

The Ethics of Child Custody  
Evaluation:  
Advocacy, Respect for Parents, and the  
Right to an Open Future  
by  
Aviva Orenstein

The Poynter Center  
for the Study of Ethics and American Institutions  
Indiana University

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**Introduction by  
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Over the course of the 2004-05 academic year, six faculty from IU Bloomington met ten times to read and discuss materials on “The Ethics and Politics of Childhood,” the theme for the second annual Poynter Center Interdisciplinary Faculty Fellowship and Seminar.

Drawing on moral philosophy, cultural studies, political theory, legal decisions, and American literature, the seminar set out to explore a series of questions surrounding children and our responsibilities toward them. If there is any one universal experience, it is that we were all young once. Yet our experiences of youth and the moral issues surrounding our relationships with parents, cultural, religious and educational authorities, and the state remain relatively unexplored. Our seminar thus tried to sort out questions regarding the nature and grounding of children’s rights, the duties of love and justice toward children, claims that cultural, political, and religious groups may make on behalf of a child’s welfare, and the moral basis of the family, among other topics. We looked at debates about the role of public education in the civic and moral formation of children; the rise of the home schooling movement; issues regarding the gestation, design, and rearing of children; and the grounds and limits of parental authority. All of these topics spark reflection about, and enlist theoretical help from, more general claims regarding human freedom, the relationship between families and the state, and the claims of identity and cultural background in childhood development.

The essay by Aviva Orenstein that follows grows out of the seminar’s year-long interaction. Professor Orenstein was one of the fellows. My aim here is to provide a preface to Professor Orenstein’s paper that summarizes some of the seminar’s

reflections and discussions over the course of the 2004-05 year.

First, a word about the topic: My rationale for choosing this topic was that little sustained work has addressed adults' moral responsibilities toward children or children's responsibilities toward themselves and others. That lacuna is striking given the universality of childhood experience and the importance of relating to children in families, schools, and civil society. Children seem strangely "orphaned" by intellectuals. Creating a bibliography that captures features of childhood experience along with their moral and political dimensions was one of our aims.

We organized our initial set of readings in a series of concentric circles. (For a copy of our syllabus, please consult our website at <http://poynter.indiana.edu/fellows04.shtml#Readings>.) We began with an effort to think about childhood experience and to consider differences between a child's and an adult's experience of the world. We thus asked whether childhood is a *stage* or a *state*, whether it should be seen as a condition of *innocence* or *diabolical adventure*, and how we might consider questions of *dependence* and *independence* of children as they grow.

We then asked how we might theorize about children's rights in light of inferences we drew from accounts of childhood experience. If there is something special about childhood either as a stage or a state, then perhaps there is something unusual about the sorts of rights we might attach to children. We discussed at length the idea from Joel Feinberg that children have a right to an "open future"—a right held in trust now for certain protections and entitlements that a child is due later, as an adult. The right to an open future refers to rights that are saved for young persons until they reach adulthood, but which can be violated prematurely, before a young person is able

to claim or use them. We also asked whether the language of rights is the best way to frame adults' responsibilities toward children, especially if we view such responsibilities as involving family ties that are of an unusually intimate sort.

Such questions have moral and legal dimensions. On the moral side, we asked how a right to an open future connects, if at all, to many parents' desires to provide "the best" for their children. How does the quest for "better children" stack up to the affirmation of a right to an open future? Are there limits to demands that many parents pursue in the training and medical treatment of their children? Is the pursuit of better children aiming to help them exercise that right, or does it suggest narrowing the options for a child? We thus asked how "open" an "open future" can be. On the legal side, we examined the extent to which such a right empowers the state to intrude into family matters, and whether such intrusions constitute an unusual sort of infringement. This is an especially sensitive matter given the privacy we attach to families as a condition for respecting the liberty of individuals and the value of family intimacy.

Questions surrounding a child's experience of intimacy in family life lead naturally into questions about the moral basis of the family and whether it constitutes a unique kind of social unit. Here the question was not whether the family contributes something valuable to the state, but whether there are intrinsic goods to the family. What legitimizes the family as a social entity, as opposed to cults, clubs, friendships, political parties, and other social groups? Are there moral goods intrinsic to the family that allows us to assign a specific sphere to it as a social unit? That is to say, is there something about the nature of the family that provides a basis for morally evaluating actual family arrangements and

relationships? In a related vein, we might ask if there are *moral* reasons for having children.

One way to approach these matters is to say, following Ferdinand Shoeman, that adults have the right to enter into certain kinds of *special* relationships. We esteem families, in other words, because they provide the locus for forming unique kinds of connections, connections that are unavailable to us in other social contexts. Yet esteeming families because they enable adults to satisfy a basic set of rights seems strange, or at least limited. It appears to ignore the goods that children experience in families independent of whether their parents are satisfying a set of rights-claims. Given that fact, we were led to ask about other goods or values that are relevant to the intrinsic goodness of the family.

Guidance on this basic question might be provided by the principles of love and justice. On the one hand, the idea of a “right to enter into certain kinds of special relationships” suggests that we look at justice as providing a basis for thinking about the moral basis for the family. Justice provides a critical principle, although perhaps a limited one, for evaluating parental decisions and family life more generally. At a minimum, it protects against families becoming small despotisms.

But many of us also experience family love as unconditionally accepting. Moreover, within families we experience mutual flourishing, intimacy, and meaningful experiences as part of the inherent goods of family life. Those facts seem not to sit comfortably with the idea of “family justice.” It seems odd to say that love should be the subject of a “claim.” Thus the seminar asked if family love presupposes justice as a primary virtue, or

whether family love qualifies or modifies the application of justice. That is to say, should justice constrain love, and if so, does that endanger it? Or is it the case that family justice ought to be qualified, perhaps tempered, by love?

Families, of course, do not exist in a cultural, political, or social vacuum. They are prime “carriers” of customs and traditions. Thus the seminar focused on the relationship between children, families, and cultural traditions. One question is whether there is something special about culture that marks it off as a unique kind of good. Often we connect considerations of culture with the good of identity formation. But basic questions about how to triangulate the values attached to cultures, families, and a respect for children are nettlesome.

For example, we might ask whether children are *entitled* to being enculturated by their parents and, if so, whether any set of cultural traditions will do. Put differently, it is an open question whether parents have the *duty* to bestow their cultural beliefs on their children. If they do have such a duty, then parents commit some kind of wrong by not socializing their children within a particular culture, or by not passing along their cultural traditions (if they have them). Rarely, however, do we in fact censure parents for failing to transmit cultural traditions that they don’t endorse.

A related set of issues turns on whether parents have a *right* to enculturate their children. If they do, then we might ask whether this right is any different from the sort of rights we generally assign to parents by virtue of their authority in the family. We might also ask if there are restrictions on this right. Naturally such a right is likely bump up against the rights that we considered at the outset of the seminar. If

children have rights, then those rights may limit what parents can do in the name of transmitting cultural values. We examined these questions in light of important legal decisions, including *Yoder v. Wisconsin*.

Encircling the child, his or her parents and family, and the family's cultural and religious traditions, is the state. Given the assumption that the state has an interest in forming citizens and that citizenship involves a certain set of virtues and dispositions, we were led to ask how to integrate the role of the state into considerations of cultural transmission and moral formation. Of special relevance is the role of *educational institutions* in such matters. The state's interest in forming citizens must, of course, be situated in relation to parents' interests in the kind of child they want to raise, *and* the interests that children may have independently of family, cultural, or state interests. There is also the delicate issue of the extent to which the state in a liberal democracy can presume to transmit moral values that seem to extend beyond those of a civic sort.

Attention to educational matters also leads naturally to considerations of the sort of "reason" that should be cultivated in schools. Sometimes such reason chafes against the traditions, cultural norms, or belief systems of families. The seminar thus considered questions of "public reasonableness" civic virtue, and the skills of democratic participation as necessary ingredients in the civic formation of children.

The seminar participants used our discussions as a platform for launching a series of independent research projects. These projects took up questions regarding the practical and moral challenges of working with divorced parents in legal

contexts, rights to health care, research on children in educational settings, and the home schooling movement.

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**Introduction**

This paper considers the question of child custody in light of children's rights. After presenting background on child custody disputes, it employs Joel Feinberg's notion of a right to an open future and Sigal Benporath's emphasis on valuing childhood to explore how the state should determine custody in contested cases, and what role, if any, the desires of the child should play in the resolution of such cases. This paper focuses on the role of the Guardian Ad Litem (GAL), who conducts investigations and advises family court judges. It concludes that children must be respected but cannot dictate custody issues, despite their intense interest in the outcome. It criticizes the intense adversarial atmosphere in which custody decisions are made, even by supposedly non-adversarial Guardians Ad Litem charged with representing the best interests of the child. This paper argues that it is nonsensical to think of children's interests in a vacuum and that the GAL must consider the interests of the family as a whole. Although the focus is on the role of the GAL, the analysis has important implications for the behavior of judges, attorneys, and parents as well.

**The Fight for Child Custody in American Courts**

Children have to belong somewhere and, at least when they are young, to someone. There are many hard-to-adopt children languishing in foster care. When no one can care for a child, it becomes the government's responsibility to do so and to make significant choices that will profoundly affect the child's future. At the opposite extreme, there are also intense fights over child custody, where too many people want the same child. Parents (and sometimes others involved in the children's

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<sup>1</sup> Professor of Law, Indiana University School of Law – Bloomington. I would like to thank the Poynter Center for the Study of Ethics and American Institutions for creating and hosting the excellent interdisciplinary seminar on the Ethics and Politics of Childhood, the Law School for sponsoring my participation, and my fellow Poynter Center seminar participants. Also thanks to Indiana University's Law and Society Workshop, Amy Applegate, Jeannine Bell, Seth Lahn, Leandra Lederman, Christiana Ochoa, Sean Pager, and David Szonyi, for their comments on an earlier draft. All mistakes and excesses are entirely my own.

lives) may wage fierce battles over the right to live with and raise a given child. When the adults cannot agree, it is again the government's responsibility to intervene, this time to determine the legal and physical custody of the child. The government must arbitrate which adults will care for the child and where the child will live and spend her time. The state must make important, and sometimes immutable, choices about the child's future. This decision, made by a family court judge, usually reflects the judge's determination of "the best interests of the child," a term that has a distinctly paternalistic ring. The decision is actually framed, however, in terms of the custody rights of the adults, which evokes ancient notions of children as property.

In most decisions about child custody, for good or ill, biology trumps all other emotional and affiliational connections. This principle of preferring blood over attachment is debatable and transparently unhelpful when parents divorce. Each parent has an equal biological (or in the case of an adoptive parent, legal) claim to the right to rear the child. In the majority of cases, the parents reach agreement on their own and manage to settle issues of custody without third-party involvement.<sup>2</sup> Only a small number of cases go to trial, and fewer still are litigated.<sup>3</sup> However, when there is no agreement, the situation can be explosive. The government, then, must decide by whom the child will be raised.

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<sup>2</sup> Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge, Mass.: Harvard University Press, 1992), p. 141. 51% of parents experienced negligible conflict and decided issues of custody on their own; 24% experienced mild conflict; 10% experienced substantial conflict; and 15% intense conflict.

<sup>3</sup> Maccoby & Mnookin, p. 103, noting that in 80% of the over one thousand cases they studied the parents agreed on custody.

In ancient and early common law, children were deemed property, and the father automatically possessed custody of them.<sup>4</sup> In the nineteenth century, notions of childhood shifted. Children became less important for their contributions as workers and childhood was conceived as a time for education and nurture, at least for the upper classes. The presumption of custody with the father yielded to the recognition, especially in the "tender years," of a child's need for maternal care.<sup>5</sup> In the United States today there is no formal presumption in favor of either parent, though many fathers still claim that a strong bias exists against them. More women have sole custody, but this is in part because many men do not seek it.<sup>6</sup>

In contested cases, courts must determine not only who will have physical custody, but who will have legal custody, thereby determining the child's medical care, schooling, and religious upbringing. Many states recognize the concept of joint legal custody, allowing both parents a say regarding education, religion, and other long-range child-rearing decisions. However, in intensely contested custody

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<sup>4</sup> Allan Roth, "The Tender Years: Presumption in Child Custody Disputes," *Journal of Family Law Quarterly* 15 (1977): 423, 425-28, noting the ancient Roman roots of the early common law's vesting custody in the father.

<sup>5</sup> Solangel Maldonado, "Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent," *University of Pennsylvania Law Review* 153 (2005): 921, 963. See quotation, "until the mid-1970's, child custody law expressly favored mothers, entitling them to custody of children of 'tender years' unless they were unfit." Roth, "The Tender Years," pp 432-38, noting that even where the law had become more egalitarian, courts still favored the mother for custody, especially during the tender years. Henry H. Foster & Doris J. Freed, "Life with Father: 1978," *Family Law Quarterly* 11 (1978): 321, 325-29.

<sup>6</sup> Maccoby & Mnookin, *Dividing the Child*, p. 99, noting only 32.5% of fathers want sole custody.

cases, where there is animosity between the parents, joint custody is often not a suitable option.

Complicating what is already a difficult and intrusive decision by government is the fact that this very tough decision about a child's future must be made at a time of great emotional instability and strife in the life of everyone involved.<sup>7</sup> Children may feel guilt, shock, fear, sadness, loneliness, distress, or anger about the dissolution of their parents' marriage.<sup>8</sup> It is often a time of upheaval and economic uncertainty. Children may need extra reassurance that the parent who left the marital home still desires a continuing relationship.<sup>9</sup> Parents are often preoccupied by recriminations and regret, and suffer a diminished capacity to parent.<sup>10</sup> They are angry, wounded, stressed, anxious, depressed and sometimes even temporarily crazed—not in good frames of mind for making crucial long-term decisions about their children's welfare.<sup>11</sup> Although divorcing parents feud about material things, by far the most excruciating conflicts, public and private, legal and informal, occur over custody, care, education, and visitation of

the children. Sometimes a parent will seek custody as a bargaining ploy, a vindictive maneuver, or as an attempt to avoid paying child support. More often, in my experience, parents feel a deep emotional need and considerable social pressure to gain custody of their children.

The process for deciding custody and visitation varies somewhat from state to state, but rests essentially with an evaluation of the best interests of the child. The law in my home state of Indiana, for instance, mirrors the uniform child custody law, delineating various factors for the best-interests analysis. Relevant factors include: the age and sex of the child; the wishes of the child (with more consideration given to the child's wishes if the child is at least fourteen years old); the interaction and interrelationship of the child with his parents, siblings and other significant people; the child's adjustment to his home, school, and community; and the mental and physical health of all individuals involved.<sup>12</sup>

Custody evaluation rests ultimately in the hands of a family court judge who operates without a jury and, except in cases of truly preposterous decisions, renders judgments that are essentially insulated from further review. The trial judge's factual findings are granted great deference and the appellate courts will not revisit a ruling except in cases of abuse of discretion or misapplication of the law.<sup>13</sup> Custody cases

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<sup>7</sup> Lee E. Teitelbaum, "Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child," *Michigan Law Review* 92 (1994): 1816. "If there is one thing about which virtually everyone interested in divorce and custody would agree, it is that this process involves, and perhaps creates, the most deeply antagonistic relations suffered by humans in modern society."

<sup>8</sup> See Judith S. Wallerstein & Joan B. Kelly, *Surviving the Breakup* (New York: Basic Books, 1996), pp. 34-95.

<sup>9</sup> Wallerstein & Kelly, p. 48.

<sup>10</sup> Wallerstein & Kelly, p. 36.

<sup>11</sup> Wallerstein & Kelly, pp. 108-131. Joan G. Wexler, "Rethinking the Modification of Child Custody Decrees," *Yale Law Journal* 94 (1985): 757-88. "Custody controversies often represent the playing out, for a significant period of time after the formal divorces, of chronic unresolved and acrimonious marital problems."

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<sup>12</sup> Indiana Code 31-14-13-2. There are also other factors not relevant to this analysis.

<sup>13</sup> See *Leisure v. Wheeler*, 828 N.E.2d 409 (Ind. App. 2005) "In general, we review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" Custody cases generally revolve around facts, and rarely present novel issues of law. Therefore, for most cases the judge's determination of the facts and the judge's application

can be reopened and changes can be made, but there is a strong bias towards the status quo. Alteration of the original determination must not only reflect the child's best interests, it must also arise out of a substantial change in circumstance.<sup>14</sup>

Custody determinations necessarily implicate deep, sometimes unexplored values. The subjective nature of the inquiry into what makes a good parent and what kind of home is good for children raises many interesting ethical as well as sociological concerns. Racism, sexism, and homophobia inevitably creep into such analyses. The history of custody determination is replete with ridiculous examples of such biases, such as the hippie Dad who was denied custody because of his lifestyle,<sup>15</sup> or the Mom who lost custody because she was married to a man of a different race.<sup>16</sup> More subtly, conscious and unconscious cultural biases (such as those of middle class imposed on poor people) play a role. Judges can easily and inadvertently impose their own value systems by, for instance, overemphasizing the importance of a tidy house or devaluing the danger of exposure to domestic violence. Unspoken but widespread institutional biases may affect the poor who may not "clean up" as well for court, who are often unrepresented

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of those facts to the case are a final determination of the custody dispute.

<sup>14</sup> A substantial change of circumstance is again a matter left primarily to the court's discretion, but can include a parent's move, the change in relationships between parents and an older teen, incarceration, or criminal acts by the custodial parent. Sometimes the wishes of a child can suffice to qualify as a substantial change as the child matures.

<sup>15</sup> *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966) The father was denied custody because of his alternative lifestyle and liberal political view as compared to grandparent's Midwest values.

<sup>16</sup> *Palmore v. Sidoti*, 3 U.S. 429 (1984), reversing the divesting of mother's custody because she remarried a black man.

by counsel, and who because of lack of funds, poor transportation, dead-end jobs, and no health care, seem less stable and dependable.

### **Guardians Ad Litem in Contested Custody Cases**

Deciding between two competent loving parents can be very difficult. Families with the means to do so often pay for professional custody evaluations which include home visits and a battery of psychological evaluations. Where there are no funds for such professional evaluators, a family court judge will sometimes rely on a Guardian Ad Litem (GAL). The GAL is charged with investigating the facts outside of court and speaking for the best interests of the child. Often the work is performed pro bono. Sometimes GALs are social workers and sometimes they are lawyers.<sup>17</sup>

For two years I was such a lawyer.<sup>18</sup> My experience led me to some practical ethical insights about the role of custody evaluators and some tough questions about the ethics of family lawyers generally. The actual custody investigation varies tremendously, but all competent GALs should conduct multiple interviews with the parents, caregivers, and children. Medical, educational, and day-care records of the

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<sup>17</sup> The benefit of using lawyers as GALs is that they are comfortable in the courtroom and can subpoena witnesses and introduce evidence. As will be noted below, there are also some serious liabilities that arise from using lawyers.

<sup>18</sup> Until recently, Indiana University Bloomington ran a clinic for highly contested custody cases where students, under attorney supervision, conducted custody investigations as GALs. Our mandate came directly from the local family-court judges, and they sent us their more excruciating and contentious cases. Our charge was not to represent the children in a traditional attorney-client role. Instead, we advised the court as to the best interests of those children.

child should be sought. No report would be complete without checking the parents' driving and criminal records. Many cases require GALs to procure health records, including mental health records of the parents and anyone who spends significant time with the child. Where there is evidence of drug addiction, parents may be subject to drug or alcohol screens, which can be ordered by the court if the parents do not consent. In addition, ex-spouses, ex-in-laws, grandparents, siblings and others can be important sources of information. The investigation is thorough, and, obviously, wildly intrusive. Parents report feeling watched and criticized to the point of not feeling natural with their children.<sup>19</sup>

### **The GAL “Best Interests” Model versus the Traditional Attorney-Client Model**

To illustrate briefly what the difference might be between the role of lawyer and GAL, imagine a fourteen-year-old girl who expresses the desire to live with her father who works nights, and is not around to supervise the girl's after-school activities. The mother and daughter have conflicted over issues of the girl's curfew and the girl's alcohol and marijuana use. A traditional attorney representing the girl would advocate for custody with the father since that is what his client wants. An attorney operating as GAL would not be obligated to recommend that the court follow the teenager's desires.<sup>20</sup> The GAL could

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<sup>19</sup> Katie Allison Granju, “Losing Custody of My Hope,” *New York Times Styles Section* (Modern Love, 5/8/2005).

<sup>20</sup> Andrew I. Shepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* (New York: Cambridge University Press, 2004), p. 142. “A Guardian, unlike an Attorney, protects rather than empowers the child. A Guardian's principal allegiance is to the court and not to a child client. A guardian is an investigator and reporter, bound to determine and advance the child's

determine that even though the fourteen-year-old doesn't want the extra supervision, it is in her best interests and the GAL would therefore recommend custody with the mother.

Lawyers and scholars hotly debate how children should be represented, whether the traditional attorney-client role or the GAL best interests role is preferable.<sup>21</sup> Even accounting for the added complexity of differences along the child development continuum,<sup>22</sup> there is no agreement on the best way to represent children in custody cases. Some advocate strongly that children as young as seven years old should have lawyers represent their independent interests.<sup>23</sup> Those who so advocate base their arguments on the autonomy rights of children and the role of lawyers as agents.<sup>24</sup> They question the appropriateness of the GAL role arguing that a “father knows best

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‘best interests’ even if those interests conflict with the child's preferences.”

<sup>21</sup> There are jurisdictions where the attorneys' role is not so clear-cut, and in New York and New Jersey, for instance, the Law Guardians may attempt to play dual roles of representatives and protectors.

<sup>22</sup> The power granted to children to direct their own lives obviously raises definitional questions. Few would grant such power to four year olds, many to children on the cusp of legal majority.

<sup>23</sup> See generally Sarah H. Ramsey, “Representation of the Child in Protective Proceedings: The Determination of Decision-Making Capacity,” *Family Law Quarterly* 17 (1983): 287.

<sup>24</sup> American Bar Association, “Standard of Practice for Lawyers representing Children in Custody Cases,” *Family Law Quarterly* 37 (2003): 129. Similarly, in a major conference at Fordham Law School conferees concluded that “lawyers serve children best when they serve in the role as an attorney, not as a guardian ad litem. . . . If the child can direct the representation, the lawyer has the same ethical obligations as the lawyer would have when representing an adult.” “Ethical Issues in the Legal Representation of Children,” *Fordham Law Review* 64 (1996): 1279, 1294-95.

interest” analysis is patriarchal, patronizing, and wrong-headed.<sup>25</sup>

The debate tends to pit legal academics (who, like the American Bar Association, favor a more traditional attorney-client relationship<sup>26</sup>) against judges and policy makers (who tend to favor the GAL role). Although there is variation around the country, many states such as Indiana do not provide children with legal mouthpieces, but instead supply them with an adult whose job it is zealously to represent children’s best interests. The law of custody in Indiana gives the child a vote, but not a veto.<sup>27</sup> As noted above, it considers the child’s wishes as a factor, with the child’s wishes becoming a more important consideration after the age of fourteen.

The policy behind the GAL role rests on the belief that cognitively and emotionally, children are not little adults, and their best interests cannot be ascertained by treating them as fully independent, autonomous beings.<sup>28</sup> This is in part because a child

operates with certain disabilities in thinking and maturity compared to adults.

Consequently, the child’s representative may need to advocate against the stated wishes of the child in some circumstances.

This debate rests somewhat on questions of legal ethics—when, if ever, a lawyer should substitute his judgment for those of his clients. It also reflects a deep and interesting debate about the nature of children, their capacity to know their best interests, and their rights to influence their futures.

### **The Various Interests in Custody Determination**

During a year-long multi-disciplinary seminar on the “Ethics and Politics of Childhood,” a group of scholars with backgrounds in history, law, philosophy, and education, regularly considered the question of children’s autonomy and agency. The issue of consulting with and deferring to children was a persistent theme. We spent much time trying to tease out the intricate web of relationships among parents, child and state. Contested custody presents a wonderful example of all the complexities and hidden assumptions behind these triangulated relationships. In custody cases, the state decides between parents on behalf of the child. What are the child’s rights and interests once basic needs of food, shelter, education, and physical safety have been met? I will address that issue after briefly mentioning the rights and interests of the parents and the state.

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as a Defendant: The Attorney-Juvenile Client Relationship,” *Behavioral Science & Law* 21 (2003): 175, 177. See “in general, children under the age of 15 have significantly poorer understanding of legal matters relevant to their participation in trials than do adults.”

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<sup>25</sup> See Peter Margulies, “The Lawyer as Caregiver: Child Clients Competence in Context,” *Fordham Law Review* 64 (1996): 1473, 1497, expressing concern about lawyers “arrogance and ignorance” in advocating for a child’s best interests.

<sup>26</sup> The American Bar Association has developed a set of ethical criteria for attorneys. It distinguishes between a child’s attorney, who represents the child as any other client would be represented and a “best interest attorney,” who serves as an agent of the court. The ABA clearly favors the traditional attorney role. See Linda D. Elrod, “Raising the Bar for Lawyers who Represent Children: ABA Standards of Practice for Custody Cases,” *Family Law Quarterly* 37 (2003): 105, 115.

<sup>27</sup> See Barbara Bennett Woodhouse, “Talking About Children’s Rights in Judicial Custody and Visitation Decision-Making,” *Family Law Quarterly* 36 (2002): 105, 123-25, which advocates a voice-but not choice-approach to involving children in decisions about custody.

<sup>28</sup> See Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woolard, “Effectiveness of Participation

As to parents' rights, they include free expression, religious expression, and privacy. A key human right is the fundamental right to procreate. That right is hollow if, once the child is born, the parents are prevented from raising the child and transmitting their values. For many people, their own liberty interests will be limited if they cannot guide their children's future and protect their communities by passing on culture and knowledge to their progeny.<sup>29</sup> Relatedly, the ability to pass on religious doctrine requires control and influence over one's children. The parents' religious expression may be deeply connected to childrearing means and ends.

The state's interests in custody reflect the state's multiple roles. The state has a role as *parens patriae*, serving to protect minors and others who do not possess legal competency to protect themselves. The government also wants to promote an educated citizenry that can participate in and perpetuate democracy. The state, in addition to protecting children and molding our young breed, must protect society *from* children. Its duty to protect the general welfare means that the state must make sure that unruly children do not threaten safety and stability; the state want to prevent their child-citizens from growing up to be dangers to their fellow citizens life, liberty and property. To the extent the state can identify involved, functioning parents, it is in its interest to do so to avoid footing the bill for welfare, foster care, or future jail time. Finally, the state has a role as arbiter of civil disputes. To keep the peace, and to clarify the rights and obligations of everyone

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<sup>29</sup> Thomas H. Murray, chapter 2, "Families, the Marketplace and Values: New Ways of Making Babies," *The Worth of a Child* (Berkeley: University of California Press, 1996). See page 19, "freedom to pursue parenthood is one of the most important expressions of individual liberty."

involved, the state must provide the parties involved with a clear and final accounting of their various parental rights and responsibilities regarding the children involved.

Finally, and most importantly for the purposes of this analysis, is the question of the child's rights. At the extremes, there is much agreement about the nature of children's rights. Few advocate for allowing kids to vote or drink alcohol, and almost everyone supports certain claim rights of children to food, shelter and freedom from physical harm. However, the extent of children's rights to be consulted and perhaps even deferred to in making important life decisions prompts lively debate.

#### *Feinberg's Right to an Open Future*

I have been particularly struck by the work of Joel Feinberg, who identified what he called children's "right to an open future."<sup>30</sup> This right is, according to Feinberg, "an anticipatory autonomy right" or "a right in trust."<sup>31</sup> Feinberg asserts that there are areas where the child is not capable of making a reasoned choice now, but adult decisions will foreclose the availability of those rights when the child reaches requisite maturity. Feinberg analyzes the conflict that occurs when a child's right-in-trust collides with a parent's rights, and notes that community interests are often involved as well.<sup>32</sup> Although he doesn't necessarily challenge the ultimate result, Feinberg criticizes the state's deference to the interests of Amish parents who want to limit their children's education because "[a]n

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<sup>30</sup> Joel Feinberg, "The Child's Right to an Open Future," from *Whose Child? Children's Rights, Parental Authority, and State Power*, edited by William Aiken (Totowa, NJ: Rowman and Littlefield, 1980), pp. 124-53.

<sup>31</sup> Feinberg, p. 126.

<sup>32</sup> Feinberg, p. 128.

education that renders a child fit for only one way of life forecloses irrevocably his other options.”<sup>33</sup>

To resolve the conflict between parents’ desire and children’s right-in-trust, Feinberg prescribes a method of parenting whereby parents get to know their children’s strengths and weaknesses, and consciously avoid boxing children into a narrow and ill-fitting future. The hope is that “if the child’s future is left open as much as possible for his own finished self to determine, the fortunate adult that emerges will already have achieved, without paradox, a certain amount of self fulfillment, a consequence in large part of his own already autonomous choices in promotion of his own natural preferences.”<sup>34</sup>

Feinberg emphasizes that a child’s right to an open future is not necessarily determined by consulting the child’s wishes. Because of the child’s immaturity, abiding by the child’s present desires may actually subvert the child’s long-term interest in an open future. As Feinberg explains, “[r]espect for the child’s future autonomy, as an adult, often requires preventing his free choice now.”<sup>35</sup>

#### *Benporath’s Notion of Childhood as an Intrinsically Valuable Condition*

Much as I am taken with Feinberg’s approach, which strikes me as providing a coherent organizing principle for talking about the rights of children, there is something troubling about rights that focus almost entirely on the future adult and that do not seriously confront present needs and wants. It is a mistake to romanticize childhood, or to attribute qualities and

abilities to children that they simply do not possess. But it is also incomplete to see childhood as merely a vehicle to adult autonomy, an unfortunate, but necessary weigh-station on the road to a full-fledged personhood. Sigal Benporath acknowledges the limitations of childhood, but argues that one need not see this state as inferior to adulthood. “A child should be accepted for what she is *now*...childhood must not be defined as a passing phase of impaired maturity...it should be recognized as a unique, yet equally significant part of human development.”<sup>36</sup> Rather than viewing children solely in terms of their present deficiencies and their future needs, Benporath argues for adult respect for children’s condition and adult’s consequent obligation toward them.<sup>37</sup> I am not particularly interested in the distinction she draws between children’s rights and adult obligations, but I credit Benporath for focusing on children as possessing special gifts and not just special needs. Benporath sees it as the obligation of the family and public institutions to acculturate children the same way one might welcome a foreigner into our country and culture.<sup>38</sup> She is much more inclined to allow “children to play an increasing decisional part in control over their lives as they grow and develop.”<sup>39</sup> She also advocates “making an effort to reveal their needs and expressed interests, through developmental and other theories as well as through listening to children.”<sup>40</sup>

A clear tension exists between her approach and Feinberg’s, but Benporath presents a necessary tonic to Feinberg’s

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<sup>33</sup> Feinberg, p. 132.

<sup>34</sup> Feinberg, p. 151.

<sup>35</sup> Feinberg, p. 127.

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<sup>36</sup> Sigal R. Benporath, “Autonomy and Vulnerability: On Just Relations between Adults and Children,” *Journal of Philosophy of Education* 37 (2003): 127, 132-33.

<sup>37</sup> Benporath, p. 137.

<sup>38</sup> Benporath, p. 138.

<sup>39</sup> Benporath, p. 138.

<sup>40</sup> Benporath, p. 138.

almost exclusive focus on the citizen-to-be. Benporath reminds us that childhood possesses the intrinsic value of being, not just the process value of becoming.

### **Applying the Scholarship of Feinberg and Benporath to Custody Cases**

Feinberg does address child custody; however, it is in the context of an unusual legal battle between grandparents and a biological father. Feinberg uses the case of Mark Painter—a notorious example of judicial bias—to argue for applying the principles of a child’s right to an open future in a neutral manner. In that case, the child’s mother was dead and the father’s counter-cultural lifestyle (including “dangerous” tendencies toward Buddhism, agnosticism, and support of the ACLU) was deemed harmful for the child. Feinberg rightfully denotes this case as a “horror story”<sup>41</sup> and argues that the state, except in extreme situations, should not remove a child from parental custody.

Feinberg observes that “[t]ypically, the state must shoulder a greater burden of justification for its interferences with parents for the sake of their children than that which is borne by parents in justification of *their* interferences with children for the children’s own sake.”<sup>42</sup> This observation, which strikes me as true, displays a persistent but unstated assumption of Feinberg’s analysis. It assumes that, in the state-parent-child triangle, the parents operate as a monolith, agreeing as to values and the child’s best interests. Therefore, Feinberg’s focus on an egregious case, in which the mother was deceased, is ultimately unhelpful in

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<sup>41</sup> Feinberg, p. 139. Feinberg argues persuasively that “no court has the right to impose its own conception of the good life on a child over its natural parents’ objections.”

<sup>42</sup> Feinberg, p. 142.

resolving the more common problems posed by custody battles *between* parents.

Although Feinberg’s theory of relying on parents as trustees of the child’s right to an open future is confounded by the fact that in a contested custody matter, the parents cannot agree, Feinberg’s principle of maximizing the child’s right to an open future nonetheless seems particularly apt. In fact, a custody battle seems like a quintessential example of a major life choice that will affect a child’s ability to exercise his autonomy as an adult. In the words of Feinberg, “the child’s options in respect to life circumstances and character will be substantially narrowed well before he is an adult.”<sup>43</sup> Custody is arguably even more vital to a child’s autonomy and ability to direct his own future than the educational or religious choices that serve as Feinberg’s core examples. At least with educational choices, under some circumstances, the adult can compensate for deficits in his childhood education. The choice of who raises the child day-to-day will have an even more profound effect on the child’s personality, life-choices, and ability to pursue an open future.

Similarly, Benporath’s work offers guidance to a GAL making a custody recommendation. First she reminds us of the importance of making sure that the person inhabiting a world of rights-in-trust is having a happy childhood, and that this passage of life is to be relished, not merely tolerated. Second, she reminds us that the world of childhood is valuable and sometimes impenetrable to adults, and that we may need children to guide us in understanding their needs. The contribution of Benporath to custody evaluations stems from this focus on the happiness of children. Children’s sense of wonder, their flexibility

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<sup>43</sup> Feinberg, p. 146.

and their innocence are important attributes that the GAL should strive to cherish and preserve. In keeping the future open for children, we ought to take pains to understand their unique needs so that our efforts to do not ruin their present.

Both Benporath and Feinberg arguably support a best-interests role rather than a traditional attorney-client role for the child. Feinberg's open future affirmatively anticipates occasions when the child's immediate desires are not consonant with his or her long term best interests. Benporath is more focused on the here and now, but she seems to see the role of child as translator for and educator of adults, not necessarily those who make the final decisions about major life choices.

### **Ethical and Practical Concerns about the Process of Determining Children's Best Interests in Custody Cases**

Concerns about the behavior of GALs arise on many levels. As noted above, there are serious debates about the best-interests role, as opposed to a more traditional attorney-client model. Also GALs face the difficulty of assessing custody without engaging in cultural and other biases. Ideally they should focus on the welfare of the child and the child's right to an open future while simultaneously protecting and promoting a happy childhood. In addition to these daunting tasks are two crucial aspects of a best-interests analysis that in my experience tend to be undervalued by GALs. The first concerns the GAL's duty towards the family as a whole. The second concerns the importance of respecting the child and keeping the child informed and involved even if the GAL does not follow the child's wishes.

### *Valuing the Parent-Child Relationship*

GALs often do not place enough weight on the parent-child relationship in assessing the child's current happiness and rights-in-trust. One need not tout parents' rights to make the narrower argument that children's rights cannot be understood without concern and respect for parents. As Thomas Murray notes "family bonds have an intimacy that distinguishes them from other attachments."<sup>44</sup>

Family law scholars and psychologists agree that a child will best develop his potential and will make the greatest gains in physical and mental health if he has a healthy relationship with both parents. Numerous studies confirm what life experience and common sense already tells us, that both parents remain vital to a child's future well-being.<sup>45</sup> In a noted study of the effect of divorce on children, researchers found that children whose parents encouraged visitation with the non-custodial parent were more psychologically healthy.<sup>46</sup> Regular and meaningful contact with both parents led to less stress, better work-effectiveness, better socialization and less

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<sup>44</sup> Murray, *The Worth of a Child*. Similarly Ferdinand Schoeman argues that children, at least vis a vis their parents, don't have rights so much as "needs, the satisfaction of which involves intimate and intense relationship with others." Ferdinand Schoeman, "Rights of Children, Rights of Parents and the Moral Basis of the Family," *Ethics* 91 (1980): 6-19; quote, p. 9. Unfortunately Schoeman focuses on the power struggle between parents and the state and does not consider the situation, such as a divorce where parents do not present a united front. Hence his arguments in favor of family privacy and his contentions that the state should not intervene absent a clear and present danger to the child do not easily apply.

<sup>45</sup> See Andrew I. Schepard, *The Unfinished Business of Modern Court Reform: Reflections on Children, Courts and Custody*, (2004), p. 21.

<sup>46</sup> See Judith S. Wallerstein & J. Kelly, *Surviving the Break-Up: How Parents and Children Cope with Divorce* (New York: Basic Books, 1980), pp. 107-09.

aggression.<sup>47</sup> Continued contact with the non-custodial parent offers emotional support, and potentially provides a larger support network and greater stimulation, and increased opportunities to interact with diverse people and stimuli.<sup>48</sup>

Unfortunately, GALs sometimes behave as if the child has little interest—emotional, relational, social or practical—in the soon-to-be defunct family unit. By narrowly focusing on the child as individual, rather than as a child who is part of a disintegrating family, the custody evaluation may ultimately ignore some crucial interests of the child. GALs sometimes adopt a constricted, atomized, autonomy-happy version that myopically focuses on the child alone. The focus on the child’s interests is correct; the definition of those interests is too narrow. The GAL doesn’t make the mistake of child liberationists who want to impute full rational decision-making to the child. Instead, the GAL falls into a related error in autonomy-focus thinking.

By undervaluing connection and forgetting that meaningful autonomy often means cultivating relationships with others, GALs may disserve the child practically and emotionally. Barring abuse or serious neglect, children will be spending time with both parents. Wisely, in my opinion, the law totally dissociates payment of child support from visitation. Even financially deadbeat parents, for example, can and should spend time with their kids. Although there is certainly danger in conflating the interests of

parents and children, it is impossible and undesirable to separate their interests entirely.

Respecting the intimacy of the parent-child relationship and honoring the parents themselves is vital to any robust notion of the best interests of the child. As Feinberg writes, childhood is a passage through which children grow into their full rights as citizens and must be prepared to exercise those rights. A key part of the preparation involves guidance from parents. Except in the most extreme situations involving abuse or neglect, it seems nonsensical to talk about the interests of children outside a consideration of the parent-child relationship.<sup>49</sup>

Similarly, Benporath’s approach requires respect for parents because they are the primary, though not exclusive, navigators for children through the foreign world of adults. At their best, parents provide the type of deep appreciation and understanding that Benporath sees as necessary outgrowths of children’s weak position in the world vis-a-vis adults.

In practice, however, GALs are sometimes brutal towards parents. Well-meaning GALs perceive their task as ascertaining the best interests of the child, and these well-meaning legal pugilists are ready to slug it out on behalf of the child. Neglecting the child’s need for intimacy, support, stability and emotional safety of competent, secure parents, GALs sometimes act as if their jobs require them to behave like Caesar in a gladiator’s duel-to-the-death over custody. They exhibit a relentless

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<sup>47</sup> See Schepard, p. 31; Robert D. Hess & Kathleen A. Camera, “Post-Divorce Relationships as Mediating Factors in the Consequences of Divorce for Children,” *Journal of Social Issues*, 35 (1979): 79.

<sup>48</sup> W. Glenn Clingempeel & N. Dickon Reppucci, “Joint Custody After Divorce: Major Issues and Goals for Research,” *Psychological Bulletin* 91(1982): 107-09.

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<sup>49</sup> The exception for abuse, neglect, and violence between former spouses is crucial. Where parents have behaved violently or endangered their family, the presumption that children benefit from their company is no longer necessarily true.

attempt to ferret out who is the better parent, and then to elevate that individual. As I have witnessed it, the “better” parent is championed and the “losing” parent is ground into the dust, portrayed as unfit and sometimes even dangerous to the child. These tendencies derive from a desire to support the GAL’s assessment of who should “win.” However, such an approach degrades the ability of the both parents to nurture the children and further frays the thin bonds of family uniting these feuding individuals and their progeny.

Certainly I would not be the first to observe that the culture of the adversary system is particularly ill-suited to resolving family-law disputes.<sup>50</sup> We hear all the time how divorce lawyers sow discord and distrust, making things worse, not only for the children, but for the adults. Ironically, the GAL, who is supposed to advocate for the child and remain outside the role of a traditional lawyer, often becomes infected by a legal culture of hyper-adversarialism. The GAL can shift from being neutral eyes and ears of the court into an advocate for one of the parties.

This happens because of the entrenchment of a legal culture of adversarialism. Lawyers are often bound by habit, ego and their training as investigators and cross-examiners. As GALs, these lawyers often fail to understand the deeper purpose of their inquiry. Ironically, the very skills the lawyers bring to their evaluations are what make their participation most destructive. Mired in the culture of the adversary system, the GAL often advocates

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<sup>50</sup> See Gregory Firestone & Janet Weinstein, “In the Best Interests of Children: A Proposal to Transform the Adversarial System,” *Fam. Ct. Rev.* 4:2 (2004): 203, 204, arguing that the adversary system disempowers and dehumanizes parents.

not for the true best interests of the child, in having a safe environment, including contact with two strong and self-confident parents, but for the GAL’s chosen result. GALs may feel strongly about their recommendations and feel that the best way to insulate their preference for one parent is to degrade the other parent. They may also over-identify with one parent and begin to take the decision very personally. By undervaluing the parent-child connection and attacking the competence, integrity, and judgment of a parent, GALs can and often do make things worse for parents, and ultimately children.

### *Taking Children Seriously*

Custody decisions for children and early adolescents should not be left to them despite their obvious stake in the outcome. Children or young adolescents are not intellectually or emotionally mature enough to determine their best interests. I am particularly convinced that this is true in custody cases. Children of divorcing parents are particularly vulnerable to having their childhood suddenly brought to an abrupt halt. Divorce often thrusts new responsibilities on children. The last thing they need is the burden of deciding custody. As I argue below, however, it is very important to take the child’s wishes seriously and to let the child teach the GAL about his or her needs.

Issues of custody arguably pose more of a challenge to Feinberg’s reluctance to let the children decide their own interests beyond those of education or religion. A child might not appreciate or be able to meaningfully evaluate his educational options, which adults can neutrally assess. With child custody, however, the child may have some intuition and experience that adults cannot access. In determining what will maximize their long-term benefit,

children may possess some specialized expertise on the question of their own custody. Their time spent in intimate, informal contact with parents give them information that no one else can fully access.

Both Feinberg and Benporath speak to this issue. Though Feinberg rejects a child's right to conclusively determine his own rights-in-trust, he definitely sees the child as an important participant in the process. He observes that "from the beginning the child must—inevitably *will*—have some 'input' in its own shaping, the extent of which will grow continuously even as the child's character itself does."<sup>51</sup> Benporath bases the obligations of adults to children in respect for the state of childhood and for the child's individuality. She warns that "[n]eglecting the present perspectives of children is not only disrespectful, and not only results in an unjust and myopic society...it also expresses a deep disregard for childhood itself."<sup>52</sup>

Perhaps because children are so easy to dismiss, GALs usually do not make the mistake of treating children as clients who should call the shots. As I asserted above, GALs do fall into adversarial traps, but slavishly following the desires of the child client is not one of them. In fact, some GALs seem to lean toward the other extreme, mistakenly concluding that children have little to offer and, therefore, failing to take their insights and preferences seriously.

### **Practical Solutions for the GAL and the Family Court Judge**

Practically, the GAL is in a unique role to foster the best interests of the child. These best interests should be broadly

defined. For instance, it is within the court's jurisdiction to order counseling, special education, or other support services for the child. As part of a custody order, the court can also require actions of the parent such as attendance at substance-abuse counseling or parenting classes. To combat the tendency to get overly enmeshed in the adversarial nature of the proceedings, GALs should deliberately focus on the strengths of both parents. Even, or perhaps especially, when one parent is the clear custody winner, the GAL should think about how to keep the non-custodial parent involved in the child's life and confident about his or her parenting skills. A parent who emerges from the custody evaluation process humiliated and feeling terrible about his ability to parent will not be able to provide the child comfort and security. A child may misread the parent's dejection as rejection. More basically, at a time of immense fragility and uncertainty, the parent's confidence will be further undermined. All of this combines to deprive a child of joy and to limit his future options.

This is not to say that GALs should ignore or whitewash problems posed by parents. Part of a GAL's job is to make hard choices and to deliver tough advice. However, a GAL must relay negative information or assessments with deep respect and compassion for parents. GALs must disclose problems honestly, but in the least inflammatory and judgmental terms possible. A GAL should show the parents the report and solicit comments and corrections.

These professional obligations do not derive from a more basic duty owed to the parents or from any sympathy one might have for them. They derive from the insight that separating the interests of the child from the strength and health of the parents relies

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<sup>51</sup> Feinberg, p. 149.

<sup>52</sup> Benporath, p. 140.

on a false and cramped view of children's interests.

As a practical matter, GALs should never ask a child with whom he prefers to live.<sup>53</sup> The child, because of his developmental stage, the influence of adults, and limited maturity and worldview, would not necessarily be able to identify his own best interests. More importantly, asking the child puts him in an impossible position. Respecting the child's emotional needs and his attachment to and fear of hurting both parents should make GALs circumspect about even posing the question. This reticence should not be confused with a lack of interest in the child's desires. There are many interviewing tricks to learn about the child's wishes and his level of attachment and how the child can educate the GAL about his or her best interests without directly expressing a choice.<sup>54</sup> GALs can maximize the child's good relations with both parents and minimize any guilt he or she might have had expressing his preference.

Obviously, there are cases where the child directly and vociferously expresses a strong preference. It is important that his or her views be treated with immense respect. The sliding developmental scale used in Indiana, where children's views on custody

take higher precedence after age 14, makes good sense.

### **Implications for Lawyers Representing Parents**

Up to this point, I have argued that GALs, in their eagerness to promote the child's best interests, may undervalue the child as a resource and fall into adversarial behavior, despite the non-adversarial nature of their roles. These criticisms of the way GALs sometimes behave invite similar questions concerning the behavior of attorneys representing the parents. Attorneys representing parents are by definition adversarial and are ethically bound to focus on the interests of their clients, and not third parties (such as the children). They rarely see their job as asking questions about the children's welfare and tend to take their cues from their clients, who are often in fragile, angry states.

Given the harms inflicted on children by dueling parents, it is reasonable to wonder whether there is a way to apply the lessons of children's best interests to the role of the attorneys for the parents, without entirely subverting the traditional attorney's role. May an attorney representing a parent even consider the welfare of the children, or would such concern for anyone other than the client-parent constitute a conflict of interest and ethical breach of the duty of loyalty?<sup>55</sup> I will not in this essay consider this immensely important and troubling ethical problem. Instead, my focus will remain on the interests of the parents because I believe that lawyers who represent parents should be concerned about the

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<sup>53</sup> National Interdisciplinary Colloquium on Child Custody, *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges*, Robert J. Levy, ed., 2005. P. 288, opposing asking a child's preference and noting that "asking a child with which parent he or she would prefer to live may well cause heightened guilt and anxiety. . . and keep the child from offering useful information."

<sup>54</sup> For instance, the child can talk about a typical day and respond to questions such as "what would you do if you had a bad dream?" These will elicit revealing answers about the child's relationship with each parent without putting the child on the spot.

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<sup>55</sup> The Lawyers' rules of professional conduct deem it a conflict of interest if a lawyer's loyalty and obligation to a client is materially limited by loyalty or obligation to third parties. See, e.g. Ind. R. Pro. Conduct 1.7.

children as part of their advocacy of parents' interests.

If a child's long-term future benefit relies on meaningful contact with two strong, sane parents, and, if, indeed, the happiness of children is not easily separated from the happiness of parents, then a fuller notion of parents' interests would motivate lawyers to think differently about the welfare of children. Rather than believing that the children's interests are incidental or even in tension with those of the parents, lawyers representing the parents could adopt and try to communicate to their clients a fuller view of the parents' long-term interests. Rather than lumping the kids in with the Tupperware as items to be won or lost in the divorce settlement, lawyers could identify what is truly unique about the parent-child relationship and counsel the parent to look ahead to their own futures. Attorneys should strive beyond satisfying the divorcing adults' perceived current need for revenge, vindication, or victory, and instead educate the clients about the long-term interests of the divorcing parents. These interests include having a calm relationship with the ex-spouse and having healthy, happy, well-adjusted children. Just as it would be foolish to identify the best interests of a child without reference to the relationship with the parent, it may be equally foolish to represent the parent without thinking about how decisions made in anger and hurt at the time of divorce and initial custody determination will affect the web of connections with the children in the present and in the future.

Misunderstood, this approach could seem dangerously close to treating adult clients like children. Just as children, for developmental reasons, cannot be relied upon exclusively to identify their own interests, so too, divorcing parents, for emotional and situational reasons, may be

poor judges of what they need. One could even go so far as argue that many parents in the midst of a divorce and custody dispute are incapable of making rational independent decisions.<sup>56</sup> Such an approach would be too radical and would clearly trample parents' rights. Yet, for many of the wrongs that parents try to address in custody cases, the language of rights is inadequate and may, when equated with property rights, and litigated in the same manner, be harmful to all involved, most notably, the parents themselves.<sup>57</sup>

I believe that the solution lies in the ability of attorneys to counsel their clients, affirmatively raising issues relating to children's long-term interests. This is not only fair to children (who are truly innocent third-parties and who pose an ethical challenge to the lawyer's traditional role-differentiated morality), but vital for parents. One hopes that parents get divorced only once. Family law attorneys see the same squabbles all the time and they note the toll it takes on children and the harm that legal wrangling does to the finances, hearts, and long-term interests of parents.<sup>58</sup> If one were to counsel clients based on the experience and wisdom of seeing many such cases, it is clear that the best advice would look to the parents' right to an open future. This open

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<sup>56</sup> The rules of professional conduct for lawyers anticipate the problem of client's incapacity and include a special provision for clients operating under a disability that includes requesting that a court secure a GAL to represent the client's best interests. This provision (Rule 1.14 of the Model Rules of Professional Conduct) was designed for mentally ill or mentally handicapped clients, and not for acrimonious divorce cases.

<sup>57</sup> See Murray, *The Worth of a Child*, noting how the in the context of discussing relationships within the family "the language of rights seems awkward and second best."

<sup>58</sup> Needless to say any financial interest a lawyer might have in prolonging the conflict can never ethically influence the lawyer's advice.

future for the parent would entail good relations with the ex-spouse, a meaningful co-parenting relationship, support with childcare, lack of tension at graduations, bar mitzvahs and communions, etc., no recriminations from children years later for having been denied the company of the other parent, and most importantly, happier and healthier kids. Obviously, an attorney cannot commandeer the process and set the goals of the representation, but an attorney can educate the client about how the parents' current interests and desires may conflict with his long term rights and interests as a parent.

## **Conclusion**

For GALs representing children in contested custody cases, it is vital to avoid being seduced by the dark side of the adversary system, and instead maintain a commitment to ensuring, wherever possible, the health and stability of both parents. This is not just for reasons of decency, but because the child's right to an open future depends on having strong, sane parents. Furthermore, in determining the child's best interests, the GAL should take the child's stated wishes very seriously, but should not feel bound by them, and should not directly pose to the child the question of which parent should have custody.

There are strong reasons why parents deserve respect in their own right and why the intimacy of their relationships with their children must be respected. In this article, however, I have attempted to craft a respectful approach to parent's rights, interests, and personhood that derives not from the parents themselves, but from the needs of their children. This approach indicates that a good lawyer should counsel his or her clients about the needs of the

children because those needs will affect the parents' rights-in-trust.

Both sets of arguments, about GALs and regular attorneys, rest on the notion that it is impossible entirely to separate the interests of parents and children. Although those interests may not be identical, and may in fact conflict at times, they are inextricably bound; it is meaningless to talk about the best interests of the child without considering the happiness of the parents, and it is equally pointless to talk about the interests of the parent without considering the long term effects on the children.