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Give Them a Sword: Representing a Parent in a Child Custody Case

*William Louis Tabac**

I. INTRODUCTION

"Next time, you should advise your client to lie." The startling suggestion came from a mother whom I had just represented in a nasty custody fight. I could have explained to her that it would be unethical for me to offer perjured testimony, but, reeling from the pain of just having lost her son, she would not have heard me.

Her remark really bothered me—all the more so because I was convinced that the other side had used perjured testimony¹—until I reflected on the most noble custody dispute of all time. It was the biblical story involving the two harlots who each claimed to be the child's real mother.² When King Solomon demanded a sword and threatened to slice the child in two with it, one harlot offered to give up her claim so that the child might live.

Arguably, the threat was justified because it worked: the King was able to smoke out the child's true mother with it. However, the threat was likely unfounded because the King probably had no intention to carry it out. His bluff, of course, has been overlooked, obliterated by the just end that it achieved. The enduring appeal of the biblical story is due, no doubt, to the stunning (if not complete) triumph of good over evil that the wise King achieved with his ruse. The biblical story also highlights some clear moral truths: child abuse is "bad" parenting, but sacrificing the child for love is "good" parenting. Finally, it is a powerful story which, as I will argue, has much to offer the practicing lawyer.

* B.A., 1962, Case Western Reserve University; J.D., 1966, George Washington University. I would like to thank my colleague Patricia Falk and lawyers Peter Enslein and Elliot Levine for their comments on the initial draft of this article.

1. A receptionist who worked for my client's husband testified that my client's boyfriend had made a pass at her. The testimony was admitted by the trial referee over my objection as to its relevance. I only mention it here to suggest the unusual breadth of the best interests standard. See *infra* notes 32-37 and accompanying text for a discussion of the best interests standard.

2. 1 *Kings* 3:16-28.

Notably, a very different kind of story unfolds each day in countless American courtrooms. Although "they" may behave very badly, "they" are usually two "good" parents vying for custody and cannot bear to sever their ties with their child. And woe to the lawyers who might have represented the harlots had the dispute arisen in one of these courtrooms. If the one harlot's lawyer knew that his client would solicit child abuse, a failure to report it would have subjected him to discipline.³ The other harlot's lawyer might have fared even worse. Anticipating the King's ploy, her lawyer might have suggested the "waiver" of her claim to the child as a counter-ploy, correctly predicting that the wise ruler might buy it. If so, the victorious lawyer also risked disbarment⁴ and perhaps even a prosecution for subornation of perjury.⁵

Under current ethical standards that govern lawyers, to knowingly offer perjured testimony is unethical.⁶ But is it immoral? What of the lie that will save a life⁷ or, to a lesser, but no less compelling degree,

3. See generally Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and The Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992). By Mosteller's count, lawyers in 22 states must report "known or suspected" abuse even if the knowledge comes from the client. *Id.* at 208-09. Yet, "even in states where lawyers carry a duty to report suspected child abuse or neglect, the extent of this obligation is typically poorly defined." Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621, 1629 (1996).

4. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1986) ("In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1996) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."). Either the Model Code or the Model Rules provision has been adopted in each state. See Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 343-52 (1994) (providing a history of the client perjury rules).

5. See, e.g., CAL. PENAL CODE § 127 (West Supp. 1997) ("Every person who willfully procures another person to commit perjury is guilty of subornation of perjury . . .").

6. See *supra* note 4.

7. "A lie is not bad in itself. It depends on what we do with it." Christopher J. Shine, Note, *Deception and Lawyers: Away From a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 722 n.1 (1989) (quoting W. SHIBLES, LYING: A CRITICAL ANALYSIS 34 (1985)). The author cites as an example the "There are no Jews here" deception to save Jews in Budapest, Hungary, from the Nazis during World War II. *Id.* at 741-42 n.94. The "lie," the issuing of false baptismal certificates to Budapest Jews by the Catholic Church, was approved by the then Papal envoy to Turkey, who became Pope John XXIII. *Id.* "Surely few of us would blanch at scaring the would-be murderer into surrendering by falsely telling her that she's surrounded by police." Stephen Ellman, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 130 (1990) (reviewing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988)).

the lie that will preserve the loving parent's bond with her or his child? Like King Solomon's.

This Essay will deal with ethical issues that confront lawyers who represent parents in child custody cases. My proposition assumes that the contest is between parents, that neither of them is unfit, and that each parent truly believes that he or she is the better parent. I propose that, because of the wide-open nature of child custody determinations and the precious parental rights that are at stake, lawyers should lay out potential strategies to their clients.⁸ By this I mean that lawyers should even put the words into their clients' mouths.⁹ I do not believe that current ethical constraints would be offended if lawyers represent their clients in this way.¹⁰

First, this Essay demonstrates that, because the "best interests"¹¹ standard that states use in awarding custody between parents is so arbitrary, lawyers cannot effectively protect the parental rights of their clients.¹² Next, this Essay contends that, because fit parents will do anything to preserve their bond with their children, the state not only expects them to commit perjury to protect their parental rights, but encourages them to do so.¹³ Finally, this Essay argues that lawyers should lay out all possible strategies to their clients even if doing so invites parents to perjure themselves.¹⁴

II. A CHILD'S "BEST INTERESTS"

When custody is contested, the judge must choose between two parents, each of whom believes him or herself to be better than the other.¹⁵ If a child is not at risk from either of them, it does not matter who wins the custody dispute: the child's welfare will be served by awarding custody to either parent.¹⁶

8. See *infra* Part IV.

9. See *infra* Part IV.

10. See *infra* Part IV.

11. See *infra* note 32 for an example of a statute delineating a "best interests" standard.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. Custody decisions between parents under the best interests standard are made in juvenile courts if the parents are not married, and in domestic relations courts if they are. See Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988). The authors surveyed Virginia judges and concluded that virtually identical procedures were used in both courts to consult with children to determine their preferences, even though Virginia law does not state the court should consider their preferences. *Id.* at 1046, 1052.

16. "[T]here usually is no rational basis for preferring one parent over another." Jon

In the state's view, the parent knows best¹⁷ and one fit parent is as good as another. Parental rights are among the most precious that Americans possess.¹⁸ Child-rearing comes in many forms, a fact both acknowledged and endorsed by the doctrine of family privacy.¹⁹ This bundle of rights, which receives the highest order of constitutional protection,²⁰ gives the parent wide discretion to raise the child as he or she sees fit.²¹ The parent may control the children's religion,²² with whom they associate,²³ and what they read and eat.²⁴ In short, parents control the same fundamental liberties that the children would exercise themselves if they were adults.

A parent's rights, of course, are not absolute, nor can they be. Free-wheeling parental authority stops at neglect or abuse.²⁵ If the child's health or life is at risk, the state may intervene to remove the

Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 2 (1987).

17. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (citing 1 W. BLACKSTONE, COMMENTARIES 453 (Cooley ed. 1899)).

18. "[T]he tradition of legal protection of parental rights has deep historical roots. Before the twentieth century, the combined status of biological parenthood and marriage signified a legal authority of almost limitless scope." Robert Scott & Elizabeth Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406-07 (1995). "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968).

19. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (noting that marriage is within a right of privacy older than the Bill of Rights); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right of privacy to unmarried couples with regard to the distribution of contraception).

20. "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

21. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "that the custody, care and nurture of the child reside first in the parents").

22. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish parents may educate children at home past the eighth grade in violation of state law mandating education until age 16, because it is contrary to the Amish religion).

23. See, e.g., *Leonhard v. United States*, 633 F.2d 599, 619 (2d Cir. 1980) (holding that the children's constitutional rights were not violated when their mother, as sole custodian, consented to be placed in a witness protection program and concealed them from their father).

24. See *Yoder*, 406 U.S. at 205; *T.B. v. State*, 922 P.2d 271 (Alaska 1996) (home schooling).

25. See *Santosky*, 455 U.S. at 760 (noting that the State could terminate parental rights upon a showing of parental unfitness).

child from a parent's custody.²⁶ Absent abuse or neglect, however, the state has no business meddling with the parent-child relationship. Furthermore, because of the weighty protection afforded the parent's rights over the child, state intervention for abuse or neglect can generally only occur in cases of clear and convincing evidence²⁷ under specifically defined circumstances. The parent must know both what kind of conduct will put parental rights at risk²⁸ and have fair warning that, because of this prohibited conduct, the state may terminate those rights.²⁹

So far, I have deliberately spoken of one parent's rights to the child for these reasons: the individual parent is the client whose rights the advocate will seek to protect in a contested custody case, and this parent is also the singular parent that the judge will favor with a judgment of sole custody. Complete, single-parent autonomy over the child, where the other parent is physically absent from the child's home and has little or no influence on the child's upbringing, is no longer the aberration that it once was.³⁰ One reason for this is that it is likely that only one functioning parent remains after a contested custody case is adjudicated.

Nonetheless, family privacy principles will apply with equal force to bar state intervention when the child has two parents sharing child care responsibilities. If the parents clash over the exercise of parental authority, the state has no interest in settling their argument. As in single-parent families, the state has no right to intervene in the ongoing relationship with the child unless the child is at risk.³¹ The state interest is implicated, however, when the parents terminate their relationship and one or both of them asks a court to award sole

26. *Id.*

27. *Id.* at 749 n.3, 767, 769 (finding a preponderance standard insufficient and holding that the precise burden equal to or greater than a "clear and convincing" standard is left to the state legislatures).

28. *See, e.g., In re Appeal in Maricopa County Juvenile Action*, 692 P.2d 1027, 1032 (Ariz. Ct. App. 1984) (explaining that due process is violated if a statute fails to provide explicit standards and leads to arbitrary and discriminating enforcement).

29. *See Alsager v. District Court*, 406 F. Supp. 10, 24-25 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976) (finding inadequate notice was given when parents only received a copy of the filed petition absent any specific factual allegations).

30. According to Census Bureau figures, the number of single-parent households doubled between 1970 and 1994, from four to eight million. Tom Zucco, *Stress Can Be a Pain to Children*, ST. PETERSBURG TIMES, Feb. 3, 1995, at 1D.

31. "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U.S. 645, 652 (1972). "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing an erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760 (1968).

custody. At that point, family privacy has been waived, the parents are adversaries, and the state, through its judges, must choose one parent over the other.

The "best interests"³² standard that governs state intervention in these cases is much broader than the narrow neglect and abuse standards that apply when the child is at risk.³³ A "best interests" case is made by a preponderance of proof rather than by the clear and convincing evidence that it takes to prove neglect and abuse.³⁴ In fact, the best interests standard is so broad that parents will have no notice of how they may lose custody and no notice of how they may keep it.³⁵ Because of its breadth, a judge will have virtually unreviewable discretion³⁶ in admitting any evidence, competent or not, that arguably pertains to the child.³⁷

32. The typical statute is like Idaho's, which provides in relevant part:

Best interest

A. In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors which may include:

1. The wishes of the child's parent or parents as to his or her custody;
2. The wishes of the child as to his or her custodian;
3. The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
4. The child's adjustment to his or her home, school, and community;
5. The mental and physical health and integrity of all individuals involved;
6. The need to promote continuity and stability in the life of the child; and
7. Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.

IDAHO CODE § 32-717 (1996).

33. See *infra* notes 34-44 and accompanying text.

34. In *Hayes v. Hayes*, 922 P.2d 896, 899 (Alaska 1996), the Alaska Supreme Court was invited to apply a heightened burden of proof but declined to do so.

35. "[T]he phrase ["best interests"] has been much criticized and attempts have been made to replace it with something less vague." HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 798 (1988).

36. "The vagueness of the ultimate standard and the number and variety of the individual factors which may be relevant to its application to the particular case have led appellate courts to follow the principle that awards of custody . . . are to be reversed only where an abuse of discretion appears." *Id.* See, e.g., *McAndrew v. McAndrew*, 382 A.2d 1081, 1086 (Md. Ct. Spec. App. 1978) (finding that no reversal is warranted unless there is a clear abuse of discretion); see also Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

37. *In re S.J.*, 849 S.W.2d. 608, 611 (Mo. Ct. App. 1993) (determining that hearsay from reports prepared by state division of family services workers was admissible; it did not amount to an abuse of discretion). Cf. *In re JRB & TWG*, 715 P.2d 1170, 1173 (Alaska 1986) (noting that under Indian Child Welfare Act, 25 U.S.C. §§ 1901-63

As a generalized standard, the best interests rule not only resists definition, but also defies it. Ever since patriarchy was the only rule for awarding custody,³⁸ the state has tried, and failed, to validate its best interests standard with various presumptions about which parent is "better." Thus, the tender years doctrine³⁹ gave way to the primary caretaker rule⁴⁰ and a joint custody rule⁴¹ that, in practice, consigns the child to one parent.⁴² Even if the state could identify the "better"

(1982), hearsay is allowed in the "best interests" dispositional phase of neglect proceedings).

38. The concept of *patria potestas* (absolute paternal power) held that the child was a chattel to which the father had all the rights. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 267 n.1 (1987).

39. This presumption, which held that young children were better off with their mothers, has, according to Clark, largely faded. CLARK, *supra* note 35, at 799-800.

40. The presumption is that children's best interests will be served by placing them with the parent who has fed and clothed them, taken them to school, and addressed other such physical needs. See, e.g., *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985), *superceded by statute*, 1990 Minn. Laws ch. 574, §§ 13-14 (amending the best interests analysis to provide that "[t]he primary caretaker factor may not be used as a presumption in determining the best interests of the child"). For a critique of the doctrine, see Crippen, *supra* note 36; John S. Murray, *Improving Parent-Child Relationships Within the Divorced Family: A Call for Legal Reform*, 19 U. MICH. J.L. REF. 563, 564 (1986).

41. See, e.g., MINN. STAT. ANN. § 518.17 (West Supp. 1997). This statute provides, in relevant part:

Custody and support of children on judgment. . . .

[W]here either joint legal or joint physical custody is contemplated or sought, the court shall consider the following relevant factors:

- (a) The ability of parents to cooperate in the rearing of their children;
- (b) Methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;
- (c) Whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and
- (d) Whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents.

If the court awards joint legal or physical custody over the objection of a party, the court shall make detailed findings on each of the factors in this subdivision and explain how the factors led to its determination that joint custody would be in the best interests of the child.

Id.

42. "Most 'joint custody' arrangements—and virtually all court-imposed joint custody decrees—fall into [that] latter category." Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502 (1988). "The studies . . . fail to support either court-imposed or presumptive joint custody." *Id.* at 506; see also Robert E. Emery et al., *Divorce, Children and Social Policy*, in 1 CHILD

parent, which it cannot,⁴³ the state still could not predict what the post-decree, custodial relationship would be like with that parent.⁴⁴ This uncertainty typically leads to a new round of best interests proceedings.

Today, a new presumption highlights the difficulties confronting the parent's advocate under the ill-defined best interests standard. A parent may now lose custody because of a conviction for domestic violence, committed not against the child, but against another household member.⁴⁵ One problem with this presumption is the questionable validity of judging an individual's parental competence by assessing the individual's treatment of another person, particularly if the conduct does not directly affect the child.⁴⁶ This problem, in turn, raises another problem. Like the best interests standard which these domestic violence statutes seek to clarify, some of these statutes tend to be so broad in their reach that they do not, themselves, give fair warning of what they prohibit.⁴⁷

DEVELOPMENT RESEARCH AND SOCIAL POLICY 189, 225-26 (stating that "joint custody does not appear to be the solution to the indeterminacy confronting judges who hear custody disputes").

43. See Elster, *supra* note 16, at 2 (indicating that "there usually is no rational basis for preferring one parent over another").

44. Also, many psychiatrists and psychoanalysts "have conceded that their theories provide no reliable guide for predictions about what is likely to happen to a particular child." Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 258 (1975).

45. See, e.g., IDAHO CODE § 32-717 (in determining the best interest of the child the court should consider several factors, one of which is the occurrence of domestic violence, "whether or not in the child's presence"); NEV. REV. STAT. ANN. § 125.480 (4)(c) (Michie 1996) (rebuttable presumption that sole or joint custody of the child by a perpetrator of domestic violence is not in the best interest of the child, upon finding parent guilty of domestic violence by clear and convincing evidence); N.D. CENT. CODE § 14.05-22 (3) (1995) (if court finds that "a parent has perpetrated domestic violence and that parent does not have custody, the court shall allow only supervised child visitation with that parent unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child's physical or emotional health"). See also *supra* note 27 and accompanying text noting that the State may intervene because of neglect only in cases where evidence of such is clear and convincing.

46. See, e.g., MINN. STAT. ANN. § 518.17(13)(b) (West 1997). The statute provides: "The court shall not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child." *Id.* Adultery, for example, has no bearing on custody unless it "adversely affects the child." *Dinkel v. Dinkel*, 322 So. 2d 22, 23-24 (Fla. 1975).

47. See, e.g., 750 ILL. COMP. STAT. 60/103 (West 1992) (amended 1996). This provision defines domestic violence as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis." *Id.* In Rhode Island, domestic violence includes "conduct which obstructs or interferes physically with a lawful meeting." R.I. GEN. LAWS § 12-29-2 (4) (1995) (making

Without a doubt, judges take their official child care responsibilities seriously, and they wield substantial authority. The discretion that judges have in choosing between fit parents under the best interests standard is about as broad as the discretion parents possess in raising their children. Yet, if neither parent is unfit, then an award of custody to either parent will be in the child's best interests in the normative sense of that phrase. In deciding between parents, however, judges will be inclined to choose the custodial prospect that comes closest to their ideal of parenting.⁴⁸ As a consequence of the extensive freedom that judges have to admit evidence and to take sides during custody hearings, their decisions generally are upheld.⁴⁹ The outcome is that one parent is awarded custody in the sense in which it is commonly understood, while the other is relegated to the status of a mere visitor.⁵⁰ In effect, the non-custodial parent's "rights" to the children—to assert control over their religion, whom they associate with, what they read and eat—have been terminated.⁵¹

The consensus seems to be that the best interests standard does not work.⁵² If that is true, absent a risk to the child from either parent, the

reference to § 11-45-1(a)(5)).

48. "[A]nything a judge finds important to the child's welfare may decide custody, from parental religious practices to lifestyle preferences." Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 616 (1992). A notorious example is *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), where the court compared the "stable, dependable, conventional, middle-class, midwestern" grandparents with the agnostic, politically liberal father who attended his wife's funeral in a sport shirt and sweater. See *id.* at 154-56. According to one *Painter* critic, "[j]udges seldom use 'best interests' analysis so blatantly as a vehicle for imposing their own values on their decisions." Judith Shandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 123 n.23 (1986).

49. Since 1969, when gender-neutral decision-making began in Minnesota, the state's appellate courts have never reversed or even remanded an original custody decision. Crippen, *supra* note 36, at 443-44.

50. "The typical sole custody arrangement under the best interests standard relegates fathers to the status of 'visitors,' sharply diminishing their parent-child contact and withdrawing their parental authority." Scott, *supra* note 48, at 624.

51. The effect on the non-custodial parent "whose parental rights have been curtailed by a sole custody decree" is like losing the child. Lois E. Hawkins, Comment, *Joint Custody in Louisiana*, 43 LA. L. REV. 85, 99 (1982); see also *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding non-custodial parent notification of abortion requirement invalid).

52. See generally Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991). Professor Schneider summarizes the views of the phalanx of family law's most distinguished scholars who have attacked the best interests standard and, while not offering an alternative of his own, concludes that a "weighty body of opinion . . . argues in various ways and for various reasons that the best interest standard confides too much to the discretion of judges and that rules of some description should supplement or supplant it." *Id.* at 2219-25. Among the authors and their works within this "phalanx" are Robert A. Burt,

state cannot determine who the better, post-decree parent will be in either a relative or absolute sense. Worse, not only is a custody decision one that virtually no one will applaud, but it is constantly subject to renegotiation.⁵³ In recognition of the indeterminacy of the best interests standard, some have wondered out loud whether a random process, like tossing a coin, might be a better way to choose between parents.⁵⁴ No one has seriously urged this solution, however, because it is frankly undignified to have a critical decision that affects parental rights depend on mere chance.⁵⁵ If it were not for the ability of the parents, through their efforts,⁵⁶ to affect the outcome of a custody dispute, a similar argument could be used against allowing sole custody to be awarded by a judge under the best interests standard.

III. INTO THE BREACH

For the moment, however, we must make do with judges⁵⁷ and a best interests standard that begs definition. There is no escaping the fact that contested custody is a terrible war that must be brought to an end. No matter what the outcome, one parent wins, the other loses, and the children become refugees.

Experts, Custody Disputes, & Legal Fantasies, 14 PSYCHIATRIC HOSP. 140 (1983); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984); Elster, *supra* note 16, at 1; Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986); and Mnookin, *supra* note 44, at 226.

53. Custody decrees are not "final decrees and can be freely modified by the issuing state" in the child's best interests. Barbara S. Silverman, Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1079 (1983). For that reason, they are not entitled to full faith and credit. *New York ex. rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

54. See Elster, *supra* note 16, at 40-43; Mnookin, *supra* note 44, at 289-91; see also JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 68 n.25 (1986) (suggesting that lots be drawn where both parents have psychological ties) (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 175-76 (1979)).

55. See Chambers, *supra* note 52, at 485 (explaining that "[m]ost people . . . would probably find such an approach callous, an evasion of responsibilities both to children and to 'justice'."). See also *Wright v. Estelle*, 572 F.2d 1071, 1078 (5th. Cir. 1978) (Godbold, J., dissenting) ("To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice.").

56. Coin-tossing would "deprive the parents of a process and a forum where their angers and aspirations might be expressed." Mnookin, *supra* note 44, at 290.

57. See Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733 (1984). Section 4607 was repealed, however, in 1994.

Parents will do anything to keep their children. They will lie, fritter away fortunes, kidnap their own children,⁵⁸ and even kill for them.⁵⁹ Remarkably, none of this conduct affects a parent's standing as the child's potential custodian.⁶⁰ Although regarded as immoral, possibly criminal, and simply unacceptable if engaged in by anyone else, such conduct is tolerated from parents.⁶¹

Such conduct, moreover, necessarily finds its way into the courtroom through the wide-open door of the best interests standard. Judges know, for example, that parents will perjure themselves to prevent their children from being taken from them; yet parents are neither deemed unfit because of their perjury nor are they disqualified from custody for it under the best interests standard.⁶² The reason that is customarily given to ignore perjury by parents—that it does not directly affect the child⁶³—emphasizes the capriciousness of a best interests rule that treats other-person, domestic violence in exactly the opposite way.⁶⁴ The real reason, I believe, is much less legalistic. If “good” parents will lay down their lives for their child, “good” parents

58. “[T]he law has actually encouraged [child abduction] because . . . state courts refuse to recognize the child custody decrees of sister states and often issue conflicting decrees favoring the abducting parent.” Marian C. Abram, Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RES. L. REV. 89, 89 (1982).

59. This sort of parental autonomy recently surfaced in popular fiction. In *A Time To Kill*, the John Grisham novel and movie of the same name, a father who avenged the rape of his child by slaying the assailants was acquitted of murder. JOHN GRISHAM, *A TIME TO KILL* (Island Books 1992) (1989); *A TIME TO KILL* (Warner Bros. 1996).

60. As the District of Columbia Court of Appeals has observed, “[o]ut of a maze of conflicting testimony, usually including . . . ‘a tolerable amount of perjury,’ the judge must make a decision which will inevitably affect materially the future life of an innocent child.” *Coles v. Coles*, 204 A.2d 330, 331-32 (D.C. 1964), *overruled in part by* *Bazemore v. Davis*, 394 A.2d 1377 (D.C. 1978). See also *Schmidt v. Schmidt*, 283 So. 2d 601, 603 (Ala. 1973) (noting that it is “well settled” that perjury at trial is not *per se* a ground of equitable interference in a decree).

61. See *In re Agosto*, 553 F. Supp. 1298, 1326 (D. Nev. 1983) (noting that involuntary testimony regarding family matters “would not merely be inviting perjury but perhaps even forcing it”).

62. In one custody case I tried, the mother was caught in a lie, held in contempt, and fined. The father, on the record, was called by the judge the “greatest prevaricator this Court has ever encountered.” The court awarded custody to the mother. An American Bar Association study found that parents routinely lie in family law proceedings. Mark Curriden, *Nothing But the Truth? Not Anymore*, CHATTANOOGA TIMES, July 18, 1995, at A1, A3.

63. See *supra* note 46 and accompanying text. Section 402 of the Uniform Marriage and Divorce Act, which is replicated in the custody laws of several states, indicates that “[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.” UNIF. MARRIAGE AND DIVORCE ACT § 402 (1982).

64. See *supra* note 45 and accompanying text.

will also lie for their child. As such, everyone knows, and expects, that parents will do whatever it takes to preserve their bond with the child. Because perjury is not only tolerated, but even acceptable from parents, perjury is therefore encouraged.

Enter the lawyers. In defending the parental rights of their clients, advocates are not only up against an indeterminate, standardless process, but they must contend with opposing parties who, like their own clients, may be inclined to resort to any means necessary to keep the child. The lawyer must, therefore, confront the full force of a state that may favor parents who willingly commit perjury to win.⁶⁵ As a result, if opposing parents can—either truthfully or with complete fabrication—successfully tailor their case to the judge hearing it, then the state will favor them.

IV. BAD LAWYER, GOOD LAWYER

Because the state, in effect, terminates the disfavored parent's rights to the child, I submit that parents should be entitled to the kind of representation that will allow them to exercise in the courtroom the same autonomy that the state accords to them outside of the courtroom. If fit parents do know best, then the goal of parental advocacy should be to allow them to choose whatever measures they deem necessary to protect their bond with their child, even if it means perjuring themselves. Under current ethical constraints, however, lawyers are limited with what they may do with false statements.⁶⁶ If their clients confide to them that they intend to commit perjury, lawyers cannot knowingly offer the testimony.⁶⁷ Conversely, if the clients do not so inform them, the lawyers *can* offer the testimony.⁶⁸ Since lawyers cannot be disciplined for acting without knowledge, in dealing with

65. "The classic example is what [David Luban] calls the 'criminal defense paradigm,' in which the hapless defendant is assailed by the full might of the state." Ellman, *supra* note 7, at 120.

66. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1996) (preventing the use of perjury by an attorney).

67. DR 7-102(A)(7) bars lawyers from promoting conduct in a client "that the lawyer knows to be illegal or fraudulent". MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (ABA 1986). EC 7-26 (1983) extends a lawyer's obligation to refrain from using perjured testimony or false evidence to include those circumstances where the attorney "knows, or from facts within his knowledge, should know, that such testimony or evidence is false, fraudulent or perjured." *Id.* at EC 7-26. The apparent conflict between this rule and DR 4-101, which prohibits a lawyer from revealing client confidences, has generated considerable debate. See generally Silver, *supra* note 4.

68. Before they are required to act, lawyers must have a "firm factual basis" for the belief that the client intended to perjure himself. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

clients under the proposal I am making, the lawyer might therefore wisely pursue a "don't ask, don't tell" policy.⁶⁹ By this I mean that lawyers should see to it that they remain purposely ignorant of their clients' intentions. I submit that, because of the autonomy that the Constitution accords to fit parents over their children,⁷⁰ it is none of the lawyer's business what strategy parents will engage in to prove that their children's welfare will be served by preserving their custody.⁷¹ The lawyer's duty is to protect, and enforce, the client's parental rights to the best of her or his ability.

Child custody adjudication purports to look beyond the parents as they are now functioning and into the future.⁷² Like the threat of King Solomon's sword, the state also uses an artifice, the so-called best interests standard, in an attempt to determine what is inherently unknowable. Consequently, parents' lawyers can be most effective in contested custody cases if they instruct their clients about how to win the favor of judges.⁷³ Under the kind of representation I am suggesting, the lawyer should lay out to the client all possible strategies in order to permit the client to select the strategy of her or his choice.⁷⁴

69. See Lincoln Caplan, *Don't Ask, Don't Tell*, NEWSWEEK, Aug. 1, 1994, at 22 (lawyers don't want to know the truth from clients because it might limit strategic choices).

70. See *supra* notes 18-24 and accompanying text (detailing the cases interpreting this right).

71. In support of a corollary to my argument, that it is not morally wrong to deceive someone to whom you do not have the duty to tell the truth, one writer refers to family privacy. DIETRICH BONHOEFFER, *ETHICS* 330 (1955). The example that Bonhoeffer gives is of a school child forced to disclose in front of his classmates the intimate details of his home. "According to Bonhoeffer, what happens in the privacy of the home is not for the school or the teacher to hear." Shine, *supra* note 7, at 743 (citing DIETRICH BONHOEFFER, *ETHICS*).

72. "Custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past." Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985). "The future lives of children are at stake, imposing heavy responsibilities on all concerned." CLARK, *supra* note 35, at 787.

73. The "standard conception" of American legal ethics, says David Luban, consists of partisanship and nonaccountability. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 7 (1988). "A lawyer must, within the established constraints of professional behavior, maximize the likelihood that the client's objectives will be attained." *Id.* at 12. When acting as an advocate for a client a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved. *Id.* Counsel must remember that they are not triers of fact, but advocates. See *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) (stating that "[i]t is the role of the judge or jury to determine the facts, not that of the attorney").

74. The ethical transgression that is to be avoided is what Richard C. Wydick calls "Grade Two" witness coaching: "[T]he lawyer knowingly, but covertly induces a witness

Lawyers typically begin representing their clients long before the final hearing in the case. Parents who are willing to do or say anything to win the custody of their child present a golden opportunity to the lawyer who is willing to teach.⁷⁵ Just as lawyers may instruct their disheveled client to shower and suit up for court, it seems to me that lawyers may properly "suit up" their client's case for trial.

A skill that the lawyer has to offer is the ability to predict how a judge will rule. I do not mean to suggest that lawyers should instruct their clients to fabricate past events, for that would both disrespect and undermine their parental autonomy. Rather, lawyers can lecture clients about the predilections of judges in terms of what kind of parenting might appeal to them.⁷⁶ In the biblical story, I therefore submit, it would have been completely within ethical bounds for the lawyers to have advised their clients about the respective selfish and selfless sacrificial positions they put forward, even if the clients had never thought of them on their own accord.

Just as there are "good" and "bad" parents, there are also both "good" and "bad" kinds of custody strategies, even under the liberal ethical standard that I am proposing. The moral worth of these strategies is measured by whether they tend to uphold or destroy the tribunal that must, for lack of an alternative, resolve the dispute. Encouraged by the wide-open nature of the best interests standard, these "good" and "bad" strategies mimic the polar positions in the biblical fable. To be thorough, lawyers must lecture their clients about both strategies. In advising a client about what story might appeal to the judge, lawyers should therefore teach them about evil, such as cutting the child in half, and about good, such as *waiving* one's rights to the child, so that the child may thrive.⁷⁷

to testify to something that the lawyer knows is false." Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 25 (1995). Still, according to Wydick, "the lawyer must have actual knowledge, which can be inferred from the circumstances, that the witness is making a false statement about [either] the events in question or . . . what the witness believes about the events in question." *Id.*

75. "[I]t is important to note the critical role of the lawyer acting as counselor. . . . Parents confronting the child welfare system for the first time often have little idea what is expected of them in order to secure return of their children." Boyer, *supra* note 3, at 1650.

76. Two researchers found, through their monitoring of lawyer-client discussions in divorce cases, that "law talk acquaints clients with a process in which judges exercise immense discretionary power. The message to the client is that it is the judge, not the rules, that really counts." Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1674 (1989).

77. David Luban probably would regard this as "connivance" by the lawyer in immoral conduct. See David Luban, *The Social Responsibilities of Lawyers: A Green*

Because one parent must be found to be “better,” so much of contested custody advocacy under the best interests standard revolves around destroying the opponent.⁷⁸ Thus, in lecturing about the “bad” kind of strategy, lawyers should instruct their clients about how to denigrate their foes. Such advice might include, for example, a lecture about the law of domestic violence and protection orders that provide for evicting abusive parents from the household.⁷⁹ Indeed, out on the street, “good” parents will engage in precisely that kind of activity to protect their children from harm. Given the broad, uncertain scope of these statutes,⁸⁰ clients may have no idea that they might be subjected to the kind of conduct that can give them an edge in the custody contest. The objective, of course, is not only to show what an evil person the opposing parent is, but to disqualify the parent as a proper, future custodian when the parent is just as fit as the client. For that reason, the strategy can be “bad” even if it is waged by a “good” parent.

“Good”-teaching lawyers will help construct a much different scenario for their clients. Along with traditional parenting skills, which they will finely tune by any variations that might appeal to the particular judge in the case, these lawyers will lecture about the value

Perspective, 63 GEO. WASH. L. REV. 955, 981 (1995). Luban’s position, as I understand it, is that a lawyer connives if he ought to know of client misconduct and promotes it anyway, even though that is not the ethical rule. He cites *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), where the defendant closed his eyes to suspicious circumstances yet was held to have punishable “knowledge.” Luban, *supra*, at 981 n.76. My position is, I think, closer to Allan Goldman’s. Goldman believes that lawyers are justified in helping their clients to fabricate evidence when this conduct is necessary to secure their clients’ moral rights. ALLAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 139-40 (1980). This, of course, sounds a lot like the doctrine of justification found in the criminal law, which is based on the notion that “members of society expect, indeed hope, that other persons placed in the same position will act similarly.” Shine, *supra* note 7, at 736 n.68. See MODEL PENAL CODE § 3.02 (1960) (harm sought to be avoided by such conduct is greater than that sought to be prevented by the law). When would “connivance” begin? “Because of the subjectiveness and vagaries of the . . . best interests [standard] . . . only in extreme circumstances will a client’s objective be unsupportable by any good faith argument.” Boyer, *supra* note 3, at 1640.

78. “The wide-open inquiry that the [best interests] standard invites often devolves into a destructive contest in which each parent competes to expose the flaws of the other.” Scott, *supra* note 48, at 622. “This is another case where the parties put more effort into denigrating one another than into determining what was in the best interests of their children. This put the trial court in the position of determining which parent was ‘the least worst.’” Voelker v. Voelker, 520 N.W.2d 903, 906 (S.D. 1994).

79. See, e.g., OHIO REV. CODE ANN. § 3113.31(E)(1) (Anderson 1996).

80. See *supra* notes 35-36 and accompanying text.

of selfless behavior toward children. For example, they will counsel their clients to promptly establish themselves as primary caretakers since even brief periods of such child-oriented behavior seem to carry great weight with judges.⁸¹

"Good" teaching lawyers may even borrow a leaf from the biblical fable by explaining to their clients the concept of a "partial waiver" of their claim to the child and the many benefits that might flow from it. To take one proven example, a sworn commitment to allow the other parent extensive, post-decree visitation will curry favor with the judge.⁸² This particular lecture in selfless behavior is clearly a "good" strategy to teach. If sworn to, and then honored by victorious parents, the commitment to give parents generous access to their children would encourage the non-custodial parents to preserve whatever may be left of their parental rights. Modification proceedings would occur with less frequency and child support payments more likely would arrive. Finally, the cost to the state of dividing custody between fit parents would be reduced. This kind of triumph, I submit, is about as close as a judge's custody award can come to her or his biblical counterpart's.

IV. CONCLUSION

To effectively protect parental rights, the lawyer need not choose between "good" and "evil." When a fit parent is fighting for her or his child, the choice will be among strategies and the choice is for the parent to make. To be ethical under the rule that I suggest, the lawyer should simply lay out the strategies along with a warning about the risks of fabricating the events instead of relaying what actually occurred. It is no secret that lawyers have always behaved in this way; they have just tended to keep quiet about it.

Lawyers, I submit, will still be able to claim the high moral ground even if the best interests standard that governs contested custody cases compels them to preach what usually passes for evil along with the

81. In *Marlatt v. Marlatt*, 427 So. 2d 1285 (La. Ct. App. 1983), the father became the "primary nurturing" parent three to five months before separation, and over the six months that the suit was filed. *Id.* at 1289. The court awarded custody to him even though it found that the mother was the "primary nurturing parent for most of the child's life." *Id.* at 1290.

82. In reversing an initial award of custody to the father, a Pennsylvania court said, "[b]ut most of all, she has a deep love for her children, and is willing to give liberal visitation rights to the father (more than, apparently, the father would be willing to do in return)." *Commonwealth ex rel. Steuer v. Steuer*, 368 A.2d 732, 735 (Pa. Super. Ct. 1976).

good. The autonomy that the Constitution accords parents will serve as much more than the shield that protects them from arbitrary state intervention in their families. If this autonomy is used as a sword, this precious freedom to act on behalf of their children will be the best weapon they have in custody proceedings.

