

AMBIVALENCE ABOUT PARENTING: AN OVERVIEW FOR LAWYERS REPRESENTING PARENTS IN CHILD WELFARE PROCEEDINGS

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INTRODUCTION	152
I. PARENTAL AMBIVALENCE: THEORETICAL UNDERPINNING AND INTERPRETATION	154
II. PARENTAL AMBIVALENCE IN A FLAWED SYSTEM	156
A. <i>The Problem of Confiding in Child Protective Workers</i> .	156
B. <i>Explaining Child Protective Workers’ Negative Response to Ambivalence</i>	157
III. PARENTAL AMBIVALENCE IN A THERAPEUTIC SETTING ...	158
A. <i>How Parental Ambivalence is Expressed</i>	158
B. <i>Addressing Ambivalence Therapeutically</i>	159
IV. PRACTICE GUIDE FOR PARENTS’ ATTORNEYS	160
A. <i>Addressing Ambivalence in the Courtroom</i>	160
B. <i>Refocusing on the Law</i>	161
C. <i>Changing the Ambivalence Narrative Through Cross Examination</i>	162
D. <i>Addressing Ambivalence Through the Attorney-Client Relationship</i>	164
1. <i>Joining Theory and Practice</i>	164
2. <i>Use Counsel’s Unique Role to Affirm and Normalize Ambivalence</i>	165
3. <i>When a Parent Is Not Seeking Reunification as a Goal</i>	166
4. <i>Advise Clients on Self-Protective Behavior</i> ...	167
5. <i>Address Inconsistent Planning with the Client</i>	168
CONCLUSION	169

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INTRODUCTION

“I like my daughter, but I am not sure I love her.”

“It took me a long time to have him [the baby] and it never occurred to me that I might not like him.”

“I miss my kids when I am gone, but after being home for about 30 minutes, I want to turn around and leave again.”

“My daughter needs to spend some time with her father right now. I need a break.”

Each of these quotes is an expression of ambivalence—the co-existence of positive and negative feelings toward the same thing—expressed by actual parents. Most of these statements passed without notice, said for example while venting to friends over a meal. However, one of these statements landed the parent in New York Family Court, where she was accused of neglect and faced with the removal of her children from her care. Which statements belong to which parents? How do we feel reading them without knowing the context of each conversation or each family? Probing these questions and the consequences of such statements is vitally important to the work of family defense, especially since every parent has had feelings of frustration, fatigue, and even hostility when it comes to their children.¹ Parents who express these feelings publically risk facing cultural, social and moral contempt.² Some even risk losing their children.³

Often the child welfare courtroom can feel like a lawless place—a place where the focus is on “concerns” about a parent rather than the legal standards and protections at play, and where judges and practitioners are accustomed to a cooperative approach of everyone working together for the same goal rather than an adversarial legal contest.⁴ There are few bright-line rules to guide decisions and often the judge’s subjective opinion about what is safe, reasonable and acceptable prevails.⁵ The subjective nature of fam-

¹ Linda Davies, *Omnipotency in Child Protection: Making Room for Ambivalence*, 22 J. SOC. WORK PRAC. 141, 147 (2008).

² *Id.* at 148.

³ *Id.*

⁴ See Darice Good-Dworak & Diana Rugh Johnson, *The Adjudicatory Hearing*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 153, 153-54 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

⁵ David J. Lansner, Reply, *Abolish the Family Court*, 40 COLUM. J.L. & SOC. PROBS. 637, 642 (2007), <http://www.lanskub.com/docs/fc.pdf> [<https://perma.cc/PV8V-N8BG>].

ily court is particularly troubling when considering how child welfare involvement impacts poor families and families of color at a disproportionate rate.⁶ Children of color are disproportionately represented in child protective services and the foster care system.⁷ Founded incidences of maltreatment vary by income level, but not by race.⁸ Research has shown that not all families are subject to the same level of scrutiny and/or intervention.⁹

Parent defense attorneys serve an essential function in leveling the playing field in court and ensuring that our clients are not unfairly held to different standards than the rest of society. We argue the legal standards when the child welfare agency is trying to improperly separate children from their parents. We investigate and share vital information with the court when the child welfare agency has left it out of their paperwork. Yet for a client whose case involves expressions of parental ambivalence, it can feel like we are tasked with arguing common sense.

This article intends to lend scholarly support to such arguments; there is an entire field of scholarship supporting the argu-

⁶ CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 2 (2011), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/T2PH-YSP9>] (“While the extent of this overrepresentation varies significantly across different regions of the country, it exists at some level in virtually every locality.”); Frank Farrow et al., *Racial Equity in Child Welfare: Key Themes, Findings and Perspectives*, in CTR. FOR THE STUDY OF SOC. POLICY & THE ANNIE E. CASEY FOUND., DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 127, 129 (2011), http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf [<https://perma.cc/G7PC-MN4U>] (“African American children are in foster care at approximately twice the rate of their presence in the general population.”); SUSAN CHIBNALL ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 4-5 (2003), <https://www.childwelfare.gov/pubPDFs/children.pdf> [<https://perma.cc/V9YG-ZCCS>].

⁷ JOSHUA PADILLA & ALICIA SUMMERS, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 1 (2011), http://www.ncjfcj.org/sites/default/files/Disproportionality%20TAB1_0.pdf [<https://perma.cc/ZU89-ZGGW>]. The rates for children by race in the population in general are as follows: African American/Black 14.5%, Caucasian/White 55.6%, Hispanic/Latino 20.1%, Asian 4.6%, American Indian/Alaskan Native .9%, and Multiracial 3.9%. *Id.* at 6. Rates for entry into foster care: African American/Black 25.1%, Caucasian/White 43.6%, Hispanic/Latino 18.3%, Asian 1.1%, American Indian/Alaskan Native 2.1%, and Multiracial 6.9%. Rates for in foster care: African American/Black 30.1%, Caucasian/White 39.5%, Hispanic/Latino 18.1%, Asian .8%, American Indian/Alaskan Native 2%, and Multiracial 2%. *Id.*

⁸ CHIBNALL ET AL., *supra* note 6, at 4.

⁹ *Id.* at 5 (“These findings suggest that the overrepresentation of African-American children in the child welfare system is not attributable to higher rates of maltreatment in this population, but to factors related to the child welfare system itself.”).

ment that parental ambivalence is not by definition pathological, but rather a normal and widely experienced response to the stresses and challenges of parenting. Below is a brief introduction to understanding parental ambivalence and some of the scholarship on it. We introduce theoretical underpinnings of parental ambivalence, discuss how parental ambivalence can be expressed, and explain how it can be addressed therapeutically. Finally, we outline ways attorneys can challenge assumptions about ambivalence in the courtroom and talk about it with their clients.

I. PARENTAL AMBIVALENCE: THEORETICAL UNDERPINNING AND INTERPRETATION

For the purposes of this article, we define parental ambivalence as the simultaneous presence of the intense, conflicting feelings of affection and love of a child and feelings of rejection, dislike or hatred of a child. In addition, this article and much of the research addressed below focus on *maternal* ambivalence rather than *parental* ambivalence because female caregivers are more likely to be the respondents in child welfare proceedings, and are much more likely to be the subject of academic study and writing on the topic.¹⁰

Maternal ambivalence is considered an expected feeling for mothers.¹¹ In early psychoanalytic¹² and attachment writing, there is ample research, consideration, and discussion of maternal ambivalence.¹³ Pediatrician and psychoanalyst D.W. Winnicott's essay, "Hate in the Counter-Transference," lists reasons why a mother may feel distress about parenting, and indeed, even hate her

¹⁰ Christina Risley-Curtiss & Kristin Heffernan, *Gender Biases in Child Welfare*, 18 *AFFILIA* 395, 401-02 (2003).

¹¹ See generally D.W. Winnicott, *Hate in the Counter-Transference*, 30 *INT'L J. PSYCHOANALYSIS* 69 (1949), reprinted in 3 *J. PSYCHOTHERAPY PRAC. & RES.* 348 (1994).

¹² "Psychoanalysis" refers to a psychiatric treatment pioneered by Sigmund Freud, which explores conscious and unconscious psychological processes. See *Psychoanalysis*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/psychoanalysis> [<https://perma.cc/24NU-QB26>] (last visited Nov. 20, 2016). Melanie Klein and D.W. Winnicott are two psychoanalysts whose work is particularly relevant to treatment of children and/or parents. See, e.g., Joseph Aguayo, *Reassessing the Clinical Affinity Between Melanie Klein and D. W. Winnicott (1935-51): Klein's Unpublished 'Notes on Baby' in Historical Context*, 83 *INT'L J. PSYCHOANALYSIS* 1133 (2002); see also Rozsika Parker, *The Production and Purposes of Maternal Ambivalence*, in *MOTHERING AND AMBIVALENCE* 17, 19 (Wendy Hollway & Brid Featherstone eds., 1997).

¹³ "Attachment" refers to attachment theory, a psychological model of the parent-child bond and how that bond can be created, damaged and repaired. John Bowlby and Mary Ainsworth have written extensively on attachment. See generally Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 *DEV. PSYCHOL.* 759 (1992).

child.¹⁴ In the 1950s and 1960s, Grete Bibring looked at the psychological processes in pregnancy and early motherhood.¹⁵ In addition to building on Winnicott's conception of maternal ambivalence, Bibring suggested that pregnancy and the path to becoming a mother was a form of crisis that women need to resolve.¹⁶ She saw the crisis as a fundamental shift in self-identity and a shift in how new mothers are perceived as individuals.¹⁷ In addition, there was a change in the expectant or new mothers' reactions to and attitudes toward their own mothers.¹⁸

Building on the idea of the psychic crisis brought on by motherhood, Daniel Stern introduced the concept of a "motherhood constellation."¹⁹ Stern proposed that upon having a baby, especially one's first child, a mother "passes into a new and unique psychic organization[.]"²⁰ This new organization is composed of four central themes: (1) Life-growth: Can I keep my child alive and growing? Will I be replaced by a "better" mother?; (2) Primary relatedness: Can I engage my baby in an emotionally authentic manner, and will this create the baby I want? Am I a "natural" at mothering?; (3) Supporting matrix: Can I "create" and "permit" the support systems necessary to accomplish all of these things?; and (4) Identity reorganization: Can I modify my "self-identity" to permit and create these functions?²¹ This psychic reorganization may take months for some women to complete and years for others.²²

Cultural factors also play a role in creating the motherhood constellation.²³ These factors include the high value society places on babies and their development; the commonly held notion that babies are supposed to be desired; the high value placed on the maternal role and the social judgment or measuring of a woman

¹⁴ See Winnicott, *supra* note 11, at 355 (including, among others "the baby is a danger to [the mother's] body in pregnancy and at birth," "[t]he baby is an interference with her private life, a challenge to preoccupation[.]" and "[the baby] is ruthless, treats her as scum, an unpaid servant, a slave").

¹⁵ Grete L. Bibring et al., *A Study of the Psychological Processes in Pregnancy and of the Earliest Mother-Child Relationship*, 16 *PSYCHOANALYTIC STUDY CHILD* 9 (1961).

¹⁶ *Id.* at 12, 14.

¹⁷ *Id.* at 15-18.

¹⁸ *Id.* at 18.

¹⁹ DANIEL N. STERN, *THE MOTHERHOOD CONSTELLATION: A UNIFIED VIEW OF PARENT-INFANT PSYCHOTHERAPY* 171-90 (1998).

²⁰ *Id.* at 171.

²¹ *Id.* at 173-80 (detailing the four themes of life growth, primary relatedness, supporting matrix, and identity reorganization).

²² *Id.* at 171.

²³ See *id.* at 174.

based on her participation in and success in the maternal role; the ultimate responsibility a mother has for the baby, even if she elicits the assistance of others; the expectation that a mother will love the baby; and the assumption a mother will receive family support.²⁴ All of these cultural factors combine with the last, contradictory reality: family, society, and culture do not adequately equip the mother with experience, training, or support to fulfill her role “easily or well.”²⁵

In today’s society, there is a romanticized notion that “good parenting” means no conflict; parents should not have (or should immediately squash) any aggressive, hostile, or ambivalent feelings toward and from their child.²⁶ In 2003, Leon Hoffman suggested that intolerance toward such feelings results in maternal guilt and anxiety that frequently leads to dysfunctional parenting behavior.²⁷ Similarly, Rozsika Parker found that the guilt and anxiety provoked by parental ambivalence, rather than the ambivalence itself, are problematic.²⁸ As such, Parker suggested that clinicians support the management of ambivalence rather than try to eliminate it entirely.²⁹ Mothering comes with a psychological reorganization that is complex and filled with memories of one’s own experience being parented and questions and fears about one’s ability to care for this new life. Ambivalence is born out of the tremendous meaning a child holds for a mother and from the physical, psychological and social demands that come with parenting.

II. PARENTAL AMBIVALENCE IN A FLAWED SYSTEM

A. *The Problem of Confiding in Child Protective Workers*

When parents communicate feelings of ambivalence toward their children to child protective workers, they risk child welfare or court involvement. The chief responsibility of child protective workers is to investigate.³⁰ As such, interactions with these workers

²⁴ *Id.*

²⁵ STERN, *supra* note 19, at 174.

²⁶ Leon Hoffman, *Mothers’ Ambivalence with their Babies and Toddlers: Manifestations of Conflicts with Aggression*, 51 J. AM. PSYCHOANALYTIC ASS’N 1219, 1220 (2003).

²⁷ *Id.* at 1232.

²⁸ Parker, *supra* note 12, at 35.

²⁹ *Id.* at 24-31; *see generally* Hoffman, *supra* note 26.

³⁰ Richard Cozzola & Lee Shevell, *Representing Parents at Disposition and Permanency Hearings*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 4, at 209, 219 (“The caseworker and the caseworker’s supervisor are usually responsible for arranging services for the parent and the parent’s children, supervising visits, evaluating the parent’s overall progress, informing the court and the attorneys about the parent’s progress, and making rec-

differ significantly from interactions with a therapist. Ideally, in the context of therapy, a clinician initiates discussion in which a parent can unburden herself and freely process such feelings.³¹ However, in the context of child welfare and child protective workers, the roles are much less clearly defined, potentially resulting in confusion for both caseworkers and parents. While it is comforting to think that child protective workers can fill both the role of clinician and the role of investigator, they are not treatment providers. They are there to investigate and report.³²

An investigation typically includes a home visit and interview, where the child protective worker asks the parent a structured set of questions including inquiries about how the parent is doing emotionally and if there is anything they need help with. Unfortunately, parents who share feelings like the examples above can find themselves standing in court, listening as things they said in their home among family are humiliatingly transplanted, read aloud in an antiseptic courtroom by government attorneys or a judge. For example, “Your Honor, *even the Respondent herself* says that she struggles to care for her children!” For lawyers representing parents in child welfare proceedings, expressions of ambivalence are sometimes presented as ‘smoking guns’ or ‘confessions’ made to child protective staff, which can severely undermine parents’ ability to retain or regain custody of their children.

B. *Explaining Child Protective Workers’ Negative Response to Ambivalence*

Child protective agencies and front line workers face a torrent of blame whenever a child is injured or dies.³³ In exploring child protection practices, Linda Davies discusses the unrealistic pressure on child welfare workers to guarantee the ultimate safety of children and explores how that expectation ignores the limitations of social work practice.³⁴ When a tragedy occurs, the public turns on caseworkers for failing at their (impossible) mandate. Fear of public backlash creates a sense of panic about “the potential disasters that lie within their caseloads.” Inevitably, this dynamic seeps

ommendations to the court concerning all of the above. Judges often call them the eyes and ears of the court.”).

³¹ See Parker, *supra* note 12, at 17-36; see also Joan Musitano & Alice Rosenman, *Separate and Connected: A Side-by-Side Model for Intervening with Mother-Child Dyads in Small Groups*, 11 J. INFANT CHILD & ADOLESCENT PSYCHOTHERAPY 96, 99 (2012).

³² See Davies, *supra* note 1, at 144-45.

³³ See *id.* at 143-44.

³⁴ See *id.* at 141-45.

into the relationship between the worker and the parents they investigate.³⁵

Ultimately workers can only monitor risk, as they are not omnipresent. They must rely on parents to protect their children. To avoid tragedy and backlash, workers are constantly trying to ferret out which parents are not capable of providing such protection and in this process may “split mothers into binary classifications of ‘good’ and ‘bad.’”³⁶ In a climate of panic around child abuse, there is little tolerance for workers to take any risk to explore the normal feeling of ambivalence that all mothers experience.³⁷ When caseworkers are facing high-pressure decisions with little background information, expressions of parental ambivalence unfortunately become the litmus test for whether a parent is “good” or “bad.”³⁸

III. PARENTAL AMBIVALENCE IN A THERAPEUTIC SETTING

A. *How Parental Ambivalence is Expressed*

What does parental ambivalence look like? It can be expressed both in words and in actions. Parents can make direct statements about disliking the child or complain about the child (e.g., he is so bad, he won’t sleep).³⁹ Parents can also say things directly to the child (e.g., you are a bad boy), or passively avoid the child through physical or emotional distancing (e.g., when child makes a bid for attention a parent is always busy or possibly leaves to go someplace else). A parent might reject a child (e.g., constant criticism, sending the child away to live with others), or engage in intrusive distancing interactions (e.g., teasing a child during play, constant bossiness with the child, eye rolling/tooth sucking at child’s attempts for interactions).⁴⁰

Whether such expressions of ambivalence are normative (natural and within social expectations) or pathological (unhealthy and signaling a deeper problem) depends on the frequency, duration, intensity, context, and impact on social and emotional functioning of parent and child.⁴¹ Distinguishing between normal and pathological ambivalence necessitates a thoughtful consideration

³⁵ See *id.* at 143.

³⁶ *Id.* at 145-48.

³⁷ See *id.* at 148-49.

³⁸ See Davies, *supra* note 1, at 148.

³⁹ The examples listed are based on clinical experience of the author.

⁴⁰ The examples listed are based on clinical experience of the author.

⁴¹ The examples listed are based on clinical experience of the author.

of the complete picture and the complete circumstances.⁴² It is a task best undertaken by an experienced clinician, armed with ample information about *and* involvement with the family. It is from this vantage point that a clinician can best assess whether or not ambivalence crosses the line from normative to pathological and, if so, how to best address the issue.

B. *Addressing Ambivalence Therapeutically*

It is the *denial* of the feelings of fury, boredom or even dislike towards children, all of which are part of motherhood, that makes the burden harder for women to bear, and can so often result in these feelings being expressed in secret and perverse ways.⁴³

For most parents it is the intolerable guilt and anxiety over feeling ambivalent and the cultural taboo of expressing such feelings that renders parental ambivalence unmanageable.⁴⁴ The ability to acknowledge and express those feelings and have them received in a supportive and affirming manner often lessens, and can even alleviate, what may be toxic about the ambivalence.⁴⁵ For those looking for additional support, potential resources include therapy for the parent or therapy that includes the parent-child dyad⁴⁶ or the greater family unit.

Individual therapy with a parent could focus on helping the parent articulate conflicting feelings, explore those feelings, and normalize them.⁴⁷ For parents with young children (typically birth to age five), there are a variety of programs that offer treatment for parent and child together.⁴⁸ These interventions can be structured

⁴² In the clinical experience of the author, whether any feeling, thought, or behavior is normative or pathological depends on the factors listed.

⁴³ Paddy Maynes & Joanna Best, *In the Company of Women: Experiences of Working with the Lost Mother*, in *MOTHERING AND AMBIVALENCE*, *supra* note 12, at 119, 126.

⁴⁴ See Parker, *supra* note 12, at 21.

⁴⁵ See Musitano & Rosenman, *supra* note 31, at 99.

⁴⁶ “Parent-child dyad” is a term used to describe the parent and child together. The term connotes the clinical understanding that the parent-child together are an entity unto itself. See, e.g., Robin C. Silverman & Alicia F. Lieberman, *Negative Maternal Attributions, Projective Identification, and the Intergenerational Transmission of Violent Relational Patterns*, 9 *PSYCHOANALYTIC DIALOGUES* 161, 178 (1999).

⁴⁷ See BARBARA ALMOND, *THE MONSTER WITHIN: THE HIDDEN SIDE OF MOTHERHOOD* 50 (2011) (“What sets *this* kind of ambivalence apart is the mother’s denial of the possibility that she is struggling with mixed feelings. The first task of a therapist is to bring these feelings into the open. This may be a major undertaking, but the relief that may ensue can have a very positive effect on a mother and her whole family.”).

⁴⁸ See, e.g., CHANCES FOR CHILDREN-NY, <http://www.chancesforchildren-ny.org> [<https://perma.cc/E8ZY-6RM7>] (last visited Nov. 25, 2016); see also *Child Trauma Research Program*, U. CAL., S.F., <http://childtrauma.ucsf.edu/> [<https://perma.cc/LP6E->

with a single dyad or in a group setting.⁴⁹ There are a variety of models and modalities.⁵⁰ One parent-child treatment option is Child-Parent Psychotherapy, pioneered by Alicia Lieberman.⁵¹ Lieberman describes the utility in working with the dyad in that it “offer[s] a window onto the mother’s internal world—a window that could remain inaccessible in individual treatment.”⁵² Furthermore, she believes “[i]n using this joint psychotherapy with high-risk mothers and young children, the therapist gains the opportunity to attend with immediacy and specificity to the ways in which the child is at risk and simultaneously to address the mother’s history and psychological experience.”⁵³

IV. PRACTICE GUIDE FOR PARENTS’ ATTORNEYS

A. *Addressing Ambivalence in the Courtroom*

As the petitioner initiating the proceeding, the child protective agency attorney has the first opportunity to frame the issue before the court, either through filing the petition with the allegations or through presenting its case first in a hearing or trial. The agency lawyer may use condemnatory language and a disapproving tone in discussing the parent’s statement of ambivalence. Such tone implies risk to the child, and taps into the judge’s predisposition to consider statements of ambivalence to be morally repugnant, as discussed above.

It is important not to adopt the language of the child protective agency attorney, or let a tone of negative judgment go unchallenged. The courtroom has long been compared to the stage: tone, body language, facial expression, and crafted word choice are essential tools.⁵⁴ Defense attorneys can use these tools to normalize parental ambivalence and promote the narrative that expression of

U8CE] (last visited Nov. 25, 2016); *Minding the Baby*, YALE SCH. MED., <http://medicine.yale.edu/childstudy/mtb/> [<https://perma.cc/Y79N-ABTB>] (last visited Nov. 25, 2016).

⁴⁹ See, e.g., *Child Trauma Research Program: Services*, U. CAL., S.F., <http://child-trauma.ucsf.edu/services-0> [<https://perma.cc/Y36R-RQU9>] (last visited Nov. 25, 2016).

⁵⁰ See, e.g., *Programs and Services*, CHANCES FOR CHILDREN-NY, <http://www.chancesforchildren-ny.org/services/> [<https://perma.cc/KQV5-9TTW>] (last visited Nov. 25, 2016).

⁵¹ See generally Silverman & Lieberman, *supra* note 46.

⁵² *Id.* at 164.

⁵³ *Id.*

⁵⁴ See generally LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 521-33 (1993); see also Peter W. Murphy, “*There’s No Business Like . . . ?*” *Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. TEX. L. REV. 111 (2002).

such ambivalence is not inherently neglectful. The overarching goal is to convey that ambivalence is normal and statements of ambivalence should not be a litmus test as to whether or not someone can or should parent. Attorneys should also reiterate for the judge that the mother is there in court today because she wants to parent her children and she wants them in her custody.

B. *Refocusing on the Law*

The Supreme Court has recognized a substantive due process right to direct the upbringing of one's child.⁵⁵ The Supreme Court has further held that the parental liberty interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."⁵⁶ Among other protections, parents are generally given an opportunity to contest the emergency removal of a child and have an evidentiary hearing on neglect proceedings.⁵⁷

The state of New York defines a neglected child as "a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care[.]"⁵⁸ While there is not an abundance of case law addressing parental ambivalence specifically,⁵⁹ the plain language of the statute dictates that the government must demonstrate actual impairment or imminent danger of impairment caused by the parent to secure a finding of neglect.⁶⁰ Furthermore, New York state law holds that any removal of a child from her parent must be found

⁵⁵ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁵⁷ Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 68-69 (2009).

⁵⁸ N. Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2015).

⁵⁹ Perhaps this dearth of case law exists because these cases tend to start weak at filing, and then get bolstered by additional allegations "discovered" over the course of the investigation; or because most cases settle and thus are not challenged on appeal. See ABIGAIL KRAMER, IS REFORM FINALLY COMING TO NEW YORK CITY FAMILY COURT? 3, 19 (2016), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/569e7d8bbfe8737de9301b71/1453227404613/CWW+%7C+Is+Reform+Finally+Coming%3F.pdf> [<https://perma.cc/Y6GK-DUEH>]; Good-Dworak & Johnson, *supra* note 4, at 153.

⁶⁰ FAM. CT. ACT. § 1012(f)(i); see also *id.* § 1022(B), (C)(iii), (C)(v).

“necessary to avoid imminent risk to the child’s life or health[.]”⁶¹ The landmark New York Court of Appeals case *Nicholson v. Scopetta* further details that such imminent risk must be “near or impending, not merely possible” and is rife with further helpful language focused on harm and risk of harm.⁶²

Focusing on these standards and rules can be especially helpful in defending a case centered around expressions of ambivalence, where no actual harm or injury to the child is alleged. In cases based solely on a parent’s expression of parental ambivalence, the child protective agency is often missing an essential element of their case: proof the child faced *actual* harm or *imminent* risk of harm. Parent defense attorneys must strenuously remind the court of this requirement: absent such a showing, an expression of ambivalence—no matter how odd or unpleasant—simply cannot constitute neglect or justify a removal.⁶³ In this way, while the prevailing social norms around ambivalence may work against parents in the child welfare courtroom, the law itself does not.

C. *Changing the Ambivalence Narrative Through Cross Examination*

Cross-examination presents an opportunity to tell the parent’s story through short, organized, leading questions.⁶⁴ In cases about ambivalence, the approach to the cross-examination depends on the witness. With a psychiatrist or therapist witness, who has clinical experience and training in the subject area, cross-examination can include questions about the scholarship discussed above to help educate the court on ambivalence.

However, based on this author’s experience, the most frequent witness in child welfare cases is the child protective services caseworker, whose role is largely investigative.⁶⁵ This person is not likely to have the clinical experience necessary to answer questions about the theoretical and therapeutic underpinnings of parental

⁶¹ *Id.* § 1022(C)(iii).

⁶² *Nicholson v. Scopetta*, 3 N.Y.3d 357, 369 (2004).

⁶³ *See id.* at 368-69 (“[T]he Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior.”).

⁶⁴ *See* POZNER & DODD, *supra* note 54, at 1, 15.

⁶⁵ *See* Cozzola & Shevell, *supra* note 30, at 219; *see also* *Becoming a Child Protective Specialist*, N.Y.C. ADMIN. CHILD. SERVICES, <http://www1.nyc.gov/site/acs/about/coming-cps.page> [<https://perma.cc/W2GW-G8Z9>] (last visited Nov. 18, 2016) (“Child Protective Specialists (CPS) respond directly to reports of child abuse and/or neglect. Using investigatory and social work skills, they engage and partner with families and community resources to ensure the safety and well-being of children throughout New York City.”).

ambivalence.⁶⁶ Cross-examination of the child protective caseworker, or any fact witness, can yield greater context surrounding the parent's statement or behavior, thereby demonstrating that ambivalence is normative and understandable.

When it comes to cross-examination, one helpful side effect of child welfare reform over the years is that child protective agencies produce an abundance of paperwork.⁶⁷ Gathering and reviewing all possible documents will allow the family defender to craft a detailed cross-examination that is supported by the documents. Even a caseworker who is hostile to the parent will have to capitulate to the new narrative if the facts are established in the documents.

The following are cross-examination topics to consider including:

a) Familiarity with the facts/documents/case: Tie the witness down to knowing the general facts of the case and have her confirm a new narrative as supported by the documents.

b) Setting: Provide further context to the allegations, consider having the client take photos of home and child's space.

c) Child's behavior/parenting challenges: Does the child have any special medical or behavioral needs?

d) Parent's responsibilities: Consider creating a weekly schedule. Include work, medical appointments, public benefits appointments, time and method of commute, and any other obligations

e) Lack of support: Where are the people who the court might expect the client to rely on? Are there geographic or bureaucratic barriers between the client and their support system?

f) Statement/action of ambivalence: Acknowledge and own the statement or behavior if it is not contested. In most instances, the question is not whether it occurred, but its significance. Does the ambivalence create sufficient risk to justify removing the child or make a finding of neglect? The goal is to reframe the state-

⁶⁶ See, e.g., N.Y.C. ADMIN. CHILD. SERVICES, *supra* note 65. New York City requires the following qualifications of applicants seeking to become Child Protective Specialists: “[a] baccalaureate degree from an accredited college, in specified discipline” that includes “[t]wenty-four semester credits in any combination of the following fields” with at least twelve credits in any one of them: “social work, psychology, sociology, human services, criminal justice, education (including early childhood), nursing or cultural anthropology” as well as “English language proficiency and basic typing skill,” and successful completion of a “comprehensive drug screening.” *Id.*

⁶⁷ See Kenneth Krekorian, *Discovery and Pretrial Proceedings*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 4, at 119, 127-28 (listing “frequently requested documents that greatly assist counsel” in parental defense).

ment/behavior in the context of the parent's situation, so there is no need to hide from it.

g) Keeping up with parental responsibilities despite statement or action of ambivalence: Is the child regularly attending school and medical appointments? Is the parent holding down a job, successfully managing a public benefits case? Highlight all the other things the parent is doing right.

After the cross-examination, the judge should have a mental image of the life of the parent, and an understanding of the context of the parent's statement or action. This pushes back against the child welfare agency's argument that a normal expression of ambivalence rises to the level of risk.

D. Addressing Ambivalence Through the Attorney-Client Relationship

Alongside courtroom advocacy, parents' attorneys also advise clients on legal strategy and serve as guides through a parallel process that takes place outside of the courtroom. This process can include working with service providers, visiting with children in foster care and undergoing home monitoring. Just as knowledge of ambivalence can be used to help mount a defense in the courtroom, that knowledge can also be helpful in advising the client and making strategic legal decisions. Below are skills counsel can use to keep normal parental ambivalence from prejudicing a client's legal case.

1. Joining Theory and Practice

A client's feelings about parenting can be especially complicated at the beginning of a neglect case, or upon the filing of a termination of parental rights petition ("TRP").⁶⁸ The client is facing the temporary or, in the case of a TPR petition, permanent loss of her children. It is a moment of crisis, and as such she is likely to feel any combination of anger, fear, despair or frustration at the loss of her children.⁶⁹ Similarly, the client may feel despair or hopelessness about her involvement with the child welfare system or some problem in her home or life—that she will never win in the system, will never be seen as a good parent, or never 'fix' some problem she is facing.

Remembering Stern's motherhood constellation, the parent

⁶⁸ Matthew Fraidin, *First Steps in Representing a Parent Accused of Abuse or Neglect*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 4, at 25, 28-30.

⁶⁹ *Id.*

who an attorney meets in court is facing questions and fears in the central themes; these feelings can be amplified by involvement with child welfare and family court systems. For example, a central question of the life-growth theme could surface: can she care for her children and help them grow?⁷⁰ At the moment counsel meets the client, she has been investigated, measured as a mother, and found wanting. She is in court because professionals think she cannot keep her children safe. She may wonder if her children will find another mother. The client is literally facing the State hiring someone, a foster mother, they believe will be a “better mother” for her children. The primary relatedness theme may also surface and includes questions around being a “natural mother,” including whether she can “read” her baby.⁷¹

System involvement touches many of the questions and concerns that underlie maternal ambivalence. Parents brought into family court are dealing with psychological and emotional stress at the loss or potential loss of their children that goes deeper than missing their children and worrying about their safety while in another’s care. The parent is facing a challenge that tears at the very fabric of being a mother and one’s concept of oneself as a mother. A mother facing a termination of parental rights proceeding has probably also been separated from her children for a long time and likely does not have the relationship she wants with her children. It may be hard for her not to internalize this as a personal failing as opposed to a product of system involvement. The court will likely inquire into if she can create a support system. A mother is often asked if there are kinship resources or other family or friends who can assist her or possibly take care of her children. What if there is nobody to take the children or if she has fears about how these supports may fare under the scrutiny of the child welfare system? An awareness of the theories underlying ambivalence and the internal questions clients may be facing can better equip family defense attorneys in navigating both ambivalence and the family court system.

2. Use Counsel’s Unique Role to Affirm and Normalize Ambivalence

Given the intensely personal nature of child welfare cases, parents’ lawyers inevitably give advice on topics outside of the strict parameters of the legal case. Counsel may be the first or only per-

⁷⁰ STERN, *supra* note 19, at 175.

⁷¹ *Id.* at 176.

son to whom a parent expresses feelings of ambivalence—dislike of a child, fear at being a parent, or uncertainty that they can care for their child. While no substitute for the therapeutic interventions described above, there is unquestionably a role for counsel in helping a client process feelings of ambivalence by affirming and normalizing such feelings. As noted above, for a parent to express feelings of ambivalence and have those feelings received in a supportive and affirming manner can significantly reduce anxiety and stress.⁷²

The parent defense attorney is unique in that they have an understanding of how the child welfare and family court systems can humiliate and demoralize parents. These attorneys have met hundreds of parents in times of crisis, consulted with those parents, and guided those parents through difficult situations. Further, the parent defense attorney is familiar with feelings and topics most parents only discuss in private. This offers a unique lens through which the parent can view her own situation. Speaking from this standpoint, the parent defense attorney carries great weight when it comes to defining what is “normal.” Counsel can tell a parent, in general terms, about the countless other parents who have expressed similar feelings of ambivalence; this helps chip away at the parent’s sense that she is an outlier, or that feeling ambivalence is a personal failure.⁷³ In a small way, counsel can connect the parent to a larger group of people, thus reducing the shame and anxiety that comes with feeling ambivalence.

3. When a Parent Is Not Seeking Reunification as a Goal

What should counsel do when a parent says she doesn’t want visits, or doesn’t want her child to return home? In a client-centered legal practice, it is a lawyer’s duty to pursue the client’s goals without paternalistic judgment.⁷⁴ Sometimes a client’s goal, for any number of reasons, is to forgo parenting temporarily or permanently. In such cases, the client likely faces harsh judgment from others; it is essential that counsel not collude in such judgment and remain committed to pursuing the client’s goals. Yet in seeming conflict with this mandate is counsel’s knowledge of parental am-

⁷² See Davies, *supra* note 1, at 147-48; see also ALMOND, *supra* note 47, at 50.

⁷³ See generally Musitano & Rosenman, *supra* note 31, at 99.

⁷⁴ Fraidin, *supra* note 68, at 25-26 (“What the client needs above all else at this moment in life is a respectful professional who avoids all prejudice and shows proper respect for the parent by listening carefully to what she has to say and demonstrating a commitment to working on her behalf going forward.”).

bivalence: that feelings of dislike, frustration, or despair are normal and can be fleeting.

A good rule of thumb is to exercise caution when taking legal action in this direction. The client should be advised that parents foregoing visitation or reunification can face strong disapproval—or hostility, even—from the court, the child’s lawyer, and the child welfare agency, which could prejudice future applications.⁷⁵ Ask the client if they are willing to take some time to consider the matter and ensure this is what they want. Counsel can explain that it may be better to err on the side of having the court issue an unused visitation order than to unnecessarily expose the client to harsh and prejudicial judgment that is not easily erased.

4. Advise Clients on Self-Protective Behavior

Sometimes parents express parental ambivalence in front of agency workers. Unfortunately, due to the pressures and biases described in Part I, agency workers will often treat parental ambivalence as pathological and problematic.⁷⁶ Workers are trained to record and catalogue such moments, after which they are presented to judges as proof to support the agency’s position that the parent is not able to care for their child.⁷⁷

One reflexive response to this situation is to impress upon parents how such statements hurt their legal case and to potentially coach a client on what things they should not say. In this response, an unintended message is “Good parents don’t say that, or feel that way.” This can add to guilt or self-doubt. A better alternative is to have a conversation with the client about self-protective behavior.

The aim of advising clients on self-protection is to help them make well-informed decisions about who to trust and confide in when feeling ambivalence. Counsel must explain that agency workers’ job is to investigate and monitor. As a result, things said to the agency worker are not private, and will be shared in the courtroom with other lawyers and the judge.⁷⁸ Instead, advise the client to stay focused on big-picture goals when talking with the child welfare worker. If the client needs an outlet to process complex feelings, counsel can redirect the client to therapeutic services where they can safely express ambivalence without having it used against

⁷⁵ Based upon the professional experience of the authors.

⁷⁶ See Davies, *supra* note 1, at 148.

⁷⁷ Krekorian, *supra* note 67, at 127.

⁷⁸ Cozzola & Shevell, *supra* note 30, at 219 (“Judges often call [caseworkers] the eyes and ears of the court.”).

them.⁷⁹

5. Address Inconsistent Planning with the Client

One of the more difficult conversations counsel may have with a client is when the client is close to reunification with her children and has a sudden setback. It can be particularly difficult when it becomes a pattern—sudden backward movement just as a case is about to reach a new stage of progress. Examples include suddenly missing visits with the child or abruptly dropping out of a required program.

In these situations, the easiest path is to focus on logistical or external forces that could be inhibiting progress. However it is also worth initiating a conversation with the client about whether they are having any feelings of ambivalence. This conversation may well feel unnatural to parent's counsel—after all, most of counsel's job is fighting against seemingly endless suspicion about the client's ability to and desire to parent. To suggest that a parent may feel ambivalence can feel disloyal. Additionally, clients may worry that if they express ambivalence, the attorney may be upset with them or not advocate as strongly for reunification. If broaching the topic of ambivalence, it is important that the attorney first reassure the client neither will happen.

If counsel is right and the client is feeling ambivalence, inviting the client to express it aloud can provide relief to anxiety, while also clearing the way for proactive planning.⁸⁰ Counsel could ask the client if they have any worries about the current plan for reunification—does the parent think the current plan will keep the kids home once they are returned? Counsel could highlight how hard the client has worked towards reunification and, in a non-judgmental way, express curiosity about the setbacks. This is an admittedly difficult conversation; it may be helpful to reference experiences working with other parents. Counsel could reflect that

⁷⁹ It should be noted that every jurisdiction has different rules for whether and to what extent child welfare agencies can circumvent federal HIPAA privacy rules to access parents' protected mental health records. See generally Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 325 (2002). Speaking directly with a client's therapist is a useful practice for determining if treatment notes will be kept confidential. Policies may vary even among clinical practices in the same jurisdiction.

⁸⁰ Barbara Almond, *Ambivalence in Pregnancy and Childbirth*, PSYCHOL. TODAY (Sept. 28, 2010), <https://www.psychologytoday.com/blog/maternal-ambivalence/201009/ambivalence-in-pregnancy-and-childbirth> [<https://perma.cc/QX4A-GNLV>] (“These issues are not easy to get to in psychotherapy, but if a woman does not wait until it is too late, she may be able to resolve them and undertake motherhood, successfully.”).

the prospect of reunification is exciting but also can be anxiety-provoking for many parents. What if the children were removed again? It was traumatic for the children and parent the first time; the thought of it happening again could seem insurmountable.

In addition, counsel already knows the main issues in the case, and so can consider how the client's concerns might fit into the themes underlying maternal ambivalence. For example, if there has been a particularly adverse relationship with the agency (per Stern's constellation, an issue with "parent's support system"), an attorney could ask if it is difficult to imagine how a trial discharge will work given the contentious relationship with the foster care agency. In such a situation, counsel is likely to have some private anxiety that the bad relationship will affect the plan. Consider, then, the experience of the parent, who knows she may only have one chance to make the trial discharge work.

Or, if a young mother has had her parenting decisions scrutinized and criticized throughout the case (an issue with the "life growth" and "primary relatedness" themes), counsel can acknowledge how it's difficult to have confidence in parenting and to figure out who one is as a parent when one is constantly feeling criticized and told what to do.

Once the client's feelings are verbalized, counsel can help arm the client with a plan for how to deal with such a situation. In short, it is worth the discomfort of raising the issue. When counsel is correct that ambivalence is a factor, clients can greatly benefit from expressing such feelings, making contingency plans, and generally confronting their anxiety.

CONCLUSION

When decision makers in the child welfare system assume statements of parental ambivalence are pathological and indicative of actual risk to children, children are unnecessarily removed from their parents or needlessly remain in foster care. Professionals in the child welfare system need to engage in thoughtful and reality-based consideration and dialogue about what is creating risk, or the specter of risk, to a family. The current consideration and treatment of statements of parental ambivalence belie efforts to critically think about a child's safety at home. This process creates a "conspiracy of silence" that serves no one.⁸¹ The often unspoken truth of the child welfare system is that poor parents are punished

⁸¹ Davies, *supra* note 1, at 148.

for actions that are ubiquitous and unnoticed in middle class homes.⁸² Parents who are brought into the child welfare system are held to a separate, unreasonable standard where they are expected to deny any feeling of parental ambivalence.

The status quo is completely at odds with what is known about parental ambivalence: expressing ambivalence in a supportive and therapeutic environment leads to improved parental functioning, whereas repressing ambivalence results in guilt and anxiety that only add to a parent's burden.⁸³ However, there is hope for improvement. Greater education about parental ambivalence, including thoughtful clinical treatment and strong legal advocacy, has the potential to make the child welfare system both more just and more effective.

⁸² See generally PADILLA & SUMMERS, *supra* note 7.

⁸³ See Hoffman, *supra* note 26, at 1226, 1233; see also ALMOND, *supra* note 47, at xi (“[I]t became increasingly clear to me that the shame and guilt that my ambivalence engendered had made it extremely hard for me, as a young mother, to come to terms with my limits. And I began to see that this was true for most mothers.”).