children before making a final assessment about the wisdom of appointing Investigators in cases involving children.

C. The Role of the State in Protecting Children

The right of the family to be free from significant state interference is fundamental in American jurisprudence. The traditional family relationship, according to the Supreme Court, has "its origins entirely apart from the power of the State," n139 is "deeply rooted in our Nation's history and tradition," n140 and is "as old and as fundamental as our entire civilization." n141

In recent years, as children have come to be recognized as "persons" within the meaning of the fourteenth amendment, n142 [*110] advocates of children's rights have increasingly called on the state to protect children from their own parents. n143 Because state intervention interferes with the family's autonomy, n144 it is important to consider whether the Supreme Court's traditional solicitude for the family relationship is rooted in the functionalist rationale that a "hands off" approach will best foster the emotional and intellectual development of children, or whether it is based on the inherent rights of parents to raise their children free from state coercion. As Professor Hafen has noted, "This question is relevant because, if all that matters is what is most advantageous to a particular child, perhaps state intervention in parent-child relationships should be more readily allowed than it is under existing law and practices." n145 If state intervention is viewed as interfering with inherent parental rights, however, legitimate grounds for intervening will be consequently limited. Moreover, even when intervention is justified, an approach bottomed on parental rights would demand that intrusion into parental decisionmaking be kept to a minimum. The view we take will thus have significant implications for determining when the state may assign counsel to represent children.

Traditionally, the general policy of state nonintervention into the family has been seen as promoting the "best interests" of children. For [*111] example, the Supreme Court recently justified the policy of deferring to parental decisions partly on the ground that the state is inept at performing the difficult role of shaping the lives and providing for the needs of children. n146 Some commentators agree. n147 As Professor Goldstein has put it, the state "does not have the capacity to supervise the delicately complex interpersonal bonds between parent and child . . . [and] even if [it] were not so incapacitated, there is no basis for assuming that the judgments of its decisionmakers . . . would be any better than (or indeed as good as) the judgments of . . . parents." n148 Since most of the time it is unclear whether state officials know what is best for children, n149 limiting state interference appears to be the safer course. n150

[*112] This justification, which may be characterized as utilitarian, suggests that family rights ought to be protected only if they result in what is best for children. If, on the other hand, the state knows better than parents do what children need or could do a better job of raising children than parents do, the utilitarian argument suggests that family autonomy should be correspondingly diminished. Under this view, familial rights are only derivative in nature and are limited to those situations in which parents in fact constitute the best caretakers. n151

Although there may be substantial agreement today about the state's general inability to determine what is best for children or to raise children itself, it is conceivable that someday the state's abilities in this area will increase greatly, due to such factors as advances in the social sciences or massive infusions of funds into state-run programs for children. At the very least, the consensus that the state is inept at childrearing might change. Thus, a utilitarian justification for family autonomy could potentially allow for a dramatic expansion of state power in the area of child development.

I believe that family autonomy should not and does not rest on such a slender reed as the tenets of contemporary child psychology. The current wisdom will almost certainly be repudiated by social scientists in the future. But even if this were not so, the state should not be permitted to substitute its judgment about child care for that of the parents except in the most compelling circumstances. Indeed, American constitutional jurisprudence now appears to recognize that the state may not intrude into family life against the wishes of the parents absent a showing that it is highly likely that grave harm will befall the child if intervention is not allowed. n152 Thus, our [*113] Constitution prohibits the state from exercising broad power to tell parents how to raise their own children. n153

As the Supreme Court recently articulated, "the tradition of parental authority is . . . one of the basic presuppositions of" individual liberty. n154 According to the Court, parents, not the state or any agent designated by the state, possess the "authority in their own [*114] household to direct the rearing of their children" n155 since "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." n156 Parents possess this childrearing authority because "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." n157 Decisions about marrying n158 and having children n159 are among the personal rights protected by the Constitution. Parents as individuals also have rights to develop intimate and loving relationships with their children and to attempt to shape their children's lives and ideals by inculcating them with the parents' values. n160 They have these rights even if it could be demonstrated that someone else might do a better job raising the child or that the child's best interests -- emotional, intellectual, or material -- would be better served by placing him with different parents.

Since parents are free to raise their children without state interference except under the most compelling circumstances, the [*115] "rights" of children are limited: they have only the right to be free from serious physical or emotional harm inflicted by their parents. n161 Some readers may feel that this position gives insufficient weight to the "rights" of children. One must distinguish carefully, however, between children's rights and children's welfare. n162 To most readers, giving a child a "right" would suggest giving him the power to make decisions for himself in a certain sphere of activity. n163 Thus, children's "rights" would be created at the expense of parents' rights by transferring legal decisionmaking power from parents to children.

[*116] Given this view, however, many of the so-called "rights" of children are not rights at all. Rather, they are

the requirements (or perhaps more appropriately, what the advocates of children's rights think are the requirements) of a happy and healthy childhood. Thus, included in the "Bill of Rights" that advocates for children have proposed are such "rights" as the right "[t]o receive parental love and affection, discipline and guidance" and the right "to grow to maturity in a home environment which enables [them] to develop into . . . mature and responsible adult[s]." n164 As Steven Bricker has aptly observed:

Many within the children's movement do not intend to alter the child's status of legal disability, but still state that they intend to promote children's rights While they may speak of the child's "right" to some perceived benefit or service which they believe helpful to the child's development, they are really seeking to impose on children, and their parents, what they themselves view as beneficial to their welfare. n165

Thus, the "rights" most advocates wish to impose on children simply increase the state's authority over children at the expense of their parents; these rights, however, are in no way intended to enhance the child's power to make decisions about his own life and well-being. n166 Most advocates of children's rights believe "that greater [state] intervention into family life is necessary in order to promote some aspect of children's lives." n167 Thus, if rights are defined as the power to control or to make choices about one's life, most advocates of children's welfare are actually antagonistic to children's rights.

[*117] We may now return to the question posed earlier: n168 On balance, would appointment of an Investigator in proceedings affecting children be a beneficial addition to the litigation process? In answering this question, we must constantly keep in view the impact of appointing counsel on family autonomy and privacy. More generally, we must ask whether we can give children lawyers -- be they of the Champion or the Investigator stripe -- without undermining legitimate parental interests in autonomy and privacy. In the next Part, I will attempt to answer these questions in the context of particular types of proceedings affecting children.

IV

THE ROLE OF COUNSEL FOR CHILDREN UNDER SEVEN IN SPECIFIC TYPES OF PROCEEDINGS

In this Part, I will examine several specific types of proceedings in an attempt to determine whether lawyers should ever be assigned to very young children and, if so, what their role should be. Independent counsel can play a vital role in certain types of litigation. It is critical, however, that we define that role with some precision; only in this way can the benefits of appointing an attorney be realized without any concomitant infringement of parental rights. Additionally, fleshing out the lawyer's function may eliminate a common problem: different attorneys in similar cases doing vastly dissimilar things. In turn, then, I shall explore divorce-custody cases, child protective proceedings, constitutional class actions, and cases in which parents seek judicial approval for medical treatment of their children.

A. Divorce-Custody Cases

Commentators have frequently advocated independent representation for children in divorce-custody cases. n169 Twenty-eight jurisdictions in the United States currently provide by statute that a representative [*118] of the child may be appointed in custody proceedings at the discretion of the judge. n170 Of these jurisdictions, seventeen provide that only an attorney can be appointed, n171 eight provide that the appointment must be of a guardian ad litem, n172 and three permit the appointment of either an attorney or a guardian. n173

Those who favor counsel for children in custody cases cite the potentially adverse effects of divorce on the child n174 and focus on those interests of the child that separate him from the other parties to the proceeding. "Without separate legal representation, the child's interests are left to the inadequate protection of parents and the court." n175 They frequently argue that representation in custody disputes would [*119] serve the same goals as are served by appointing counsel in delinquency cases: "protection of society's young and the assurance that they will have a hopeful future." n176 They thereby imply that a right to counsel in custody cases is grounded in the Constitution.

But *In re Gault* n177 is not a precedent for counsel for young children in custody cases. In the first place, delinquency proceedings involve children over the age of seven; these children are old enough to instruct counsel and to play an intimate role in the direction of the litigation. n178 My focus in this Part, however, is on children who are too young to play such a role. Yet maturity aside, there are at least two significant differences between custody and delinquency proceedings that render *Gault* inapposite to the custody context.

First, the potential for harm to the child is not as great in custody cases as it is in delinquency cases. n179 In the latter type of case, the child may be removed from his family and placed in a state institution. In custody cases, however, the child will merely be required to live with one parent or the other. This difference is not simply one of degree -- it is a difference in kind as well. n180

The second distinction between delinquency and custody proceedings is more complex and concerns the role played by the state in each type of case. In a delinquency proceeding, the state faces the child as accuser and seeks to adjudicate his legal responsibility in a [*120] court of its own creation. The state's role in a custody dispute, on the other hand, is derivative of the parents' power over their children. This distinction can be seen most clearly by examining the parents' authority to settle the custody issue through private agreement. As we saw in the preceding Part, parents legally exercise a high degree of control over their children's lives. n181 For example, if parents decide to separate, they may arrange between themselves which parent should have custody. The child would have no legal power to overturn this arrangement; furthermore, he would have no right to be consulted about it or to have his preferences taken into account in its making. n182 Indeed, if the parents embodied their arrangement in a formal agreement, a court would generally enforce the agreement without inquiring into whether it comported with the child's "best interests;" n183 in essence, by virtue of the couple's status as parents, their decision would be presumed to be the best for the child.

If the parents cannot agree between themselves and go to court to settle their dispute, they are, from one point of view, simply delegating their legal decisionmaking power over their children to the state. They are asking the state to do something that they have the legal power to do themselves. Yet advocates of separate counsel in divorcecustody proceedings would argue that, even though the court is making the very same decision that the parents could have made themselves without participation by the child and even though it is making that decision at the request of the parents, the child now has a right to be heard through counsel in the proceeding. The child's right to participate in the decisionmaking process, to have his preferences and interests consulted, would be purely adventitious and would turn on whether the parents had been able to reach their own decision concerning custody. Surely, though, a right to counsel should not turn on mere fortuities.

[*121] While these differences alone may not prove that counsel for children is inappropriate in custody proceedings, they do suggest that a constitutional right to counsel in custody proceedings cannot be inferred from the holding in *Gault*. n184 Moreover, when we consider the question of counsel from the *parents'* point of view, we discover several reasons not to appoint counsel in custody cases. Today, many jurisdictions require the court in a divorce proceeding to award custody according to the "best interests" of the child. n185 But because this test is so open-ended, virtually any piece of information about the parents' personal lives can be considered relevant to the decisionmaking process. Each parent's financial condition, social life, personal disposition, even his or her taste in literature, could conceivably have a bearing on the child's best interests. Thus, the very breadth and vagueness of the best interests test becomes an invitation to pry into the personal affairs of the separating spouses.

Were it not for the call for attorneys for children, this threat to parental privacy would be tangential to this Article. The best interests test, of course, might encourage bitter custody battles, with each spouse dredging up long-forgotten indiscretions to mortify the other in open court. Still, the separating parents would remain free to agree between themselves not to reveal such secrets. But then the Investigator enters the picture. The Investigator's job, you may remember, is to ferret out relevant information. n186 And since under the best interests test virtually everything may be relevant, appointment of an Investigator to represent the child means that very little may be left of the parents' interest in privacy. Thus, in the guise of attorney for the child, the state may be able to discover the parents' most

deeply-held secrets.

Regardless of the value of the information discovered and brought to light, parents who go to court to resolve custody disputes should have the right to keep certain matters out of the controversy. Assume, for example, a custody case in which the father has had homosexual affairs and the mother has had an extramarital affair with a person of a different race. Each spouse knows about the other's conduct. At the outset of the litigation, both agree that no one -- least [*122] of all their child -- would be better off if these details about their private lives were revealed; their only point of disagreement is over who should have custody of their child. Once in court, however, the couple may find that their agreement to keep their private lives confidential is irrelevant. The court will want to know any and all details that might bear on the child's best interests, and it may appoint an Investigator to help uncover these details. But why should we deliberately design our litigation system to enable strangers to invade the privacy of this couple? n187

The standard answer is that this type of personal information is vital if the court is to make the best possible disposition for the child; in essence, the child's best interests are viewed as outweighing the parents' privacy rights. n188 But it is important to put the significance of the custody decision in proper perspective. Although it may be true that "[f]ew decisions are as agonizing for a trial judge or for other public decisionmakers as choosing between disputants for the custody of a child," n189 this results largely from the fact that either parent could just as well be awarded custody. Generally, both parents are fit to raise the child; indeed, few other legal decisions are as certain to be decided with so small a risk of seriously damaging the child. The harm to the child stems from the parents' decision to separate, and private information about the parents will not change this fact.

[*123] But even if the value of the Investigator's revelations were greater, appointment of an Investigator would still be unwarranted. The real issue, of course, is the one explored in the preceding Part: to what degree should the rights of the parents turn on the best interests of the child? n190 We saw in that Part that, in rejecting the utilitarian justification for family autonomy, society indicated that it was willing to sacrifice even significant improvements in child welfare to preserve parental decisionmaking autonomy. n191 There is no principled basis for striking a different balance between parental rights and child welfare where privacy (rather than autonomy) rights are involved, particularly since the effects on the child of an "incorrect" decision would be so slight. n192

But it is fair to say that most advocates of counsel in custody disputes are not arguing for appointment of an Investigator; rather they are advocating the appointment of a Champion. Nevertheless, appointing a Champion rather than an Investigator does not alleviate the objections to court-appointed counsel for children in custody adjudications. Advocates want a Champion in order to assure that the "correct" decision is reached in the case. n193 For example, a particularly influential student note, which strongly argued for counsel in custody cases, lauded the Champion role. n194 The authors of the note discussed an instance in which a noncustodial parent moved to modify a custody decree, claiming that the custodial parent had neglected the children and was a drug user. n195 After jointly investigating the facts, the Family Relations officer n196 and the court-assigned lawyer for the children agreed that the charges of neglect were unfounded and that the drug use by the custodial parent was sufficiently in the past as to have no effect on the present care of the children. Nonetheless, the Family Relations officer recommended that a change in custody be made because of the "non-custodial parent's material advantages and [*124] more conventional lifestyle." n197 The attorney for the children, on the other hand, "saw no reason to move the children since they appeared to be happy and well cared for." n198 The authors concluded that "the child's attorney brings a perspective on the custody question different from that of the Family Relations officer and can in addition protect the child in court." n199

It is apparent that the note's authors disagreed with the Family Relations officer on the merits and generally opposed custody decisions based on the financial condition of the parent. n200 But this example provides little justification for court-assigned counsel for the very reasons canvassed earlier in this Article. n201 The roles in the example might just as likely have been reversed, with the Family Relations officer recommending no change in custody and the children's attorney proposing modification. As long as both adults, the attorney for the child and the Family Relations officer, are deciding for themselves what the child needs, the child will be no better represented by one, two, three, or more Champions. About the only thing one can say in favor of injecting yet another adult into the process of

determining the child's best interests is that it increases the likelihood that the adults will disagree among themselves.

Such disagreement would not be an insignificant asset in this particular example; hopefully, the second Champion would offset the biases of the first. If one Champion is already involved, then, two Champions may be better than one, in part because it is less likely that the judge will automatically defer to either Champion. But appointment of one Champion alone will almost certainly result in the kind of arbitrariness discussed earlier in the Article. n202 Thus, in states that do not have a Champion already built into the case in the form of a Family Relations officer, we should be very wary of appointing counsel for the children.

[*125] Even if it is both unwise and unnecessary to provide representation for children in custody proceedings, either by Investigators or Champions, attorneys probably will continue to be assigned for that purpose. When assigned, an attorney should respect the privacy rights of the parents and intrude as little as possible. If the child is old enough to speak, the attorney should ascertain the preferences of the child and advocate them in court just as he would advocate the preferences of an adult client. n203 If the child is too young to express a preference or does not have one, the attorney should decline the appointment or, in the words of an experienced New York Family Court judge, merely "[s]it . . . mute at the counsel table" during the trial. n204 Finally, lawyers for children should recognize that, when they undertake a full-scale investigation into the parents' private lives, they are acting less as counsel for their young clients than as court-assigned factfinders. The profound impact on parental privacy interests caused by counsel taking on the Investigator role and the questionable importance [*126] of the additional information that may be adduced lead to the conclusion that an attorney should decline to play the Investigator unless expressly directed to do so by the court.

B. Child Protective Proceedings

Increasingly, courts are appointing attorneys to represent children in neglect and abuse cases. n205 Although the majority of children in the state's care are "voluntarily" placed there by their parents, n206 a substantial number were first separated from their parents by means of neglect or abuse proceedings. n207 Separating a child from his parents may have lasting effects on the child. n208 In recognition of this impact, statutes n209 and case law n210 in many jurisdictions provide children with [*127] the right to independent, court-assigned counsel in proceedings adjudicating their parents' fitness.

1. Who May Represent the Child's Interests: The Parents or the State?

In deciding whether children should have counsel in child protective proceedings, courts and commentators have focused on whether either of the other parties in the case can adequately represent the child's interests. In *Sims v. State Department of Public Welfare*, n211 for instance, a federal district court held that, when children's interests are represented adequately by another party, independent counsel is not required. n212 The *Sims* court further held that the state cannot adequately represent the child in protective proceedings because "[t]he interest of the state and the interest of the child differ in such a manner that they must be assumed to be adverse until there has been a final adjudication on the merits." n213

Contrasting sharply with the view taken by the court in *Sims* that the state cannot adequately represent the child's interests is the position adopted by the former Department of Health, Education, and Welfare (HEW). In 1974, Congress mandated that states appoint a guardian ad litem for every child involved in a state neglect or abuse proceeding as a condition for receiving federal funds. n214 To implement this provision, HEW promulgated regulations that provided for representation of a child by "an attorney charged with the presentation in a judicial proceeding of the evidence alleged to amount to the abuse and neglect, so long as his legal responsibility includes representing the rights, interests, welfare, and well-being of the child." n215 The HEW position appears dangerously cynical. Whether or not one believes that children need independent representation in neglect proceedings, surely all would agree that a child should not be represented by the party pressing charges against his parents.

[*128] If the state cannot adequately represent the child's interests, what about the parents? Advocates of separate

counsel for children have suggested that the child's interests and that of his parents diverge in the child protective context. n216 But this argument is unconvincing. We have seen that our legal system confers on parents broad decisionmaking powers over their children; n217 the law thereby presumes that the interests of parents and their children are generally identical. The mere filing of neglect or abuse charges against the parents should not dispel this presumption. Indeed, insofar as these parental decisionmaking powers may be constitutionally grounded, n218 appointment of counsel before an adjudication of neglect or abuse may be unconstitutional. Such appointment deprives parents of their right to speak and make decisions for their child even though they have not yet been shown to be unfit. n219

Goldstein, Freud, and Solnit agree with this analysis. In *Before the Best Interests of the Child*, n220 they argue that, absent parental consent, counsel should not be appointed in neglect proceedings for children living at home. They also note that the law presumes that parents will make appropriate decisions for their children; n221 thus, until a court determines that parents have been neglectful -- that is, "until the presumption of parental autonomy has been overcome" n222 -- there is no justification for interfering with normal parental prerogatives by requiring independent counsel for the child. n223 Indeed, the authors go so far as to argue that appointment of independent counsel deprives *both* the parents and the child of due process. n224

The argument that parents -- and neither the state nor separate court-appointed counsel -- are entitled to represent the child prior to [*129] an adjudication of neglect or abuse finds significant support in the Supreme Court's recent opinion in *Santosky v. Kramer*. n225 Although *Santosky* did not implicate the right-to-counsel issue, the Court's reasoning appears equally applicable to the question of who should represent the child in protective proceedings. The Court recognized in *Santosky* that a trial in which the state seeks to expunge parental rights "pits the State directly against the parents." n226 At the trial, the Court held, "the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge." n227

Santosky involved a termination of parental rights proceeding initiated after the children had been out of the parents' home for several years n228 and had already been found to have been neglected. n229 The Court's view that the state may not presume an adversity of interest between parents and child before trial should apply a fortiori to the initial neglect or abuse proceeding since, unlike in *Santosky*, no showing of unfitness of any kind will have been made prior to such a proceeding. n230

2. Due Process Analysis

Despite the impact on parental autonomy rights of giving counsel to children, some commentators continue to argue that children are [*130] constitutionally entitled to separate representation in protective proceedings. n231 As in the divorce-custody area, n232 these commentators frequently have attempted to ground this putative right to counsel in the due process clause of the fourteenth amendment. Once again, *In re Gault* n233 is the relevant precedent.

In some respects, *Gault* would appear to have limited precedential value in the child protective context. The structural differences between the delinquency proceeding at issue in *Gault* -- pitting the state against a child accused of wrongful conduct -- and a neglect proceeding -- pitting the state against parents accused of wrongful conduct -- are immediately apparent. While the consequences to the child of an adjudication of neglect may not differ materially from those resulting from a delinquency adjudication, n234 this similarity in outcome does not dispose of the question whether due process requires counsel for children in protective proceedings.

As the Supreme Court has said, "due process is not a technical conception with a fixed content unrelated to time, place and circumstances." n235 Determining whether and what process is due is a fluid and flexible procedure. Keeping this flexibility of procedure in mind, the question thus becomes whether, given the adversarial nature of the typical protective proceeding and the nature of the child's interests, due process requires appointment of independent

counsel. I believe that the answer to this question is no; as long as the other parties to the proceeding -- the state and the parents -- are adequately represented, children are not constitutionally entitled to their own counsel. As one commentator has noted, "counsel for the child often plays only a marginal role in . . . neglect cases: usually the two major adversaries [parents and the state] will bring out all the relevant facts and viewpoints." n236 To the extent that the child has a right to be free from unnecessary state interference, his meaningful opportunity to be heard is adequately protected by the presence of counsel for the parents. n237 At the same time, the attorney for the state stands in a [*131] position to protect the child's interest in being free from harm at the hands of his own parents. n238

At the trial stage, where the only issue for the court is the factual one of whether the parents engaged in conduct that was neglectful or abusive, counsel for the child would appear to be unnecessary. The only question being litigated is, essentially, the parents' guilt or innocence. While this question implicates the child's interest in being free from harm, counsel for the state will ensure that this interest is vigorously defended. At the same time, counsel for the parents will ensure that the child's interest in family autonomy is adequately protected. All that independent counsel could add to the factual and legal presentation of the other parties would be to inform the court of the child's wishes and preferences in the matter. But even if the child were old enough to express his preferences, those preferences are irrelevant to the legal question being adjudicated, namely, whether the parents committed the acts with which they are charged. Thus, although the child does not have a direct voice in the proceedings, the point for constitutional analysis is that the child does not require one. All of the child's interests implicated in this stage of the proceeding will be adequately protected. This situation, of course, stands in sharp contrast to that in *Gault*, where, absent counsel, the child's interests would have been completely unprotected.

Unfortunately, this optimistic scenario frequently does not work well in practice. Parents are often unable to defend themselves adequately against charges of neglect. A recent Supreme Court case, *Lassiter v. Department of Social Services*, n239 highlights this problem. In *Lassiter*, the Court held that due process does not always require that counsel be appointed to represent indigent parents in termination of parental rights proceedings. n240 In cases in which the parents are not represented, I find it difficult to believe that the child's interests can be protected adequately by the parents alone. Believing that *Lassiter* was wrongly decided, I am unwilling to concede that unrepresented parents are able to protect their own interests, much less those of their children. The Supreme Court, however, is unlikely to hold that children are constitutionally entitled to their own counsel *only* when their [*132] parents are unrepresented; such a holding could be premised only on the assumption that unrepresented parents are not able to prevent untoward state interference, an assumption that would undermine *Lassiter* itself.

Despite the fact that *Lassiter* involved the right to counsel for parents in termination proceedings, the Court's reasoning could easily be extended to child protective proceedings. n241 The Court's due process holding was premised on the fact that parents do not face a loss of their physical liberty in termination proceedings. Concluding that the line of right-to-counsel cases yielded a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty," n242 the Court left "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." n243 Since child protective cases can no more deprive parents of their physical liberty than can termination proceedings, *Lassiter* suggests that there should be a presumption against appointing counsel in both types of cases.

Furthermore, courts in at least two jurisdictions have suggested that procedural protections generally need not be so great in protective proceedings as in termination proceedings. n244 These courts recognized that the consequences of termination cases are generally more severe than those of protective cases. Erroneous findings of neglect or abuse in protective proceedings result in, at worst, temporary loss of custody, whereas termination proceedings may result in the permanent severance of parental ties. Thus, the California Supreme Court recently held that procedural safeguards ought to be at least as extensive in termination proceedings as in child protective actions. n245 Similarly, a New York court ruled that, although the Constitution as expounded in *Santosky v. Kramer* n246 requires proof by clear and convincing evidence in termination proceedings, proof by a preponderance [*133] of the evidence is constitutionally sufficient in child protective proceedings. n247 These cases further suggest that, after *Lassiter*, parents have no

automatic right to counsel in protective proceedings.

Despite the potentially profound effect of *Lassiter* on the parents' ability to protect their own and their children's interests in protective and termination cases, however, I still believe that the argument that *children* have a constitutional right to counsel in these types of proceedings is misguided. Although the Supreme Court has never addressed the question, it seems very unlikely that the Court would conclude that children have an automatic due process right to counsel in either neglect or termination proceedings. n248 It would be remarkable for the Supreme Court to hold that, while parents do not have a right to counsel in such cases, children do. The issue in child protective proceedings is whether the parents have violated minimal standards of care in raising their children. It is the parents who must defend themselves or lose their right to the care and custody of their children. It would be ironic if a parent, the party who stands to gain the most from the presence of counsel, has no constitutional right to be represented, while the child, having the least to gain from counsel, has such a right. Furthermore, giving the child this right would be anomalous as long as we continue to recognize expansive parental autonomy rights. As long as parents have broad legal power over their children, they can deprive their children of both the right to a court hearing and to counsel by agreeing with the state to place their children "voluntarily" in a foster home. n249

Nevertheless, while parents do not suffer a loss of physical liberty in protective or termination proceedings, children do face a risk of change of custody in such proceedings. Does this difference imply that children ought to be constitutionally entitled to counsel in protective and termination proceedings? Given the reasoning of the decision in *Lassiter*, there might be some logical basis for this claim. The Supreme Court's recent decision in *Lehman v. Lycoming County* [*134] *Children's Services Agency*, n250 however, substantially undermines this argument.

In *Lehman*, a parent sought a writ of habeas corpus in a federal district court on behalf of her three children, alleging that her parental rights had been unconstitutionally terminated in a state proceeding. n251 The lower federal courts dismissed the case for lack of jurisdiction. n252 The Supreme Court affirmed. Distinguishing between prisoners who have been incarcerated pursuant to a state criminal conviction and children who have been placed in foster homes pursuant to a state judgment terminating parental rights, n253 the Court concluded that the *Lehman* children were not "in custody" within the meaning of the federal habeas statute. n254 Specifically, the Court noted that the children, who were in separate foster homes, "are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system." n255 Moreover,

[t]hey are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley v. Municipal Court* n256] and *Jones v. Cunningham* n257] and they suffer no "collateral consequences" -- like those in *Carafas v. LaVallee* n258] -- sufficient to outweigh the need for finality. n259

If the right to counsel arises from the loss of physical liberty, *Lehman* is a major obstacle to the claim that children have a constitutional right to counsel in protective cases. While children in such proceedings face a risk of change of custody from that of their parents to that of the state welfare authorities or foster parents, it is difficult to argue after *Lehman* that this change of custody is a deprivation of physical liberty sufficient to trigger a right to counsel.

Lehman, of course, is not completely dispositive of this issue; specifically, the majority in that case "express[ed] no view as to the availability of federal habeas when a child is actually confined in a [*135] state institution rather than being at liberty in the custody of a foster parent pursuant to a court order." n260 Thus, while it is arguable that those children who are *institutionalized* as a result of protective proceedings have a constitutional right to counsel under *Lassiter*, it is unlikely that the Supreme Court would adopt the paradoxical result of giving children, but not their indigent parents, a right to counsel in such circumstances.

3. *Practical Considerations and the Role of Court-Assigned Counsel*

Whether or not there ought to be counsel for children in child protective proceedings, the fact is that many states require it. n261 The remainder of this Part will consider what an attorney should do if he is assigned to represent a child under the age of seven in a protective proceeding.

Perhaps I should begin by stating categorically what a court-appointed lawyer should *not* do: he should play neither Champion nor Investigator. Each role is highly problematic. While serious and careful empirical research is needed to determine what effect Champions have on the litigation process, n262 my experience as an attorney representing children and parents in protective proceedings in New York City over the past decade convinces me that the Champion has an inordinate influence on the proceedings. Too often, what the Champion wants, the Champion gets. For example, when the Champion [*136] opposes a child's return to his parents despite some evidence that return is appropriate, the court rarely orders the return of the child.

Just as the Champion's role presents too high a risk of inordinate influence, the Investigator's role must also be rejected if familial and parental privacy and autonomy are not to be needlessly intruded upon. The county attorney or prosecutor is constrained by the ordinary rules of discovery, but the Investigator knows no such limitations. By visiting his young client at home, he can learn more about the parents than the state welfare authorities were ever able to. But whatever might be his value in seeking "truth," the Investigator's uninvited presence is simply too great an intrusion into the family prior to an adjudication of neglect or abuse. n263

Not everyone would agree with my argument up to this point. In a recent article, n264 Douglas Besharov argues that attorneys for children should, in essence, play the Champion and decide for themselves whether protective proceedings should be dismissed: "The person representing the child has an affirmative obligation to determine whether court action is in the child's best interest and, if it is not, to seek its dismissal." n265 If the attorney believes or finds that dismissal is appropriate, Besharov suggests that the attorney should make a formal motion to dismiss or attempt to structure the evidentiary hearing in a manner supporting dismissal. n266

[*137] Besharov identifies five cases where the child's counsel should seek dismissal: (1) when there is no persuasive evidence of abuse or neglect; n267 (2) when the child, although abused or neglected in the past, faces no such danger in the future; n268 (3) when the child is protected by virtue of the parents' voluntary acceptance of social services; n269 (4) when the harmful effects of state intervention outweigh the danger the child faces from his parents; n270 and (5) when a sufficiently mature child requests that the petition be dismissed. n271

No one can seriously doubt that the child protective proceeding should be dismissed in the first four situations. But unless one posits a judicial system that lacks all capacity to discriminate between baseless and worthy cases, all of these situations will result in dismissal anyway. Lawyers for children are not needed to advocate dismissal where, as in the situations Besharov posits, that result is clearly warranted. But in the vast number of cases in which dismissal might be appropriate, the issues will be close. Reasonable people will disagree.

The mistake in Besharov's argument lies not in his identification of unworthy cases, but in his attempt to convince lawyers, who nominally represent the child, to determine for themselves when a case fits one of his five categories. Besharov sloughs off the problem of imposing that kind of responsibility on an attorney: "No one can disagree that determining where a child's interest lies is a subjective and dangerous task (although, of course, judges do so every day)." n272 But judges do so every day because judges are empowered to do so in our legal system. Judicial decisions are made in a fundamentally different context from that in which an attorney's decisions are made. Judges, unlike attorneys, base their decisions on sworn testimony and other evidence carefully adduced at trial. Even then, when judges make mistakes, appellate courts can correct them.

[*138] My point is not that it is impossible to decide another's interests without the benefit of formalized judicial procedures. It is simply that, in our legal system, making these types of decisions is the judge's job. In asking the child's lawyer to make the very same decision that the judge must make, Besharov reveals the poverty of his vision of the lawyer's role; having no distinctive function of his own to fulfill, the lawyer is doomed to duplicate, or usurp, the

roles played by the other participants in the litigation process.

Contrary to Besharov's suggestions, the court-appointed lawyer should not participate in *any* aspect of a neglect proceeding until the child has been judicially declared to be neglected. By adhering to this "minimalist" role, lawyers will avoid intruding in inappropriate ways into the litigation process. Lawyers may find it difficult to carry out this non-role. Courts may insist that they become involved; indeed, refusing to play a role in the proceeding may even be regarded as contumacious conduct. One could easily argue that there is little distinction between refusing an assignment, which clearly constitutes contumacious conduct in certain circumstances, and accepting an assignment but refusing to do what the court believes is required to carry out that assignment. It is one thing to debate issues philosophically in a law journal, and quite another to tell a judge that, while he has the power to appoint counsel, he is without authority to instruct counsel about that appointment.

If lawyers cannot practicably avoid participating in the proceedings prior to an adjudication of neglect, it is important that every lawyer at least adopt a uniform posture and role so that what counsel does and what is expected of him will not vary from lawyer to lawyer; otherwise an undue risk exists that the lawyer will impose his own "personal childrearing preference upon his 'client.'" n273 The law itself suggests a simple, uniform posture for lawyers to take. Time and again, courts have recognized a presumption that it is in the child's best interests to be reared by his natural parents. n274 This presumption, which is overcome only *after* a court finds that a parent has neglected his child, was recently affirmed by the Supreme Court. In *Santosky v. Kramer*, n275 the Court made clear that it is impermissible to presume that a child and his parents are adversaries before the state has actually [*139] established parental unfitness in court. n276 When attorneys represent very young children, they, too, should embrace the presumption that the law recognizes; thus, prior to an adjudication of parental unfitness, the lawyer should side with the natural parents and automatically try to have the charges dismissed.

There are important practical reasons why an attorney for the child should side with the parents rather than with the state. First, although empirical research on the issue is lacking, my own experience suggests that juvenile court judges tend to believe the charges of neglect and parental unfitness. n277 This tendency is similar to the bias shown by psychiatrists towards predicting that a patient will engage in dangerous behavior. n278 It is well known that psychiatrists are prone to overpredict such behavior and recommend a patient's hospitalization or his continued hospitalization. n279 Though many reasons -- including professional training, the inadequate time devoted to the determination, differences of class and culture between psychiatrist and patient, and personal bias on the psychiatrist's part n280 -- have been advanced to explain this phenomenon, the most important one is surely that the

psychiatrist almost never learns about his erroneous predictions of violence -- for predicted assailants are generally incarcerated and have little opportunity to prove or disprove the prediction; but he always learns about his erroneous predictions of nonviolence -- often from newspaper headlines announcing the crime. This higher visibility of erroneous predictions of nonviolence inclines him, [*140] whether consciously or unconsciously, to overpredict violent behavior. n281

The same can be said of juvenile court judges. If a judge removes the child from the custody of his parents in the face of allegations of child abuse, the removal may have been unnecessary, but there is no way that the removal will result in a headline in the next day's newspapers. n282

A second reason to side with the parents is that parents rarely receive adequate representation. The vast majority of parents accused of inadequate parenting are indigent. n283 As a result, if they have counsel at all, it is court-assigned counsel. Except for the zealous representation that can be expected of community legal services attorneys, these counsel are frequently ineffective and unskilled, and give their clients less than their full effort. n284

Parents frequently receive inadequate representation from court-appointed lawyers for a number of reasons. First, the attorney is generally not adequately paid to represent the parents. Moreover, the method of payment, based on a very low hourly rate with a maximum [*141] amount per case, makes it unprofitable to go to trial. Since an attorney

can easily earn the maximum fee in most cases without going to trial, work at trial may effectively go uncompensated. Second, class and social biases affect many attorneys. Apart from these court-assigned cases, many attorneys rarely represent or even come into contact with poor people. Finally, when parents are accused of wrongdoing in rearing their children, it is not unusual for their attorney to side emotionally with the accuser. This may have something to do with the fact that children are involved. In my experience, it is rare to find an attorney who feels a personal commitment to represent accused parents zealously the way he would feel a commitment to represent a criminal defendant. n285 Indeed, the absence of such commitment in juvenile court is glaring.

Recently, Douglas Besharov confirmed the existence of a similar phenomenon among lawyers representing children involved in protective proceedings. He noted that a child's representative in a protective proceeding has "an almost universal tendency" to believe the charges of neglect or abuse. n286 Besharov considered this phenomenon to be "natural" given the many "cases in which the court's failure to protect obviously endangered children led to their further injury and even death." n287 Additionally, as Besharov noted, attorneys commonly assume that "if a child protective agency has filed a petition the child's interests must require court action." n288

As a result, most cases of abuse or neglect are resolved by a parental admission without any trial. When I worked as a staff attorney with the Legal Aid Society in New York City, attorneys for parents would frequently "plea bargain" in protective proceedings and admit to "involuntary neglect," a nonexistent charge. Judges regularly participated in this ploy. The effect of the admission of neglect was that the court acquired jurisdiction over the family, a position that allowed it to order any disposition it saw fit. Thus, a kind of collusion was frequently engaged in by the court, the attorney for the state, and the attorney for the parent.

[*142] The appropriate role for counsel of young children at the trial level is to oppose the court's jurisdiction and to seek to maintain the parent's exclusive control over the children. n289 Of course, when the parent's own counsel rigorously opposes the court's jurisdiction, the need for the children's counsel to play this role is diminished, if not entirely eliminated. But when the parents' attorney is less than vigilant in protecting the parents' constitutional and statutory rights, the child's counsel should step in and enforce those rights. This will ensure that the presumption in favor of parental autonomy will be overcome only on the basis of evidence presented in court.

If a finding of neglect is in fact made, thereby overcoming the presumption in favor of the parent, counsel should alter his role. It is now, when the child has been separated from his parents and the court proceedings are over, that the child is often most in need of representation; yet many lawyers consider their job to be done at this point. On the contrary, counsel should now begin overseeing the enforcement of both visitation rights and obligations and the periodic review of foster care placement provided for by statute. n290 Typically, state welfare agencies are obligated to assist the removed child towards the goal of reuniting him with his family. Similarly, parents have an obligation to accept social services and to visit and otherwise maintain contact with their child. If parents fail to carry out these obligations, their parental rights may be permanently terminated. Counsel for a child who has recently been removed from his parents can do much to increase the chances that child and parents ultimately will be reunited.

Once the child is placed in a foster home, his attorney should seek an order allowing the parents to visit him frequently. Counsel should also monitor the visitation order to ensure that it is being enforced. This is necessary, for example, in the not uncommon situation in which the child is placed in a suburban foster home far from where his parents reside. The supervising agency's options when this occurs are to bring the child to the parents, or vice versa. If, however, the agency requires that the parents travel but fails to provide funds to enable them to do so, it has effectively prevented visits from occurring.

Additionally, once the placement is made, counsel should ask the court to make specific findings of fact detailing what the parents must [*143] do, in terms of rehabilitation, to regain custody of their child. Lawyers too often overlook this task. If courts, agencies, and parents alike have a common and specific idea of what the parents must do to regain custody, the prospects of seeing the family reunited are much brighter. Alternatively, where the parents are not able to meet these obligations, the sooner this is known, the better; the child will then be freed for an earlier (and

perhaps easier) adoption.

Finally, after the child has been placed in foster care, his counsel must remain active to prevent unwarranted transfers of the child between foster homes. It is not uncommon for the state to move a child from one placement to another without any concerned adult objecting. n291 The child may need the aid of his attorney to avoid unnecessary disruptions in his life.

C. Miscellaneous Proceedings

1. Foster Children and Class Actions -- Smith v. Organization of Foster Families For Equality & Reform (OFFER) n292

This Section examines the *OFFER* case, which provides an excellent opportunity to demonstrate how the ill-considered appointment of lawyers to represent young children can radically transform the structure of a litigation.

OFFER was a civil rights class action brought on behalf of foster parents and foster children, who alleged that due process required the State of New York to hold an administrative hearing before removing a child from a foster home in which he had resided for at least one year. n293 The purpose of the hearing was to give foster parents and children an opportunity to present evidence bearing on the removal decision; the plaintiffs claimed that a hearing was required regardless of whether the child was being removed to return him to his legal parents n294 or to place him in another foster home or in another type of state-sponsored care. n295

[*144] The lawsuit was brought originally in federal district court by the New York Civil Liberties Union (NYCLU) on behalf of certain named foster parents and foster children. The NYCLU sought class certification and requested that it be allowed to represent the class of all foster parents and all foster children in the State of New York. n296 The named defendants included the State of New York's Department of Social Services and New York City's Department of Social Services.

After the action was filed, several legal parents whose children had been placed in the foster care system intervened as defendants opposing the relief sought. n297 They took the position that a hearing was not constitutionally required before a child was returned to his legal parents, in part because such a hearing would interfere with the alleged constitutional rights of parents and children to be reunited as quickly as possible. n298 Thus, at the time of trial, the court was assured of the following configuration of positions: the foster parents would assert that a hearing must be held in all cases before a child is removed; the city and state defendants would assert that a hearing is never required; and the intervening legal parents would assert that, at least when the child is being removed to return him to his legal parents, no hearing is required. In short, each of the possible outcomes that the court might reach was being vigorously pressed by at least one of the parties.

This complex configuration may have suggested to the court that certain issues in the lawsuit demanded more thorough exploration. In particular, the case presented a difficult substantive question: whether the court should distinguish between, on the one hand, taking a child out of foster care to return him to his legal parents and, on the other, taking him out of foster care to place him in some other [*145] state-care arrangement. The state and city defendants argued vigorously against such a distinction. The intervening legal parents, on the other hand, may have been willing to argue in favor of drawing this type of distinction, but probably only as a litigation strategy. In reality, the legal parents cared less about doctrinal subtleties than they did about winning on the merits of their claim that no process is due when children are being returned to their legal parents.

Unless independent counsel was appointed for the children, only the original plaintiffs' counsel, the NYCLU, was in a position to argue that due process required a hearing before an intra-foster-care move, but did not require a hearing before a move returning the child to his legal parents. The NYCLU, however, was involved in a hopeless conflict of interest on this question. One group of NYCLU clients, the foster parents, did not want to distinguish between these

two types of cases. The foster parents argued that, when a child has been in a foster home for a significant period of time, process is due the foster parents regardless of where the child will be sent after removal. On the other hand, the NYCLU's other clients, the foster children, may have wished to distinguish between these different types of removals.

Soon after the case was brought, the district court, recognizing the potential conflict between the foster parents' and foster children's interests, appointed independent counsel to represent the children. n299 At the same time, the district court denied the NYCLU's request that it be permitted to represent the foster children, rather than the foster parents. n300 If the court had granted this request, the NYCLU would probably have argued that foster parents and children have a right to a hearing in all cases. Because the district court may have surmised that the NYCLU would argue this position even if it continued to represent only the foster parents, the court's decision to appoint independent counsel for the children appears to have been reasonable. Nevertheless, the court's failure to instruct properly the counsel for the foster children was far less reasonable. Having concluded that an [*146] additional attorney was needed in the case, it was incumbent upon the court to tell that attorney exactly what role it expected him to play. The court's only words of guidance, however, were that

[t]he interests of all parties other than the children are well represented by counsel in this proceeding. Therefore, the court must look to and rely heavily on the children's counsel to articulate and define their interests. The children's counsel must advocate the rights of the children and the children alone, vigorously, independently, and without regard to the interests of any other party to the action. n301

Counsel for the children took this mandate literally and litigated the case according to what he thought his clients' interests demanded; in other words, he became the Champion. Thus, even though the foster children were designated in the complaint as plaintiffs, counsel for the children filed both an answer to the complaint and a memorandum of law arguing that the case presented no constitutionally cognizable claim. n302 Furthermore, counsel disregarded the stated views of several of the adolescent named plaintiffs. These adolescents had joined in the NYCLU's original complaint; nevertheless, counsel ignored their wishes by filing an answer in the case. n303 Since these children were mature enough to direct their own attorney, counsel's refusal to follow their directions was unjustifiable. n304 In the end, the named adolescent plaintiffs never received an advocate for their position. Instead, the court saddled them with a Champion.

[*147] What went wrong in *OFFER*? The court's principal mistake was in confusing the distinction between *party* representation and *issue* representation. An additional attorney supporting a position already forcefully taken by one of the parties was not what was needed. Instead, the court should have appointed counsel to argue a position that no one else in the case was willing or able to provide. *OFFER* could have been litigated more neatly and fully if the court had simply requested amicus involvement by one or more individuals or organizations. n305 In light of the court's instructions, however, counsel for the children never conceived his role in terms of simple issue presentation.

Admittedly, *OFFER* is an unusual, perhaps unique, case. Appointing an attorney to represent plaintiff children who is antagonistic to the relief sought will occur infrequently. But the case highlights the problems that result from appointing counsel for children who are too young to communicate their own views. Unable to be guided by their young clients, attorneys inevitably become either Champions or Investigators. Due process is not served by fostering the illusion that counsel can actually represent these children; rather, once a court is satisfied that all the relevant issues in a case involving such children will be properly argued, it should dispense entirely with appointing separate counsel for them.

2. Cases Requiring Judicial Approval for Medical Related Treatment

Up to this point, I have argued consistently against giving children counsel in legal proceedings. But my opposition to appointment of counsel is not inflexible; there are cases where counsel is essential if the child's legitimate interests are to be protected. This is so in cases where parents wish to do something to their child that, as a matter of [*148] federal constitutional or state law, requires judicial approval. In these cases, unlike those we have already

discussed, the presence of an adult party opposing the parents' position is unlikely. Examples of such cases range from the extreme one of *In re Quinlan*, n306 where parents sought permission to turn off their comatose daughter's life support apparatus, to ones in which parents seek to institutionalize their child as mentally defective or mentally ill. n307 Other examples include cases in which parents charge that their child is incorrigible or beyond parental control, n308 or seek court approval for surgery on a healthy child to allow his organs or tissue to be transplanted into a sibling. n309

A number of commentators have argued that courts should generally defer to parents in these types of cases, including those involving civil commitments to mental health facilities n310 and other medical decisions. n311 Andrew Watson, for one, has suggested that "[a]bsent a charge of abuse or neglect, parents' decisions to impose medical treatment should be respected no less than their decisions to withhold it." n312 Other commentators have disagreed and have argued that many issues of childhood and its legal disabilities should be subjected to case-by-case judicial resolution. n313

[*149] Whether parental decisions regarding the child's welfare ought to be subjected to judicial scrutiny is a question that lies beyond the scope of this Article. These types of cases may or may not be suitable for court review. Nevertheless, I believe that, once the legislature or courts have determined that the parents may not have the last word in these matters, the solemnity of the judicial process demands that issues deemed worthy of adjudication actually be litigated. n314 Counsel for the child is indispensable if the court's decision is to be both informed and fair.

The purpose of assigning counsel in these cases is similar to the Supreme Court's practice of "invit[ing] specially qualified counsel 'to appear and present oral argument'" to assure a full exploration of the issues. n315 In cases such as *In re Quinlan*, n316 for example, the parents are seeking to terminate their child's life. While many parents are motivated by love for their child, others might be concerned simply with decreasing their financial obligations and personal suffering. Whatever their motivations, however, the law already has decided that the parents' wishes should not, ipso facto, prevail. The parents must justify their position in court.

To ensure the legal validity of the parents' position in such cases, the attorney for the child should vigorously oppose the relief sought. n317 [*150] Courts need counsel for children in these cases in order to develop fully *all* of the possible arguments against granting the relief the parents seek. If after a review of the facts, appointed counsel personally decided to support the requested relief and tailored the child's case accordingly, all of the adults in the courtroom would be urging the court to reach the same decision. But the burden of decision rests with the court. Regardless of the personal viewpoint of the child's counsel, the court must make its order; by failing to oppose the relief sought by the parents, counsel deprives the court of access to arguments against the proposed treatment.

A further illustration of the difficulties surrounding the appointment of counsel for the child is provided by *Ruby v. Massey*, n318 which was brought in federal court by three couples whose adolescent daughters were severely retarded and physically handicapped. n319 The parents sought to have their children sterilized through therapeutic hysterectomies. The family doctor, as well as doctors for the University of Connecticut Health Center (one of the defendants), considered the hysterectomies to be medically appropriate. However, neither the University of Connecticut Health Center nor other hospitals in the state would perform the operations; they all feared potential civil liability since the girls could not give informed consent and it was unclear that the parents' consent would be sufficient. n320

The plaintiffs sought a declaratory judgment that the defendants' refusal to perform the hysterectomies was unconstitutional and an injunction ordering the defendants to "refrain from refusing" to perform the operations. n321 The plaintiffs did not request a finding that the [*151] three girls ought to be sterilized; instead, they argued that the parents of incompetent children have inherent legal authority to consent to medically appropriate hysterectomies. n322 Alternatively, they claimed that the State of Connecticut's refusal to provide a statutory procedure for authorizing sterilizations of non-institutionalized retardates violated the Constitution. n323

Although the defendants formally opposed jurisdiction over the case and sought to have it dismissed, they did not

take issue with the merits of the parents' argument. They asserted only that no state law permitted doctors to perform such operations. n324 Thus, one of the basic issues before the court -- whether parents have a constitutional right to make binding medical decisions for their children and to consent to medically appropriate procedures, even where those procedures are irreversible -- was not disputed by the parties. Only by appointing counsel for the children could the controversy be sharpened to aid the court's decision.

Of course, an attorney for children in such a case cannot determine what the children personally want. But that does not mean that he should act from a subjective sense of their "best interests" as a guardian ad litem might do. n325 In *Ruby*, the district court did assign guardians ad litem for the girls; it specifically directed the guardians to assist the court in deciding whether parents possess the power to consent to sterilization when the child is not in a position to consent herself. n326 One of the appointed guardians, however, disagreed with the court as to the appropriate role of counsel; he argued that the role described by the court was that of an amicus curiae and not that of a guardian ad litem. The appointed guardian proposed instead that, as [*152] a safeguard to the child, he should determine for himself whether "the operation is in the best interests of the ward." n327 Accordingly, the guardian sought authorization from the court to have whatever psychiatric, psychological, or physical examinations he deemed necessary to assist him in determining the child's best interests. n328

The court granted the guardian this authority, but, surprisingly, not for the purpose of determining the child's best interests. Instead, the court, likening the guardian's role to that of a court reviewing action by an administrative agency, allowed independent examinations of the girls to determine whether the action proposed by the parents was arbitrarily or capriciously made. n329 At the same time, however, the court took the position that the determination whether sterilization was medically appropriate was not before it. Rather, the court limited its inquiry to a different, purely legal question: may the State of Connecticut refuse to perform a medically appropriate sterilization if the parents consent to the surgery? n330

Proper representation for the teenage girls in *Ruby* would have involved ascertaining what issues, if any, affecting the children had not been sharply contested by the other parties. The representatives for the children should have argued that, when parents wish to subject their children to sterilization, due process requires a hearing at which the parents must overcome a strong presumption against permitting such treatment. At the very least, the guardian should have argued that sterilization should not be allowed merely because parents and their doctor desire it. Unfortunately, no one in the case argued even this minimal position.

Even if the issue in *Ruby* had included the propriety of the operations themselves, the protesting guardian's view of his role would have been wrong. In such a case, the guardian's approach should not be to satisfy himself "that the operation is in the best interests of the child," n331 but to ensure that there are no circumstances under which anyone could believe otherwise. It is irrelevant that the particular person representing the child believes one thing or another. As long as a reasonable argument can be made that a particular outcome in the case is appropriate and no one else is advocating that [*153] position, counsel's duty requires him to argue for that outcome regardless of his own personal beliefs. n332 The role is exactly opposite that played by a court in the administrative hearing context: instead of strongly presuming the validity of the parent's decision, the court should entertain a heavy presumption against its invalidity.

In *Superintendent of Belchertown State School v. Saikewicz*, n333 for example, Joseph Saikewicz, a sixty-seven-year-old man with an I.Q. of ten and a mental age of approximately two years and eight months, was institutionalized at the Belchertown State School. Mr. Saikewicz was suffering from leukemia. The issue before the court was whether he should be given chemotherapy; the treatment, though likely to prolong his life, would almost certainly cause painful side effects. Saikewicz's attending physicians argued that the treatment was inappropriate. n334 The court appointed a guardian ad litem, who agreed with the physicians. n335 As one commentator has noted, "the only person in the room who seemed interested in considering arguments in favor of chemotherapy" was the judge. n336

After a brief hearing, the trial court ordered that no treatment be administered. n337 On appeal, the Massachusetts Supreme Judicial Court indicated that in future cases "it will often be desirable to appoint a guardian ad litem . . . to represent the interests of the person." n338 The court described the role of such a guardian in a manner entirely consistent with the role of counsel that I have advocated in this Article. The court instructed that the guardian is charged with

the responsibility of presenting to the judge, after as thorough an investigation as time will permit, all reasonable arguments in favor [*154] of administering treatment to prolong the life of the individual involved. This will ensure that all viewpoints and alternatives will be aggressively pursued and examined at the subsequent hearing where it will be determined whether treatment should or should not be allowed. n339

To avoid the risk that the parties will, for their own convenience, restrict attention to certain issues and deny the court the complete picture, Professor Baron and two colleagues proposed in 1975 that guardians should present all evidence and arguments against the relief sought regardless of the guardians' personal view of the case. n340 They are surely right. In such cases, counsel is necessary to ensure that *all* of the issues in the case will be fully aired. To some readers, this role may seem overly modest. But only this role can ensure that the attorney truly will serve the "best interests" of the client.

CONCLUSION

Lawyers have a clear, identifiable role to play when representing mature clients: to follow their clients' directions within the bounds of the law. This role, however, is not available to the lawyer asked or appointed to represent a child who is too young to communicate his own point of view. In this Article, I have tried to explore the ramifications of this fact; I have tried to ask whether one could "represent" a young child and yet still be a "lawyer," and I have concluded that one cannot.

Were the problem of appointing counsel for young children simply one of role definition, I would have little cause for concern. Times change, and with them the functions and responsibilities of the attorney. But in their rush to give children counsel, judges, legislators, and commentators all too frequently overlook two overriding problems. First, proponents of counsel for young children seem to be blinded by their imagery of due process of law. The opportunity to be heard has a complementary component: the opportunity to speak. When lawyers [*155] are assigned to speak for children, we are assured only that another adult will be heard; with the class and cultural differences that separate many lawyers from their clients, what the lawyer has to say frequently tells us nothing about what the child wants or needs. Instead, we are informed only about the attorney's values. If paternalism and the imposition of middle-class values are to play a major role in deciding legal disputes involving children, the substantive rules themselves should reflect this. But the intrusion of such values indirectly through the device of a child's attorney should be eschewed. Second, proponents of counsel for children also overlook the rights of parents -- persons intimately connected with the children's welfare. Expansion of the child's right to counsel ultimately takes its toll on the parent's privacy and autonomy.

All of this, of course, does not prove that children should never be accorded a right to counsel. It does suggest, however, that courts and legislatures need to balance the competing interests more carefully than they have done in the past. And it may also suggest to the lawyer representing a young client something about his own power, and about his responsibilities. A lawyer representing a child possesses seemingly limitless power to invade the privacy of the family unit and to impose his values on parents and child. If nothing else, I hope that this Article will have persuaded the attorney to use that power sparingly.

More is not always better. In lawsuits, as in romance, very often two's company, and three's a crowd.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Criminal Process Assistance of Counsel Criminal Law & Procedure Guilty Pleas General Overview Criminal Law & Procedure Counsel Right to Counsel General Overview

FOOTNOTES:

n1 387 U.S. 1 (1967).

n2 Among the situations in which courts and commentators have suggested that counsel for children should be required are juvenile delinquency proceedings, mental hospital commitments, divorce litigation involving child custody, divorce litigation not involving custodial issues, child protective proceedings, foster care decisions, termination of parental rights proceedings, paternity proceedings, and *parens patriae* actions to compel medical treatment or education. For a useful discussion of the literature, see Genden, Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings, 11 *Harv. C.R.-C.L. L. Rev.* 565, 570-83 (1976).

n3 See, e.g., Inker & Perretta, A Child's Right to Counsel in Custody Cases, 5 *Fam. L.Q.* 108, 113 (1971); Note, Due Process for Children: A Right to Counsel in Custody Proceedings, 4 *N.Y.U. Rev. L. & Soc. Change* 177 (1974) (arguing for a constitutional right to counsel in all cases involving custody, including neglect and divorce proceedings).

n4 In this Article, I will consider children under the age of seven to be too young to instruct counsel. Selection of this age is somewhat arbitrary. It is based upon the view that, consistent with *Gault*, children aged seven and over must be accorded the power to direct their own counsel. See text accompanying notes 32-73 *infra*. My conclusions in Parts III and IV, however, do not depend on characterizing age seven as the appropriate age to accord children the power to direct counsel. The reader should feel free to substitute whatever age he thinks is most appropriate.

n5 The Model Code of Professional Responsibility, adopted by the American Bar Association in 1969, comprises nine sections. Each section consists of a Canon, various Ethical Considerations, and a number of Disciplinary Rules. The Canons are statements of axiomatic norms and set forth standards of conduct in general terms. The Ethical Considerations constitute aspirational ethical goals towards which members of the profession should strive. The Disciplinary Rules, on the other hand, are mandatory in nature and state the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Model Code of Professional Responsibility, Preamble and Preliminary Statement 1 (1980).

n6 See *id.* EC 7-1 (lawyers are part of a "profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits"). These rights include both claims against the state, as in the case of constitutional rights, and claims against private parties, as in the case of traditional, common law rights. They include substantive rights, such as those embodied in tort law, and procedural rights, such as the fifth amendment right to remain silent.

n7 *Id.* Canon 7.

n8 *Id.* EC 7-19.

n9 Id. EC 7-8. This requirement seeks to maximize the possibility that the *client* will "reach a proper decision." Id. Obviously, such a requirement is critical in any legal system that is as committed to client control as ours is. See text accompanying notes 10-14 *infra*.

n10 Model Code of Professional Responsibility EC 7-7 (1980).

n11 Id.; see also *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143, 1145 (9th Cir. 1977) (applying California law to hold that settlement would not bind plaintiffs absent showing that plaintiffs had authorized counsel to settle, even though plaintiffs' counsel had advised opposing counsel that settlement offer was satisfactory).

n12 Model Code of Professional Responsibility EC 7-7 (1980).

n13 The Model Code is ambiguous as to the precise allocation of decisionmaking responsibility between attorney and client:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

Id. For recent discussions of the contours of client control, see D. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974); Katz, *On Professional Responsibility*, 80 *Com. L.J.* 380 (1975); Lehman, *The Pursuit of a Client's Interest*, 77 *Mich. L. Rev.* 1078 (1979); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 *U. Pa. L. Rev.* 41 (1979).

At least some courts have held that, while the client has broad control over the subject matter of the case, tactics and procedure may be chosen by the attorney without client involvement; indeed, according to one commentator, the decisions of these courts suggest that the control of the attorney over tactics and procedure is so complete that he can act in these areas "despite his client's contrary instructions." See Spiegel, *supra*, at 50 & n.52. Other commentators and courts, however, have asserted that the client has ultimate authority to instruct the attorney on any and all phases of their relationship: "The view of the lawyer as a technician in service of a client-principal we may call instrumentalism: the lawyer is an instrument of his client's purposes." Lehman, *supra*, at 1079.

n14 Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 *Am. B. Found. Research J.* 1003, 1003.

n15 I do not mean to suggest, of course, that a rights-based legal system necessarily entails client control of the litigation. In particular, a nonadversarial, i.e., inquisitorial, litigation system might be rights-based and yet not allow for significant control by the client. But I believe that, given the active role of counsel in our adversarial system, control by the client is necessary if the client's rights are to be preserved.

n16 See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (fourteenth amendment concept of personal liberty encompasses woman's decision to terminate pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (constitutional right of privacy violated by laws forbidding use of contraceptives). Client control also furthers an important democratic value: the right of the individual to participate in the making of governmental decisions affecting his interests. Cf. Michelman, *Formal and Associational Aims in Procedural Due Process*, in

Procedural Due Process 126, 128 (NOMOS XVIII) (J. Pennock & J. Chapman ed. 1977) (arguing for a "non-formal" type of due process that would "express[] revulsion against the thought of life in a society that accepts it as normal for agents representing the society to make and act upon decisions about other members without full and frank interchange with those other members"). By taking instructions from his client, the attorney ensures that the client will play a direct and personal role in the judicial decisionmaking process. Client control means that the state will have to confront the individual directly and let him have his say before it affects his legal interests. It also maximizes the probability that the individual's particular point of view will be heard by the official decisionmaker. Cf. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."). The important point here is not just that the attorney enables a voice to be heard, but that it be the *client's* voice.

n17 Perhaps, though, the argument in favor of client control can be reduced to one simple and obvious point: Why have an adversary system of adjudication that does not also permit the client to control the course of the litigation? Would there be any advantage either to society or to the individual litigants in having two lawyers argue their personal views of the facts and the law to the judge and jury? I suspect that the answers to these questions are so self-evident to most observers that few would advocate an expansive measure of attorney control in cases involving adult clients. Nevertheless, I have found that many attorneys who believe that the adversarial model is appropriate for litigation involving older children also believe that they have no duty to follow their juvenile clients' wishes.

n18 I have somewhat arbitrarily selected age seven as the age at which children should first be accorded the power to direct their own counsel. See note 4 *supra*; see also text accompanying notes 30-31 *infra*.

n19 See, e.g., *In re Gault*, 387 U.S. 1 (1967) (right to counsel in delinquency proceedings); *In re Orlando F.*, 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976) (right to counsel in parental rights termination proceedings); *N.Y. Fam. Ct. Act § 249* (McKinney 1983) (right to counsel in abuse and delinquency proceedings); *Ohio Rev. Code Ann. § 2151.352* (Page 1976) (same); statutes cited in note 171 *infra* (right to counsel in divorce custody proceedings).

n20 See text accompanying note 15 *supra*.

n21 See text accompanying notes 16-17 *supra*.

n22 These two questions are clearly interrelated. Most obviously, the power to make important decisions for oneself is an important type of legal right in our society. See note 16 *supra*. Nevertheless, a child may have many legal rights even though society would not consider him to be personally autonomous and thus capable of making important decisions concerning his personal affairs. For example, even a one-year-old child has a right to be free from physical injury inflicted by nonfamily members. But no one would consider a one-year-old child to be an autonomous individual able or entitled to make decisions on his own; indeed, no one would seriously suggest that the child could or should be allowed to control litigation instituted to vindicate his right to be free from physical harm.

As my analysis of *Gault* will suggest, however, see text accompanying notes 33-42, 54-59 *infra*, I believe that there is an intimate connection between the preservation of certain types of legal rights and the power to control one's attorney. The particular types of rights in questions are (1) substantive rights against the state and

against one's parents and (2) procedural rights in legal proceedings affecting one's interests, including the right to be heard. Unlike traditional private law rights, such as the right to be free from bodily harm, these substantive and procedural rights embody a strong commitment to personal autonomy. See text accompanying notes 54-59 *infra*. Thus, to accord a child these types of rights implies at least a limited recognition by society of the child's autonomy and individuality. This, of course, is the reason why our legal system accords very young children few (if any) significant procedural or substantive rights against either their parents or the state. See text accompanying notes 161-67 *infra*. Nevertheless, not all of these rights constitute true autonomy rights. For example, in some jurisdictions, a child has a right to be heard in a divorce-custody proceeding and to make his preferences known to the court. See note 203 *infra*. But he does not have a true autonomy right in this matter; it is for the court, and not for the child, to decide which parent will have custody. Thus, the issues of legal rights, personal autonomy, and client control are interrelated in a rather complex fashion.

n23 See, e.g., Mlyniec, Book Review, 33 *Stan. L. Rev.* 371, 378-86 (1981); Wald, Children's Rights: A Framework for Analysis, 12 *U.C.D. L. Rev.* 255 (1979). For a penetrating discussion of a child's right to autonomy in decisionmaking premised on the constitutional right to privacy, see Keiter, Privacy, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach, 66 *Minn. L. Rev.* 459, 467-87 (1982).

There is no universal consensus, however, as to the age at which such autonomy rights should be accorded to children. For discussions from a purely social-scientific point of view, see generally Grisso, Juveniles' Capacities to Waive *Miranda* Rights: An Empirical Analysis, 68 *Calif. L. Rev.* 1134 (1980); Grisso & Vierling, Minors' Consent to Treatment: A Developmental Perspective, 9 *Prof. Psychology* 412 (1978); Melton, Psycholegal Issues in Juveniles' Competency to Waive Their Rights, 10 *J. Clinical Child Psychology* 59 (1981). Some commentators would deny children the right to make their own decisions until they reach legal adulthood at age eighteen. See, e.g., J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* (1979). Goldstein and his co-authors would preserve the parents' traditional power to make important decisions for their children; they presume that, while children under eighteen are unable to decide on their own what is best for themselves, parents generally are able to determine what is in their children's best interests. *Id.* at 7. Other commentators, however, have argued that birth itself confers on the child the moral right to make decisions for himself. See generally R. Farson, *Birthrights* (1974); J. Holt, *Escape From Childhood* (1974).

For general psychological discussions of the intellectual and moral development of children, see E. Erikson, *Childhood and Society* (2d ed. 1963); J. Piaget, *The Moral Judgment of the Child* (1965); see also Wald, *supra*, at 273-75.

n24 See, e.g., *N.Y. Educ. Law* § 3205 (McKinney 1981).

n25 See, e.g., Ill. Ann. Stat. ch. 48, § 31.1 (Smith-Hurd Supp. 1983-1984); *N.Y. Educ. Law* § 3215 (McKinney 1981); *N.Y. Labor Law* §§ 130-140 (McKinney 1965 & Supp. 1983-1984).

n26 See, e.g., *N.Y. Veh. & Traf. Law* § 507(1) (McKinney Supp. 1982-1983).

n27 *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

n28 See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (privacy); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (same); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (free speech).

n29 This position is at odds with much of the literature. For a discussion of the literature, see Foster & Freed, A Bill of Rights for Children, 6 *Fam. L.Q.* 343, 345-46 (1972) (noting the paucity of legal authority for the proposition that children are persons under the law); see also Genden, *supra* note 2 (advocating legal representation for juveniles).

n30 See note 4 *supra*. The age at which children should be allowed to participate in decisions affecting their legal interests remains a subject of great dispute. In Note, The Mental Hospitalization of Children and the Limits of Parental Authority, 88 *Yale L.J.* 186 (1978), for example, a student author argued that children under the age of fourteen should not have a constitutional right to counsel in civil commitment proceedings. See *id.* at 205-09, 214. Similarly, the former Department of Health, Education, and Welfare (HEW) had great difficulty in determining a threshold age separating younger children from more mature children in a variety of administrative and legal contexts. For example, the need to obtain the informed consent of human subjects participating in biomedical and behavioral research funded by HEW forced the Department to develop rules to ensure that the subject's consent was both intelligent and voluntary. In order to ensure the valid consent of children participating in these projects, HEW promulgated proposed rule § 46.409, 43 *Fed. Reg.* 31,794 (1978). This complex rule provided that an "Institutional Review Board" be established for each research project; the Board was to ensure that both the child subjects and their parents consented to participation in the project. But this general rule was qualified by a number of exceptions, including one that stated that the Board need not require a child's "assent" if the child is "so incapacitated that he or she cannot reasonably be consulted." *Id.* An earlier proposal had opined that "children who are seven years of age or older are generally capable of understanding the procedures and general purpose of research and of indicating their wishes regarding participation," *id.* at 2087, and that the assent of children over seven should therefore be required in addition to the parents' assent. HEW withdrew the seven-year-old threshold after critics charged alternatively that the age was too young or too old. The current proposal does not contain any age level triggering the requirement that a child's assent be obtained; instead, the present rule states that, "[i]n determining whether children are capable of assenting, the Board shall take into account the ages and maturity of the children involved." *Id.* at 31,794; see also *Ga. Code Ann. § 19-9-1(a)* (Supp. 1983) (specifying age 14 as age at which child's choice of custodial parent shall be respected in custody dispute).

n31 See generally Note, Appointing Counsel for the Child in Actions to Terminate Parental Rights, 70 *Calif. L. Rev.* 481, 510 n.195 (1982).

n32 As the Supreme Court noted in *In re Gault*, 387 *U.S.* 1 (1967): "At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders." *Id.* at 16-17 (citation omitted).

n33 387 *U.S.* 1 (1967).

n34 The Court in *Gault* held that the juvenile accused of delinquency needs the assistance of counsel in order "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36 (citation omitted).

n35 *Id.* at 55.

n36 *Id.* at 56-57.

n37 *Id. at 33-34.*

n38 See text accompanying note 15 *supra*.

n39 *Gault, 387 U.S. at 15-16.*

n40 *Id. at 17.*

n41 *Id. at 33-34* (notice of charges); 41 (counsel); 55 (self-incrimination); 56 (confront and cross-examine witnesses).

n42 See text accompanying notes 54-59 *infra*.

n43 See, e.g., Isaacs, *The Lawyer in the Juvenile Court*, 10 *Crim. L.Q.* 222, 233-34 (1968); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 *Geo. L.J.* 1401 (1973).

The fact that commentators continue to debate the role of counsel for accused delinquents long after *Gault* reflects, I believe, the legal community's more general refusal to recognize adolescent autonomy. For a discussion of the general treatment of adolescents in the United States, see E. Friedenberg, *The Dignity of Youth, and Other Atavisms* (1965); E. Friedenberg, *The Vanishing Adolescent* (1964); P. Goodman, *Growing Up Absurd* (1960).

n44 J. Goldstein, A. Freud & A. Solnit, *supra* note 23.

n45 *Id. at 127.*

n46 *Id. at 128.*

n47 *Id. at 129.*

n48 *Id.*

n49 *Id. at 118-21.*

n50 At least one commentator, however, has argued that *Gault* cannot be read to support any position on who -- the child or the parents -- should instruct counsel in delinquency proceedings: "Although it stretches *Gault* to read the decision as a 'reaffirmation' of parental autonomy, neither does *Gault* affirm juvenile autonomy. In fact, notwithstanding assorted dicta in the opinion, *Gault* neither presented nor decided any issue of parent-child conflict; the question remains open." Fisher, *Parents' Rights and Juvenile Court Jurisdiction: A Review of Before the Best Interests of the Child*, 1981 *Am. B. Found. Research J.* 835, 844.

n51 *387 U.S. at 36* (emphasis added).

n52 *Id. at 41* (emphasis added).

n53 In a recent essay, Professor Burt agreed that "[t]he Court spoke consistently of vindicating children's rights, though the facts of the *Gault* case made clear that both the child and his parents were united in resisting juvenile court jurisdiction." Burt, *The Constitution of the Family, 1979 Sup. Ct. Rev. 329, 349* (citation omitted).

n54 See text accompanying notes 35-37 *supra*.

n55 387 *U.S. at 55*.

n56 *Id. at 47*.

n57 397 *U.S. 358 (1970)*.

n58 *Id. at 368*.

n59 Both *Gault* and *Winship* repeatedly emphasized the loss of physical liberty and stigmatizing effect that a child may suffer as a result of a delinquency conviction. See *Winship, 397 U.S. at 365-66; Gault, 387 U.S. at 27, 36-37, 50*.

n60 121 *N.H. 531, 535, 431 A.2d 144, 148 (1981)*.

n61 *Id.*, 431 *A.2d at 148*.

n62 As I noted at the outset, see text accompanying note 18 *supra*, I take no position with regard to whether older children should have a right to counsel in other types of proceedings. Assuming that a jurisdiction has accorded the juvenile such a right, however, the question remains whether the child should be given the power to direct counsel's actions.

n63 See authorities cited in note 19 *supra*.

n64 See text accompanying note 42 *supra*.

n65 The *Gault* Court expressly limited its holding to the adjudicatory phase of a delinquency proceeding. 387 *U.S. at 13*.

The Supreme Court and other federal courts have rarely had occasion to define the role of counsel for children in contexts other than delinquency cases. Two cases involving the civil commitment of adolescents, *Parham v. J.R., 442 U.S. 584 (1979)*, and *Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979)*, seemed to offer the Supreme Court just such an opportunity; the Court, however, never reached the issue of counsel's role, holding instead that due process did not require an adversary precommitment hearing with counsel for the children. The district court in *Institutionalized Juveniles*, having held that children do have a

right to a precommitment hearing with counsel, went on to examine the role that counsel ought to play. *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 44 & n.47 (E.D. Pa. 1978), rev'd, 442 U.S. 640 (1979). That court, however, took a position at odds with my view that the attorney should take his instructions from the child if the child is sufficiently mature. It insisted that "the child must have a capable advocate who has the sole responsibility of advancing the child's *best interests*." *Id.* at 44 n.47 (emphasis added). But representing a person's "best interests" gives the advocate the discretion to decide where those interests lie. *Gault* did not charge lawyers for children in delinquency proceedings with the paternalistic task of representing anyone's "best interests." Absent some principled distinction, there is no reason to believe that a different rule should apply in civil commitment proceedings.

n66 See Sussman, Practitioner's Guide to Changes in Juvenile Law and Procedure, 14 *Crim. L. Bull.* 311 (1978).

n67 See *Gault*, 387 U.S. at 15-17 (noting that delinquency proceedings were historically perceived as attempts to help the child).

n68 One court has utilized this analogy between delinquency and protective proceedings to hold that children involved in neglect cases are entitled to court-assigned counsel. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976).

In my opinion, the *Conn* court's analysis overlooked a crucial distinction between delinquency and other types of legal proceedings affecting children, namely, their relative impact on parental privacy and autonomy rights. In comparison with delinquency proceedings, neglect, abuse, termination, and divorce-custody cases may have a significant impact on the parents' ability to keep their private affairs out of the public eye and to make important family decisions free from coercive state interference. See text accompanying notes 185-92, 217-19 *infra*. Any decision to accord children a right to counsel in other types of proceedings must therefore take into account these effects on family integrity and parental privacy. By deciding to accord children a right to counsel, however, a court or legislature implicitly determines that the child's interest in having a voice in the proceeding outweighs the impact on parental rights. At that point, the similarity in purposes and effects between protective and delinquency proceedings would counsel giving the child the power to direct his lawyer once he reaches the age of seven in both types of proceeding.

n69 See text accompanying note 32 *supra*.

n70 Model Code of Professional Responsibility EC 7-11 (1980); see also *id.* EC 7-15, -16.

n71 Clearly, neglect, abuse, termination, divorce-custody, and delinquency proceedings are all adjudicative in nature.

n72 Model Code of Professional Responsibility EC 7-11 (1980).

n73 *Id.* EC 7-12.

n74 See note 22 *supra*.

n75 For a discussion of the position that a child's instructions should prevail in nondelinquency proceedings beginning at the age of ten, see Note, *supra* note 31, at 510 n.195.

There may, of course, be a simpler and more direct way to determine the age at which a child should first be given the power to direct his own attorney, that is, by examining the purposes behind giving the child an attorney in the first place. Thus, if a state accords children a statutory right to counsel in divorce-custody proceedings so that they may be "heard," how would this purpose be furthered by having the attorney decide for himself what is in the child's best interests? See note 17 *supra*. I suspect, however, that the legislators and judges who give juveniles a right to counsel never carefully analyze the ends they wish to further by doing so.

n76 See text accompanying notes 10-17 *supra*.

n77 See generally *E. Erikson, supra* note 23; J. Piaget, *supra* note 23.

n78 See, e.g., *Kingsbury v. Buckner*, 134 U.S. 650 (1890).

n79 See Fraser, Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem, 13 *Cal. W.L. Rev.* 16, 30 n.107 (1976).

n80 *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (guardian ad litem has authority to control and direct the course of litigation).

n81 As Goldstein, Freud, and Solnit have noted: "[L]egislators, judges, and commentators (including ourselves) have failed to clarify how the role of the lawyer for a child client may differ from his role in relation to adult clients." Goldstein, Freud & Solnit, *supra* note 23, at 116-17 (footnote omitted).

n82 This is not surprising since the Court has never ruled that children under seven have a right to counsel in any type of proceeding whatsoever. The Court had a rare opportunity to address this issue but declined to do so in *Smith v. Organization of Foster Families for Equality & Reform (OFFER)*, 431 U.S. 816 (1977). For further discussion of *OFFER*, see text accompanying notes 292-305 *infra*.

n83 See cases cited in notes 85, 90, 93 *infra*.

n84 See, e.g., *Roe v. Conn*, 417 F. Supp. 769, 780 (1976).

n85 40 *N.Y.2d* 103, 351 *N.E.2d* 711, 386 *N.Y.S.2d* 64 (1976).

n86 *Id.* at 112, 351 *N.E.2d* at 717, 386 *N.Y.S.2d* at 68-69.

n87 *Id.*, 351 *N.E.2d* at 716, 386 *N.Y.S.2d* at 68.

n88 *Id.* (quoting *In re Ray A.M.*, 37 *N.Y.2d* 619, 624, 339 *N.E.2d* 135, 138, 376 *N.Y.S.2d* 431, 436 (1975)).

n89 *Id.*, 351 N.E.2d at 717, 386 N.Y.S.2d at 69.

n90 438 F. Supp. 1179 (S.D. Tex. 1977), rev'd on other grounds sub nom. *Moore v. Sims*, 442 U.S. 415 (1979). The children in *Sims* may have been over the age of seven. See *Sims*, 438 F. Supp. at 1183 (noting that children attended elementary school). There is nothing in the opinion, however, to suggest that the court wished to limit its constitutional holding to older children.

n91 *Id.* at 1194-95.

n92 *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

n93 For other cases holding that a child has a right to counsel, see *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (neglect proceedings); *Wasson v. Wasson*, 92 N.M. 162, 163, 584 P.2d 713, 714 (N.M. Ct. App. 1978) (all proceedings involving a child); see also *In re Richard E.*, 21 Cal. 3d 349, 353-55, 579 P.2d 495, 498-99, 146 Cal. Rptr. 604, 607-08 (1978) (court has discretion to appoint counsel for minor in termination of parental rights proceeding but must appoint counsel where child's separate interests would otherwise go unprotected), appeal dismissed, 439 U.S. 1060 (1979). In each of these cases, the court failed to discuss the role counsel might play.

n94 Model Code of Professional Responsibility EC 7-12 (1980).

n95 For a criticism of this standard in the context of civil commitment proceedings, see Note, The Role of Counsel in the Civil Commitment Process: A Theoretical Framework, 84 *Yale L.J.* 1540 (1975):

Since the very matter in controversy at the hearing is the mental condition of the client, is it the role of the lawyer in effect to prejudge the question and shape his role accordingly? Do decisions to be made on behalf of the client "in court proceedings" include the fundamental decision not to articulate the client's spoken desires to be free from detention, or do they merely refer to tactical decisions? How does the attorney go about ascertaining the "interests" of the client?
Id. at 1544.

n96 See *N.Y. Fam. Ct. Act* §§ 242, 249 (McKinney 1983).

n97 *Iowa Code Ann.* § 598.12 (West Supp. 1983-1984); *Ky. Rev. Stat. Ann.* § 403.090 (Michie Supp. 1982); *Mass. Gen. Laws Ann. ch. 215, § 56A* (West Supp. 1983-1984); *Minn. Stat. Ann.* § 518.165 (West Supp. 1984); *Neb. Rev. Stat.* § 42-358 (1978); *N.H. Rev. Stat. Ann.* § 458:17-a (1983).

n98 *Iowa Code Ann.* § 598.12 (West Supp. 1983-1984); *Neb. Rev. Stat.* § 42-358 (1978).

n99 A number of commentators have attempted to define the role of counsel for children in specific types of proceedings. Notable among them are Besharov, Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings, 20 *J. Fam. L.* 217 (1981-1982); Genden, supra note 2, at 588-93; Harhai, Ethical Considerations in the Representation of Children, in *Advocating for Children in Courts* 87 (ABA Nat'l Inst. 1980); Note, supra note 31, at 508-13; see also Popkin,

Lippert & Keiter, Another Look at the Role of Due Process in Juvenile Court, 6 *Fam. L.Q.* 233, 246-47 (1972) (discussing difficulty of determining how to provide juvenile with "effective assistance of counsel").

n100 Inst. of Jud. Admin., ABA Juvenile Justice Standards: Standards Relating to Counsel for Private Parties Standard 2.3(b) commentary at 73 (1980) (emphasis added) [hereinafter Standards Project].

n101 *Id.*

n102 *Id.*

n103 *Id.* (citations omitted).

n104 *Id.* Standard 2.3(b) commentary at 74.

n105 *Id.* Standard 3.1(b)(ii)[c].

n106 *Id.*

n107 *Id.*; see also *id.* Standard 3.1(b) commentary at 82 ("[T]his section urges that, after such an inquiry [into the juvenile's circumstances], counsel adopt the position requiring the least intrusive intervention, if any, justified by the child's circumstances.").

n108 The probable outcome of applying such a standard, of course, will be that the attorney decides for himself what the child needs and should want. As we shall soon see, having the attorney decide for himself what is in the child's best interests is the hallmark of one of the two roles counsel for young children may play, that of "Champion." See text accompanying notes 116-31 *infra*. Significantly, the Standards also allow the attorney to adopt a different approach to the proceeding if he so wishes: he "may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence." Standards Project, *supra* note 100, Standard 3.1(b)(ii)[c]. This approach corresponds to the second of the two roles counsel may play, that of "Investigator." See text accompanying notes 132-38 *infra*.

n109 J. Dick, D. Lansner & I. Rosenberg, Practice Manual for Law Guardians in the Family Court of the State of New York 154 (Legal Aid Society, Juvenile Rights Division 1976) (on file at New York University Law Review).

n110 See text accompanying note 108 *supra*.

n111 Another difficulty inheres in the Legal Aid Society's position. That position apparently applies both to young children and to older children and adolescents. Thus, Legal Aid lawyers apparently feel that they may ignore the express wishes of even a fourteen- or sixteen-year-old client if they believe that the client's interests will be served best by doing so. This, of course, raises anew the issues of client control that were explored earlier in the Article. See text accompanying notes 18-75 *supra*.

n112 Fraser, *supra* note 79, at 33.

n113 See text accompanying note 110 *supra*.

n114 The word "Champion" comes from Justice Brennan's separate opinion in *Parham v. J.R.*, 442 U.S. 584 (1979): "Children incarcerated in public mental institutions are constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful confinement." *Id.* at 638 (Brennan, J., concurring in part and dissenting in part). Steven Bricker, in an excellent article, was the first to use the term "Champion" in the way in which I use it in this Article: an adult who imposes his values on a child. See Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 *U. Rich. L. Rev.* 661, 693 (1979).

n115 Although it is analytically useful to separate the roles of Champion and Investigator, it is important to emphasize that they are not necessarily mutually exclusive categories. Rather, they represent the endpoints on a continuum of attorney behavior. Moreover, Champions may come in different degrees. But what ultimately distinguishes the Champion from the Investigator is that the former seeks to effect the particular result that he believes most appropriate for his young client, while the latter presents all the information he thinks relevant to the court and allows the court to make up its own mind. Thus, the Champion is an advocate, the Investigator is not.

n116 The expected benefits of adding a Champion to the litigation process are discussed in a recent student note. In justifying separate counsel for children in divorce-custody cases, the note cites approvingly a case in which "the Family Relations officer recommended a switch in custody while the attorney recommended against modifications. . . . The attorney's independent judgment is therefore an important contribution." Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 *Yale L.J.* 1126, 1179-80 (1978). The note does not confine its argument to cases in which the child is under seven years of age. Thus, like the Legal Aid position discussed earlier, see note 111 *supra*, the authors of the note would have the attorney advocate whatever position he thinks best even though the client is old enough to articulate his preferences and make reasoned judgments about his situation.

The Champion role is widely accepted among legal scholars and practitioners. Even model laws propose that counsel for children should determine for themselves what the children need. "The lawyers . . . shall represent the interests of the children *as they appear to the lawyers*, taking account of the children's own opinions and other relevant considerations." A Divorce Reform Act, 5 *Harv. J. on Legis.* 563, 584 (1968) (emphasis added).

n117 Model Code of Professional Responsibility EC 7-24 (1980); see also *id.* DR 7-106(c)(3), (4).

n118 As Justice Rehnquist has noted, one of the premises of the American legal system is "that adversary litigation will indeed bring to light the truth with respect to the facts and enable the decisionmaker to decide better whatever legal questions are involved." Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 *U. Miami L. Rev.* 1, 10 (1978). For general discussions of the adversarial process, see J. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis* 23, 26, 38 (1975); Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1282-83 (1976).

n119 Genden also recognizes the possibility of usurpation of the factfinder's function by Champions. He

argues that, while some commentators believe that counsel should "identify his own conception of the child's best interests and advance that position . . . [,] because this outlook would usurp the ultimate fact-finding to be made by the court, a more limited role is proper [The determination] as to what should happen to the child . . . rests exclusively with the court." Genden, *supra* note 2, at 588-89 (footnote omitted); see also Thode, *The Ethical Standard for the Advocate*, 39 *Tex. L. Rev.* 575, 584 (1961) ("The advocate does not *decide* what is just in this case -- he would be usurping the function of the judge and jury -- he acts for and seeks for his client that which he is entitled to under the law." (emphasis in original)).

n120 See Note, *supra* note 116.

n121 See *id.* at 1184; see also Dembitz, Book Review, 83 *Yale L.J.* 1304, 1313 (1974).

n122 See note 128 *infra*.

n123 See text accompanying note 117 *supra*.

n124 See Dembitz, *supra* note 121, at 1312-13 (noting that the position of child's counsel in custody cases will generally duplicate the position advocated by one of the parents).

n125 See text accompanying notes 119-21 *supra*.

n126 This hypothetical was suggested by an actual case described in Note, *supra* note 116, at 1151.

n127 Appointment of a Champion may lead to a biased, as well as an arbitrary, outcome in a case. Judge Dembitz, an experienced New York Family Court judge, has noted the danger that the child's attorney will side with one of the parties because of a bias against the other party. Dembitz, *supra* note 121, at 1313 n.42.

The possibility that a biased attorney for the children might have tipped the case in favor of the other side led the attorney for the parents in one case, *In re Apel*, 96 *Misc. 2d* 839, 409 *N.Y.S.2d* 928 (*Fam. Ct.* 1978), to move for the dismissal of the court-appointed lawyer (called a "law guardian" in New York). The parents' attorney believed that the law guardian was predisposed in favor of keeping the children in foster care; indeed, the guardian had supported the county's request for an extension of the children's placement in foster care. The law guardian did not deny that he had already formed a definite opinion about the appropriate disposition of the case. See *id.* at 840-41, 409 *N.Y.S.2d* at 929. The parents' attorney objected to the partisan position the law guardian was taking and to the fact that he was appearing as "an auxiliary counsel for the petitioner." *Id.*

In deciding the motion, the court recognized that "the proper role of the Law Guardian who represents children who are the subject of child protective proceedings . . . is somewhat unclear, or at least nowhere definitely stated." *Id.* at 841, 409 *N.Y.S.2d* at 929. While the court denied the parents' attorney's motion, it recognized that the ground for dismissal might be meritorious:

At the outset of the case, a Law Guardian, who in addition to his role as counsel, advocate and guardian serves also in a quasi-judicial capacity in that he has some responsibility, at least during the dispositional phase of the proceeding, to aid the court in arriving at a proper disposition, should, like the Judge, be neutral. At some point in the hearing he has a right to formulate an opinion and then to attempt to persuade the Court to adopt that disposition which, in his judgment, will best promote his ward's interest. But certainly the Law Guardian's

conclusions in these matters should not be reached in advance of a hearing and without knowledge of the facts. *Id.* at 842-43, 409 N.Y.S.2d at 930.

If Champions are systematically biased towards a given result, perhaps because of class or cultural factors, appointment of Champions will not lead to random outcomes in cases involving children. Instead, these outcomes will be skewed towards a particular result. For example, I have found that lawyers representing *parents* in abuse or neglect proceedings tend to believe that their clients are guilty. See text accompanying note 285 *infra*. If lawyers representing children in these types of proceedings are similarly predisposed to believe the charges against the parents, which the evidence seems to suggest, see note 286 and accompanying text *infra*, they may tend to side with the state authorities and advocate removal of the child from the parents' home. If this occurs on a regular basis, the outcomes in child protective proceedings will be systematically skewed towards removal. But such a practice would be as arbitrary as one in which the outcomes were purely random; under such a practice, whether the parents lose their children would no longer depend on whether they committed abusive or neglectful acts, but on the emotional biases of the Champions. The litigation process would now function only to rubber-stamp the decisions of the state welfare authorities.

n128 Arbitrariness in legal decisionmaking offends against a central tenet of formal conceptions of justice: the imperative that like cases be treated alike. See J. Rawls, *A Theory of Justice* 237 (1971) ("[T]he precept that like decisions be given in like cases significantly limits the discretion of judges. . . . The precept forces them to justify the distinctions that they make between persons by reference to the relevant legal rules and principles.").

One could argue, of course, that arbitrariness is inevitable in any real-world legal system. Who wins in any given suit will depend as much on the sympathies of the judge or jury as it does on the legal posture of the case. On this view, the Champion's involvement does not dramatically increase the likelihood that otherwise like cases will come out differently. But this argument ignores an important aspect of the situation involving the Champion. Even given the fact that judge and jury are inevitably biased, the American legal system provides a formal mechanism to temper that bias: it affords the parties an opportunity to be heard, to tell their story and to make their case before the official decisionmaker. Where a Champion is appointed, however, there is a substantial risk that the parties will not be afforded a similar right to be heard. The Champion may be the effective decisionmaker -- he may control the outcome of the case -- and yet the parties are denied any open, formal opportunity to make their case to the Champion. Furthermore, while the exercise of power by judge and jury derives its legitimacy from the role judge and jury play in our American system, the determinations of the Champion cannot claim a similar legitimacy. When the Champion controls the fate of the parties, his role in the legal system is *ad hoc* at best.

n129 Cf. *Gardner v. Florida*, 430 U.S. 349, 358-59 (1977) (allowing trial judge to impose death sentence on basis of confidential information not provided to defense may result in judge misinterpreting that information); *Herring v. New York*, 422 U.S. 853, 863 (1975) (summation of counsel may "correct a premature misjudgment").

n130 At least one knowledgeable commentator has argued that the call for counsel for children reflects "an exaggerated and unrealistic view of the utility of such counsel" in custody cases. Dembitz, *supra* note 121, at 1312 (footnote omitted).

n131 See text accompanying note 124 *supra*.

n132 In the words of one statute, which delineates the Investigator's role in the divorce-custody context, the

representative of the children is to "make such investigation as will enable him to ascertain all facts and circumstances that will affect the rights and interests of the children and will enable the court to enter just and proper orders and judgment concerning the care, custody and maintenance of the children." *Ky. Rev. Stat. Ann. § 403.090(3)* (Michie Supp. 1982). One court has stated that the role of counsel for young children is to "ensur[e] that the record upon which the court must rely in exercising its discretion is as complete and accurate as possible." *In re D.*, 24 Or. App. 601, 609, 547 P.2d 175, 180 (en banc), cert. denied, 429 U.S. 907 (1976).

n133 See text accompanying note 118 supra.

n134 See Patouris, Book Review, 57 *N.Y.U. L. Rev.* 203, 209-10 (1982).

n135 See Note, supra note 116, at 1150-53.

n136 Freedman, Judge Frankel's Search for Truth, 123 *U. Pa. L. Rev.* 1060, 1063 (1975).

n137 *Id.*

n138 See text accompanying notes 185-92, 263 infra.

n139 *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845 (1977).

n140 *Bellotti v. Baird*, 443 U.S. 622, 638 (1979).

n141 *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring); see also Paulsen, The Legal Framework for Child Protection, 66 *Colum. L. Rev.* 679, 679 (1966) ("In America, raising children is the business of parents, not of government.").

n142 *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969).

n143 See, e.g., H. Foster, A "Bill of Rights" for Children (1974); D. Gil, Violence Against Children: Physical Child Abuse in the United States 141-48 (1970); S. Soman, Let's Stop Destroying Our Children 238-57 (1974); Bourne & Newberger, "Family Autonomy" or "Coercive Intervention"? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect, 57 *B.U.L. Rev.* 670 (1977); Coyne, "Who Will Speak for the Child?" in *The Rights of Children* 193 (A. Wilkerson ed. 1973).

n144 Courts and commentators have frequently referred to the family's right to be free from state intervention, which they have variously referred to as a right of "family integrity" or "family autonomy." See, e.g., *Roe v. Conn*, 417 F. Supp. 769, 777 (M.D. Ala. 1976) (family integrity); *Alsager v. District Court*, 406 F. Supp. 10, 15 (S.D. Iowa 1975) (same), aff'd, 545 F.2d 1137 (8th Cir. 1976); Levy, The Rights of Parents, 1976 *B.Y.U. L. Rev.* 693, 698 (family autonomy). "Family integrity" was first recognized by Justice Harlan: "The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting); see also *Griswold v.*

Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (relying on his dissent in *Poe*).

The protection of privacy under the fourth amendment is also an important pillar of family autonomy. Justice White recently reemphasized Justice Brandeis's view that the fourth amendment, at its core, protects not only property rights but also the more important promise of "conditions favorable to the pursuit of happiness." *Rakas v. Illinois*, 439 U.S. 128, 166 (1978) (White, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

n145 Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights," 1976 *B.Y.U. L. Rev.* 605, 626.

n146 *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (raising children and teaching them is "beyond the competence of impersonal political institutions"). "Family autonomy" actually encompasses two, interrelated concepts: (1) the power of parents to make important decisions regarding their children free from state interference, and (2) the right of parents to the custody of their children, to have their children live with them, and to share in and supervise their children's emotional and intellectual development. Thus, while some forms of state intervention, such as a mandatory summer camp program for very young children, might endanger both aspects of family autonomy, other forms of intervention, such as a requirement that parents teach their children how to read beginning at age three, would threaten only the first aspect. The strongest version of what I characterize as the utilitarian argument in favor of family autonomy, see text accompanying note 151 *infra*, would argue that the state is inept both in making judgments about a child's best interests and in putting those judgments into practice. This appears to be the form of argument espoused by Professor Goldstein. See note 148 and accompanying text *infra*.

n147 See, e.g., Wald, Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of *Before the Best Interests of the Child*, 78 *Mich. L. Rev.* 645, 645 (1980) ("[O]ur preference for parental autonomy is based on the assumption that children develop best when raised by their biological parents."). For the proposition that the freely exercised and nonreviewable decisionmaking authority of parents is essential to the healthy development of children, see generally Watson, Children, Families, and Courts: *Before the Best Interests of the Child* and *Parham v. J.R.*, 66 *Va. L. Rev.* 653 (1980).

n148 Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 *Yale L.J.* 645, 650 (1977).

n149 State policy toward child rearing revolves around attempts to answer this question: will children become what this society most wants if parents are left to follow their own stars in child rearing and if plural subcultural groups are free to shape norms of child rearing for parents, or if the more inclusive state community is permitted to intrude and set limits on both parental and small-group impositions on children? The answer to this question surely must be that there can be no conclusive answer favoring one contestant over the other.

Though it may seem paradoxical, that answer is a central guide for court review of state child rearing policy. If there can be no such conclusive answer, courts should properly insist that the question remain adequately open. Burt, Developing Constitutional Rights Of, In, and For Children, 39 *Law & Contemp. Probs.* 118, 131 (Summer 1975); see also *Wisconsin v. Yoder*, 406 U.S. 205, 222-24 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Children do not have a right to an "ideal" family, in part because of a lack of consensus as to what constitutes adequate child care and because of the fear that any consensus would exclude many legitimate

cultural differences. Inst. of Jud. Admin., ABA, *Juvenile Justice Standards: Standards Relating to Abuse and Neglect 1-2* (1980) [hereinafter *Abuse and Neglect Standards*]; *id.* Standard 1.1 commentary at 49-50, Standard 1.4 commentary at 56.

n150 *Abuse and Neglect Standards*, *supra* note 149, at 3 (deference should be given to family autonomy because such deference "is most likely to lead to decisions that help children").

n151 See Strauss & Strauss, *Book Review*, 74 *Colum. L. Rev.* 996, 1001 (1974) ("[G]overnment is more effectively limited by recognizing that the parents' claim is not a mere derivation of what the interests of the child require . . .").

n152 While the Supreme Court claims that it applies a rational relation test in the family autonomy area, see *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974), the cases are inexplicable if this claim is taken at face value. Rather, the cases actually apply the type of strict scrutiny described in text. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Bd. of Educ.*, 414 U.S. at 639-40; *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Pierce v. Society of Sisters*, 288 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). See generally Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 *Stan. L. Rev.* 1383 (1974). As Professor Burt has written, "[W]hen the state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal." Burt, *supra* note 149, at 127; see also *Abuse and Neglect Standards*, *supra* note 149, Standard 1.3 ("The statutory grounds for coercive intervention on behalf of endangered children . . . should authorize intervention only where the child is suffering, or there is a substantial likelihood that the child will suffer, serious harm.").

n153 The utilitarian conception of parental rights is not the only view that suggests that the state could, under some circumstances, exercise broad powers over children. A related and equally questionable notion is that parenthood is a state-created trust exercised subject to conditions imposed by the state. See Foster & Freed, *Child Custody (Part I)*, 39 *N.Y.U. L. Rev.* 423, 426 n.14 (1964) (Parenthood is "a trust imposed upon the parent by the state as *parens patriae*"). As one commentator recently noted, "[p]arents are still, to some extent, viewed as child-socialization agents of the state." Note, *supra* note 31, at 196 (footnote omitted).

This reasoning denies that family autonomy is of a preconstitutional order. Describing the state as imposing a trust on parents implies that the state is prior to the relationship between child and parent; under this view, the state came first and, in its discretion, conferred on parents the privilege of raising the state's children.

This theory is extremely pernicious. Unfortunately, it is espoused by a number of influential commentators. Goldstein, Freud, and Solnit, for example, have argued that parenthood should be thought of as being assigned by the state and confirmed by a birth certificate. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 5 (1973). What is particularly dangerous about this type of argument is that it undermines the vision of the relationship between individual and state that underlies our constitutional order. As Professor David Richards has recently argued, constitutional values have their roots in the contractarian theories of philosophers such as Locke, Rousseau, and Kant. These values stress the individual's freedom to make decisions for himself ("Natural Freedom") limited only by governmental power vested in the state by contract or consent. See Richards, *The Individual, The Family, and The Constitution: A Jurisprudential Perspective*, 55 *N.Y.U. L. Rev.* 1, 6-20 (1980). Thus, under Richards's view, the individual, and the relationship between parent and child, is prior to the state, and not vice versa.

According to Professor Richards, central to the rights of the individual under the Constitution is the freedom

to

paint[] one's own idea of the good life, self-critically deciding, as a free and rational being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left fallow, with what or with whom in one's life one will or will not identify, and what goals to strive toward. *Id.* at 9. Childrearing plays a special role in the adult individual's development. It "is one of the ways in which many people fulfill and express their deepest values about how life is to be lived. To this extent, one's children are the test of one's life and aspirations." *Id.* at 28 (footnote omitted).

n154 *Bellotti v. Baird*, 443 U.S. 622, 638 (1979). The Court has recognized the right of parents and families to be free from unnecessary state interference under theories of privacy, see, e.g., *United States v. Orito*, 413 U.S. 139, 142 (1973); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), liberty, see, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 230-34 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and integrity, see, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting).

n155 *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

n156 *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (emphasis in original). It may be recalled that Justice McReynolds, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), criticized Plato's vision of removing children from their parents and raising them in a manner consonant with the state's interests as "doing violence to both letter and spirit of the Constitution" and being "wholly different from those [ideas] upon which our institutions rest." *Id.* at 402.

n157 *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (plurality opinion) (footnote omitted) (1977); see also *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977).

n158 See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

n159 See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

n160 Karst, *The Freedom of Intimate Association*, 89 *Yale L.J.* 624 (1980); Pound, *Individual Interests in the Domestic Relations*, 14 *Mich. L. Rev.* 177 (1916). These parental rights are intimately related to the core constitutional protections of speech, religion, association, and privacy. The rights of parents to raise and educate their children free from state coercion ensures that children, when they grow up, will be individuals, with individual beliefs, habits, and behavior, and not state-programmed automatons. It is therefore not surprising that a number of the cases that have most eloquently defined the rights of parents have involved questions of education or religious belief. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also Note, *Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird*, 52 *S. Cal. L. Rev.* 1869, 1884 (1979) ("[W]hat is jealously guarded at the very heart of a parent's relationship with his or her children is the transmission of values, beliefs, and a way of life that the parent has found most conducive to personal fulfillment and happiness.") (footnote omitted).

This suggests, of course, that the homogenization of values that would result if parental rights were undermined would fall heaviest on those politically defenseless racial, economic, ethnic, and religious groups whose values, beliefs, and childrearing habits are not reflected in American elite culture. Indeed, courts and commentators have often noted the link between family autonomy and social pluralism. See *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion); *id.* at 508 (Brennan, J., concurring); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 *Stan. L. Rev.* 985, 991-93 (1978). Bruno Bettelheim, discussing the kibbutz experience in Israel, has offered an insightful commentary on the relationship between childrearing and social pluralism. He noted, "[I]t is inconceivable how we in the United States could even strive for such a consensus-society when all our traditions, when our greatest social, economic, and political successes (though our contradictions and shortcomings too) flow from so deep a commitment to a pluralistic society." B. Bettelheim, *The Children of the Dream* 46 (1969).

n161 This formulation, of course, is too abstract and vague to give concrete guidance to legislators or judges who must draft or interpret statutes. In particular, the concept of "serious harm" will be construed differently by different people. Professor Mnookin, for example, has proposed the following standard for determining when state intervention is proper:

A state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child's health; and (b) there are no reasonable means by which the state can protect the child's health without removing the child from parental custody. Mnookin, *Foster Care -- In Whose Best Interests?*, 43 *Harv. Educ. Rev.* 599, 631 (1973) (emphasis omitted). Similarly, the Standards promulgated by the Institute of Judicial Administration prohibit coercive intervention unless "a child has suffered, or there is a substantial risk that a child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury" or the "child is suffering serious emotional damage . . . and the child's parents are not willing to provide treatment for him/her." Abuse and Neglect Standards, *supra* note 149, at Standard 2.1.

The Standards, in particular, have been criticized for their emphasis on restricting state power over parental decisionmaking; the critics have argued that many nonsevere but otherwise serious situations over which courts should be empowered to assert control lie beyond the state's power under the Standards. See, e.g., Bourne & Newberger, *supra* note 143, at 674. Indeed, at present, state authorities are frequently authorized to intervene under such vague standards as whether the child "fails to thrive under parental care." See Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 *Fam. L.Q.* 245, 268 (1974).

n162 See Bricker, *supra* note 114, at 665; Wald, *supra* note 23.

n163 See Bricker, *supra* note 114, at 664 (defining "right" in terms of the power to control or to make choices about one's life).

n164 Foster & Freed, *supra* note 29, at 347; see also The United Nations Declaration of the Rights of the Child, U.N. Resolution 1386 (XIV), Principle 6 (1959) ("The child . . . shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security . . ."). For other, somewhat absurd examples of putative rights of children, see Wald, *supra* note 23, at 257 n.10 (listing, *inter alia*, constitutional rights to play, laughter, understanding, tolerance, and even a right to adult models demonstrating tolerance).

What is particularly striking about most of these rights is the degree to which they reflect middle- and

upper-middle class conceptions of the "good life." See note 160 *supra*. If such cultural bias is common among lawyers, one may question whether appointing separate counsel in child protective and divorce-custody proceedings does not simply increase the state's power to ride roughshod over the cultural values of poor and minority parents. See note 127 *supra*.

n165 Bricker, *supra* note 114, at 665.

n166 As Professor Wald has observed, providing children with certain benefits "does not entail giving them more autonomy or self-determination. Quite the opposite. Demands for such rights recognize that children cannot provide for themselves and need the care and guidance of adults. Thus, these claims might be better thought of as protections due, rather than rights of, children." Wald, *supra* note 23, at 261.

n167 Bricker, *supra* note 114, at 666.

n168 See text accompanying note 138 *supra*.

n169 A divorce-custody case involves separating or divorcing parents who, unable to agree between themselves, turn to the courts to decide which of them will retain custody of the children. Among the vast body of literature advocating separate counsel for children in such cases are J. Goldstein, A. Freud & A. Solnit, *supra* note 153, at 65; Foster & Freed, *supra* note 29, at 355-57; Inker & Perretta, *supra* note 3, at 116-19; Standards Project, *supra* note 100, Standard 2.3(b); Singer & Shipper, *The Child's Right to Independent Counsel in Custody Proceedings*, 5 *Law & Psychology Rev.* 51, 77-78 (1979); Specca & Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 *UMKC L. Rev.* 1 (1969); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 *Hastings L.J.* 917, 930-50 (1976); Note, *supra* note 3, at 179-87. Among the authorities opposing counsel for children are Dembitz, *supra* note 121, at 1312-13; Levy, *supra* note 144, at 705; Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 *Tex. Tech L. Rev.* 619, 642-43 (1976).

n170 *Alaska Stat. § 25.24.310* (1983); *Ariz. Rev. Stat. Ann. § 25-321* (1976); *Cal. Civ. Code § 4606* (West 1983); *Colo. Rev. Stat. § 14-10-116* (1973); *Conn. Gen. Stat. Ann. § 46-43* (West 1971); *Del. Code Ann. tit. 13, § 721* (1981); *D.C. Code Ann. § 16-918(b)* (1981); *Hawaii Rev. Stat. § 571-46(8)* (1976); *Iowa Code Ann. § 598.12* (West Supp. 1983-1984); *Ky. Rev. Stat. Ann. § 403.090* (Michie Supp. 1982); *Md. Cts. & Jud. Proc. Code Ann. § 3-604* (1980); *Mass. Gen. Laws Ann. ch. 215, § 56A* (West Supp. 1983-1984); *Minn. Stat. Ann. § 518.165* (West Supp. 1984); *Miss. Code Ann. § 93-5-13* (1972); *Mo. Rev. Stat. § 452.490* (Supp. 1982); *Mont. Code Ann. § 40-4-205* (1983); *Neb. Rev. Stat. § 42-358* (1978); *N.H. Rev. Stat. Ann. § 458.17-a* (1983); *N.M. Stat. Ann. § 40-4-8* (1983); *N.Y. Fam. Ct. Act § 249* (McKinney 1983); *Ohio R. Civ. P. 75(B)(2)*; *Ore. Rev. Stat. § 107.425(2)(b)* (1981); *Tex. Fam. Code Ann. § 11.10* (Vernon Supp. 1984); *Utah Code Ann. § 30-3-11.2* (1976); *Vt. Stat. Ann. tit. 15, § 594* (1974); *Va. Code § 16.1-266(1)* (1982); *Wash. Rev. Code Ann. § 26.09.110* (Supp. 1983-1984); *Wis. Stat. Ann. § 767.045* (West 1981). While the Uniform Marriage and Divorce Act § 310 (1974) also calls for representation by a child advocate, the Uniform Child Custody Jurisdiction Act (1968) does not adopt a similar approach.

n171 *Ariz. Rev. Stat. Ann. § 25-321* (1976); *Cal. Civ. Code § 4606* (West 1983); *Colo. Rev. Stat. § 14-10-116* (1973); *Conn. Gen. Stat. Ann. § 46-43* (West 1971); *Del. Code Ann. tit. 13, § 721* (1981); *D.C. Code Ann. § 16-918(b)* (1981); *Iowa Code Ann. § 598.12* (West Supp. 1983-1984); *Ky. Rev. Stat. Ann. § 403.090* (Michie Supp. 1982) ("friend of the court"); *Md. Cts. & Jud. Proc. Code Ann. § 3-604* (1980); *Mont. Code Ann.*

§ 40-4-205 (1983); *Neb. Rev. Stat. § 42-358* (1978); *N.Y. Fam. Ct. Act § 249* (McKinney 1983); *Ore. Rev. Stat. § 107.425(2)(b)* (1981); *Utah Code Ann. § 30-3-11.2* (1976); *Vt. Stat. Ann. tit. 15, § 594* (1974); *Va. Code § 16.1-266(D)* (1982); *Wash. Rev. Code Ann. § 26.09.110* (Supp. 1984).

n172 *Hawaii Rev. Stat. § 571-46(8)* (1976); *Mass. Gen. Laws Ann. ch. 215, § 56A* (West Supp. 1983-1984); *Minn. Stat. Ann. § 518.165* (West Supp. 1984); *Miss. Code Ann. § 93-5-13* (1972); *Mo. Rev. Stat. § 452.490* (Supp. 1982); *N.H. Rev. Stat. Ann. § 458:17-a* (1983); *N.M. Stat. Ann. § 40-4-8* (1983); *Wis. Stat. Ann. § 767.045* (West 1981).

n173 *Alaska Stat. § 25.24.310* (1983); Ohio R. Civ. P. 75(B)(2); *Tex. Fam. Code Ann. § 11.10* (Vernon Supp. 1984). Virginia provides for the appointment of an attorney as a guardian ad litem. See *Va. Code § 16-1-266(D)* (1982).

n174 Such effects include loss of self-esteem, interruption of psychological development, anxiety and fantasies of personal guilt, and increased incidence of psychosomatic illness. See Note, *supra* note 116, at 1130-31.

n175 *Id.* at 1133-34; see also *id.* at 1137-38 ("Because the child's interests are significantly affected by the process and outcome of the custody suit, they merit legal recognition. Because they may differ significantly from those of the parental parties to the suit and are not protected by the judge without assistance, they warrant separate legal representation."). Other commentators have argued that children have a right to counsel on constitutional due process grounds. See, e.g., Note, *supra* note 169, at 930-50; Note, *supra* note 3, at 179-87. For additional arguments that children and parents have very different interests in custody disputes, see J. Goldstein, A. Freud & A. Solnit, *supra* note 153, at 31-52; Genden, *supra* note 2, at 573.

n176 Inker & Perretta, *supra* note 3, at 115. These authors have asserted that any distinction between delinquency and nondelinquency proceedings is ultimately "contrived, artificial and without foundation." *Id.* at 119.

n177 387 *U.S. 1* (1967).

n178 See text accompanying note 32 *supra*.

n179 Thus, I do not agree with Judge Rives of the United States Court of Appeals for the Fifth Circuit, who declared in a dissenting opinion:

While I am fully cognizant of the gravity of a juvenile's being declared delinquent, I feel that the important liberties at stake in this [custody] case require the same degree of judicial vigilance. A change of parental bondage during the tender years is hardly less upsetting of one's pattern of life than is the denomination and possible commitment of a child as a "juvenile delinquent."

Brown v. Chastain, 416 *F.2d* 1012, 1027 (5th Cir. 1969) (Rives, J., dissenting).

n180 One commentator has likened a child's removal from his home in a neglect proceeding to a search and seizure within the meaning of the fourth amendment. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 *Vill. L. Rev.* 521, 530-35 (1977-1978).

This analogy would be inapt in the divorce-custody context.

n181 See text accompanying notes 152-60 supra.

n182 As the Supreme Court has stated in a different context, Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.

Parham v. J.R., 442 U.S. 584, 603-04 (1979). The parents' power to decide for themselves which parent should have custody assumes, of course, that the custodial parent is not unfit. Absent such unfitness, however, neither the state nor the child can overturn the custodial arrangement.

n183 See, e.g., *Slattery v. Slattery*, 139 Iowa 419, 116 N.W.2d 419 (1908) (court will enforce custodial agreement as long as it was entered into in good faith and is "fair and reasonable" in content).

n184 For a similar argument that no right to counsel in child protective proceedings can be derived from *Gault*, see text accompanying notes 231-60 infra.

n185 See, e.g., *Cal. Civ. Code § 4600(a)* (1983); Ill. Ann. Stat. ch. 40, § 602(a)(2) (Smith-Hurd 1980); *Mont. Code Ann. § 40-4-212(2)* (1983); *Ohio Rev. Code Ann. § 3109.04(c)(1)* (Supp. 1982).

n186 See text accompanying note 132 supra.

n187 One reason might be to encourage parents to agree privately by making judicial dispute resolution too costly. This reason is rarely advanced and is crudely instrumental.

n188 Alternatively, the parents may be viewed as waiving their privacy rights when they go to court. Goldstein, Freud, and Solnit have made a similar argument in a slightly different context. They argue that separating spouses who go to court should not have power to limit the scope or content of the court's award; rather, they assert, by invoking the court's jurisdiction, the parents have completely waived their right to make decisions in this matter. J. Goldstein, A. Freud & A. Solnit, supra note 23, at 115.

In their earlier book, *Beyond the Best Interests of the Child*, Goldstein, Freud, and Solnit proposed that, while the parents should have the power to arrange between themselves who will have custody of the children, if they are unable to do so and go to court to resolve the dispute, the court should award full custody to one parent without allowing the other parent any visitation rights. J. Goldstein, A. Freud & A. Solnit, supra note 153, at 38. Professors Mnookin and Kornhauser have criticized this proposal on the ground of internal inconsistency: "What is strange . . . is the extreme limitation on the parents' legal powers: they can decide who will have full custodial rights, but they have no power to bind themselves legally to some alternative division of responsibilities concerning the child." Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 982; see also Strauss & Strauss, supra note 151, at 1001-02. Mnookin and Kornhauser strongly favor maximizing parents' ability to settle divorce-related issues through "private ordering:" "We believe divorcing parents should be given considerable freedom to decide custody matters -- subject only to the same

minimum standards for protecting the child from neglect and abuse that the state imposes on *all* families." Mnookin & Kornhauser, *supra*, at 957 (emphasis in original); see also *id.* at 958.

n189 Note, *supra* note 116, at 1126 (footnote omitted).

n190 See text accompanying notes 144-60 *supra*.

n191 See text accompanying note 160 *supra*.

n192 See Note, *supra* note 116, at 1150-53.

n193 "Because the child's interests are significantly affected by the process and outcome of the custody suit, they merit legal recognition. Because they may differ significantly from those of the parental parties to the suit and are not protected by the judge *without assistance* they warrant separate legal representation." *Id.* at 1137-38 (emphasis added).

n194 *Id.* at 1126.

n195 *Id.* at 1179-80.

n196 While the Connecticut Family Relations Division is primarily a fact-gathering agency, it is empowered to formulate recommendations for the court based on information it has collected. *Id.* at 1178.

n197 *Id.* at 1179.

n198 *Id.*

n199 *Id.* at 1180 (footnote omitted).

n200 See *id.* at 1136, 1179-80.

n201 See text accompanying notes 124-28 *supra*.

n202 See *id.* As the example provided in Note, *supra* note 116, itself suggests, it is common for different Champions to draw different conclusions about the child's best interests from the same set of facts. Furthermore, I have observed that the attorneys for the parents frequently attempt to influence the Champion's deliberations; thus, realizing that the Champion's recommendation may control the outcome in the case, each parent's attorney attempts to curry favor with the Champion in the hope that the Champion will adopt a position favoring his client. See *id.* at 1173. All of this suggests serious questions about arbitrariness, legitimacy, and usurpation of function. See note 128 *supra*.

n203 Mylniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 *J. Fam. L. 1*, 16 (1977-1978). One might expect that jurisdictions that authorize counsel for children in custody proceedings would defer to the child's choice of custodian. Although virtually every state permits the court to give precedence to the child's preference in custody determinations, only 24 do so by statute. See *Alaska Stat. § 25.24.150(c)(3)* (1983); *Ariz. Rev. Stat. Ann. § 25-332(A)(2)* (West Supp. 1983-1984); *Cal. Civ. Code § 4600(a)* (1983); *Colo. Rev. Stat. § 14-10-124(1.5)(b)* (Supp. 1983); *Conn. Gen. Stat. Ann. § 46b-56(b)* (West Supp. 1983-1984); *Del. Code Ann. tit. 13, § 722(a)(2)* (1981); *D.C. Code Ann. § 16-911(5)(1)* (1981); *Fla. Stat. Ann. § 61.13(3)(i)* (West Supp. 1983); *Ga. Code Ann. § 19-9-1(a)* (Supp. 1983); *Hawaii Rev. Stat. § 571-46(3)* (1976); *Ill. Ann. Stat. ch. 40, § 602(a)(2)* (Smith-Hurd 1980); *Ind. Code Ann. § 31-1-11.5-21(a)(3)* (Burns Supp. 1983); *Ky. Rev. Stat. § 403.270(1)(b)* (Michie Supp. 1982); *Minn. Stat. Ann. § 518.17(1)(1)* (West Supp. 1977); *Miss. Code Ann. § 93-11-65* (1972); *Mo. Rev. Stat. § 452.375(2)* (1978 & Supp. 1982); *Mont. Code Ann. § 40-4-212(2)* (1983); *Neb. Rev. Stat. § 42-364(1)(b)* (1978); *N.H. Rev. Stat. Ann. § 458-17(vi)* (1983); *N.J. Stat. Ann. § 9:2-4* (West 1976); *N.M. Stat. Ann. § 40-4-9(A)(2)* (1978); *Ohio Rev. Code Ann. § 3109.04(C)(1)* (Supp. 1982); *Okla. Stat. Ann. tit. 12, § 1277.1* (West Supp. 1982); *Utah Code Ann. § 30-3-10* (Supp. 1983); see also Speca, *The Role of the Child in Selecting His or Her Custodian in Divorce Cases*, 27 *Drake L. Rev.* 437 (1977-1978). Of these states, however, only 18 provide by statute for appointment of an advocate for the child. The six states that do not provide for advocates are Florida, Georgia, Illinois, Indiana, New Jersey, and Oklahoma. On the other hand, 28 jurisdictions authorize by statute the appointment of a representative for children in custody disputes. See note 129 *supra*. Of these jurisdictions, nine -- Iowa, Maryland, Massachusetts, New York, Oregon, Texas, Vermont, Virginia, and Wisconsin -- do not give any weight to the child's preference. Even in those states that do explicitly take into account the child's preference, one commentator has observed that the child's preference "is a factor employed to reinforce the correctness of a decision based upon other criteria and will be overlooked when in conflict with other standards." Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 *J. Fam. L.* 21, 27 (1965). All of this suggests an obvious, but all too often overlooked, point: we cannot decide whether to confer a right to counsel on children, or intelligently discuss the role counsel should play, if such a right is conferred without considering the entire constellation of substantive and procedural rights that we are willing to give children. See notes 17, 75 *supra*.

n204 Dembitz, *supra* note 121, at 1312.

n205 According to the Institute of Judicial Administration, "the statutes of thirty-five states guarantee appointed counsel to children in neglect proceedings." *Abuse and Neglect Standards*, *supra* note 149, Standard 5.2D, commentary at 110. The Model Child Abuse and Neglect Reporting Law § 15A (1975), reprinted in A. Sussman & S. Cohen, *Reporting Child Abuse and Neglect: Guidelines for Legislation* (1975), provides: "Children subject to any judicial proceeding regarding child abuse or neglect shall be entitled to legal counsel appointed by the Court at public expense. Counsel for the child shall in no case be the same as counsel for the alleged abuser or any governmental or social agency involved." *Id.* at 53. For arguments that children in child protective proceedings are entitled to independent counsel, see Fraser, *supra* note 79, at 31-45; *Abuse and Neglect Standards*, *supra* note 149, at 109-10; Redeker, *supra* note 180; Note, *Courts: Seen and Not Heard: The Child's Need for His Own Lawyer in Child Abuse and Neglect Cases*, 29 *Okla. L. Rev.* 439 (1976); Comment, *A Recommendation for Court-Appointed Counsel in Child-Abuse Proceedings*, 46 *Miss. L.J.* 1072 (1975).

n206 See, e.g., Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 *Geo. L.J.* 887, 921-22 & n.185 (1975); Mnookin, *supra* note 161, at 601. In *Smith v. Organization of Foster Families for Equality & Reform*, 431 *U.S.* 816 (1977), the Supreme Court noted that as many as 80% of the children in foster care in New York City are voluntarily placed. *Id.* at 824 n.9.

n207 When social or welfare workers are unsuccessful in convincing parents to place their children with the state temporarily, they frequently seek removal through juvenile court order. In my experience, voluntary placements and court-ordered removals have similar effects on the child. The difference between the two types of cases usually lies in the degree of the parents' willingness to resist or accept the social worker's recommendation.

n208 For a discussion of these effects, see J. Goldstein, A. Freud & A. Solnit, *supra* note 23, at 5-14; Wald, *supra* note 23, at 277. The child is removed from the only environment he has ever known and may remain a ward of the state indefinitely. For example, the district court in *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), found that the median time spent in foster care in New York City was over four years. *Organization of Foster Families for Equality & Reform v. Dumpson*, 418 F. Supp. 277, 281 (S.D.N.Y. 1976). Nor is placement of the child likely to end the effects of separating a child from his home environment. As the Supreme Court found in *OFFER*, "nearly 60% of the children in foster care in New York City have experienced more than one placement, and about 28% have experienced three or more." 431 U.S. at 837.

n209 See, e.g., *N.Y. Fam. Ct. Act §§ 241, 242, 249* (McKinney 1983); see also note 205 *supra*.

n210 See, e.g., *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979); *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976).

n211 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979).

n212 *Id.* at 1194.

n213 *Id.* It is curious that the *Sims* court failed even to consider that appointment of independent counsel for the child might be unnecessary because the interests of the parents and the child might be presumed to be identical. Perhaps the court's oversight can be explained by the way the issues in the case were framed, with the court's attention focused on whether Texas could presume an identity of interest between the state and the child.

n214 42 U.S.C. § 5103(b)(2)(G) (1976).

n215 45 C.F.R. § 1340.3-3(d)(7) (1982).

n216 See, e.g., Redeker, *supra* note 180, at 527-29; Note, *supra* note 31, at 497-98 (termination proceedings).

n217 See text accompanying notes 152-60 *supra*.

n218 See *id.*

N219 One commentator has similarly noted that "in a sense, granting the child party status and independent

counsel before the allegations [of neglect and abuse] have been proved does beg the question by accomplishing the desired intervention [into the family unit] before proof of its justification." Fisher, *supra* note 50, at 845.

n220 J. Goldstein, A. Freud & A. Solnit, *supra* note 23.

n221 *Id.* at 112.

n222 *Id.*

n223 *Id.* at 113.

n224 Goldstein, Freud, and Solnit have claimed that appointment of counsel deprives the parents "of their right to represent the child through their own counsel, with counsel they choose for their child, or even without counsel." *Id.* at 113-14 (footnote omitted). Similarly, appointment of counsel deprives the child of due process because it denies him "his right to be represented by his parents before the law." *Id.* at 114 (footnote omitted).

n225 455 *U.S.* 745 (1982). While *Santosky* involved a termination proceeding rather than a protective proceeding, the differences between the two types of proceedings are insignificant for purposes of my argument.

n226 *Id.* at 759.

n227 *Id.* at 760 (emphasis in original).

n228 *Id.* at 751.

n229 *Id.*

n230 A recent law review note has posited in the context of termination of parental rights that separate counsel is not necessarily required; if it can be shown that counsel for one of the participants can be relied on to advocate both the child's best and professed interests, appointment of separate counsel is not necessary. Thus, in order to determine whether separate counsel must be appointed, the court should assess the ability of counsel who are already involved to advocate the child's interests.

Note, *supra* note 31, at 497. In asking which of the parties might be able to provide this advocacy, however, the note automatically rejected the parents, reasoning that "[b]ecause the parents are charged with being generally unwilling or unable to protect the child's welfare, they cannot be presumed to be acting to protect the child's interests in the proceedings." *Id.* at 498. Furthermore, the note asserted that "[c]ounsel for the state is perhaps uniquely able to advocate the child's interests," *id.*, although it recognized that in certain cases, such as where the state welfare agencies may themselves have violated statutory or internal regulations, representation of the child by the state would be inappropriate, *id.* at 500-01. The note's premises, however, are simply incompatible with *Santosky*.

n231 See, e.g., Abuse and Neglect Standards, *supra* note 149, Standard 5.2D commentary at 109-10; Note, *supra* note 3; Comment, note 205, at 1090-92.

n232 See text accompanying notes 174-84 supra.

n233 387 U.S. 1 (1967).

n234 See note 68 and accompanying text supra.

n235 *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24 (1981) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

n236 Fisher, supra note 50, at 843.

n237 The parents share fully the child's interest to be free from unnecessary state interference and are thus able to protect their child's interest to the same degree as they are able to protect their own. I am assuming, of course, that the parents have counsel. But see text accompanying notes 239-43 infra.

n238 But see Ramsey, Representation of the Child in Protection Proceedings: The Determination of Decision-making Capacity, 17 Fam. L.O. 287, 323 n.133 (1983) (arguing that the state is generally under-prepared in protective cases).

n239 452 U.S. 18 (1981). In jurisdictions where counsel for children are regularly assigned, such assignments may actually encourage lax preparation by the state since the children's lawyers frequently act as back-up prosecutors. See text accompanying notes 286-88 infra.

n240 *Id.* at 32. The vast majority of states, however, do appoint counsel for parents in termination proceedings, either by case law or by statute. See *Lassiter*, 452 U.S. at 34.

n241 Cf. *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983) (per curiam) (relying on *Lassiter* to hold that due process requires only case-by-case determination of whether counsel must be appointed for indigent parents in dependency proceedings). But cf. *Smith v. Edmiston*, 431 F. Supp. 941 (W.D. Tenn. 1977) (parents have right to counsel in dependency and neglect proceedings; decided prior to *Lassiter*).

n242 *Lassiter*, 452 U.S. at 26-27.

n243 *Id.* at 32.

n244 See cases cited in notes 245, 247 infra.

n245 See *In re Jacqueline H.*, 21 Cal. 3d 170, 176, 577 P.2d 683, 687, 145 Cal. Rptr. 548, 552 (1978).

n246 455 U.S. 745 (1982).

n247 *In re Linda C.*, 86 A.D.2d 356, 361, 451 N.Y.S.2d 268, 271 (1982). But see *In re Christine H.*, 114 Misc. 2d 475, 482, 451 N.Y.S.2d 983, 987 (Fam. Ct. 1982) (clear and convincing standard required in child abuse cases).

n248 But see *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 43 n.10 (1981) (Blackmun, J., dissenting) ("The possibility of providing counsel for the *child* at the termination proceeding . . . requires consideration of interests different from those presented here, and again might yield a different result with respect to the right to counsel.") (emphasis in original).

n249 See note 207 *supra*. In *Lassiter*, the Supreme Court apparently did not find it ironic that North Carolina law required appointment of a lawyer as the child's guardian ad litem whenever a parent denied a material allegation in a termination proceeding. Neither the fact that the child, but not the parents, was entitled to a lawyer, nor the fact that, if the parents failed to file an answer, the child did not get a lawyer, appeared to trouble the Court. *Lassiter*, 452 U.S. at 29.

n250 458 U.S. 502 (1982).

n251 *Id.* at 505-06.

n252 *Id.* at 506-07.

n253 *Id.* at 510-11.

n254 28 U.S.C. §§ 2241, 2254 (1976).

n255 458 U.S. at 510.

n256 411 U.S. 345 (1973).

n257 371 U.S. 236 (1963).

n258 391 U.S. 234 (1968).

n259 458 U.S. at 510-11.

n260 *Id.* at 511 n.12.

n261 See, e.g., *Wagstaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975); *Ricketts v. Ricketts*, 265 Ark. 28, 576 S.W.2d 932 (1979) (en banc); *In re Orlando F.*, 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976); *Stapleton v. Dauphin County Child Care Servs.*, 228 Pa. Super. 371, 324 A.2d 562 (1974); cf. *In re D.*, 24 Or. App. 601, 547 P.2d 175 (en banc) (although counsel for the child is not required in every neglect proceeding, it

should be provided on case-by-case basis where necessary to protect child's best interests), cert. denied, 429 U.S. 907 (1976). It has been estimated that over 40 states provide for the independent representation of children in child protective proceedings. See Besharov, *supra* note 99, at 217 & n.1.

n262 A recent empirical study of the effects of guardians ad litem on protective proceedings in North Carolina concluded that the presence of guardians produced no overall effects on the litigation. Kelley & Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 *J. Fam. L.* 405, 451 (1982-1983). The study also found that guardians spent a median of only five hours working on each case and that "both guardians and judges seemed to assume that the guardian should play only a minor role." *Id.* There is thus reason to question whether the study's conclusion of overall ineffectiveness of guardians would be valid for jurisdictions in which counsel for the child plays a more active role in the litigation. In addition, the jurisdiction studied was highly interventionist; children were removed from their homes in nearly nine out of ten cases entering the court system, which is approximately twice the national statistic. *Id.* at 406. Since the study found that guardians sided with the state most of the time, it is understandable that the authors concluded that the guardians were ineffective.

n263 See J. Goldstein, A. Freud & A. Solnit, *supra* note 23, at 112. Goldstein and his co-authors would appoint independent counsel in neglect proceedings in two situations only: (1) where the child has been removed from the custody of the parents *pendente lite*; and (2) where an adjudication of neglect has already been made and the court is determining what permanent disposition to make. *Id.* at 111-12. In the first case, Goldstein and his co-authors argue that the role of counsel is "[t]o assure that the state provides the child in an emergency with adequate care until the placement process has run its course." *Id.* at 115. In the second case, counsel should be assigned to "assure that the process of disposition and the placement itself will make [the child's] interests paramount and provide him with the least detrimental alternative." *Id.* at 114.

Goldstein, Freud, and Solnit do not claim that counsel should never "represent" a child in the traditional sense; if counsel is assigned by the court, they point out, "[c]ounsel cannot turn directly to the children whom he represents for his instructions." *Id.* at 122. Instead, counsel "must turn to the court and to the legislature for the guidance he would normally receive from autonomous parents who engage him to represent their children." *Id.* at 121. Correspondingly, they argue, if parents retain counsel for the child, the parents alone ought to determine the role that counsel is to play. *Id.* at 120.

Clearly, then, one ought not to describe counsel in these proceedings as representing the child. Rather, the attorney is acting as counsel for either the state or the parents, that is, for the party who hires and directs him.

n264 Besharov, *supra* note 99.

n265 *Id.* at 237.

n266 *Id.* at 238.

n267 *Id.* at 220.

n268 *Id.* at 223.

n269 *Id.* at 227-28.

n270 *Id.* at 231.

n271 *Id.* at 234. I will not elaborate on Besharov's views concerning the role of lawyers for mature children, since I am concerned with very young children in this Article. Besharov makes a helpful contribution to my present discussion, however, when he distinguishes between a court's duty and the attorney's duty to respect the wishes of a mature child:

[T]he Court should [not] be bound by the desires of even a mature child. It still must make its decision on the basis of the law and the child's interests as it determines them. Rather, the child's wishes should bind *his representative*, and should shape the position he takes before the court.
Id. at 236 (emphasis in original).

n272 *Id.* at 238.

n273 J. Goldstein, A. Freud & A. Solnit, *supra* note 23, at 122.

n274 See, e.g., *People ex rel. Anonymous v. Anonymous*, 10 N.Y.2d 332, 335, 179 N.E.2d 200, 201, 222 N.Y.S.2d 945, 946 (1961).

n275 455 U.S. 745 (1982).

n276 *Id.* at 760.

n277 Child protective cases are too easily decided according to the subjective values of the judge. As the Supreme Court has acknowledged: "[J]udges . . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 835 n.36 (1977); see also Note, The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication, 44 *Brooklyn L. Rev.* 63, 64 n.4, 79 n.103 (1977). Similarly, Professor Mnookin has observed that judges in child protective proceedings generally assume jurisdiction. Mnookin, *supra* note 161, at 627-28. This almost automatic assumption of jurisdiction, coupled with the ubiquitous "best-interests-of-the-child" test gives family court judges extensive power to intervene in (and restructure) the family unit. See Klaff, The Tender Years Doctrine: A Defense, 70 *Calif. L. Rev.* 335, 357 (1982) ("If defining standards are not provided [for the "best interests" test], the test is simply a grant of broad discretion to trial judges to exercise their own views on what is best for children.").

n278 See, e.g., Ennis and Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 *Calif. L. Rev.* 693, 712 (1974).

n279 *Id.*; see also Dershowitz, The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways, *Psychology Today*, Feb. 1969, at 47.

n280 Ennis and Litwack, *supra* note 278, at 720-26.

n281 Dershowitz, *supra* note 279, at 47.

n282 This bias in favor of self-preservation and against taking chances that could result in bad publicity is prevalent in certain jurisdictions. In New York City Family Court, for example, the probation department, as a courtesy to the judge, frequently flags abuse cases that have come to the public's attention by affixing a note to the court papers, reading: "THIS IS A DAILY NEWS CASE." The effect of this message is self-evident and will be felt by all but the most scrupulous judges. Bias of juvenile courts against the poor is also well documented. See, e.g., P. Murphy, *Our Kindly Parent -- The State*, 153-63 (1974). For an account of the wide discretion given to judges and the subjective bases upon which judges frequently decide to remove children from their parents, see Mnookin, *supra* note 161, at 619-22.

n283 "Nationwide data on the income of families placed in foster care do not exist, but statewide studies indicate that at least eighty to ninety percent of such families are below the poverty line and the majority receive public assistance." McCathren, *Accountability In the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect*, 57 *B.U.L. Rev.* 707, 711 *n.16* (1977) (citing authorities); see also S. Katz, *When Parents Fail* 28-29 (1971); Dembitz, *Child Abuse and the Law -- Fact and Fiction*, 24 *Rec. A.B. City N.Y.* 613, 623 (1969); Mnookin, *supra* note 161, at 603; Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 *Calif. L. Rev.* 694 (1966); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623, 692 *n.269* (1976). One explanation for the disproportionate number of child protective proceedings involving poor parents is that "harm to poor children is more likely to be discovered because all aspects of the lives of poor families are subject to the constant scrutiny of public clinics and welfare workers." Bourne & Newberger, *supra* note 143, at 691.

n284 By contrast, counsel supporting applications to remove children from their homes typically are staff counsel of a local government unit. While frequently overworked and rarely able to devote much time to any one case, these lawyers possess a familiarity with the process that is often lacking in their adversaries. But see note 238 *supra*.

n285 This is not to suggest that criminal defense lawyers always discharge their responsibilities to their clients with undiluted zeal. See Burt, *Conflict and Trust Between Attorney and Client*, 69 *Geo. L.J.* 1015, 1035-36 (1981).

n286 Besharov, *supra* note 99, at 218. A recent empirical study of guardians ad litem in North Carolina similarly found that the guardian agreed with the recommendation of the state welfare authorities in 88% of the protective cases. See Kelly & Ramsey, *supra* note 262, at 452.

n287 Besharov, *supra* note 99, at 218.

n288 *Id.*

n289 Parents' continued control over their children is especially critical since a majority of the children

involved in neglect proceedings are under seven years old. See Mnookin, *supra* note 161, at 630.

n290 See, e.g., *N.Y. Soc. Serv. Law* § 392 (Consol. 1972).

n291 As many as one-third of the transfers between foster homes may be at the request of the foster parents. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 847 n.55 (1977).

n292 431 U.S. 816 (1977), *rev'g* *Organization of Foster Families for Equality & Reform v. Dumpson*, 418 F. Supp. 277 (S.D.N.Y. 1976).

n293 Amended Complaint, *OFFER*, 418 F. Supp. 277 (S.D.N.Y. 1976).

n294 This Article uses the term "legal parent" to refer to a natural or biological parent.

n295 Foster care is theoretically a temporary arrangement, designed to provide substitute care for the child whose parents are temporarily unable to care for him. As the Supreme Court put it: "[T]he distinctive features of foster care are first, 'that it is care in a *family*, . . . ' and, second, 'that it is for a *planned* period -- either temporary or extended. This is unlike adoptive placement, which implies a *permanent* substitution of one home for another.'" *OFFER*, 431 U.S. at 824 (citing A. Kadushin, *Child Welfare Services* 355 (1st ed. 1967)) (emphasis in original). In fact, however, the Court recognized that foster care frequently lasts indefinitely. *Id.* at 836. Moreover, the record in *OFFER* showed that, rather than being removed from their foster home in order to go home, nearly 60% of the children in foster care were removed in order to be placed in another foster home, and 28% had experienced three or more placements. *Id.* at 837.

For a discussion of the issues in *OFFER*, see Dobbs, *Foster Care and Family Law: A Look at Smith v. OFFER and the Constitutional Rights of Foster Children and Their Families*, 17 *J. Fam. L.* 1 (1978-1979); Muench & Levy, *Psychological Parentage: A Natural Right*, 13 *Fam. L.Q.* 129 (1979); Note, *Constitutional Protection of Long-Term Foster Families*, 79 *Colum. L. Rev.* 1191 (1979); Note, *Constitutional Rights of the Foster Child: The Forgotten Party in Custody Adjudication*, 31 *Rutgers L. Rev.* 205 (1978).

n296 *OFFER*, No. 74 Civ. 2010, slip op. at 1 (S.D.N.Y. Mar. 22, 1976).

n297 *OFFER*, 418 F. Supp. at 278.

n298 *Id.* at 283.

n299 *OFFER*, No. 74 Civ. 2010, slip op. at 3, 4-5 (S.D.N.Y. Dec. 11, 1974).

n300 *Id.* at 4. It was the NYCLU's position that it could adequately represent both the foster parents and the children. NYCLU Memorandum of Law in Support of Motion to Reinstate Counsel at 8, *OFFER*. At the outset of the litigation, the NYCLU and all the named plaintiffs, including the foster children, agreed that, if at any time during the litigation the district court found the foster parents' and foster children's interests to be adverse, the NYCLU would continue to represent the plaintiff foster children and the foster parents would obtain

independent counsel of their own choosing. *Id.* In fact, after the district court appointed independent counsel for the foster children, one of the named foster children submitted an affidavit to the court requesting that the NYCLU be allowed to continue to represent her. Nevertheless, the court refused to honor the child's request. See note 304 *infra*.

n301 *OFFER*, No. 74 Civ. 2010, slip op. at 11-12 (S.D.N.Y. Dec. 11, 1974).

n302 After submission of proof by all parties, the three-judge district court ruled that, once children have resided in a foster home for one year, they have a constitutionally cognizable liberty interest; the court held that a hearing was therefore required in all cases. *OFFER*, 418 F. Supp. 277, 289 (S.D.N.Y. 1976), *rev'd sub. nom. Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977). Even after this ruling, counsel for the children continued to argue against recognizing a constitutional right to a preremoval hearing. Counsel successfully sought a stay of the court's order in the Supreme Court, *Gandy v. Organization of Foster Families for Equality & Reform*, 425 U.S. 988 (1976); he also filed a notice of appeal designating the foster children as appellants before the Supreme Court. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. at 823. He took these actions even though his clients, the plaintiff foster children, had been granted *all* of the relief they had sought in their original complaint.

n303 See text accompanying note 302 *supra*.

n304 This was not the first rebuff for the adolescent plaintiffs. Prior to the counsel's appointment, the district court had ignored the request of the named children plaintiffs to be represented by the NYCLU. *OFFER*, slip op. at 14-15, 18 (S.D.N.Y. Dec. 11, 1974); see Affidavit of Cheryl Wallace, *OFFER* ("I understand what having a lawyer means . . . it means that [someone] will present my viewpoint to the court . . ."). As the district court pointed out, *OFFER* was a class action "of vital importance to the well-being of more than one thousand children." *OFFER*, slip op. at 11 (S.D.N.Y. Dec. 11, 1974). Therefore, the judge noted, "I think that I am justified in attaching no weight whatever to the named children's choice [of counsel] as it affects the representation of the other children in the class." *Id.* at 15. This statement reveals one of the major difficulties in the *OFFER* case: the class as certified was simply too large and contained members possessing potentially conflicting interests. The class included both very young children, who were too young to direct counsel, and older children, who were mature enough to instruct their own attorney. One of the ironies of *OFFER*, then, was the fact that the only members of the class who were old enough to have a clear view of what they wanted and to articulate that view -- the adolescent plaintiffs who had brought the action -- never received an advocate so that unnamed, inarticulate children might have counsel.

n305 For the use of amicus counsel to argue a position that would otherwise go unrepresented, see *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955) (Court invited amicus counsel to argue unconstitutionality of Virgin Islands' divorce statute since neither party to divorce proceeding would advocate that position).

n306 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976). The comatose patient in *Quinlan* was twenty-one years old and therefore not a child. Nevertheless, given Karen Ann Quinlan's physical condition, the case presented the same problems concerning counsel's role as do cases involving young children.

n307 See, e.g., *In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (minor had right to pre-admission hearing before neutral factfinder to determine whether institutionalization was reasonably likely

to benefit him). Not every state, however, requires court approval before institutionalizing a child. See, e.g., *Ga. Code Ann. § 37-3-20* (1982) (upon application of parent or guardian, hospital superintendent may admit child if he finds evidence of mental illness; no hearing required) (held constitutional in *Parham v. J.R.*, 442 U.S. 584 (1979)).

n308 See, e.g., *N.Y. Fam. Ct. Act §§ 712, 732, 733(b)* (McKinney 1983).

n309 See generally Baron, Botsford & Cole, *Live Organ and Tissue Transplants from Minor Donors in Massachusetts*, 55 *B.U.L. Rev.* 159 (1975).

n310 See, e.g., Burt, *supra* note 53, at 358-64 (litigation, with emphasis on winning and losing, is particularly inappropriate forum for addressing inevitable, potentially beneficial family conflicts engendered by commitment decisions).

n311 Goldstein, *supra* note 148.

n312 Watson, *supra* note 147, at 672. Professor Goldstein has argued:

When death is not a likely consequence of exercising a medical care choice there is no justification for governmental intrusion on family privacy; nor is there justification for overcoming the presumption of either parental autonomy or the autonomy of emancipated children. Where the question involves not a life-or-death choice but a preference for one style of life over another, the law must restrain courts and medicine men from coercively imposing their "kindness" -- their preferred life styles -- in the form of medical care upon nonconsenting parents and their children. Goldstein, *supra* note 148, at 664.

n313 See generally Tribe, *Childhood, Suspect Classifications and Conclusive Presumptions: Three Linked Riddles*, *Law & Contemp. Probs.*, Summer 1975, at 8, 18-31 (arguing that fundamental nature of rights involved and moral flux regarding those rights require "dynamic" policy formation and application in cases involving children).

n314 A court's decision is not a mere

private affair. It culminates in a court order which is one of the most solemn of governmental acts. Not only is a court an agency of government, but remember that its order, if not voluntarily obeyed, will bring into action the police, the sheriff, even the army. What a court orders, then, is no light matter. The court represents the government, organized society, in action. J. Frank, *Courts on Trial* 95 (1963).

n315 *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955) (quoting *Granville-Smith v. Granville-Smith*, 348 U.S. 885 (1954)) (miscellaneous order denying leave to submit case without oral argument).

n316 70 *N.J. 10*, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

n317 In *Quinlan*, the comatose child was incapable of exercising her right to decline treatment. The father sued as the guardian for the child. The court ultimately ruled that "the guardian and family of Karen [should be permitted] to render their best judgment" on her behalf.

If their conclusion is in the affirmative this decision should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them. It is for this reason that we determine that Karen's right of privacy may be asserted in her behalf, in this respect, by her guardian and family under the particular circumstances presented by this record.

Id. at 41-42, 355 A.2d at 664. I do not quarrel with this result; indeed, I think it was correct. If I had been appointed counsel to Karen Ann, however, I would have opposed this result as a matter of course.

n318 452 *F. Supp.* 361 (*D. Conn.* 1978).

n319 Two of the girls were legally blind and deaf; both girls understood only eight to ten signs and lacked the ability to communicate. The third girl had congenital encephalopathy with gross emotional and neurological retardation; she was also legally blind and had minimal ability to communicate. Each girl resided at a school during the week and spent the weekend with her family. Because of their impaired mental functioning and physical handicaps, it was inevitable that the girls would have to be placed in permanent custodial care in an institutional setting.

At the time the case was filed, each girl had begun or was about to begin menstruating. The parents alleged that, because of the girls' handicaps, menstruation caused the girls psychological distress as well as severe painful cramping; coping with the hygienic and psychological problems of menstruation had heavily burdened the parents and the staff of the school; the three girls could not cope with menstruation and could never reasonably be expected to be able to cope with menstruation, pregnancy, or childbirth; and birth control devices such as oral contraceptives or intra-uterine devices were either impractical or ineffective because they would not lessen the burdens of menstruation, and it was too difficult to be sure each day that the contraceptive had been taken or was in place. *Id. at 362-65.*

n320 *Id. at 364.*

n321 *Id. at 363.*

n322 *Id. at 364.*

n323 *Id.* The state did provide such a procedure for certain institutionalized retardates, *id.*, thereby raising questions of equal protection.

n324 *Id. at 363.*

n325 See text accompanying note 78 *supra*.

n326 The purpose . . . is to deal with the question of consent to the performance of this operation.

The situation is one on which the papers show that it is impossible for these young women to give assent or an informed consent themselves. And so the question is narrowed down to whether or not another source for consent is legally permissible. And that question does not reach the problem of whether the operation is advisable.

The problem is who may consent to it, who has the power to make the judgment.

So we really do not get into the issue of whether the operation is advisable. Somebody can choose what to do about his own body and someone can choose what to do about the body of a minor if there is a proper relationship to that minor.

Transcript of hearing on motion for appointment of guardians ad litem on *October 31, 1977, at 6-7, Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978).

n327 Id. at 9.

n328 Id. at 10.

n329 Id. at 13. The court reasoned that this determination was necessary to ensure "that [the] method of obtaining consent has been adhered to, and properly adhered to." Id. at 8.

n330 Id. at 6-7. Given the nature of the decision, the court's authorizing the guardian to perform a battery of medical tests appears particularly inexplicable.

n331 Id. at 9.

n332 The Massachusetts Supreme Judicial Court recently defined the role of a guardian ad litem in a sterilization case in exactly this way:

The guardian ad litem is to be charged with the responsibility of zealously representing the ward, and must have full opportunity to meet with the ward, present proof, and cross-examine witnesses at the hearing. In order to guarantee a thorough adversary exploration of the difficult question posed, the guardian ad litem should present all reasonable arguments in favor of the court's denial of the petition, so that "all viewpoints and alternatives will be aggressively pursued and examined at the subsequent hearing."

In re Moe, 432 N.E.2d 712, 721 (Mass. 1982) (quoting *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 757, 370 N.E.2d 417, 433 (1977)) (citations omitted).

n333 373 Mass. 728, 370 N.E.2d 417 (1977).

n334 Id. at 730, 370 N.E.2d at 419.

n335 Id.

n336 Baron, Assuring "Detached but Passionate Investigation and Decision": The Role of Guardian Ad Litem in *Saikewicz*-type Cases, 4 *Am. J.L. & Med.* 111, 121 (1978).

n337 *Saikewicz*, 373 Mass. at 735, 370 N.E.2d at 422.

n338 *Id.* at 757, 370 N.E.2d at 433.

n339 *Id.*, 370 N.E.2d at 433-34.

n340 The authors stated:

Courts should be required to appoint guardians ad litem to represent prospective minor donors in all transplant proceedings. The guardian's role should be defined as that of an advocate of the child's interest in *not* acting as a donor; the guardian should be instructed to present all the evidence and arguments against his ward's donation and to oppose the positions taken by the hospital and family, regardless of the guardian's personal perception of the child's actual interests.

Baron, Botsford & Cole, *supra* note 309, at 186 (emphasis added).