10-1-1996

Life and Death Lawyering: Dignity in the Absence of Autonomy

Teresa Stanton Collett

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/jisle

Part of the Legal Ethics and Professional Responsibility Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/jisle/vol1/iss1/12

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Journal of the Institute for the Study of Legal Ethics by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
LIFE AND DEATH LAWYERING: 
DIGNITY IN THE ABSENCE OF AUTONOMY

Teresa Stanton Collett*

I. INTRODUCTION

While practicing law on a daily basis, I represented a hospital seeking authority to give a blood transfusion to a baby over the objection of his Jehovah Witness parents. The hospital called late one evening, and asked if we could get an order immediately. The treating physician assured me that death was inevitable without the transfusion, and estimated the child’s chance of survival as one in five with the transfusion. Without a moment of hesitation I replied, “Start setting up the equipment. We’ll have the order before you’re ready to go.” I called the local district attorney’s office. One of the lawyers there began to prepare the petition and order for the judge’s signature. The judge was contacted at home, and agreed to sign the order as soon as it was delivered to his house. Start to finish, initial client request to final order, the process took less than an hour, and I made good on my promise that we would have the order before the doctor was ready to start the blood transfusion.

Swift justice if there ever was, right? Well, it certainly was swift, but whether it was justice continues to trouble me today. The baby did not survive, even with the transfusion. And while I am entirely confident that the child is not in hell because some lawyers and doctors decided to force foreign blood into his veins,1 I am equally confident that we

---

* Professor of Law, South Texas College of Law. Visiting Professor of Law, Notre Dame Law School. I am grateful for the encouragement of Professors Monroe Freedman and Thomas Shaffer as I struggle to articulate the differences between autonomy and human dignity. My research assistants, Kathryn Elias and Kathryn Weston-Overbey, have greatly improved my footnotes by their diligent efforts.

1. Cf. Safeguarding Your Children from Misuse of Blood, OUR KINGDOM MINISTRY 3 (Sept. 1992) reprinted in FAMILY CARE AND MEDICAL MANAGEMENT FOR JEHOVAH’S WITNESSES at 35 (1992)). Biblical passages often used in support of the refusal to consent to blood transfusion include Genesis 9:3-4 (“[n]ow you can eat them, as well as green plants; I give them all to you for food. The one thing you must not eat is blood still in it; I forbid this because the life is in the blood”); Leviticus 17:14 (“[t]he life of every living thing is in the blood, and that is why the Lord has told the people of Israel that they shall not eat any meat with blood still in it, and that anyone who does will no longer be considered one of his people”); Deuteronomy 12:23-25 (“[o]nly do not eat meat with blood still in it, for the life is in the blood, and you must not eat the life with the meat. Do not use the blood for
caused untold pain to the baby’s parents, who had agonizingly decided that their baby’s eternal life was more important than his temporal existence.

This experience led me to explore the lawyer’s obligations in the factual circumstances that act as hypothetical fact patterns for this essay. These hypotheticals reveal the weaknesses in the liberal foundation of the “standard conception” of the lawyer’s role.² The “ideals” of partisanship and nonaccountability embodied in that conception become incoherent when used to justify advocacy of an outcome chosen by the lawyer, and a mockery of morality when the lawyer seeks an outcome contrary to the client’s expressed desires. The discord between the intentions and results of these ideals is due in large part to the implicit “conception” of the client as autonomous rights-bearing individual.³ Such an understanding of clients is patently false when applied to children or disabled adults, and is dangerously incomplete when dealing with adults deemed legally competent.

In this essay I suggest that legal ethics would be more consistent with the reality of day-to-day practice, and provide greater guidance in the dilemmas that do arise, if the current understanding of clients as autonomous rights-bearers is replaced by an understanding which recognizes the intrinsic dignity of each person, deriving not from their capacity to reason and be autonomous, but rather from their innate capacity to seek, know, and move toward the objective good.

---

² One of the best descriptions of the “standard conception” of the lawyer’s role is provided by Murray L. Schwartz in The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669, 673 (1978). Devotion to partisanship and nonaccountability, the two ideals identified by Professor Schwartz, were dubbed the “standard conception” by Gerald J. Postema in Moral Responsibility in Professional Ethics, 55 N.Y.U. L. REV. 63, 73 (1980). Some scholars have argued that there is no standard conception of a lawyer’s role or that the standard conception does not guide lawyers decision making in the day-to-day practice of law. See, e.g., Ted Schneyer, Moral Philosophy’s Standard Misconception of Legal Ethics, 1984 Wis. L. REV. 1529, 1532-37.

³ The limitations of this understanding of human nature in crafting effective rules of law are explored by Professor Mary Ann Glendon, in RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).
Consider the following hypothetical cases:

**Baby John’s Case** - Judge Wise calls and asks you to accept an appointment to represent John, the infant son of Jehovah Witnesses. Last week, John was admitted to the hospital as a “blue child.” A “blue child” is a child who has suffered extensive oxygen deprivation resulting in a bluish tinge around the mouth and on the nail beds, with clubbing of the fingers and toes.4

Upon examination the doctors determined that John’s heart was enlarged on the right side, and that on the left side was a moderately loud murmur that occurred during contraction of the heart, resulting in uneven blood flow. The doctors have tried treating him without blood transfusions, but are now convinced that transfusions are necessary. The health-care providers (or government authorities, if that is the proper local procedure) have initiated a proceeding to obtain a judicial order allowing the transfusions. There is no order appointing a guardian ad litem, and the court wants to appoint you as “attorney for the child” (whatever that means).

The judge tells you that the pleadings reflect that John’s parents want their son to live, but not by way of offending God. The doctors are taking the position that the blood transfusion is medically necessary. Will you accept the appointment, and if so, what are the objectives of Baby John’s representation?5

**Beth’s Case** - Mr. and Mrs. Smith have asked you to represent their fourteen-year-old daughter, Beth.6 She is mildly retarded, with the rea-

4. This medical condition was suffered by the infant in State v. Perricone, 181 A.2d 751 (N.J. 1962). The Court described the child’s condition as “blue around the lips and on the nail beds, both on fingers and toes, and who showed clubbing of the fingers and the toes, which is evidence of chronic oxygen lack.” *Id.* at 753.

5. Model Rule 1.2 provides that the client is to determine the objectives of the representation. However Rule 1.14 recognizes that the lawyer may be called upon to represent a client whose “ability to make adequately considered decisions in connection with the representation is impaired...” The rule authorizes the attorney to seek the appointment of a guardian or “take other protective action with respect to a client.” *Model Rules of Professional Conduct* Rules 1.2 and 1.14 (1994).

6. Since Beth is incapable of contracting for legal services, such an agreement is not inconsistent with the Model Rules. However, Rule 1.8(f) recognizes the propriety of accepting payment from a third party only where the client consents, and loyalty to the client and confidentiality are maintained. *Id.* Rule 1.8.

EC 7-12 of the ABA Model Code of Professional Responsibility stated that “[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of the matter in question or of
soning ability of an eight-year-old. Four months ago Beth was raped as she was walking home from school. There is no factual basis to suspect the involvement of any family member. Beth became pregnant. She is under the care of an excellent pediatric gynecologist and obstetrician. The doctor has determined that, due to certain vascular conditions, there is a high probability that continuing the pregnancy will result in Beth’s suffering a severe stroke, or possibly dying. The doctor has recommended terminating the pregnancy. A second opinion confirms that this is medically indicated in order to preserve Beth’s health. Beth and her parents are orthodox Roman Catholics, and all three refuse to consent to the abortion.7

The district attorney, at the urging of the doctors, has initiated a medical neglect proceeding, seeking a court order to terminate the pregnancy. Will you represent Beth? As Beth’s lawyer, what position will you take in the medical neglect proceeding?

Variations on Beth’s Case - Is your analysis different if Beth’s desires diverge from her parents?8 If she articulates a desire to terminate the pregnancy, but her parents refuse to consent?9 If her parents want the

contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If 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 interest of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.”

7. This hypothetical is loosely patterned after the facts of People v. Parks, 359 N.E.2d 358 (N.Y. 1976), and recent newspaper accounts of the pregnancy of a comatose rape victim. See, e.g., Judy Mann, A Case of Terrible Choices, Washington Post, Jan. 31, 1996, at E15, 1996 WL 3061705. Other cases dealing with the rape of incapacitated women include Doe by Roe v. Madison Center Hosp., 652 N.E.2d 101 (Ind. Ct. App. 1995), and In re Estate of D.W., 481 N.E.2d 355 (Ill. App. Ct. 1985) (a guardian is vested with broad authority to act in the best interest of a ward and could consent to an abortion for her mentally retarded ward even when the abortion was not necessary to protect the ward’s life or health).

The official teachings of the Roman Catholic Church are clear that “abortion willed either as an end or a means, is gravely contrary to the moral law.” CATECHISM OF THE CATHOLIC CHURCH, P 2271 (1994). The threat to Beth’s life posed by continuing the pregnancy, however, may permit the removal of the fetus, even at a stage where the life of the child could not be sustained outside the womb. See Stephen Schwarz, THE MORAL QUESTION OF ABORTION 167-70 (1990).

8. At least one court has suggested that the role of counsel is to always contest the relief sought by the petitioner. In Guardianship of K.M., 816 P.2d 71 (Wash. Ct. App. 1991), the court held that independent counsel should be appointed “to ensure a thorough adversary exploration of the issues” arising from parents’ petition to authorize sterilization of their disabled fifteen-year-old daughter. Id. at 75

9. In re Anonymous, a minor, No. 2950752, 1996 WL 187818 (Ala. Civ. App. 1996), involves the unusual situation where the court, hearing the petition of a minor to authorize consent to an abortion, receives testimony from the minor’s mother concerning the reason she refuses to consent to the abortion.
doctors to perform the abortion, but Beth wants to continue the pregnancy? Will you take Beth's case, and if so, how do you prosecute it?

**Ellen's Case** - Mr. and Mrs. Grant and their seventeen-year-old daughter Ellen have asked you to represent Ellen. The Grant family are Jehovah Witnesses. Ellen suffers from leukemia, and her doctors are insisting that she accept blood transfusions. Without transfusions, the doctors predict that Ellen will die within a month. She and her parents have refused to consent on the basis of their religious beliefs. Child welfare authorities have initiated child neglect proceedings in order to obtain court approval of the transfusions.

As a part of the initial discussions between the family and doctors, Ellen has undergone a psychiatric evaluation by a specialist in adolescent psychology. The psychiatrist was selected by the doctors urging the transfusions. His report states that Ellen has the maturity of an 18- to 21-year old, and that, in his opinion, she has arrived at an informed decision to reject the transfusions. He is willing to testify that Ellen's wishes should be honored. Will you accept Ellen's case? If so, what are your ethical obligations to Ellen?

These fact patterns illustrate the wide variance in maturity that children experience from the time of birth until legal emancipation at age eighteen. Baby John is incapable of forming or communicating a decision concerning his treatment. Fourteen-year-old Beth is capable of forming and communicating a decision concerning her pregnancy, but her decision is one that the courts are likely to ignore either on the basis that Beth's choice does not reflect mature judgment, or that her decision is not in her best interest.


On rare occasion courts have denied the petitions of guardians seeking permission to consent to abortion on behalf of the disabled person. See D.R. v. Daughters of Miriam Center for the Aged, 589 A.2d 668 (N.J. Super. Ch. 1990). Cases representative of the courts' proclivity to declare abortion in the best interest of the disabled person are In re Estate of D.W., 481 N.E.2d 355 (Ill. App. Ct. 1985) (medical necessity not required to authorize guardian to consent to abortion) and In re Jane A., 629 N.E.2d 1337 (Mass. App. Ct. 1994) (absent evidence that ward would consider fetus as important or dispositive factor in her decision, court erred in denying guardian authority to consent to abortion).

11. This hypothetical is based upon the facts of In re E.G., 549 N.E.2d 322 (Ill. 1989) (holding that a minor who possesses the requisite degree of maturity has a limited right to refuse life-sustaining medical treatment).

12. The court is likely to cast its opinion in terms of Beth's immaturity in order to bring the decision within the constraints of constitutional law regarding a minor's ability to seek an abortion,
ing and communicating a mature judgment concerning the transfusions but, due to her minority, may be legally incapable of compelling the doctors to honor it.

Several courts and commentators have struggled with the role of children's lawyers in other contexts, such as divorce proceedings or criminal trials.\(^\text{13}\) Regardless of the context, many of the general questions remain the same. Should lawyers be appointed in every case? If not, what criteria should be employed to decide if a lawyer should be appointed in any particular case? If a child is to be represented, who selects the lawyer? Who determines the objectives of the representation? Should the lawyer zealously pursue the objective of the child client in the same way that he or she might pursue the objectives of an adult client?

Distinct from the general questions that arise in any case involving the representation of children are the issues that are unique to cases involving healthcare. Who should decide whether to accept or reject proposed medical treatments for children? Is litigation an appropriate method of resolving disputes between healthcare providers and patients or their families? Does the model of zealous advocacy best promote the proper resolution of these cases? Or should it be modified where the stakes are so high—literally life or death, salvation or healing, or the authority and freedom of families and individuals versus the duty and obligation of the state to protect the lives of its citizens and promote the common good?\(^\text{14}\) As evidenced by these questions, the hypothetical fact independent of her parents' decision. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992) (Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure). \textit{Id.} at 899.


patterns raise fundamental questions about the nature and purpose of human and communal life, as well as the ability of the American legal system to resolve conflicts arising from differing answers.

III. ASSUMPTIONS UNDERLYING THE STANDARD CONCEPTION OF THE LAWYER’S ROLE

In defining the obligations of the child’s lawyer in such cases, commentators have necessarily assumed answers to many of the contested questions. Under the standard conception of lawyering, the lawyer is a partisan advocate of the objectives of the client and not accountable for the nature of those objectives. Contemporary accounts of these ideals are largely based upon political liberalism’s understanding of the person and the individual’s relationship to the community and the state. Clients are viewed as “free and independent selves unclaimed by ties antecedent to choice.” Acts which have value are those acts which are chosen by the client, and value accrues to those acts by virtue of being chosen rather than any inherent moral quality to the act. A conception of lawyering built upon this understanding of the person necessarily venerates the lawyer’s role in facilitating the client’s choice rather than the object or effect of that choice.

This is consistent with political liberalism’s commitment to neutrality among competing conceptions of the good life. If no particular conception of the good life is to be favored by the state, then the individual ultimately reigns supreme in defining the goals and purposes of his or her life. This sovereignty is due in large part to the confidence of Enlightenment philosophers that reason would guide the individual to choices that would simultaneously benefit both the individual and the larger commu-


nity. Thus "enlightened self-interest" ultimately would promote the common good, without use of the coercive power of the state.

In cases where the nature of the common good was contested and had to be defined in order to pursue a particular path of common effort, public dialogue and the rational process of argument and disputation would lead to a recognizable "solution." \(^1\)

Thus autonomy, neutrality, and rationality are the foundational premises upon which the standard conception of the lawyer's role is built. Yet cases involving medical treatment of children challenge each of these premises.

IV. RESOLUTION OF THE CASES UNDER THE STANDARD CONCEPTION

If liberalism's professed neutrality on questions of the ultimate purpose of human life is taken seriously, it is impossible for the lawyer to evaluate the competing visions of "good for the child." \(^2\) There is no presumptive Good by which to measure the proposed decision of the parents, child, or healthcare providers. Under the standard conception of the attorney's role, this neutrality effectively precludes the lawyer from taking any position in Baby John's case since the client is unable to communicate even the most rudimentary values to guide the attorney's advocacy. \(^2\) In the cases of Beth and Ellen, the attorney may surmount liberalism's agnosticism by relying upon the clients' expressions of desires.

---

18. \(\text{Id. at } 499-502\)

19. This is true, even according to one of the most successful revisionists of the standard conception. "This [problem in justifying paternalism] is the axiom of liberal society which (in the excellent characterization of Ronald Dworkin) 'supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.'" David Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454, 464 (quoting Ronald Dworkin, Liberalism, in PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978)).

20. This is equally true for the court, yet courts routinely assert that the decisions they render in such cases are based upon the best interests of the child. Until the mid-1900's, courts were not so reluctant to recognize a religious commitment underlying our system of government. See, e.g., State for Use And Benefit of Town of Pryor v. Williamson, 347 P.2d 204, 206 (Okla. 1959) (permitting chapel on state-owned property); Paramount-Richards Theatres v. City of Hattiesburg, 49 So. 2d 574, 577-78 (Miss. 1950) (upholding Sunday-closing laws); Doremus v. Board of Education of Borough of Hawthorne, 71 A.2d 732 (N.J. Super. Ct. Law Div.), aff'd, 75 A.2d 880 (N.J. 1950), appeal dismissed, 342 U.S. 429 (1952) (upholding Bible reading and prayer in public schools); and Mordecai F. Ham Evangelistic Ass'n v. Matthews, 189 S.W.2d 524 (Ky. Ct. App. 1945) (rejecting church's claim of exemption from taxation).

Professor Robert Rodes, Jr., expresses skepticism as to the current claims of neutrality after thoughtful analysis of the opinions rendered in several types of cases, including cases involving blood transfusions administered to Jehovah Witnesses, in Sub Deo et Lege: A Study of Free Exercise, in RELIGION AND THE PUBLIC ORDER (Donald A. Giannella ed., 1968).
Yet for many lawyers the principle of nonaccountability will not silence the accusations whispered by their consciences should they effectively advocate a course of action that results in the avoidable death or eternal condemnation of a child. If the attorney adheres to the standard conception, to the extent that such whisperings are silenced, it will be by recourse to the liberal ideal of personal autonomy. This is the primary aspect of the client to be served by legal representation according to the standard conception.\footnote{21} Professor Monroe Freedman suggests that the lawyer serves client autonomy because of the coercive nature of the law.\footnote{22} Adopting the criminal prosecution as his primary paradigm, Professor Freedman argues that the individual is morally entitled to have at least a single ally in seeking to avoid being subjected to another's will (be it the state or a private litigant).\footnote{23} Professor Stephen Pepper argues that equality of individuals is the foundation for the standard conception. Lawyers ensure that clients have effective access to the public good of the law in order to exercise autonomy (or free will) in whatever manner the clients choose within the bounds of the law. Any limitations on this access would necessarily relegate those deprived of access to second-class citizenship.\footnote{24} Professor Fried argues that autonomy is the primary


\footnote{22. \textit{MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS} 47-48 (1990) (disagreeing with Fried's friendship model set forth in \textit{Lawyer as Friend} but agreeing with Fried's essential point that "human autonomy is a fundamental moral concept that must determine, in substantial part, the answers that we give to some of the most difficult issues regarding the lawyer's work." \textit{Id.} at 48. In the civil context, he suggests that all legal counseling is done in anticipation of future litigation. "[A]ny lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind." \textit{Id.} at 66. This understanding of the nature of law is fully described and defended in \textit{HANS KElsen, General Theory of Law and State} (1946).}

\footnote{23. \textit{Fried}, supra note 22, at 16 (1991) ("[T]he lawyer is the client's 'champion against a hostile world' [C] — the client's zealous advocate against the government itself."); \textit{But see}, Teresa Stanton Collett, \textit{Understanding Freedman’s Ethics}, 33 \textit{ARIZ. L. REV.} 455, 456 (1991) (suggesting that Freedman misunderstands the role of the lawyer. "The role of the lawyer is not to "win" the unwinnable case, nor to legally extort more for the client than the client is entitled to under the law. The role of the lawyer is to voice the client's perspective artfully and persuasively so that a just resolution can be reached. Few clients intentionally act in a totally irrational or unjustifiable manner. The client's motivation, intent, circumstances and desires provide the tools that a lawyer uses in representation. The lawyer's job is to make the others involved in the matter understand the client's perspective and vicariously share the client's pain or dilemma. Once the decisionmakers understand the perspectives of all involved, the law and the parties can 'do justice.' Absent this understanding, any justice achieved is merely a happy coincidence.")}

\footnote{24. \textit{Pepper}, supra note 21, at 615-17.}
characteristic of the client because it is through choosing and ascribing value that the person evidences his or her unique identity as a moral actor.  

The inadequacy of this understanding of the client is illustrated by its application to the hypothetical fact patterns. Ellen’s case fits most easily into the standard conception. Representation of Ellen is no more troubling than representation an adult Jehovah Witness seeking to avoid unwanted medical care. This is true because the standard conception of the lawyer’s role admits two primary limitations upon the objectives a client may seek. First, the client’s objectives must be within the law, and second, the objectives should represent the client’s “adequately considered decision.” Ellen’s objective is not precluded by the law since there is no legal duty to seek medical treatment. Nor does her objective violate the second limitation which contains a presumption of rationality or reasonableness. In Ellen’s case, the report of the examining psychiatrist provides support for the application of that presumption, at least if “adequately considered” is defined in terms of the process of decision making, rather than the ultimate decision reached.

Beth presents a more difficult case for the standard conception because, while her chronological age of fourteen might support application of the presumption of rationality and thus autonomy, her mental age of eight makes such an assumption less certain. This is further complicated by the fact that the medical procedure at issue has a constitutional gloss absent from the blood transfusions involved in Baby John and Ellen’s cases. The professional norms governing lawyers suggest that the lawyer should defer when the client “has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” However the required degree of understand-

25. Fried, supra note 21, at 1068-69 ("We must attain and maintain in our morality a concept of personality such that it makes sense to posit choosing, valuing entities—free, moral beings.")
27. Id. Rule 1.14.
28. This process oriented measure of mental capacity contains the same implicit assumption that only the individual should determine the ends he seeks, and, thus, it is improper to evaluate capacity on the basis of the decisions made rather than decision making. See generally President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment (1983); Susan M. Denbe, Termination of Life-Sustaining Medical Treatment: Who Should Exercise a Patient’s Right to Die?, 12 HEALTH CARE SUPER. 60 (1994); Daniel B. Griffith, The Best Interests Standards: A Comparison of the State’s Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients, 7 ISSUES L. & MED. 283 (1991); and Allen C. Snyder, Competency to Refuse Lifesaving Treatment: Valuing the Non-logical Aspects of a Person’s Decisions, 10 ISSUES L. & MED. 299 (1994).
ing and deliberation is not specified. In individual cases, the lawyer is left to determine whether respect for the client's decisions, and thus autonomy, should dictate the objectives of the representation.

In Baby John's case, his incapacity to reason or communicate precludes recourse to the standard conception. The lawyer, receiving no information from the client concerning the client's objectives, can not justify seeking particular ends on the basis that those ends are the reasoned choice of the client. Rather, the ends sought will reflect ends prescribed by the court, the lawyer, or the child's family.

If prescribed by the court, the lawyer's moral justification probably will be grounded in some concept of procedural justice. This justification may require the attorney to oppose the relief sought by the petitioner in order to "insure a thorough adversary exploration of the issues."³⁰

Many courts and commentators equate procedural justice with the adversary system. Proponents argue that the adversary presentation of evidence maximizes the chances that the truth will be arrived at by the fact finder,³¹ and promotes the protection of legal rights.³² Neither of these arguments provides much insight into resolving cases involving the medical treatment of children.

In the hypothetical cases (as in many similar reported cases), the truth of the "facts" is not the heart of the controversy. When medical opinion divides over the proper treatment, or when recognized healthcare providers are willing to provide alternative, and non-controversial treatments, transferring care of the patient to the providers who offers treatment consistent with the patient's (or family's) desires is the easiest and most appropriate resolution of the conflict. Only when healthcare providers are unified in their recommendations, and the patient (and/or family) declines to act on those recommendations, do the courts typically become involved.³³ Yet in these cases, the issue the court is called to

---

32. Freedman, supra note 22, at 3-4.
resolve is the very issue that the current understanding of liberalism professes to be off-limits—what Good should the individual seek.

In all of our hypothetical cases, the healthcare providers assert that the good to be sought on behalf of the child is restoration of health or preservation of life. The intrinsic value of this goal is not disputed by the parents or the child. In fact, the courts routinely acknowledge that this good is desired by the parents as well as the healthcare providers. The point of dispute is whether the good of health or preservation of life can be pursued by means that the child (or parents) believe offend God, or are objectively evil. The child or parents argue that the good of health is secondary to the good of obeying God or avoiding evil.

Just as the facts are not the heart of the controversy, neither does the adversarial norm of competing "legal rights" neatly fit these cases, although the courts often discuss the issues in terms of the legal right of parents to direct the care and upbringing of their children. In such dis-


34. Maine Medical Center v. Houle, Superior Court, No. 74-145 (Me. Super. Ct. February 14, 1974) reprinted in Harry D. Krause, Family Law: Cases, Comments, and Questions 1178-1180 (3d Ed. 1990) ("The most basic right enjoyed by every human being is the right to life itself.") Compare Aristotle, Nicomachean Ethics 1.6: 1097A15-23 (Jonathan Barnes ed. 1985) (health is a good sought by all men), and John Finnis, Natural Law and Natural Rights 86 (1980) ("A first basic value, corresponding to the drive for self-preservation, is the value of life. The term 'life' here signifies every aspect of the vitality (vita, life) which puts a human being in good shape for self-determination. Hence, life here includes bodily (including cerebral) health, and freedom from pain that betokens organic malfunctioning or injury.").

35. E.g. State v. Perricone, 181 A.2d 751 at 759 (N.J., 1962) ("Respondent concedes that appellants evidenced sincere parental concern and affection for their child. But those are not the controlling factors."); Robert Stinson and Peggy Stinson, On the Death of a Baby, Atlantic Monthly, July 1979 at 64 (Parents' account of personal, family, and financial impact of prolonged death of premature infant due to heroic measures and experimental techniques undertaken by hospital without parents' consent); Cf. Parham v. J.R., 442 U.S. 584, 602 (1979) ("Historically it has been recognized that natural bonds of affection lead parents to act on the best interests of their children." (Emphasis added)).

36. Cf. Parham, 442 U.S. 584 (holding that parents may commit children for residential psychiatric care); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (upholding injunction against compulsory attendance at public schools on basis of parental right to direct the upbringing and education of their children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish parents who refuse to send children to formal high school are not in violation of compulsory attendance statute since they provide alternative education that would adequately prepare children for life within their community); and Prince v. Massachusetts, 321 U.S. 158 (1944) (affirming conviction of Jehovah's Witness under a statute forbidding minors from selling newspapers as not in violation of "freedom of religion" or denying "equal protection"). Compare Bruce C. Hafen, Individualism and Autonomy in Family Law: the Waning of Belonging, 1991 B.Y.U. L. Rev. 1 with James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 Calif. L. Rev. 1371 (1994) (arguing that parents' have no moral right to exercise control over children, but merely privilege to exercise control consistent with
putes, what "legal right" of the child should the lawyer seek to protect? Children have an interest in the continuation of life and the avoidance of pain. They have an interest in having their parents make the decisions on matters that require the most extensive and intimate knowledge of the child. For children of sufficient maturity, there is an interest in having their views heard and respected by those in authority, as well as a claim of free exercise of religion by children who have embraced a religious faith as their own. Each of these interests should weigh heavily in the balance of judgment concerning the child's welfare, yet which constitutes the "legal right" to be protected by the child's lawyer?

Related, yet distinct, from the argument that legal representation promotes and protects the legal rights of the client, is the argument that adversarial representation evidences society's commitment to human dignity. By presenting the client's position with the greatest zeal possible, the lawyer ensures that the client's actions or desires are presented as positively or persuasively as possible to the decision maker. Thus society evidences its willingness to take seriously all of those who come before the courts.

This is the most persuasive justification offered for the adversary system. However, it fails in the context of the hypothetical cases if the lawyer opposes any position other than one established by the child client. If the lawyer opposes the relief sought by the petitioner because

37. See Maine Medical Center, No. 74-145 at 1178-1180 ("[t]he most basic right enjoyed by every human being is the right to life itself.").
40. In re E.G., 515 N.E.2d 286 (Ill. App. Ct. 1987) (seventeen year-old Jehovah Witness should have been partially emancipated to permit her to refuse blood transfusion); In re Green, 292 a.2d 387 (Pa. 1972) (requiring trial court to consider views of sixteen-year-old regarding proposed surgery).
41. Id. See also Novak v. Cobb County-Kennestone Hospital Authority, 849 F.Supp. 1559, 1571, 1574-75 (N.D. Ga. 1994) (sixteen year-old Jehovah Witness patient's right to free exercise of religion was not violated by court ordered transfusion).
42. Freedman, supra note 22, at 13.
43. Id. at 65. This position is critiqued by David Luban in LAWYERS AND JUSTICE: AN ETHICAL STUDY 85-87 (1988).
that is the role the court assigns, the lawyer may provide the testing of evidence and argument desired by the decision maker, but that is not the same as evidencing respect for the views of the person represented. If the lawyer advocates his or her own view of what is in the best interest of the child client, the lawyer may provide the court greater insight into the facts surrounding the controversy, but this also differs from promoting the dignity of the child. Only by limiting legal representation to representation of the views or desires of the child, does the attorney provide the affirmation that society takes seriously the claims of even its youngest members, regardless of whether those members are sufficiently autonomous to make the ultimate decisions in controversy.

V. Resolution Based Upon Human Dignity

The above discussion evidences the limitations of the standard conception when premised upon liberalism's ideals of autonomy, neutrality, and rationality. The limitations can be avoided by reconceiving of the lawyer's role as a partisan for the human dignity of the client, and holding lawyers accountable for ascertaining whether representation of particular objectives is consistent with that dignity. In a post-modern world, where autonomy is seen as a unrealistic description of the decision making process; rationality is understood as an incomplete, if not false, description of that which is essentially human; and neutrality is recognized as both impossible and often undesirable, an alternative conception of the lawyer's role must be established. Representation based upon human dignity provides such an alternative.

For purposes of this article, human dignity is defined as the constant attraction and movement of people toward the Good through the use of

44. By appointing a lawyer to represent the child's best interest, the court merely expands the number of decisionmakers. This does little to solve the essential problem which is ascertaining whose conception of the Good should dominate. By independently determining and advocating the lawyer's conception of the child's best interest, the lawyer interjects one more competing vision. It seems wrong to take the vision of a total stranger to the situation and introduce it as yet another idea that competes for control of the treatment of the child.

Another danger of appointing a lawyer to represent the child's best interest before a tribunal empowered to act as parent, is the possibility that the court will abandon its responsibility to independently assess the competing claims for control, and merely defer to the judgment of its own appointed agent, the child's attorney. This threatens a form of secret decisionmaking that is antithetical to our understanding of the nature of judicial resolution of disputes, for the judgment of the lawyer will be arrived at through his or her private investigation. Many of the facts the lawyer relies upon in forming an opinion about the child's best interests may not be subjected to the cleansing power of adversarial confrontation. And, in the end, while the appearance of adversarial process remains intact, the outcome is predetermined through the guise of appointing a lawyer for the child.
will, intellect, spirit, and body. This concept of person assumes an external good (or goods) that is the natural object of each person.\textsuperscript{45} It rejects the idea that each individual is purely a construct of his or her personal history and choices. Instead, by embracing human dignity as the ultimate objective of client representation, we recognize that the individual person is chosen as well as chooser; spirit as well as will, altruistic as well as egotistic. The definition refers to “people,” not person, because the primary concern is the individual within a community, rather than the individual alone. This is because much of our recognition of the Good (or goods) begins within the relationships we are born into, and continues in our communal movement toward realizing that Good in our lives.\textsuperscript{46}

VI. HUMAN DIGNITY AS A MORE INCLUSIVE DESCRIPTION OF THE CLIENT

Human dignity provides a more solid foundation for understanding the nature of the client in the context of legal representation. This is true because human dignity, while including some concept of autonomy, is a more inclusive description of the person the lawyer is called to serve. It provides a basis for representation of those who are not recognized as autonomous, as well as acknowledging the placement of the individual within relationships with others.

The need for a more inclusive conceptual foundation of the attorney-client relationship is illustrated by the inability of the autonomy-based model to coherently define the lawyer’s role when representing clients lacking or having limited autonomy, such as children. The lack or loss of autonomy should not render a person a non-entity for legal representation. Yet, if the lawyer’s paramount purpose is to facilitate the client’s exercise of autonomy, then legal representation of children truly is problematic since many of us will readily concede that children are not autonomous beings, at least until they attain sufficient maturity to make decisions in a manner that reflect that those decisions are the product of their reason and free will.

\textsuperscript{45} John M. Finnis provides a careful explanation of the natural goods that can be discerned by practical reasonableness in Finnis, Natural Law, supra note, 34. Abraham J. Heschel describes the communal aspect of the person as solidarity. “Man in his being is derived from, attended by, and directed to the being of community. For man to be means to be with other human beings.” Abraham Heschel, Who is Man? at 45 (1965).

\textsuperscript{46} John M. Finnis provides a careful explanation of the natural goods that can be discerned by practical reasonableness in Finnis, Natural Law, supra note 34. Abrams J. Heschel describes the communal aspect of the person as solidarity. “Man in his being is derived from, attended by, and directed to the being of community. For man to be means to be with other human beings.” Abraham Heschel, Who is Man? at 45 (1965).
Reconceiving of the lawyer’s relationship with clients as affirming the dignity of the client is central to resolving the problems facing lawyers who represent children in cases concerning life-sustaining treatment. The case of a child rejecting medical care because of a hope of eternal salvation or a desire to avoid evil, is not the same as the case of a child rejecting medical care because of temporary, but intense, suffering. In the first case the claim of moral goodness that the child seeks to express is central to the child’s human dignity. In the second case the claim of avoidance of pain, while also a part of human experience, is not central to defining what it is to be human and may be in direct conflict with a primary aspect of human dignity, which is the goodness of life and its continuation.47

Human dignity is an intrinsic good and innate attribute of every person. Autonomy is an instrumental good limited to individuals capable of exercising reason. To define legal representation in terms of autonomy rather than human dignity is to celebrate procedure over substance, or decisionmaking over decisions. Human freedom has value to the individual and to the community in the exact proportion that it furthers the individual and common search for the Good. For example, the free exercise of religion should be protected, not because religion should be a matter of indifference to the state, but rather because it is too important to subject to the authority of the state. Similarly free speech should be protected, not because hate speech or pornography inflict no harm, but because the bounds of community are dependent upon communication—honest and free communication between people. When autonomy results in objectively evil acts, while it may be necessary to tolerate the acts to achieve a greater good, it is absurd to suggest that any other person (whether or not a lawyer) has a moral obligation to assist in the exercising of the freedom or autonomy that resulted in those acts. Human dignity as the premise of legal representation recognizes this fact and would not require assistance, since representation would be premised upon the human capacity to recognize the Good and move toward it, no matter how haltingly.

Human dignity demands recognition of human goods other than autonomy. One of those goods is the existence and authority of human associations other than the state. This leads to the relational aspect of human dignity as defined by this article. In medical treatment cases concerning children, the core issue is who will have the authority to direct

the treatment. In the cases of Baby John, Beth, and Ellen, the problem is that we have at least three possible decisionmakers: the parents, the child, and the doctors. The state is a fourth competing decisionmaker in some states. At least two of these decisionmakers disagree. Because of the level of conflict, the issues are placed before the court for resolution. But unlike other cases resolved in civil litigation where the court simply decides among competing claims, in medical treatment cases involving children, the court, through common law, declares itself to be a superior claimant as the representative of the state.

It is an aspect of human dignity that intimate associations such as parent/child or husband/wife will be recognized and deferred to, absent some important common interest that requires protection. This is true because it is through such relationships that we experience our greatest success in responding to our innate attraction toward the Good. It is in the family that the child is brought into being, and through the family, he or she continues to become more fully human.

The family pre-exists the State, and its members are the true and only parents of the child. Recognition of parental authority stems from this truth. For the state to intervene to define the child’s best interests contrary to the understanding expressed by the parents and child is to claim a greater good than the human dignity experienced in the relationships of families. It effectively silences the parents and the child on a matter of tremendous importance and substitutes the opinion of state. This can only be done on a claim of common good. In order for the lawyer to promote the dignity of the child client, the claim of common good must be challenged and the state or healthcare providers required to show why the good sought by the child and/or parents must give way to a different good. This challenge is necessary in order to preserve the relational interests that all of us have in nurturing the mutual support and dependence represented by the family and other human associations which exist independent and prior to the political order.

VII. Conclusion

In cases like those of Baby John, where the children are neither capable of forming nor communicating decisions concerning their medical treatment, no lawyer should be appointed to represent the child. Young children enjoy human dignity to the same degree as all people,

48. In re C.A., 603 N.E.2d 1171 (Ill.App. 1992), appeal denied 610 N.E.2d 1264 (1993) ("the ultimate issue, them, is who is in the best position to decide (and who gets to decide who will decide).")
but affirmation of the dignity through legal representation is not possible. Instead, the child's dignity is affirmed by representation of those who bear day-to-day responsibility in the nurturing and caring for the child, most often the parents. They can present the fullest description of the child—not only as he or she is today, but as he or she was yesterday, and most probably will be tomorrow. The parents in these cases have not failed to seek care for their children, nor evidenced disregard for their children's welfare. They have not forfeited their right to direct the treatment of their children. It is the parents who should speak for the child in court, rather than some lawyer whose insight is limited both by time of acquaintance and ignorance of the faith embraced by the family.

When the child is capable of expressing an opinion concerning the proposed treatment and that opinion is grounded in some conception of goodness, the child should be represented. Fourteen-year-old Beth should be represented because she is capable of expressing an opinion and seeks either to preserve her health or avoid participating in an objectively evil act. Because Beth has the reasoning ability of an eight-year-old her decision will not be the result of the mature reflection that courts require prior to partially emancipating a child in order to allow the child to make medical decisions. Nonetheless, Beth has formulated some objective in furtherance of a recognized good, and will be the person subjected to or denied treatment. This gives her a moral right to be heard, and that right is most effectively exercised through counsel.49 This is true, of course, only in so far as her lawyer advocates the objectives that Beth desires. Because Beth's moral right to representation arises from her right to be heard, rather than her right to control the decision, the lawyer should seek the objective that Beth defines, regardless of the lawyer's assessment of Beth's decision-making ability, or his or her opinion concerning whether Beth's objective is consistent with her best interest.

Similarly Ellen should be represented consistent with her expressed desires in so far as those desires arise in conjunction with her attempts to attain goodness.

The standard conception in which the lawyer seeks to further the autonomy of the client may yield the same result in Ellen's case. However, the outcomes of Beth's and Baby John's cases differ significantly. Defining legal representation as serving the dignity of the client effectively precludes strangers from promoting what one author has called

---

49. David Luban refers to this as the "own-mistakes" principle which requires that those who will bear the primary burden of conforming to the legal mandate be afforded the most significant consideration during the process of decision making. Luban, supra note 43, at 344.
“the right to be represented, but not heard.” The absence of rationality or autonomy no longer would license lawyers to define the objectives of representation in ignorance or disregard of their clients. Nor would non-accountability shield lawyers from moral approbation when the ends sought on behalf of their clients were inconsistent with the Good (or goods) all persons seek. Since that Good (or goods) is discerned and achieved most fully in community, lawyers properly would be concerned with the relationships of their clients, as well as their autonomy. This understanding of the lawyer’s role would preclude representation of Baby John, except through representation of his parents, and require Beth’s lawyer to seek the objectives that she desires. Beth’s decision would not preclude others from contesting her conception of the Good, nor bind the court to honor her wishes, but it would ensure that her voice was heard.

Hearing the voice of the “other” affirms the intrinsic dignity of the person. The unique purposes, perspective, and relationships of each person are acknowledged. Premising legal representation upon the dignity of the client, rather than autonomy, ensures that even “the least among us” may speak to those who would exercise power over their lives. It allows considerations of truths, like love and faith, that find only a dim echo in reason, yet are compelling to and worthy of the human person.

It is possible that by serving the dignity of the client, rather than the autonomy, we may even discover that this more truthful description permits greater positive freedom for both client and lawyer. We may discover anew that “the truth shall make [us] free.” But this time the freedom will be real freedom — freedom to serve our clients, our society, and the Good that we are called to seek.

51. John 8:32 (“And ye shall know the truth, and the truth shall make you free.”)