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CONSTRUCTIONS OF CLIENT COMPETENCE AND THEORIES OF PRACTICE

Robert Rubinson*

I. INTRODUCTION

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

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

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

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

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


4. See infra text accompanying notes 58-137.

5. See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 221 (1980) ("any consistent set of metaphors will most likely hide indefinitely many aspects of reality—aspects that can be highlighted only by other metaphors that are inconsistent with it"); Lucie E. White, Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn, 77 CORNELL L. REV. 1499, 1509 (1992) (recognizing the need for "multiple theoretical lenses, lenses which focus on institutions, on moments of recognition, as well as on the ebbs and flows of interpersonal power").
decrement. The fourth section explores what happens when the two perspectives of attorney and client—informed by the idea of decrement yet drawn apart by it as well—interact in complex ways. Finally, the fifth section explores the consequences of this analysis for client-centered lawyering. While the critical message of client-centered lawyering—the centrality of client perspectives—remains valid and of extraordinary importance to teachers and practitioners, the analysis of how attorneys and elderly clients interact raises questions about the idea that attorneys should remain "neutral" as they seek to unveil an "authentic" client voice free of attorney influence. Rather, legal representation can be conceptualized as a dynamic attempt to construct meaning, and this conceptualization has important advantages for both attorneys and clients.

II. CONSTRUCTIONS OF COMPETENCE

A. "There" or "Not All There"

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

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

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

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

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

In fact, my reactions to these clients were suffused with assumptions about the elderly and the aging process. I drew inferences from the age and characteristics of these clients, and these inferences—described more fully below\(^10\)—in turn influenced how I viewed the client and the client’s problems and thus, ultimately, how I approached the representation.

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

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

10. See infra text accompanying notes 39-86.
B. Traditional Approaches to Competence

There is virtually no legal literature on how attorneys and the elderly construct their conceptions of competence and how these play out in attorney/client interactions.\(^1\) There is, however, a considerable body of literature about the appropriate analysis attorneys should apply in determining how best to counsel clients assuming that they are of "questionable competence." This literature sets the context for exploring from a different perspective the patterns that emerge when attorneys construe the competence of elderly clients.

Traditional approaches to competence assume that competence is determinate and discoverable. As such, "competence" forms an important link in the "agency" conception of legal representation.\(^2\) Thus, if the client/principal lacks competence, the attorney/agent lacks authority to act on the client/principal's behalf, thus nullifying an attorney's authority to represent a client.\(^3\)

However, this approach is fraught with difficulties. A primary problem is the lack of a meaningful definition of competence.\(^4\) The legal concept of "competence" is an either/or proposition: either you have it or you don't. At first blush, this approach seems reasonable enough given that "competence" has an air of scientific precision. However, psychiatrists do not agree:

\(^1\) Although not focusing on attorney/client interactions, one recent article does examine how prejudice against the elderly plays out in courts and legislatures. See Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997).


\(^4\) See William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and the Courtroom*, 2 ELDER L.J. 1, 17-22 (1994); Herr, supra note 7, at 617-18. Indeed, typical legal formulations tend toward the tautological, such as the widely used definition of "incapacitated person" from the Uniform Probate Code: "[A person] impaired by reason of mental illness, mental deficiency, physical illness or disability . . . or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." UNIF. PROBATE CODE § 5-103(7), 8 U.L.A. 327 (1988). See also Bobbe Shapiro Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings, in LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY* 212, 217-21 (Marshall B. Kapp et al. eds. 1986) (classifying statutory definitions of incompetence and incapacity).
The law has tended to address competency as a fixed attribute of an individual, a characteristic in itself with an inherent stability. The clinician, on the other hand, knows that what the law calls competency is, in fact, a set of deductions from a variety of clinical data that can be as subject to influence and change as the more basic mental attributes on which it is based.\(^{15}\)

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

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


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

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

It is interesting to note the distinction between the issue of capacity and other terms in the law—such as the "reasonable person" standard in tort law—which are classically difficult to define. Absent precise definition by courts or legislatures, any definition of "reasonable person" necessarily entails an exploration of what such a person would do "under the circumstances of the particular case"—in other words, in context. RESTATEMENT (SECOND) OF TORTS § 285 cmt. d (emphasis added). In contrast, the classic view holds that capacity operates independently of context.
There is yet another difficulty with the traditional agency approach to competence. If the principal/agency relationship breaks down, the law provides an alternative: guardianship. However, many observers take a dim view of guardianship for at least two reasons. First, there is no reason to believe that judges are in a better position than anyone else to reach principled decisions about a fluid legal fiction like “competence.” Second, given inadequate judicial oversight subsequent to the appointment of a guardian, the alleged incompetent person might be subject to the whims of unscrupulous guardians or conservators.

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

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

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

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


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

24. See Margulies, supra note 18, at 1076-77 (noting the “duty to maximize the availability of legal services” to “challenged seniors”); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 404 (1996) (stating that while solving the “lawyer’s dilemma,” withdrawal “may leave the impaired client without help at a time when the client needs it most”).
Given that attorneys frequently will represent a client of questionable competence without seeking a guardian, issues of how an attorney should counsel and interact with such clients become highly significant. These issues are characteristically framed in terms of a debate between those who hold that an attorney's role is to advocate on behalf of what a client wants (a view that values a client's "autonomy" above all else), and those who believe that an attorney has a role in actively determining what is in the "best interests" of the client. This debate assumes that lawyers have two choices: 1) an attorney should at most facilitate the client in making an educated, "autonomous" choice; or 2) an attorney should reach decisions based upon what the attorney paternalistically believes to be in the "best interests" of the client even if inconsistent with the stated views of the client.

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


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


29. See id.

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

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

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

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

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

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

34. See Margulies, supra note 18.

35. Id. at 1076-80.
Margulies' access, connection and voice, and Rein's autonomy and social interests furnish important categories for analysis. However, setting aside questions about the value of their particular analyses and those of others—questions that tend to dominate the academic discourse in this area—an important question remains regardless of which factors one chooses: how do people go about constructing the meaning that gets plugged into these factors? For example, how do we construe, under Rein's analysis, a client's "untrammeled decision making" or, under Margulies' analysis, what "the client's voice" is? After all, a central insight of clinical theory is that underlying facts and the ends and means of representation are not pieces of data prepackaged for examination, but are constructed by attorneys and clients. Moreover, this construction inevitably involves building upon assumptions about how the world works. If it were otherwise, life would be, in William James' phrase, "a bloomin' buzzin' confusion." A great deal of important work in a variety of disciplines has explored the critical issues surrounding such "construction of meaning." Social psychologists, for example, have demonstrated that human beings are "cognitive conservatives," that is, our minds tend to interpret facts to be consistent with what we already believe, and these interpretations are often guided by assumptions and stereotypes. Legal commentators have also


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


39. For example, through "confirmation bias," humans "manage knowledge in a variety of ways to promote the selective availability of information that confirms judgments already arrived at." Anthony G. Greenwald, The Totalitarian Ego: Fabrication and Revision of Personal History, 35 AM. PSYCHOL. 603, 606 (1980). Through "biased hypothesis testing," we subject evidence supporting hypotheses with which we do not agree to greater scrutiny than evidence supporting hypotheses with which we do agree. See, e.g., Lord et al., Considering the Opposite: A Corrective Strategy for Social Judgment, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1232 (1984). For a review of the different processes that social psychologists have identified as contributing to these tendencies, see Robert Rubinson, The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse, 101 DICK. L. REV. 3, 27-29 (1996). For influential inquiries that explore the construction of meaning in other disciplines, see generally CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973) (anthropology); MIKHAIL BAKHTIN, THE DIALOGIC
explored how stock stories and stereotypes often control the construction of and justification for ostensibly "neutral" legal principles. 40

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

III. THE IDEA OF DECREMENT

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


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

44. Id. at 12.

45. I have chosen to use the terminology adopted by COUPLAND ET AL., supra note 41. Although not always called "decrement," this stereotype is often described in the literature on aging and gerontology. See, e.g., Carroll L. Estes, The Aging Enterprise Revisited, 33 GERONTOLOGIST 292, 292 (1993) (a social "construction of reality is that the aging process is one of biological, physiological, and cognitive decline"); H.B. GIBSON, THE EMOTIONAL AND SEXUAL LIVES OF OLDER PEOPLE 55 (1992) ("The stereotype that younger people, both professional and lay, have of aging includes a false model of deterioration over time."); George Banziger & Jean Drensenst, Achievement Attributions by Young and Old Judges as a Function of Perceived Age of Stimulus Person, 37 J. GERONTOLOGY 468, 468 (1982) ("stereotypically . . . old age [is] associated with a perceived diminution of competency"); Marie R. Haug & Marcia G. Ory, Issues in Elderly Patient-Provider Interactions, 9 RES. ON AGING 3, 6 (1987) (noting social stereotype which "lump[s] all those 65 and over into one category and characteriz[es] all older people as in declining or ill health . . . and doomed to senility"). Even Shakespeare's Dogberry notes in MUCH ADO ABOUT NOTHING, act 3, sc. 5, that "[w]hen the age is in, the wit is out."
The pervasiveness of the idea of decrement is extraordinary. It surfaces in popular culture, such as jokes and birthday cards which invoke the decremental effects of aging.\textsuperscript{46} It arises in categories that link age with physical or cognitive challenges: Medicare, for example, is called "Health Insurance for Aged and Disabled,"\textsuperscript{47} and Social Security is called "Income for Aged, Blind, and Disabled."\textsuperscript{48} Binder, Bergman and Price construct a similar category bydevoting a portion of a chapter on "atypical and difficult clients" to "communicating with aged and infirm clients."\textsuperscript{49}

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

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

\textsuperscript{46} See GIBSON, supra note 45, at 73; Judith Rodin & Ellen Langer, Aging Labels: The Decline of Control and the Fall of Self-Esteem, J. SOC. ISSUES, Spring 1980, at 12, 13.
\textsuperscript{48} Id. § 1381. Linking together these three groups reveals other stereotypes, such as the blind not being "fully able." Surveys have also found that many state statutes link age with incompetence or infirmity. See Whitton, supra note 11, at 477-78. It has been argued that the very existence of such "age-segregated categorical services" fosters the perception that aging is a uniform "problem" that requires governmental intervention. See Estes, supra note 45, at 292.
\textsuperscript{49} BINDER ET AL., supra note 1, at 245. Although including the caveat that "not every older person will have difficulty recalling and conveying information," the thrust of the section is that "[c]ommon barriers to satisfactory communication include advanced age and medical infirmity." Id.
\textsuperscript{50} The impact of the norm of decrement on discourse will be addressed in more detail in Part V. See infra text accompanying notes 117-146.
\textsuperscript{51} See infra text accompanying notes 95-96.
\textsuperscript{52} See Ellen Bouchard Ryan & Rochelle L. Cole, Evaluative Perceptions of Interpersonal Communication with Elders, in COMMUNICATION, HEALTH AND THE ELDERLY 172, 177 (Howard Giles et al. eds., 1990). For a theoretical discussion of the possible operation of this process, see V.A. Braithwaite, Old Age Stereotypes: Reconciling Contradictions, 41 J. GERONTOLOGY 353, 358 (1986). Braithwaite speculates that when an elderly person does not exhibit the stereotyped characteristics of decrement, the person "exceeds expectations" and thus is judged more favorably. See id.
It is undeniable that aging sometimes undermines aspects of physical and mental health. However, even apart from mounting evidence that these effects are reversible far more often than generally recognized, the idea of decrement vastly simplifies the complex processes affecting an extraordinarily large and diverse group of individuals. In fact, wholesale mental and physical decrement is not an inevitable part of the aging process. Instead of progressive decline, the vast majority of "older people function[ing] at much the same level over quite a long period of time, suffering the usual ups and downs of health that are experienced at all ages, but not deteriorating as is popularly supposed." Put simply, the vast majority of the aged are sharp as a tack and do not suffer from a progressive decline in competence.

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

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

53. See infra text accompanying notes 73-77.
55. GIBSON, supra note 45, at 56. This is also true of physical functions even after a disabling episode like a stroke. See Thomas M. Gill et al., Predictors of Recovery in Activities of Daily Living Among Disabled Older Persons Living in the Community, 12 J. GEN. INTERNAL MED. 757 (1997).
56. A range of statistics support this point. To take just a few: 1) only two to four percent of the population over sixty-five have Alzheimer's Disease, see AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 137 (4th ed. 1994); 2) severe psychotic disorders are less prevalent among the elderly than among the non-elderly, see Linda F. Smith, Representing the Elderly Client and Addressing the Question of Competence, 14 J. CONTEMP. L. 61, 68 (1988); 3) Ninety-five percent of persons over sixty-five and eighty percent of persons over eighty are not affected by significant cognitive impairment, see Robert P. Roca, Determining Decisional Capacity: A Medical Perspective, 62 FORDHAM L. REV. 1177, 1181 (1994).
57. See Estes, supra note 45, at 292; Whitton, supra note 11, at 456 n.4. The influential idea of "social construction" is usually associated with the intellectual movement called "post-structuralism." For a famous example of post-structuralist analysis, see MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME 1: AN INTRODUCTION (Robert Hurley trans., 1990).
58. The idea of decrement reverberates in social policy as well. There is, for example, the usually implicit notion that the old have lived their lives, and thus their increasing medical and emotional needs are less legitimate than the needs of other segments of society. See, e.g., GIBSON, supra note 45, at 60.
elderly which screens out “dissonant and nonconforming concepts.” There is a pervasive social presumption in favor of declining competence among the elderly and, as a result, attorneys and the population at large—including the elderly themselves—construct meaning in line with this assumption.

IV. THE INTERNALIZATION OF THE IDEA OF DECREMENT

A. Attorneys

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

1. Interpreting Behavior as Demonstrating Declining Competence

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

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

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


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

63. There have been empirical demonstrations of this effect. See, e.g., Rodin & Langer, supra note 46, at 17-18 (reporting that subjects viewed forgetful behavior by an older person more negatively than comparable forgetful behavior by a younger person). These effects are a consequence of the human tendency towards “confirmation bias” and “biased fact assimilation.”
often will assume that elderly clients have experienced declining competence, and attorneys often will seemingly—but mistakenly—find what they are looking for.64

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

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

Moreover, an inevitable byproduct of this phenomenon is that, like Sherlock Holmes once observed, “we do not consider especially informative
the fact that the dog did not bark during the night."69 Thus, elderly clients might engage in a range of perfectly ordinary behavior. Nevertheless, this "normal" behavior may remain invisible while the occasional memory lapse or distracted speech stands out as confirming declining competence.70

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

2. Actualism

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

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

70. See, e.g., Ryan & Cole, supra note 52, at 178 ("there is considerable likelihood that competent behaviours of older adults will be under-utilised in forming the first impressions so critical to initial and subsequent encounters").
71. See Goodenough, supra note 16, at 56. See also Haug & Ory, supra note 45, at 26. These conditions afflicted the ninety-year-old client I described above. See supra text accompanying notes 6-8.
72. See, e.g., Ryan & Cole, supra note 52, at 179.
73. I have borrowed this term from Daniel C. Dennett. See Dennett, supra note 17, at 260.
74. Such a stance reflects the emphasis among gerontologists on accommodative as opposed to restorative approaches in analyzing the needs of the elderly. See Estes, supra note 45, at 294.
76. See generally KRA, supra note 66.
people. Obviously, attorneys are not qualified to medically examine clients to determine possible causes of mental impairment or memory loss, but the possibility of reversible causes might have an enormous impact on how attorneys construct their interpretation of the mental states of the elderly.

3. The Complexity of Competence

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

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

77. Howard Waitzkin et al., Narratives of Aging and Social Problems in Medical Encounters with Older Persons, 35 J. HEALTH & SOC. BEHAV. 322, 342 (1994). One researcher concluded that 75% of the disabilities of the elderly are “sociogenic,” that is, the result of social attitudes and stigmatization. ALEX COMFORT, A GOOD AGE 140 (1976).
78. See supra text accompanying notes 14-18.
79. See supra text accompanying notes 15-17.
80. As previously noted, conventional wisdom considers memory to be a foundation of competence. See supra text accompanying notes 66-67. See also PRATT & NORRIS, supra note 42, at 87-88.
81. See Wiete, supra note 16, at 264. For example, even the 2.4% of the population over 65 who suffer from Alzheimer’s Disease first experience impairment only of “short-term memory and concentration, while sparing long-term memory, values, convictions, and personality.” Rosoff & Gottlieb, supra note 20, at 7.
82. See Smith, supra note 56, at 71.
83. See id.
4. "I'm Not Impaired, So The Client Must Be"

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

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

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

85. For a discussion of "paternalism" under such circumstances, see Luban, supra note 26, at 466-82.
87. This tendency might be related to the importance that dependency has on the elderly. See infra text accompanying notes 115-16.
88. William H. Simon describes a case which illustrates this point. See Simon, supra note 27, at 214-16. Simon represented a sixty-five-year-old woman in a criminal case involving a traffic accident. Despite Simon's best efforts, the client and her minister insisted that Simon was "the expert," and thus should tell her what to do. See id. at 215.

One study found that at least in doctor-patient interactions, older people are significantly more likely to defer to authority than younger people. See Marie Haug, Doctor Patient Relationships and the Older Patient, 34 J. GERONTOLOGY 852, 854-57 (1979) (elderly found to have "greater adherence to traditional authority relationships"). One explanation for such deference is that the elderly are from a "societal milieu" which fostered "an unquestioning belief in physician altruistic expertise" and "respect for authority." Marie R. Haug, Elderly Patients, Caregivers, and Physicians: Theory and Research on Health Care Triads, 35 J. HEALTH & SOC. BEHAV. 1, 2-4 (1994). It is thus possible that some clients—especially elderly clients—are particularly comfortable with the "professional in charge" paradigm that is anathema to the conception of lawyering as "client-centered." See Haug & Ory, supra note 45, at 29-30 (some elderly patients "could conceivably be more comfortable with the 'old-fashioned' familiar style of 'doctor in charge'"). However, there are obvious dangers in ascribing a unitary "social milieu" to a large group of people of strikingly different backgrounds. See Howard Giles et al., Communication, Health and the Elderly: Frameworks, Agenda and a Model, in COMMUNICATION, HEALTH AND THE ELDERLY 1, 10 (Howard Giles et al. eds., 1990) ("the elderly emanate from different historical periods with their own cohorts, values and predispositions").
at the same time, an attorney should not assume that "impairment" is the only, or even primary, explanation for this behavior.

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

**B. The Elderly Client**

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

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

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

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

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

92. Rhode, supra note 33, at 42.

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

94. See infra text accompanying notes 98-116.
identity roles and styles and deny stereotypic attributions in their own and in others’ talk,” some elderly clients will internalize the idea of decremen t and thus “sound, look, feel, think, and act older.” It is these clients who are especially at risk of appearing incompetent.

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

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

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

95. Giles et al., supra note 88, at 11.
96. Id. at 10. See also Elias S. Cohen, The Elderly Mystique: Constraints on the Autonomy of the Elderly with Disabilities, Geronologist, Supp. June, 1988, at 24 (in some settings, “the elderly themselves have bought into an elderly mystique which holds that the potentials for growth, development, and continuing engagement virtually disappear”); Ryan, supra note 75, at P41 (stating the cognitive function of some elderly diminish because of low social expectations).
97. See supra text accompanying note 52.
99. See Jacobs, supra note 61, at 378-79 (describing research exploring how expectations induce the objects of those expectations to act in accordance with them); Deborah L. Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1189 (1988) (stating “[a]s both experimental and longitudinal studies have repeatedly demonstrated, low expectations of achievement frequently become self-fulfilling prophecies.”); Theory and Experience, supra note 31, at 1056 (noting that a victim of domestic violence “herself may be affected by the understandings of domestic violence that she finds in the legal system and the rest of her world”). For a probing examination of the internalization of oppression, see Lucie E. White, To Learn and Teach: Lessons from Driefontein on Lawyering and Power, 1988 Wis. L. Rev. 699.
100. Carroll L. Estes, the Aging Enterprise 2 (1979).
101. See Estes, supra note 45, at 294.
Moreover, the home life of some elderly persons fosters a sense of dependency and helplessness:

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

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

2. Consequences

While, at a minimum, the idea of decrement is a significant challenge to older people’s morale and confidence,\(^\text{108}\) its potential consequences are pervasive.

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

\(^{102}\) See supra note 66, at 4.
\(^{103}\) See Rodin & Langer, supra note 46, at 15; Cohen, supra note 96, at 24.
\(^{104}\) See COUPLAND ET AL., supra note 41, at 59.
\(^{105}\) Id. at 138
\(^{106}\) See supra text accompanying note 50.
\(^{107}\) See COUPLAND ET AL., supra note 41, at 150.
\(^{108}\) See id. at 24; Estes, supra note 45, at 293; Ryan, supra note 75, at P41.
\(^{109}\) See supra text accompanying notes 65-66.
\(^{110}\) Ryan, supra note 75, at P41.
coupled with the lack of stimulation that afflicts the day to day lives of some elderly people, this "reality" becomes reality, and there really can be memory loss. 111 Such memory loss, however, is not organic, and may be remedied by correcting situational factors contributing to these problems. 112

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

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

111. See id. (asserting that "[l]ower self-evaluations of memory, based in part on negative social expectations, can lead to poorer memory performance through their indirect impact on decreased effort, less use of adaptive strategies, avoidance of challenging situations, and failure to seek medical attention for disease-related symptoms of forgetfulness"); Rodin & Langer, supra note 46, at 24-25.
114. See, e.g., Haug & Ory, supra note 45, at 13 (explaining that as a result of "ageism," the elderly "may be apt to attribute many of their complaints to the inevitable results of old age"); Wete, supra note 16, at 260 (describing "learned helplessness" among the elderly).
115. See, e.g., Frolik & Barnes, supra note 54, at 698-703.
116. Estes, supra note 45, at 293 (citations omitted).
V. THE DISCOURSE OF DECREMENT

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

A. "Overaccommodation" by Younger Interlocutors

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

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

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

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

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

121. Id. This conversational strategy reflects the "inverted U" model of mental competence over the lifespan. See supra text accompanying note 44. I employed this strategy when speaking to one of the elderly clients I described in Part 1. See supra text accompanying notes 7-9.
use of high pitch, increased loudness, more repetitions, tag questions, altered pronoun use, and simplification of vocabulary and grammar.”

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

B. Discursive Strategies by the Elderly

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

1. Age-Marking and Self-Handicapping

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

122. Ryan & Cole, supra note 52, at 173; see also COUPLAND ET AL., supra note 41, at 36.
123. PRATT & NORRIS, supra note 42, at 176; Ryan & Cole, supra note 52, at 174, 184-85.
124. See PRATT & NORRIS, supra note 42, at 176; Ryan & Cole, supra note 52, at 174, 184-85.
125. Ryan & Cole, supra note 52, at 187-188; see also Theory and Experience, supra note 31, at 1056-57 (describing how attorney/client interactions risk imposing on a victim of domestic violence “the understandings of domestic violence that she finds in the legal system and in the rest of her world”).
126. See PRATT & NORRIS, supra note 42, at 176; Ryan & Cole, supra note 52, at 174. As one nursing home resident observed: “Why do you think the staff insists on talking baby talk when speaking to me? I understand English. I have a degree in music and am a certified teacher. Now I hear a lot of words that end in ‘y.’ Is this how my kids felt? My hearing aid works fine. There is little need for anyone to position their face directly in front of mine and raise their voice with those ‘y’ words.” Whitton, supra note 11, at 473.
127. See Ryan & Cole, supra note 52, at 184-85.
128. See COUPLAND ET AL., supra note 41, at 37; see also Felstiner & Sarat, supra note 3, at 1449-50.
be familiar. As noted above,129 many elderly freely disclose their age, even though such disclosures at initial meetings are viewed as socially taboo among the non-elderly.130 The elderly may also explicitly refer to themselves as "old" or "elderly," or appear to be self-obsessed.131 While such "self-handicapping" strategies appear to be classic signs of feeblemindedness, they may be motivated by needs that are common to all ages and that have nothing to do with cognitive decline. These strategies might, for example, be designed to: 1) elicit patience or sympathy; 2) elicit compliments or praise by the younger speaker that the older person is, for example, "remarkable for her age," thereby bolstering an older person's self-esteem; or 3) act as "a means for gaining compliance or services."132 However, the impact on the younger interlocutor might be that the elderly person is seen as self-centered, selfish, or "not all there."

2. Off-Topic Verbosity

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

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

JC: mm

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

129. See supra text accompanying notes 104-107.
130. See COUPLAND ET AL., supra note 41, at 56.
131. See id. at 60.
132. Id. at 49.
133. See id. at 39.
were fifteen (1.0) now(.) a packet of biscuits(.) and ten pence
variation on them

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

D: I think there should be some price control

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

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

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

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

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

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

135. Id. at 42.

136. Id.

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

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

139. See COUPLAND ET AL., supra note 41, at 63.
This analysis merely hints at the complexity of elderly discourse. Although conversational strategies employed by the elderly might well have nothing at all to do with the supposed decremental process of aging, they may resonate with this idea and thus lead to an assumption that the person actually suffers from cognitive decline.

C. Warning Signs

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

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

1. “Keeping Contact”

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

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

\(^{140}\) Racial stereotyping might also lead attorneys to characterize clients as “difficult.” See Jacobs, supra note 61, at 355.

\(^{141}\) Haug & Ory, supra note 45, at 19.

\(^{142}\) Id.

\(^{143}\) This recalls the problem of “I’m not impaired, so you must be,” noted at supra text accompanying notes 84-90. In that earlier instance, a client’s seemingly incomprehensible goals are
to revisit their working conception of their client's needs. Such an enterprise might generate a richer understanding of what is "really" concerning the client. 144

2. Noncompliance

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

VI. IMPLICATIONS FOR PRACTICE THEORY

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

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

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

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

146. See Haug & Ory, supra note 45, at 27-28 (noting that failure to take medication among the elderly might be an assertion of independence).
discussion. Next, this section will draw upon this analysis in order to explore more generally assumptions underlying client-centered lawyering.

A. The Virtues and Pitfalls of Empathic Understanding

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

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

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

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

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

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

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

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

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

151. See Giles et al., supra note 88, at 13-17.
152. See id. at 13-14.
153. Id. at 17 (citation omitted).
154. See Rodin & Langer, supra note 46, at 23; see also Banziger & Drevenstedt, supra note 45, at 472.
155. These questions are also analyzed in psychological literature more generally. Much of the client-centered lawyering literature draws upon the work of Carl Rogers, who emphasized empathy and “unconditional positive regard” in psychotherapy. See Simon, supra note 147, at 511-16. However, other approaches to psychotherapy adopt a far more active—even challenging—role for the therapist. See Ellmann, supra note 147, at 1011.
156. See Rodin & Langer, supra note 46, at 24.
157. See id. at 25 (“Restructuring the environment to make it more demanding, and then motivating elderly people to increase their cognitive ability, leads to improvements in memory that are generalizable”).
Of course, such a stance potentially creates problems. If, as noted above, some conversational strategies by the elderly are designed to elicit sympathy, clients might grow to dislike such a “low-attuning” stance and the attorney who employs it. Given the internalization of the idea of decrement, the elderly client might be offended by the attorney’s socially inappropriate lack of sympathy for the conventional effects of aging. Moreover, the great risks of the “traditional” non-client-centered approaches to lawyering might emerge: the imposition of an attorney’s value system, further disempowering already disempowered groups, and shutting down dialogue.

B. Consequences for Theory

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

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

158. See supra text accompanying notes 129-32.
159. See Dinerstein, supra note 2, at 720; BINDER ET AL., supra note 1, at 16-24.
160. For example, a commonly accepted observation is that unlike poor or “outsider” clients, corporate or wealthy clients are not likely to be subject to attorney domination. See, e.g., Dinerstein, supra note 2, at 720. Binder, Bergman and Price also recognize that a client-centered lawyer need not be a “blind instrumentalist” when “a client’s values conflict with fundamental moral precepts or positive legal rules.” BINDER ET AL., supra note 1, at 18-19.
161. See BINDER ET AL., supra note 1, at 17; Smith, supra note 137, at 543. This approach has attracted criticism. Some critiques hold that the standard version of client-centered lawyering does not go far enough in promoting the autonomy of the client. See, e.g., Alex J. Hurder, Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration, 44 BUFF. L. REV. 71 (1996) (advocating that attorney and client explicitly “negotiate” the terms of the attorney/client relationship). Conversely, some of the criticism is directed at how theories of client-centered lawyering go too far in valorizing the client’s goals to the exclusion of broader social and moral principles that might be at stake in the representation. See, e.g., Robert M. Bastress, Client Centered Counseling and Moral Accountability for Lawyers, 10 J. LEGAL PROF. 97 (1985); Stephen Ellmann, Lawyers and Clients, 34 UCLA L. REV. 717, 748-49 (1987). There also have been recent stirrings that client-centered lawyering and the standard critiques of it do not capture the complexities of how the mind works as explored by cognitive science. See Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. LEGAL EDUC. 313, 317 (1995); Steven L. Winter, Cursing the Darkness, 48 U. MIAMI L. REV. 1115,
strategies that rests upon certain assumptions. "A client-centered conception assumes that most clients are capable of thinking through the complexities of their problems. In particular, it posits that clients are usually more expert than lawyers when it comes to the economic, social and psychological dimensions of problems."\textsuperscript{162} Client-centered lawyering thus recognizes "the importance of clients' expertise, thoughts and feelings in resolving problems."\textsuperscript{163} In elaborating this notion, some commentators have adopted the metaphor of "lawyer as translator" through which attorneys should seek to translate client stories in order to educate and persuade legal decision-makers.\textsuperscript{164}

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

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

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

\textsuperscript{1129-32 (1994). For an overview of some of these critiques and others, see generally Robert D. Dinerstein, \textit{Client-Centered Counseling: Reappraisal and Refinement}, 32 ARIZ. L. REV. 501 (1990).}
\textsuperscript{162. BINDER ET AL., \textit{supra} note 1, at 17.}
\textsuperscript{163. \textit{Id.} at 18.}
\textsuperscript{164. \textit{See, e.g.}, Cunningham, \textit{supra} note 2, at 1331-39; Gilkerson, \textit{supra} note 2, at 914-18.}
\textsuperscript{165. \textit{See} Dinerstein, \textit{supra} note 2, at 700; Smith, \textit{supra} note 137, at 542-43.}
\textsuperscript{166. \textit{See, e.g.}, GERALD P. LOPEZ, \textit{REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE} (1992); Cunningham, \textit{supra} note 2; White, \textit{supra} note 61.}
\textsuperscript{167. \textit{See} Davis, \textit{supra} note 59, at 1643.}
is such a thing as an "autonomous" client, and that there is such a thing as a "neutral" attorney. I will address each of these simplifications in turn.

1. The Unitary Client "Story" or "Voice"

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

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

2. The Autonomous Client

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

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

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

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

171. See supra text accompanying notes 117-46.

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

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

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

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

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

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

176. See supra text accompanying notes 147-59.

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

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

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

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

\textsuperscript{178} See BINDER ET AL., supra note 1, at 288.

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

\textsuperscript{180} For commentators who have noted how attorneys’ expectations influence the interpretation of a client’s situation, see BAKHTIN, supra note 39, at 291; Cahn, supra note 169, at 2490 (describing how the author’s “story of what happened to my client is informed by my own expectations”); Cunningham, supra note 2, at 1336-38; Lopez, supra note 3, at 1613-14; Margulies, supra note 68, at 709-11 (discussing the operation of stock stories and stereotypes in assessing clients in a law school clinic); White, supra note 61, at 45-48.
view," given that all meaning has a "point of view." 181 This is true even
with the usual caveat that attorneys should be neutral "to the best of their
abilities" or "as much as possible" because even these qualifiers assert that
there is a way to approach meaning apart from our own assumptions and
"points of view." 182 In this frame, attorney "neutrality"—conceptualized as
a goal that can be approached but never attained—may cause more harm than
good by setting forth a goal that has no meaningful content. 183

4. Complexities

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

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

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

181. Alfieri, supra note 86, at 2121 (criticizing a "perspectiveless" theory of practice); see
also supra text accompanying notes 36-40. Analogous conceptions of "neutrality" in the realm of
judicial decision-making have long been under attack. See Rubinson, supra note 39, at 14.
182. Stanley Fish placed the issue of "neutrality" into a larger frame. Fish argued against
what he calls the possibility of "critical self-consciousness." FISH, supra note 37, at 436-67.
"Critical self-consciousness" holds that we can rise above "interests, preferences and biases" and
avoid "prejudgments" through some combination of self-awareness and tentativeness about our own
beliefs. According to Fish, this process "is itself an 'interested' act, that is, an act performed within
a set of assumptions—concerning what is and is not evidence and what are and are not criteria for
judgment—that is, constitutive of and inseparable from some partial view of the world." Id. at 439.
Skepticism is not the answer because skepticism itself operates "within—and not outside of—the
already structured field that is consciousness." Id. at 440.
183. It is worth noting as well that social scientists have found that exhortations to be
"unbiased" and "impartial" have no impact on the human tendency to view facts as confirming what
is already believed. See, e.g., Lord et al., supra note 39, at 1239.
184. See supra text accompanying notes 91-97.
185. It has been noted how social attitudes toward elderly women differ from social attitudes
toward elderly men, and that elderly men might negotiate the process of aging differently than
might have on attorney/client discourse, \(^{187}\) the significance of the socio-economic status of the client or of the attorney, \(^{188}\) the impact of an elderly client’s surroundings (such as a nursing home), \(^{189}\) the impact of an attorney’s or client’s appearance, \(^{190}\) the implications of how attorneys might assume that their individual experiences with the elderly are generalizable to the elderly population at large, \(^{191}\) and how other assumptions might be related to the idea of decrement, such as the idea that the elderly are less deserving of attention because they have already lived the bulk of their lives or because they receive a disproportionate share of societal resources. \(^{192}\)

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

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187. See Appelbaum & Roth, supra note 15, at 1466; Giles et al., supra note 88, at 15-17; see also Jacobs, supra note 61 (addressing the impact of race in counseling).
188. See Appelbaum & Roth, supra note 15, at 1466.
189. See White, supra note 61, at 45-48.
190. See John F. Nussbaum, Communication and the Nursing Home Environment: Survivability as a Function of Resident-Nursing Staff Affinity, in COMMUNICATION, HEALTH AND THE ELDERLY 155 (Howard Giles et al. eds., 1990). For example, “given the fact that many nursing home residents are impaired in cognitive function, all residents are thus assumed to be similarly impaired.” Wetle, supra note 16, at 264.
192. See Wetle, supra note 16, at 260-63; Whitton, supra note 11, at 469-74.
193. DENNETT, supra note 17, at 450. This basic idea has been expressed in many ways in many different disciplines. See, e.g., BAKHTIN, supra note 39, at 290 (“In any given historical moment of verbal-ideological life, each generation at each social level has its own language; moreover, every age group has as a matter of fact its own language, its own vocabulary, its own particular accentual system that, in their turn, vary depending on social level, academic institution . . . and other stratifying factors.”); FISH, supra note 37, at 30 (“each of us is a member of not one but innumerable interpretive communities in relation to which different kinds of belief are operating with different weight and force”).
representation. While this view raises questions about ideas like "neutrality" and "autonomy," it also highlights the importance of greater understanding and recognition of the complexity of attorney/client interactions.

C. Consequences for Practitioners and Teachers of Practice

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

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

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

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

194. See Blasi, supra note 161, at 317 ("At bottom, lawyering entails solving (or making worse) problems of clients and others, under conditions of extraordinary complexity and uncertainty, in a virtually infinite range of settings.").
social change through individual representation.\(^{195}\) If attorneys come to view the social webs and cognitive processes that define and structure meaning as integral to practice and worthy of study, attorneys would be in a better position to learn through clients and to help clients learn through them. This approach offers the possibility of enriching our conception of legal representation by emphasizing "mutual education,"\(^ {196}\)—a process of transformation to be experienced by both attorneys and clients.

**VII. CONCLUSION**

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

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

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

\(^{196}\) White, *supra* note 99, at 743.