Resolving Family Conflicts

Edited by
Jane C. Murphy

The Family, Law and Society

Resolving Family Conflicts

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Series Preface

The family is a central, even an iconic, institution of society. It is the quintessentially private space said, by Christopher Lasch, to be a 'haven in a heartless world'. The meanings of 'family' are not constant, but contingent and often ambiguous. The role of the law in relation to the family also shifts; there is increasing emphasis on alternative dispute-resolving mechanisms and on finding new ways of regulation. Shifts have been detected (by Simon Roberts among others) from 'command' to 'inducement', but it is not a one-way process and 'command' may once again be in the ascendancy as the state grapples with family recalcitrance on such issues as child support and contact (visitation) arrangements. Family law once meant little more than divorce and its (largely) economic consequences. The scope of the subject has now broadened to embrace a complex of relationships. The 'family of law' now extends to the gay, the transgendered, 'beyond conjugality', perhaps towards friendship. It meets new challenges with domestic violence and child abuse. It has had to respond to new demands – from women for more equal norms, from the gay community for the right to marry, from children (or their advocates) for rights unheard of when children were conveniently parcelled as items of property. The reproduction revolution has forced family law to confront the meaning of parentage; no longer can we cling to seeing 'mother' and 'father' in unproblematic terms. Nor is family law any longer a 'discrete entity'; it now interfaces with medical law, criminal law, housing law and so on.

This series, containing volumes on marriage and other relationships (and not just cohabitation), on the parent–child relationship, on domestic violence, on methods of resolving family conflict and on pluralism within family law, reflects these tensions, conflicts and interfaces.

Each volume in the series contains leading and more out-of-the-way essays culled from a variety of sources. It is my belief, as also of the editors of individual volumes, that an understanding of family law requires us to go beyond conventional, orthodox legal literature – not that it is not relevant – and use is made of it. But to understand the context and the issues, it is necessary to reach beyond to specialist journals and to literature found in sociology, social administration, politics, philosophy, economics, psychology, history and so on. The value of these volumes lies in their coverage as they offer access to materials in a convenient form which will not necessarily be available to students of family law.

They also offer learned and insightful introductions, essays of value in their own right and focused bibliographies to assist the pursuit of further study and research. Together they constitute a library of the best contemporary family law scholarship and an opportunity to explore the highways and byways of the subject. The volumes will be valuable to scholars (and students) of a range of disciplines, not just those who confront family law within a law curriculum, and it is hoped they will stimulate further family law scholarship.

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Introduction

Over the past two decades, virtually all areas of family law have undergone major doctrinal and theoretical changes – from the definition of marriage, to the financial and parenting consequences of divorce, to the legal construction of parenthood. Family law scholars have analysed and critiqued these changes from a variety of perspectives. But scholars have paid less attention to another important set of family law developments: changes that signal a paradigm shift in the way that most family legal conflicts are resolved. These changes in family conflict resolution have transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system. Moreover, the changes have important implications for the way that family law is understood and taught. Our objective in this volume is to examine the contours of this paradigm shift in family conflict resolution and explore its implications for family law practice and scholarship. In this Introduction, we describe the elements of the paradigm shift and sound some cautionary notes. We also highlight the major themes of the essays and excerpts that follow.

I. Elements of the Paradigm Shift

A. Rejection of Adversary Procedures

The paradigm shift explored in this volume encompasses a number of related components. The first component is a profound scepticism about the value of traditional adversary procedures. An overriding theme of recent family law reform efforts is that adversary processes are ill-suited to resolving disputes involving children. Similarly, social science research suggests that children's adjustment to divorce depends significantly on their parents' behaviour during and after the separation process: the higher the level of parental conflict to which children are exposed, the more negative the effects of family dissolution (Emery, 1994, p. 205; see also Chapter 9 herein). Armed with these social science findings, court reformers have argued that family courts should abandon the adversary paradigm, in favour of approaches that help parents manage their conflict and encourage them to develop positive post-divorce co-parenting relationships. Gregory Firestone and Janet Weinstein (Chapter 1) detail the aspects of the adversary model that disserve the interests of children and families. Adversary processes, they contend, 'legalize' complex family relationships and disempower parents and other participants. Divorce litigation is expensive and produces delays that conflict with a child's sense of time. The zealous advocacy demanded of lawyers unnecessarily exacerbates family conflict and improperly privileges individual rights over mutual interests and ongoing relationships.

Clare Huntington (Chapter 3) offers a similar critique of rights-based child welfare practice. Huntington argues that 'as currently implemented, the rights-based model of child welfare protects neither parent nor child in the typical case' (p. 33). In part, this is because rights create

a win–lose mentality that fuels an adversarial relationship between parents and the state. In place of this adversarial process, Huntington proposes a problem-solving model designed to foster collaboration between the state and families involved in the child welfare system. Similarly, Firestone and Weinstein propose a comprehensive dispute resolution system for families in transition. This system would offer families an array of problem-solving mechanisms and supportive services and would accord traditional adversary procedures a sharply limited role in the overall resolution of family conflicts.

Family courts have embraced these insights and have adopted an array of non-adversary dispute resolution mechanisms designed to avoid adjudication of family cases. Divorce-related custody mediation is the best known and established of these procedures.[1] Robert E. Emery, David Sbarra and Tara Gover (Chapter 9) detail the reasons for the rapid spread of court-connected custody mediation and review the research on its effectiveness. The authors conclude that, while additional studies are needed, existing research strongly suggests that custody mediation increases settlement, reduces legal costs, enhances party satisfaction and improves long-term relationships between non-residential parents and children and between divorced parents.[2]

The appeal of non-adversary dispute resolution has moved beyond divorce-related custody cases to the more public realm of child welfare proceedings, where family group conferencing and other problem-solving approaches have begun to supplant more traditional adjudicative models (See, for example, Chandler and Giovannuci, 2004; Merkel-Holguin, 2004). Clare Huntington (Chapter 12) describes the theoretical underpinnings of family group conferencing and explores its potential for reforming the child welfare system. Similarly, Robert Wolf (Chapter 6) describes the creation and functioning of a family treatment court that handles child neglect cases involving substance-abusing parents. Drawing on a criminal drug court model, the Manhattan treatment court combines a problem-solving approach with extensive judicial monitoring, in order to rehabilitate drug-abusing parents and reunite them with children previously removed from their care. Greg Berman and John Feinblatt (Chapter 5) provide a broader context for these family court reforms by tracing the history of problem-solving courts and outlining their common goals and elements.

An increasing number of family lawyers have also rejected the adversary paradigm, in favour of a 'collaborative law' model. Pauline Tesler (Chapter 19) describes the basic elements of this collaborative model, under which lawyers and clients agree at the outset of the representation that the lawyers will withdraw if the matter proceeds to litigation.[3] Tesler argues that this withdrawal obligation gives collaborative lawyers a significant external incentive to remain at the negotiating table in the face of apparent impasse, since '[u]nlike litigation attorneys, collaborative lawyers share the risk of failure in collaboration with their clients' (p.

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[1] For a comprehensive examination of divorce-related custody mediation see Jay Folberg, Ann Milne and Peter Salem, 2004.

[2] A recent survey of parents involved in custody and child support disputes indicates higher levels of satisfaction with mediation than with judges, attorneys or other court-connected services (Leite and Clark, 2007).

[3] For a recent, comprehensive discussion of collaborative lawyering see Gary Voegele, Linda Wray and Ronald Ousky, 2007; see also Symposium, 2004. For a description of a team-based collaborative model, in which lawyers work closely with mental health professionals who serve as divorce coaches and child specialists see Susan Gamache, 2005.

396). Barbara Glesner Fines (Chapter 20) examines a number of ethical issues raised by the collaborative law model. These include concerns about lawyer competence and limited scope representation, as well as the possibility that a commitment not to litigate may compromise the lawyer's duty of zealous advocacy. Glesner Fines concludes that while collaborative lawyering presents an exciting variation on the growth of consensual, cooperative dispute resolution processes, family lawyers who adopt this model must be extremely diligent in their evaluation of clients, opposing counsel and their own skills and motivations in order to provide ethical representation.[4]

Forrest Mosten (Chapter 18) situates collaborative law in its larger social and professional context by examining a number of emerging roles for the family lawyer that stem from the shift to a less adversarial dispute resolution model. These emerging roles include dispute resolution manager, consultant during mediation, family advocate and preventive legal health care provider. The essays by Mosten, Glesner Fines and Tesler underscore the point made by two leading commentators that 'in the last quarter century, the process of resolving legal family disputes has, both literally and metaphorically moved from confrontation toward collaboration and from the courtroom to the conference room' (Schepard and Salem, 2006, p. 516).

B. Recharacterizing Family Disputes as Social and Emotional Process

A second element of the paradigm shift is the assertion that most family disputes are not discrete legal events, but ongoing social and emotional processes. This re-characterization of family disputes began with the shift from fault-based to no-fault divorce; more recently, it has become one of the basic tenets of the movement for unified family courts. Barbara A. Babb (Chapter 2), a leading advocate of unified family courts, urges family law decision-makers to adopt an ecological approach that 'look[s] beyond the individual litigants involved in any family law matter, to holistically examine the larger social environments in which the participants live' (p. 23). Armed with this perspective, family court judges should fashion remedies that strengthen a family's supportive relations and that 'facilitate linkages for the litigants between and among as many systems in their lives as possible' (p. 23).

Thus re-characterized as social and emotional processes, family disputes require interventions that are not zealously legal, but rather collaborative, holistic and interdisciplinary. As Professor Babb explains, to positively affect family members' behaviour, 'family law remedies must reflect an integrated approach to family legal issues. This means that decision-makers must consider all of the parties' related family proceedings, as well as all of the institutions or organizations potentially affecting the behavior of families and children' (p. 23). In contrast to the narrow, issue-oriented focus of traditional adversary procedures, such an interdisciplinary focus invites judges to develop a holistic assessment of the family's legal and social needs and to devise more comprehensive legal remedies. Catherine Ross (Chapter 7) identifies both inter-disciplinary training and the provision of comprehensive family services as critical components of a unified family court system. Similarly, Patrick Parkinson (Chapter 28) describes recent efforts in Australia to establish a network of community-based family relationships centres

[4] For additional discussion of these ethical issues see John Lande, 2003; see also Voegele, Wray and Ousky, 2007; Schwab, 2004).

that would help divorcing and separating parents avoid contested legal proceedings. An explicit goal of this initiative is to change cultural understandings so that decisions about post-separation parenting are no longer 'seen in the first place as a legal issue' (p. 548).

Understanding family conflict primarily as a social and emotional process, rather than a legal event, also reduces the primacy of lawyers and enhances the role of mental health professionals in the family court system. Janet Johnston (Chapter 15) describes how the traditional orientations of lawyers and therapists have fuelled divorce-related conflict; she then explains how lawyers and mental health professionals can work more collaboratively to meet the needs of high-conflict families. The 'delegalization' of family disputes also transforms the role of the judge. Unlike the solitary, detached jurist who presides over a courtroom isolated from the non-legal world, the modern family court judge functions as a 'team leader' who embraces interdisciplinary collaboration and coordinates a range of court-connected services (Boldt and Singer, 2006, p. 96).

C. From Backward-Looking Adjudication to Forward-Looking Intervention

This new understanding of family disputes has also led to a reformulation of the goal of legal intervention in the family. Traditionally, legal intervention was a backward-looking process, designed primarily to assign blame and allocate rights; by contrast, under the new paradigm judges assume the forward-looking task of supervising a process of family reorganization. As Andrew Schepard (Chapter 4) explains, family court judges no longer function primarily as fault-finders or rights adjudicators, but as ongoing conflict managers. Indeed, Schepard analogizes the modern family court judge to a bankruptcy court judge overseeing the reorganization of a financially distressed business: 'The business is raising children and the parents – the managers of the business – are in conflict about how the task is to be accomplished. The court's aim is to get the managers to voluntarily agree on a parenting plan rather than impose one on them.' (p. 56) More generally, Greg Berman and John Feinblatt (Chapter 5) explain that problem-solving courts 'seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the future well-being of communities' (p. 73).

The therapeutic jurisprudence movement incorporates this forward-looking perspective. As a number of scholars have noted, therapeutic jurisprudence provides the theoretical foundation for problem-solving courts, including unified family courts (Winick and Wexler, 2003; see Kuhn, 1998, pp. 67–8). From a therapeutic perspective, the goal of legal intervention is not merely to resolve disputes, but to improve the material and psychological well being of individuals and families in conflict. Family court judges embrace this therapeutic role by attempting to understand and address underlying family dynamics and by structuring interventions that 'aim to improve the participants underlying behaviour or situation' (Babb, Chapter 2, p. 20).

D. Capacity Building to Empower Families and Promote Settlements

To achieve these therapeutic goals, family courts have adopted systems that de-emphasize third-party dispute resolution in favour of capacity-building processes that seek to empower

families to resolve their own conflicts. Consistent with this philosophy, jurisdictions across the country have instituted mandatory divorce-related parenting education and other skill-building programmes. Andrew Schepard (Chapter 27) describes a number of these programmes and analyses their role in preventing and defusing family conflict. Similarly, the American Law Institute's *Principles of the Law of Family Dissolution* (2002) endorses individualized parenting plans as an alternative to judicial custody rulings and urges the adoption of court-based programmes that facilitate these voluntary agreements.[5] More recently, a number of family courts have added 'parenting coordinators' to their staff; these quasi-judicial officials assist high-conflict families to develop concrete parenting plans and to resolve ongoing parenting disputes that arise under these plans.[6] Christine Coates and her colleagues (Chapter 14) analyse the increased use of parenting coordination to manage high-conflict custody cases and explore the legal challenges that this practice has provoked. As Andrew Schepard (Chapter 4) explains, such capacity-building programs 'are the core of a newly created settlement culture, and trials are a last resort for particularly troublesome cases' (p. 56).

E. Pre-Dispute Planning and Preventative Law

A fifth component of the paradigm shift is an increased emphasis on pre-dispute planning and preventive law. Familiar examples include the increased acceptance and enforceability of prenuptial and domestic partnership agreements (see, generally, Bix, 1998; Silbaugh, 1998). June Carbone and Harold Fink (Chapter 26) propose a more comprehensive planning approach to both pre-marital agreements and pre-birth determinations of parenthood. Their proposal combines private negotiation with mediation and up-front judicial approval to anticipate and resolve issues of parentage and post-separation obligation. By combining public and private processes, Fink and Carbone hope to capture the benefits of private ordering, while limiting the results of unequal bargaining power and providing a measure of protection for children. Proposals for mandatory or government-encouraged pre-marital education reflect a similar preventive theme. Over the past decade, the United States' government has invested substantial resources in public and private marriage education programmes aimed especially at low income partners (Dion, 2005). More generally, scholars and advocates of 'preventive law' have urged individuals to use legal mechanisms to anticipate and plan for family transitions (see, for example, Robbennolt and Johnson, 1999). This emphasis on publicly-supervised private ordering creates a hybrid model that expands the role of family lawyers and courts beyond their traditional dispute–resolution function. It also extends the time frame during which families interact with the legal system.

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[5] For additional discussion of parenting plans see Michael E. Lamb, 2002; Francis J. Catania, Jr., 2002. The American Academy of Matrimonial Lawyers has developed a model parenting plan. For a discussion of that model see Mary Kay Kisthardt, 2007.

[6] In 2006, an interdisciplinary taskforce of the Association of Family and Conciliation Courts (AFCC) issued guidelines for parenting coordination that address the role, qualifications and ethical obligations of parenting coordinators. See AFCC Task Force on Parenting Coordination (2006), p. 164.

F. International Perspectives

The paradigm shift that we describe is by no means unique to the United States. Indeed, in many ways, the transformation taking place in the United States today tracks developments that have been underway for several decades in a number of European and Commonwealth countries. For example, the Family Court of Australia, created in 1976, was an integral part of that nation's adoption of no-fault divorce. From the beginning, the Australian Family Court was envisioned as a new kind of legal institution – a pro-active and interdisciplinary enterprise that would blend law, counselling, social and dispute resolution services (Nicholson, 2002; see Parkinson, 2005). The New Zealand Family Court, created five years later, consciously followed the Australian example; both reflected what one New Zealand jurist later described as the enthusiasm of a 'more therapeutically optimistic time' (Elias, 2002, p. 297). Like their Australian counterparts, the New Zealand reformers 'recognized that the adversarial system was an inappropriate vehicle for the resolution of family disputes in the vast majority of cases, particularly where the continued parenting of children was an issue' (Nicholson, 2002, p. 287). Like current reformers in the United States, the architects of the Australian and New Zealand courts envisioned a collaborative and supportive forum in which the judge 'would be removed as a distinct power figure' and 'those involved in family conflicts [could] negotiate, settle and accept their own resolutions' (Elias, 2002, p. 297). Patrick Parkinson (Chapter 28) describes that nation's most recent family law reform efforts, which seek to redirect parenting disagreements away from the judicial system entirely and into community-based dispute-resolution centers.[7]

Scholars and court systems around the world are also struggling with a common set of dilemmas about how best to incorporate children's voices in divorce, custody and child protection proceedings.[8] Nigel Lowe and Mervyn Murch (Chapter 22) describe current debates in England over the appropriate extent and means of children's participation in the resolution of family legal disputes.[9] Excerpts from works by Martin Guggenheim (Chapter 21) and Barbara Ann Atwood (Chapter 23) present different American perspectives on this question. Professor Guggenheim criticizes advocates who seek to enhance children's participation in contested custody proceedings, particularly through legal representation. He notes that children ordinarily have no say in determining their living arrangements outside the context of divorce or parental separation, and he questions whether giving children a significant voice in disputed custody matters actually serves children's interests. Professor Atwood focuses more broadly on the legal representation of children in both abuse and neglect proceedings and private custody disputes. She notes that 'while many courts and commentators agree that children should have a "voice" in proceedings affecting their interests, the meaning of the child's voice is fraught with ambiguity' (p. 447). Despite the lack of clear guidance for children's representatives, Atwood emphasizes the value to children of having a lawyer

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[7] For a related proposal to remove divorce from the courts, based on the Danish system of administrative dissolution see Susan Zaidel, 2004.

[8] For a comprehensive analysis of children's participation in child protection proceedings around the world see Jean Koh Peters, 2006.

[9] For a thoughtful discussion of the challenges posed by a desire to incorporate children's views into the divorce process see Carol Smart, 2002.

advocate their wishes; she concludes that 'children can only benefit from the ongoing efforts to improve the performance of those who speak for them' (p. 455).

G. The Promise of the New Paradigm

Taken together, these developments hold considerable promise for families. Most legal experts agree that adversary justice works best for antagonists with conflicting interests and no ongoing personal ties. Alternative dispute resolution procedures offer families a mode of conflict resolution that is both more enduring and less destructive of ongoing relationships than adversary litigation. Non-adversary processes are also more amenable to direct participation by family members – a particularly important feature, given the high percentage of family litigants who are not represented by counsel (see Berenson, Chapter 17). Similarly, judicial interventions that successfully build capacity and enhance problem solving skills should allow families to avoid the financial and emotional drain of future encounters with the legal system. On a more theoretical level, the paradigm shift that we describe appropriately rejects the mythology of the private family – a mythology that characterizes well-functioning families as fully autonomous and self-sufficient and that labels families that seek – or are subject to – state intervention as dysfunctional or inadequate.[10] The new paradigm recognizes instead that family and state governance are intertwined and that families need both private space and public support in order to function effectively.

II. Some Cautionary Notes

Despite the promise these developments hold for families in conflict, a number of cautionary comments are in order. Although these dramatic shifts in family dispute resolution have been underway for close to a decade, scholars and family policy makers have engaged in relatively little critical analysis of the risks and potential negative consequences of such change. This volume explores these concerns by examining: the limits of the institutional competence of courts, the surrender of fact-finding and decision-making to individuals without legal training, the loss of autonomy and privacy for family members subject to continuing court oversight, particularly low income families, and the disjunction between alternative dispute resolution and authoritative legal norms.

As with most discussions of relative strengths and weaknesses, many of the concerns raised here are really the 'flip-side' of a potential benefit. Giving courts the flexibility and informality to respond quickly to families in transition can lead to legitimate concerns about reduced accountability and fairness. Having the benefit of a variety of experts from a number of disciplines to address family conflict may result in confusion about roles and authority to act. Providing mechanisms to sustain co-operation and agreement achieved in court proceedings may threaten strongly valued norms of family privacy and autonomy. As with any reform, the value and impact of these developments must be evaluated in the context of available alternatives. And the potential risks posed by the new paradigm may well be worth taking given the demonstrated

[10] For a thoughtful discussion of this mythology see Clare Huntington, 2007.

problems in the adversary system. But in order to begin a meaningful evaluation of these reforms it is critical to identify the potential problems and concerns.

A. Questions about the Institutional Competence of Family Courts

Although families may benefit from the capacity-building and problem-solving approaches embraced in the new paradigm, it is unclear whether courts are competent to provide these services. As Anne Geraghty and Wallace Mlyniec (Chapter 8) explain, court-based procedures have historically been designed to determine facts and enforce norms. The unified family court movement has sought to expand these functions to address both the legal and non-legal problems of families who come to courts seeking resolution of their disputes. While the goals of the court system have expanded substantially, the structural changes contemplated in even the ideal family courts may not be sufficient to meet the reformers' ambitious agendas. Courts with their 'limited remedial imaginations', may not be the best institutional settings for resolving the non-legal issues proponents wish to place within their authority (Menkel-Meadow, 1996, pp. 5–7). As a result, the restructured family courts may be incapable of achieving the formidable task described by Geraghty and Mlyniec as 'provid[ing] coordinated holistic services … to address the physical and mental needs of the family' (p. 121).

These institutional shortcomings may be particularly acute at a time when American trial courts' caseloads, particularly the family law cases, continue to grow and resources for these courts are on the decline in many states. Recruiting, training and retaining appropriate judicial and non-judicial staff for the multiple functions contemplated or, in some cases, statutorily mandated in these courts would challenge even a well-financed, broadly committed effort.

Geraghty and Mlyniec argue that asking a court system to take on these broader tasks may detract from its fundamental role as a forum for fair and authoritative dispute resolution. Scarce resources must be spread even more thinly and some courts may have difficulty meeting both basic dispute resolution functions and the broader and more ambitious goals of the new family courts. As several essays in this volume suggest, making good on the broad promise of reform for even a handful of parties may come at a substantial cost to long-held values of due process, family privacy and autonomy (Chapters 8 and 13; see also Hardcastle, 2003).

B. The Surrender of Fact-Finding and Decision-Making to Non-lawyers

The new paradigm for family law decision-making contemplates substantial involvement and reliance on non-legal staff to 'manage' cases, provide court-connected services and assist fact-finders and decision-makers in achieving settlements or reaching decisions. Catherine Ross (Chapter 7) describes the perceived need for an expanded role for these new players in the system:

> Each court needs an intake team and a case manager for every family … Courts should have well-trained resource personnel at all levels, including magistrate hearing-officers, special masters, mediators, court clerks, social workers, and other service providers who can perform triage. … Judges focus on complex cases by, among other things, delegating to others matters that can safely be handled by alternative forms of dispute resolution. If handled properly, many or most of these cases need never reach a judge (p. 108).

Non-legal and, in many instances, non-professional staff have always exercised enormous influence in child welfare proceedings where the state has intervened after allegations of child abuse or neglect.[11] But the new paradigm expands the role of such staff, particularly case managers and mediators, in both child protection and divorce and child access proceedings in the new model courts. Amy Sinden (Chapter 13) explores this expanded use of non-legal personnel in the context of child protection. She attributes the expanded role to the 'subtle dynamic' that 'arises on a day-to-day level in these cases, due in part to the prevalence of social work discourse and the tendency of the participants to view these cases in therapeutic rather than legalistic terms. This dynamic implicitly suppresses rights talk and discourages the participants from taking advantage of those procedural protections that do exist' (p. 240).

Although generally supportive of these developments, Clare Huntington (Chapter 3) notes the role of the family court movement in the expansion of informal, non-adversarial alternative dispute resolution mechanisms in child welfare cases. Under the new regime, social workers, 'coordinators,' and other non-legal actors play a central role in decisions about removal and placement of children where abuse or neglect is alleged. As Sinden explains, the danger for families, primarily poor, involved in these proceedings is that the disregard for statutory and constitutional norms will result in extensive state involvement in these families by non-judicial personnel prior to any judicial determination justifying such involvement. And decisions will be made in informal settings based upon the evaluations, however flawed, of staff with few standards for guiding these decisions and little or no opportunity for review.

The new paradigm has also expanded the role of such non-judicial personnel in family disputes involving divorce and child access in which the state is not a party. This expansion includes broader authority for professional staff drawn from mental health and social work backgrounds with relatively established roles, such as mediators and custody evaluators. It also includes non-legal personnel with new titles and somewhat less-established roles such as 'parenting coordinators' as described by Christine Coates et al. (Chapter 24). Other newly endowed non-judicial positions include early neutral evaluators (see, for example, Santeramo, 2004; Johnston, Chapter 15) and 'family law facilitators' (Chase, 2003).

These expanded roles are controversial. Two contributors to this volume respond to Timothy M. Tippins' and Jeffery Whittmann's (2005) critique of the growing reliance by judges on 'expert' opinions by non-legal personnel and call for an end to the practice of custody evaluators making recommendations to judges to resolve custody cases.[12] Mary Kay Kisthardt and Barbara Glesner Fines (Chapter 24) urge changes intended to reduce the role of custody evaluators in making the ultimate judgment about child placement in contested cases while preserving a role for these evaluators in a non-decisional capacity. In a companion piece, Joan B. Kelly and Janet R. Johnston (Chapter 25) accept much of the critique that custody evaluators have 'flimsy grounds (ethically, empirically, and legally) for making recommendations on the ultimate issue' of child placement (p. 474). They urge courts to limit the use of these non-legal players to conducting forensic custody evaluations in serious cases

[11] See for example Murphy, 1998, p. 707, who concludes that child protective service workers who may have little or no experience or specialized education make most of the decisions in this arena.

[12] As early as the 1980s, a few commentators recognized these shifts in both the rhetoric and decision-making in family disputes, particularly with regard to child access. Martha Fineman, in an early and much cited article, noted that the 'professional language of the social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric' (Fineman, 1988).

of child abuse or neglect rather than routinely investigating and making recommendations in all contested custody cases.

C. The Loss of Privacy and Autonomy for Families

A particularly troubling risk associated with the new paradigm in family dispute resolution is the increased loss of privacy that results from the expanded role of the family court. When family disputes are viewed as opportunities for therapeutic and holistic interventions in the family, increased state involvement in family life is inevitable. Of particular concern in the new model courts, however, is both the lack of clearly defined parameters for such intervention and the disparate impact expanded state intervention may have on poor families.

Increased reliance on informal procedures such as family group conferencing heightens the risk of unchecked state intervention and threats to due process in these cases. Amy Sinden describes these new informal procedures for resolving allegations of child abuse and neglect as a 'free ranging family therapy session' in which there is 'virtually no limit on the topics that can be discussed or on the people who may be invited to join' (Chapter 13, p. 258).

The new regime also raises similar concerns in divorce and child access proceedings. Both the enhanced goals of intervention and the expanded roles of court personnel increase the risk of due process violations and loss of privacy in family life. As noted by Catherine Ross (Chapter 7), one of the principle components of the new family court is that one judge will hear all matters involving a single family. Such an approach may result in both more informed and more efficient decision-making. But, as Geraghty and Mlyniec (Chapter 8) point out, it may also result in judges having access to information about a family that would be inadmissible in traditional adversarial proceedings. Judges may also reach decisions in one proceeding based upon conclusions reached in another. The risks of coercion and unwarranted interference increase as the judges' role in the new 'problem solving' family court shifts from mere dispute resolution to the less defined and potentially broader role of using their 'authority to motivate individuals to accept needed services and to monitor [the parties'] compliance and progress' (Boldt and Singer, 2006, p. 96: quoting Winick, 2003).

The threat to family privacy and autonomy is particularly high when families navigate the court system without lawyers. Stephen Berenson and Russell Engler have both contributed pieces to this volume that address the issue of the unrepresented litigant in family court. Berenson (Chapter 17) documents the broad scope of the problem and describes the burdens it creates for the unrepresented parties as well as for the court. He concludes that when family law disputes proceed through courts with no lawyers on one or both sides there is often 'a failure of legal justice for the parties to family law disputes' (p. 345).

The increase in unrepresented litigants may also require a rethinking of traditional assumptions about legal and judicial practice. Russell Engler (Chapter 16) begins by explaining that rules about who is authorized to give legal advice and requirements of judicial impartiality were developed with an assumption that parties appearing before courts would have full legal representation. Engler argues that these rules frustrate the goals of justice and fairness when applied to unrepresented litigants. The threat to justice and fairness includes unchecked state intrusion into the lives of poor families who lack access to legal representation. When the court orders mediation, represented parties may be able to bypass court sponsored programmes. Their attorneys can object to mediation, negotiate directly with opposing counsel or choose

a private mediator. While courts have the authority to order services regardless of family income, parties whose attorneys have negotiated agreements can present those agreements at the first court proceeding and avoid referrals for services, thus remaining 'under the radar' of the court. For families without lawyers to navigate the system or without resources for outside experts or services, involvement in the web of interventions in the new family court is almost impossible to avoid.

D. The Disjunction Between Alternative Dispute Resolution and Authoritative Legal Norms

In appropriate cases, mediation can empower parties, enhance their ability to work together in the future, and promote flexible and creative problem-solving. But participation in mediation also poses a serious risk that parties may waive important legal rights or enter into agreements that exacerbate conflict. This is particularly true when mediators are ill-equipped or poorly trained. Incompetent mediators can do great harm, especially to vulnerable parties for whom the 'empowering' promise of mediation can become, instead, an exercise in coercion and arm-twisting. This risk is particularly acute without appellate review, a public record, or established grievance procedures that, at least in theory, provide a check on a comparable risk of 'bad' judging.

The risks of mediation are heightened where parties are required to participate in mediation and lack information about legal norms.[13] Many mediation proponents argue that without complex rules of procedure and evidence and governing substantive law, parties can navigate the process of mediation themselves. Under this conception of family mediation lawyers have little or no role. Unless confronted with a court order for mediation, attorneys rarely mention mediation as an option for clients facing family breakup, either in divorce or through child welfare proceedings.[14] Mediators share the view that attorneys have little or no role to play in mediation. Some proponents of mediation actively discourage their participation.[15] But other commentators have recognized the critical role attorneys can play in preparing clients for mediation and in the mediation sessions themselves. Craig McEwen and his co-authors (Chapter 10) draw from findings of a study of the role of lawyers in court-mandated divorce mediation in Maine to argue that the presence of lawyers can help to ensure fairness in court-

[13] The American Law Institute recognizes these risks in its *Principles of the Law of Family Dissolution* [*Principles*]. Although the *Principles* encourage courts to inform family disputants about the availability of mediation and other non-judicial procedures, they do not allow a court to mandate mediation. Moreover, the ALI Comments urge that parents 'be encouraged to confer with an attorney before deciding whether to engage in mediation, again during the process and before they reach a final agreement' (2000, §2.07).

[14] In response to this concern, the American Bar Association (ABA) added language to its Comments to Model Rule 2.1 Scope of Advice suggesting that lawyers may be obligated to advise clients about the availability of alternative dispute resolution, noting that: 'when a matter is likely to involve litigation, it may be necessary … to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation' (ABA, 2004, R. 2.1 cmt. 5).

[15] Mark Rutherford: 'For mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client's interests contradicts the very essence of mediation and can produce inequitable results' (1986, p. 27).

mandated mediation. They conclude that lawyer participation can be a more effective way of making both the process and results of mediation fair than moving to voluntary mediation or creating a highly regulated approach to mediation.

But even if lawyers were accorded an increased role in mediation, there would be little benefit to low income litigants given the large numbers of parties who appear in family courts without lawyers.[16] Russell Engler (Chapter 16) examines the impact of lack of representation on parties in court-sponsored mediation, finding that the risk of loss of rights in that process is significantly greater for unrepresented parties. Even if the attorney does not attend the mediation, the represented party has far greater access to an expert source of information about judicial proceedings, each party's legal rights and remedies, and the parties' chances of success in court. No comparable source of information exists for the unrepresented party, given the current conception of the mediator's role as 'neutral.' Engler sees this as particularly dangerous when coupled with the pressure in court programmes to clear dockets through mediation. He concludes that mediators and other court personnel should rethink their roles in the light of the needs of unrepresented litigants.

The risks of mediation are also heightened in family disputes where one party is less powerful than the other.[17] Power imbalances may exist in cases where only one party is represented by an attorney or may result from race, gender, class, sexual orientation and cultural differences in mediation. The most disabling power imbalance in mediation may be in relationships where domestic violence has taken place. In these cases there has already been a severe abuse of power and the consequent power imbalance can make mediation impossible.[18] Nancy Ver Steegh's essay (Chapter 11) presents a particularly well-balanced and useful approach to resolving questions about the much debated issue of mediation and domestic violence. Recognizing the wide spectrum of quality in mediation options and the different circumstances facing abuse survivors, Ver Steegh argues against categorical answers to these issues. Instead, she urges an approach that permits domestic violence victims 'the opportunity to make an informed choice about which divorce process – mediated or adversarial – will best meet the needs of their families' (p. 205).

The risks posed by mediation in the face of a disabling power imbalance may also be present in 'family conferencing' in child welfare cases. While these cases may involve more attorneys than private family disputes, the attorney's role in family conferencing is almost as ill-defined and limited as in divorce and custody disputes (Kisthardt, 2006). And these cases are often marked by intimate partner violence and parties with limited education and resources

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[16] See Berenson (Chapter 17) where he describes a 1991–92 study of sixteen large urban areas nationwide finding that '72% of all domestic relations cases involved at least one unrepresented party' (p. 333); see also, Maryland Judiciary Administrative Office of the Courts Family Administration finding that 70 per cent of cases involving family disputes in Maryland involved at least one represented party (2007, pp. 29–30).

[17] One of the earliest articulations of this position is the oft-cited article by Tina Grillo, 1991.

[18] The Commentary to the ALI *Principles* (2000) notes that mediation poses an especially high risk of coercion and intimidation where domestic violence has occurred or is occurring (§2.07, Comment). The *Principles* therefore require that mediators screen for domestic violence and for other circumstances that may impede a party's capacity to participate in the mediation process. If there is credible evidence of such circumstances, then mediation should not occur unless reasonable steps are taken both to ensure the consent of each party to the process and to protect the safety of the victim (§2.07(2)).

(Murphy, 1998, p. 711). In addition to the power imbalance that may exist between family members, Amy Sinden notes that these cases also involve the 'substantial disparity of power' between parents, most often poor mothers, and the state which holds the 'palpable threat' of removing of their children (Chapter 13, p. 251). All of these circumstances create risks that the mother will suppress 'her point of view in order to achieve agreement' (p. 257) and not benefit from statutory or constitutional protections in place in the child welfare context.

Some existing research addresses these concerns (Emery, *et al.*, Chapter 9). But one of the difficulties in evaluating family mediation is the complexity of measuring 'success'. Given mediation's focus on 'needs' rather than 'rights,' measuring participant 'satisfaction' has been the dominant measure of success. Minorities and other traditionally less powerful groups may, however, have lower expectations about how well their needs can be met, thus rendering 'satisfaction' an inadequate measure of success for these individuals. This suggests that, in order to measure the 'success' of these new forms of dispute resolution, researchers must augment their focus on party satisfaction with more explicit consideration of 'fairness' in both process and outcome.

We hope readers of this volume will draw their own conclusions about the promise and risks of the paradigm shift we have described. Understanding and evaluating these changes should help prepare scholars and policy-makers for the challenging task of designing systems that serve the needs and protect the interests of families who seek both justice and conflict resolution.

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Part I
Theoretical Foundations

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In the Best Interests of Children: A Proposal to Transform the Adversarial System

Gregory Firestone and Janet Weinstein

In the traditional family law and child protection litigation where the court is asked to make determinations based on the best interests of a minor, the adversarial, rights-based model often fails to serve the interests of children and families and may be more harmful than beneficial to children relative to other possible methods of dispute resolution. This article examines the shortcomings of such an adversarial, rights-based model; briefly highlights the literature on dispute resolution systems design; and then proposes a new approach to better serve the interests of children in family law and child protection cases.

As many others have previously discussed, the adversary system is often unhealthy for children.[1] In the traditional family law litigation process and the child protection system where the court is asked to make determinations based on the best interests of a minor, the adversarial, rights-based model typically fails to serve the interests of children and families and may be more harmful than beneficial to children relative to other possible methods of dispute resolution.

Shortcomings of the Adversary System

Our legal system generally relies on the notion that adversaries in a legal dispute will draw forth all information relevant to the contest in the process of putting forward their best positions, thereby allowing the decision maker to determine the "truth" and to make the best decision. Although the goal of an adversarial, rights-based model is to best serve the interests of children, the current system has a number of shortcomings that undermine the best intentions of the professionals involved.

"Legalization" of human problems. The best interests of children in divorce and child protection cases have become defined as primarily a legal problem; in reality, they are much more complex psychological, social, and legal problems that typically become intertwined

into other issues such as child support. Family relationships have become "legalized" in such a way that the system loses sight of the human problems in context and focuses only on addressing answers to the legal issues. The failure to better examine family problems contextually results in little recognition for the ecological perspective of family dynamics. Greater understanding of cultural mores, for example, has no place in a system bound by the act of fitting evidence into the fixed definitions of a statute. The law is not the appropriate forum for assisting dysfunctional families to function better. Resolution of the legal case often does little to improve or resolve the underlying family dynamics.

Disempowerment and dehumanization of the participants. Parents, accustomed to being the decision makers in matters pertaining to their children, typically become disempowered in litigation. In child protection cases where parents allegedly have failed to adequately care for or have abused or neglected their children, not enough effort is made to enable the parents to participate collaboratively with others in determining what services will be provided. In litigation, parents often become frustrated because rules of procedure and evidence may work to distort the facts on which the decision will be made. Parties may not be able to tell their stories, instead having to make the facts fit into the categorized requirements of the law. What seems to be actually relevant to the parties, what they need to say to feel heard, may not be presented to the court and may be seen as irrelevant to the proceeding.

Clearly this is also a dehumanizing experience. Although some attention has been paid to attempting to create a more humane and child-centered courtroom, the process of engaging in a battle with family members is rarely, if ever, a positive experience; certainly it is not for the children who are often placed in the middle of this warfare. Nor is it generally helpful to the parents or to the professionals who are trying to help them mend family relationships.

Rights over interests. Although the focus on the best interests of the child does create some pressure for parents' attorneys to couch their arguments in terms of what is best for the child, the court in child protection and custody disputes cannot ignore the rights of the parents. Concerns regarding gender equality have further[2] focused the discourse on parental rights; many believe the end product has been court orders that fail to honor family relationships.[3] This focus on the rights of the parents in custody and parenting disputes often occurs without a discussion of the responsibility adults owe to their children.

Zealous advocacy. The lawyer's ethical obligation to zealously represent his or her client is probably the cornerstone of the adversary system. The zealous advocate protects the rights of the client and cannot, according to principles of professional responsibility, do anything that would diminish the rights of the client. This kind of behavior is inappropriate for matters in which the court is required to determine the best interests of the child. Zealous advocacy of a client's rights may be counter to the best interests of the child, and such advocacy tends to further escalate existing conflict between the parties and cause greater harm to the child.[4]

Destruction of ongoing relationships. Preservation and healing of relationships between the contestants is not a consideration in this model, even though in cases involving the custody and welfare of a child, relationships are at the heart of the matter. Disputes involving the custody of children, particularly where abuse and/or neglect by one or both of the parents

is alleged, tend to be among the most bitterly fought legal battles. It is critical to recognize that one of the most consistently reported findings of divorce research involves the toxic effect on children caught in the middle of ongoing conflict of their parents.[5] The adversary process makes enemies and exacerbates existing controversy. There is no healing element in the process to help to mend relationships that have been damaged or to promote future healthy interactions. The effects of these broken relationships on children and parents are devastating and long lasting.

Delayed outcomes. Litigation takes too long, especially considering a child's sense of time.[6] In fact, in a divorce, the custody issue may never be truly final until the children reach majority age. Until that time, the parents may engage in ongoing battles over the best interests of their children. There is little doubt that the consequences of uncertainty and instability can devastate a child and affect functioning and performance in all areas, particularly the ability to form satisfying relationships as an adult. Although it is important that the process not be steamrollered so as to result in injustice to the parents and child, delays that have no real positive role in the determination of the best outcome for a family and child are not justifiable.

Expense of litigation. The adversarial system is based on the idea that people will be represented by attorneys who will bring forth the best case. In family law cases, the vast majority of parties are unable to afford counsel.[7] In many jurisdictions, parents are unrepresented in child protection hearings, at least in the preliminary proceedings. Court time is also costly. Judges are paid for their expertise in the law and their skill in managing the trial process. Additionally, attorneys' fees for litigation involve preparation time and time spent in court waiting for cases to be called. Experts are expensive and, in most states, there are inadequate resources to pay for adequate forensic reports in child protection and family custody cases. The focus on the litigation process drains resources from where they are really needed, in the delivery of services to families who are experiencing transition and disruption. In child protection matters, the cost of attorneys' fees might be paid from the same budget that pays for services or social workers. In family court cases, parents might have to choose between having legal counsel and some other service, such as mental health or financial counseling.

Limited information for decision making. Special rules governing the relationship between attorney and client are an integral part of our adversary system. Client confidentiality and rules of evidentiary privilege mean that some information may come to the attention of the attorney but not be presented to the finder of fact, regardless of how relevant or material the information is to determining the appropriate outcome of the case. In proceedings where the judge is supposed to assess all the facts and make a determination as to the best interests of the child, barriers to full disclosure are barriers to accomplishing this end.

Past oriented. The adversary system is not dynamic and focuses largely on information about the past. Child protection and custody disputes are about the future welfare of the child. Although past acts may provide some help in thinking about the welfare of the child, they are not determinative. The family is a living entity, dynamic in nature, involving personalities and relationships that will change depending on how the family is reordered. Parenting may change after a divorce, so that an examination of parenting at the time of divorce is not

necessarily the best indicator of what will occur later. The traditional legal approach requires a momentary snapshot judgment of the family structure, which does not serve the best interest of the child.

Exclusion of others. The adversary system typically involves a battle between the parties to the proceedings. Although others may participate as witnesses, third-party interests are not relevant to the outcome. Although the law may define the family as consisting of parents and children, others, including relatives, friends, counselors, and neighbors, can play substantial roles in the family. Particularly for cultures within our society in which extended family includes relatives as well as nonrelatives, the legal barriers that exclude these people from participating and contributing to the outcome restrict the ability to understand the family and its needs, and likely limit the number and quality of options for serving the best interests of children.

Polarized role of experts. The adversary system often pushes many helping professionals to become advocates for one position. Therapists, evaluators, teachers, physicians, and others often not trained to be advocates in the legal sense are usually more aware of the dynamic and contextual nature of the family and are uncomfortable taking such one-sided positions. For example, in child protection cases, social workers often become adversaries to the families they are supposed to serve. Similarly, mental health professionals who have testified frequently in best interest cases often adapt to the process with frightening success.[8] For example, mental health professionals who rely on the adversarial legal system as a source of income may be concerned with more than the threat of being embarrassed by skillful cross-examination. Where more than one mental health expert is involved, the fact that they may be testifying for opposing parties may also tend to draw them into the role of adversaries rather than neutral, objective witnesses and impede their interactions.[9] Opportunities for collaborative problem solving are foregone in allegiance to the adversarial process, which often only serves to confuse the issues with conflicting testimony.

Compromised use of mental health services. Parties who are in therapy may be more inclined to hide their own shortcomings for fear that any disclosures made in counseling may be later presented to the court. Mental health professionals often find that parties are less inclined to be open in counseling and that the expectation that a mental health professional may be called to testify can greatly impede mental health counseling.

Error bias. In the context of child protection and family custody proceedings, the first decision is often determinative of later decisions; thus, "an error at one stage is more likely to be maintained or exaggerated than reversed."[10] For example, in child protection cases, the first decision to remove a child might eventually result in the child's adoption, as the child-caretaker relationship grows and the parent is basically excluded from the child's life. If the risk to the child was not as great as initially feared, a family has been unnecessarily destroyed. Judges understandably are risk-aversive, and these tendencies may contribute to these initial errors.[11]

Inadequate training of decision makers. Our legal system has no special insight into the needs of children and families, nor do legal professionals typically have special training to deal

with the complex and difficult issues that arise in these disputes. Judges and attorneys find themselves involved in the lives of families in an intimate way for which they never prepared in law school. The best interests standard, which has been criticized for being vague and for being an illusory determinant of the child's welfare,[12] exaggerates the training deficiencies because those who make the decisions are often forced to rely on their personal biases, experience, and intuition. Judges and attorneys frequently must rely on the word of other professionals, who have more specific training in issues relating to parent-child relationships, child development, and risk assessment, with little expertise to critically analyze such expert testimony.

Role of children in litigation. Although it is best to keep children out of the conflict arena where possible, in most cases children are well aware that their parents are involved in a dispute concerning them. In these situations, commentators disagree about the role of the child and about the role of children's attorneys. Children may come to court and be forced to take sides against one or both parents, or they may have their concerns expressed to the court by their attorney or guardian ad litem. The significance of what children say may not be understood, or the children's perspectives may not be presented to the court at all. Ultimately, proceedings that place children in the middle of an adversarial battle involving their parents are antithetical to the best interests of those children.[13]

A Comprehensive Dispute Resolution System

We propose that a system that truly serves the needs of families in crisis should be based on an understanding of their needs. In addition, such a system should draw on the accumulated knowledge we have of private and freestanding dispute resolution systems. Below we summarize a few approaches to alternative dispute resolution (ADR) system design that include some principles we have incorporated into our proposal.

Dispute Resolution Systems Design Theory

Ury, Brett, and Goldberg[14] outline six principles of dispute system design. They are (a) focus on interests, (b) loop-backs, (c) low costs rights and power backups, (d) consultation and feedback, (e) low- to high-cost sequence of procedures, and (f) provision of motivation, skills, and necessary resources. Although their book, *Getting Disputes Resolved*, was written to address organizational dispute resolution systems, we would suggest that these principles can also be applied to developing a comprehensive dispute resolution program that would better serve children and families, as discussed below.

Constantino and Merchant also offer complementary organizational dispute resolution principles that provide additional insights into the development of a comprehensive dispute resolution program. They are (a) develop guidelines for whether ADR is appropriate, (b) tailor the ADR process to the particular problem, (c) build in preventive methods of ADR, (d) make sure that disputants have the necessary knowledge and skill to choose and use ADR, (e) create ADR systems that are simple to use and easy to access, and (f) allow disputants to retain

maximum control over choice of ADR method and selection of any third party whenever possible.[15]

Last, Rowe[16] offers additional considerations when developing organizational dispute resolution systems. Although addressing a different organizational system than family court, Rowe's suggested factors are also helpful here. According to Rowe, one should consider the following factors: (a) the values of the system, (b) the presence of many options, (c) multiple access points, (d) an organizational ombudsperson, (e) wide scope, and (f) continuous improvement.

Proposal for a Comprehensive Dispute Resolution System for Families in Transition

We propose that it is time to consider developing a comprehensive dispute resolution program for families experiencing divorce or child protection problems that is built on the lessons learned about the inadequacies of the current approach and the contributions of the literature on dispute resolution system design. This proposed approach emphasizes a new thinking about family court services. It builds on the multidoor door courthouse concept[17] in a number of important ways. First, the program itself would be a private/public endeavor and, although intertwined with court programs, would be a free-standing operation that utilizes court services mostly for rights-based dispute resolution backups and for the filing of agreements and court documents. Public-private partnerships will likely become more necessary in the future as the volume of divorce and child protection cases continues to increase in many jurisdictions at a time when state budgets are increasingly limited in their ability to provide adequate funding for court operations. Although courts may still need to provide low cost or free services to indigent families, such services could be offered directly by the court or supported with court or community funding. Combining court services with private dispute resolution methods and other supportive services will also serve to create an independent, comprehensive dispute resolution system where litigation plays a very small role in the overall resolution of conflicts.

Second, rather than courthouse being the entry point, people would enter the system through consultation with a Dispute Resolution Coordinator (DRC). The DRC, unlike the "intake specialist" used in the multi-door courtroom concept, would be available for the family each time a new problem arises, allowing the family to "loop-back" through the system, accessing a variety of processes and services, depending upon the family's current needs. DRCs would be available in local communities, making them easily accessible to clients and not necessarily under the umbrella of the courthouse.

Third, the DRC's role would be different from the triage model of the multidoor courthouse. After proper screening for domestic violence, the DRC would empower the parties (when domestic violence and child protection concerns are not present) by offering them different methods of dispute resolution and enabling the parties, to choose their own preferred method. In cases involving domestic violence and/or child protection, the DRC would still seek to offer those dispute resolution options that were considered appropriate for the specific case. The DRC would not be involved in the resolution of substantive issues in the case. The role

of the DRC would be to educate the parties concerning their dispute resolution options and assist them in choosing methods of dispute resolution. Thus, it would become an expectation that parties would seek resolution of disputes without having to come into the courthouse, which represents the adversarial system and a win/lose culture. Moving the major activities of dispute resolution out of the courthouse may be an essential step to changing the cultural expectations of how disputes are resolved. Fourth, we propose that the development of the comprehensive dispute resolution program be designed with initial and ongoing input from all stakeholders in the system, including families involved in divorce and child protection proceedings.

We believe it is time to consider implementing new dispute resolution systems that incorporate the values and ideas discussed below. What we present here is a basic outline; the specific mechanisms of any such system would vary depending upon community needs and resources.

1. Availability of many dispute resolution options. Families are unique, and the issues that families are dealing with in custody and child protection cases include financial concerns, parenting issues, mental health concerns, domestic violence, substance abuse, limited resources, third-party concerns, and so forth. A variety of problem-solving mechanisms should be available to families and should be affordable; services that cover a spectrum of economic resources should be available. Extended family members and other support persons should be encouraged to participate where their participation would assist in the resolution of the problem. The expectation in the system should be that parties will resolve their dispute, with the assistance of the system if necessary. Options for conflict resolution should include such ADR processes and services as mediation, parenting coordination, family group counseling, education, counseling, neutral evaluation (including custody evaluations), arbitration, litigation and more cost-effective rights-based options, and other methods that would provide the parties with what they need in their particular situations. In divorce cases, such options could be available for custody and noncustody issues, as ultimately it is in the best interests of children to have parents resolve all outstanding divorce issues in a timely and conflict-reducing manner. Dispute Resolution Counselors will need to be culturally competent to serve the needs of their communities, understanding that some problem-solving processes may be particularly suited for use with some groups and not others.

2. Emphasis on interest-based approaches. The best way to maximize the interests of children and families is to encourage interest-based problem solving. This problem-solving system will focus on the interests of the participants rather than on their legal rights. Although the system would include a mechanism for determining legal rights where necessary, the expectation on the part of all participants would be that they will focus on concerns related to family functioning, with a particular focus on the interests of the children. The dispute resolution program would encourage interest-based collaborative processes where the parties would be able to problem solve together and determine their own outcomes. Although knowledge of rights-based solutions would be encouraged to enable parties to make informed choices, the emphasis would be on building solutions that work best for the parties and their families. As such, the parties would be encouraged to find customized solutions that may not be an option

in litigation where courts have a limited repertoire of remedies and typically do not have the time or resources to create individualized parenting plans for families.

Interest-based problem solving focuses on the needs of the individuals who are involved in the problem. Because it is tailored to deal with the specific issues of these particular people, it is more likely to maximize opportunity to address all needs. Parties are not restricted to discussing information that is determined to be legally relevant. People who are not parties to the legal action but who have an interest in the well-being of the family may be appropriate participants. Interest-based problem solving also fosters conflict reduction. The parties can experience that their concerns are being heard and addressed. In addition, the focus on interests, rather than winning, forces parties to find ways to solve their problems by working together. In turn, the parties learn skills that will allow them to avoid conflict in the future.[18]

3. Focus on problem solving. The system must reflect a cultural shift from a focus on winning to a focus on problem solving. The message received by participants from their initial entry into the system is that they are expected to resolve this dispute, with the help of the processes and services that will be made available to them, and that the interest of the system is the same as theirs-to protect the well-being of their children.

4. Availability of affordable rights-based solutions. Families need low-cost strategies to resolve their parenting and financial disputes. Similarly, states cannot afford the cost of litigating these matters if they are to use tax dollars wisely. As expensive dispute resolution strategies only drain families of essential resources at a critical time and limit a state's ability to provide necessary services, low-cost alternatives should be available. Therefore, when the parties fail to reach an interest-based solution or when interest-based strategies are not possible, there need to be multiple levels of options, including affordable rights-based resolution processes. The current family law and child protection system is complex and expensive, and even when alternatives such as special masters are used, the process tends to resemble litigation. Experts trained to determine these rights could more quickly and efficiently resolve many of the rights-based issues that are determined in family court, such as child and spousal support, and property interests. If the culture can be shifted so that expectations of the participants are not about winning or losing, but rather are about helping the family to make necessary changes, the parties could have these issues resolved by a third person, when they cannot reach agreement on their own, with less expense, paperwork, and formality. Although the determinations of these experts may be subject to court review, such review should be limited to procedural fairness-in other words, whether the decision maker considered all of the facts provided by the parties-and, if so, whether there was an abuse of discretion. Courts can create panels of professionals for determining these special issues, and the dispute resolution coordinator can offer the family a range of services.[19]

5. The services of a DRC. To be effective problem solvers, the parties must be provided with information about the dispute resolution process and the choices available to them. A DRC would serve as a consultant to the parties to advise them of their conflict resolution options and to empower them to choose the best options for themselves. When the parties are unable to agree upon a dispute resolution process, the DRC can mediate the process issue. In the event the parties do not agree on a particular method of dispute resolution, the parties could

then be directed to proceed to a predetermined path of dispute resolution as set forth in the comprehensive dispute resolution program.[20] In child protection cases, the DRC would also ensure that the dispute resolution path was consistent with state-determined mandates for child protection judicial proceedings. This DRC would also help to ensure that the system of loop-backs works effectively, ensuring that families do not fall through the cracks but rather get assistance each time a problem arises. The DRC would also encourage parents to receive training in the skills they will need to succeed at solving their problems. In addition, this DRC would be able to track the success of the program and recommend improvements.

6. Guidelines and screening. Guidelines should be established to help in the determination of whether court intervention is required.[21] In some cases, interest-based and collaborative strategies would not be appropriate. For example, screening for domestic violence would need to be a part of an initial assessment to determine the appropriateness of ADR options for parties and, where appropriate, some services may not be offered to some families.[22] New programs to better address the special needs of domestic violence would need to be developed that better address concerns relating to safety, imbalances of power, and the special needs of children in these cases. Such programs would emphasize timely resolution in a manner that separates the victim and children from the batterer, provides specialized treatment as appropriate, and seeks to find ways to help children heal. Similarly, in child protection cases, appropriate screening would be necessary to ensure that children are not placed in danger in mediation. This screening could be provided by the child protection agencies and guardian ad litem or court-appointed special advocates already involved in such cases or other professionals as needed. Screening could also be designed to ensure that parties are competent to participate in mediation.

One might also consider appropriate screening to ensure that parties are not conducting themselves in a fraudulent manner. For example, parties could be asked to submit financial affidavits and, when necessary, a process of discovery could be implemented to ensure that all financial information is accurate.

7. Support. Families in times of stress need additional support. Divorce is difficult, as is participating in the child protection system. Even parents with the best intentions to minimize conflict are not always successful. A support system that helps people manage the changes in the family would include services such as job counseling and training, housing assistance, and respite care, as well as educational programs that could include topics such as collaborative methods for resolving divorce, conflict resolution skills for parents, the impact of divorce on children, and so forth.[23] The educational programs could be mandatory and required early, rather than late, in the divorce process.[24] To reduce costs, such programs could be available on videotape/DVD, through local court or university programs, or delivered via the Internet. Such programs would not only be helpful in resolving current disputes but may also enable parties to better resolve disputes in the future, therefore serving a preventive role as well. A team approach to providing services could help to ensure that the spectrum of support needed by parents and children would be available.

8. Focus on future-oriented strategies. Dispute resolution strategies must be future oriented. As discussed above, the past orientation of the legal system does not provide adequate

consideration of the future change and development of the family and the individuals who comprise it. Strategies for problem solving must include discussions of what will happen as the children mature and as the needs and parenting abilities of the parties change. Furthermore, there must be discussion of problem-solving mechanisms that will be in place as future concerns arise. Each new problem should not require, as they do now, filing of legal documents and an onerous process that stands in the way of getting the problems solved.

9. Encouragement of professional collaboration. Divorce and child protection matters are complex problems and that solutions require collaboration and the participation of many other professionals. All professionals involved need training in mental health, law, collaborative conflict resolution strategies, the dynamics of divorce, child development, the causes and consequences of child maltreatment, and the importance of interdisciplinary teams. Resources would also need to be committed to train court staff in more effective techniques for encouraging greater collaboration among professionals as well as among parties.[25]

10. Empowerment of parents. Parents need and more often will benefit from a process for resolving disputes more than they need or will benefit from outside decision-making services.[26] A process in which parents can fully participate and begin to take responsibility for the decisions that will reshape their lives does not occur when families must rely on judicial decision making. Although it may be true for child protection cases, divorce is not in and of itself a reason for the state to direct the lives of parents and children. Even in cases of child maltreatment, extended family members are often in a better position to participate in decision making, as shown by the successes of family group conferencing. Similarly, in child protection mediation, the families are often able to reach a consensus with child protection agencies, guardian ad litem, and others involved in the child protection case, and there is strong judicial support for such nonadversarial dispute resolution strategies such as mediation and family group conferencing.[27]

11. Respect for families' privacy. Given that the matters that come before a court in custody and visitation conflicts are very private in nature, they should be confidential rather than public. Unless good reason can be shown to open a family law proceeding, these hearings should be closed in a similar way that juvenile court cases are protected.

12. Long-term thinking. Prevention strategies can lessen the impact of these disputes on children and families. Families going through divorce require many of the same kinds of support that are needed by parents and children in the child protection system. Education about relationship maintenance, dealing with stress, communication skills, and budgeting is helpful to people who are changing the structure of their families. Furthermore, group, couple, and individual counseling can help people make the adjustments they need to the new family structure. Such services need to be available to families even before any legal action is taken.[28] Parents who receive services to help them cope with change will be able to minimize their conflict and, thus, minimize the damage to the children.

13. Understandable process. Families need an understandable process. The system must be simple, comprehensible, and easy to access, with multiple access points. The complexity and barriers to accessing the legal system are not appropriate to solving family problems. A dispute

resolution coordinator might be the first point of access. There should be significantly less paperwork and procedure than what is now required in the legal process.[29] Record keeping would be solely for the purpose of tracking the family's needs and progress. To the extent they are still necessary, court forms, program intake forms, and other documents would need to be readily available, and helpful directions and assistance would be provided to aid parties in completing them.

14. Ongoing evaluation. The system must provide a mechanism for improving itself. It is particularly important for the participants to have the opportunity to give feedback regarding their experiences and suggestions as to how the system might be improved to better serve the needs of the parties. Similarly, the professionals involved in the system should have a process for commenting about their concerns and thoughts about how the system is working. Finally, there should be a procedure for tracking results to examine the efficacy of the system in terms of criteria such as decreases in litigation and better outcomes for children.

Conclusion

A cultural shift in our expectations surrounding best-interest conflict resolution is essential. Rather than turning to the courts to make difficult relationship decisions, a comprehensive system needs to be in place that is based on an understanding of the psychological, social, and other dynamics that underlie these matters and encourages the development of collaborative, interest-based problem solving. The comprehensive dispute resolution program we offer here is based upon some of the principles of dispute resolution system design and built upon what we have learned in divorce and child protection cases. It attempts to fashion dispute resolution services to the needs of families going through difficult times rather than fit the families into a system that was never really intended to heal their problems. We believe that such a comprehensive system will not only best serve the interests of children and families, it will also offer families in transition a more humane and cost-effective method for resolving the difficult challenges that these families encounter.

We recognize that such a change will also permit families to resolve their disputes in ways that will be better attuned to the special cultural considerations of a given family. For example, permitting greater involvement of other family members in such methods as family group conferencing would enable families to better find solutions that build on family strengths in a manner that is more specific to their own culture, religion, and ethnicity. Similarly, in divorce, mediation would serve to encourage better communication between family members, and in child protection cases would serve to improve working relationships with caseworkers and others involved with the family. Such improved communication and problem solving could also serve to better enable the professionals to become more attuned to the cultural sensitivities and needs of the family.

Such a comprehensive dispute resolution system would also benefit from the recent emergence of collaborative and cooperative law practices where lawyers are committing themselves to working more collaboratively with couples and professionals and seeking resolution in a more interest-based and collaborative manner. Similarly, the emergence of unbundling of

legal services also well lends itself to such a dispute resolution system where parties may benefit from specific and limited assistance from attorneys. Similarly, we would expect to see the emergence of other types of divorce coaches and consultants from other professions, including mental health and accounting.

To make this transformation, the current stakeholders in the system, including families and professionals, will need to be educated about the consequences of participating in the current adversary system and the possibilities of alternative processes. This would require local organization and the support of the family and juvenile courts. Attorneys would need to be trained to incorporate the values on which this proposal is made, beginning in law school. Interdisciplinary trainings and meetings would need to be conducted for all professionals working in the current system to develop new, collaborative ways of problem solving. The growing popularity and success of the collaborative law movement, particularly in the area of family law, is a good example of how this can occur.

Undertaking to transform the manner in which disputes are resolved in divorce and child protection proceedings would be a huge undertaking that must be carefully and thoughtfully developed. Such efforts might first begin with pilot programs or other methods of incremental development where changes can be deliberately and carefully analyzed in a systematic manner.

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Notes

[1] *See*, e.g., Janet Weinstein, *And Never the Twain Shall Meet: The Adversary System and the Best Interests of Children*, 52 U. MIAMI L. REV. 79 (1997); Heather Crosby, *The Irretrievable Breakdown of the Child: Minnesota's Move Toward Parenting Plans*, 21 HAMLINE J. PUB. LAW & POLICY 489 (2000). For a discussion of the negative effects of parental conflict on children of divorce, *see generally* ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 30 (2004) [hereinafter SCHEPARD, CHILDREN, COURTS AND CUSTODY].

[2] ANDREA CHARLOW, AWARDING CUSTODY: THE BEST INTERESTS OF THE CHILD AND OTHER FICTIONS, IN CHILD, PARENT, AND STATE 3, 5-6 (S. Randall Humm et al. eds., 1994).

[3] Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1234-35 (1992).

[4] For a discussion of the role of zealous versus competent advocacy by lawyers for parents in child custody disputes, see SCHEPARD, CHILDREN, COURTS AND CUSTODY, *supra* note 1, at 125-38. *See also*, Weinstein, *supra* note 1, at 163, for a discussion of the role of attorneys in a problem-solving system.

[5] For example, *see, The Wingspread Conference Report in High Conflict Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146 (2001).

[6] JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (Free Press 1973).

[7] *In re* Family Court Steering Committee, 794 So. 2d 518 (Fla. 2001) (stating that in 60% of new divorce cases filed in Florida, at least one party is pro se; in 80% of postjudgment matters at least one party is pro se). *See* SCHEPARD, *supra* note 1, at 40 for a discussion of the effect of pro se litigants on the child custody court's docket.

[8] *See*, Richard A. Garner, M.D., *My Involvement in Child Custody Litigation*, 27 FAM. & CONCILIATION CTS. REV. 1 (1989).

[9] *See* Weinstein, *supra* note 1, at 100; Garner, *id*.

[10] Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLEE 139 (1995).

[11] *Id*.

[12] *See, e.g*., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (1995) (arguing that the standard is vague and subject to arbitrary application and should not be used for decisions about whether to intervene); N. Dicon Reppucci and Catherine A. Crosby, *Law, Psychology, and Children: Overarching Issues*, 17 LAW & HUM. BEHAVV. 1 (1993) (regardless of how it is measured, the best interests of children are generally indeterminant, and largely a matter of values); Catherine A. Crosby-Currie, *Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals*, 20 LAW & HUM. BEHAVV. 289 (1996) (the indeterminacy of the standard vests judges with a great deal of discretion and very little practical assistance).

[13] *See* Weinstein, *supra* note 1, at 116.

[14] WILLIAM URY, JEANNE BRETT, & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED, 42 (Jossey-Bass Publishers 1993).

[15] CATHY CONSTANTINO & CHRISTINA S. MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTH ORGANIZATIONS, 121 (Jossey-Bass Publishers 1996).

[16] MARY ROWE, DISPUTE RESOLUTION IN THE NON-UNION ENVIRONMENT IN FRONTIERS IN DISPUTE RESOLUTION IN LABOR RELATIONS AND HUMAN RESOURCES (Sandra Gleason ed., Michigan State University Press 1997).

[17] The concept of the multidoor courthouse was developed by Harvard Law Professor Frank E. A. Sander, who first presented it in 1976. Responding to growing public dissatisfaction with the justice system and serious overcrowding of court dockets, Sander conceived of a court that offered parties a variety of ways to solve their disputes. Rather than simply adding all cases to the litigation docket, multidoor courthouses direct disputants to "intake specialists" who assess the disputes and determine the optimal routes to resolution. Those routes may include assistance from community resource centers, early neutral evaluation, mediation, arbitration, minitrial, summary jury trial, or litigation, among others. The idea is to save time and money for both disputants and the court, while also improving satisfaction with the process by finding the most appropriate process for the situation. FRANK E. A. SANDER, VARIETIES OF DISPUTE PROCESSING, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979). *See* SCHEPARD, *supra* note 1, at 50 for a discussion of the Pound Conference and the multidoor courthouse and the influence of both on how courts resolve child custody disputes.

[18] Although we understand that court orders will still play a significant role in cases of domestic violence, child abuse, or neglect, as well as where child abduction is a concern, our goal is to change the culture so that expectations are focused on reaching resolution rather than warring. Similarly, legal authority may be required when parties fail to cooperate and cannot be persuaded to participate in

good faith in less adversarial processes. For example, parties who fail to disclose financial assets in a dissolution proceeding or who threaten to violate visitation orders may be more likely to do so under the threat of a court sanction. *See* Weinstein, *supra* note 1, at 159, discussing a collaborative problem-solving approach that uses teamwork and consensus building even in cases in which the courts must become involved and describing the narrow role of the court.

[19] The complex legal system that currently processes family disputes is primarily a result of legislative, rather than constitutional, mandate. The regulation of family matters is an area traditionally left to the states under the 10th Amendment. A few particular issues have risen to the level of constitutional scrutiny, primarily those issues dealing with the child-parent relationship. The U.S. Supreme Court has determined that the rights of parents and children to family integrity and to maintain their relationships can only be disturbed when the court finds by clear and convincing evidence that the parent is unfit (Santosky v. Kramer, 455 U.S. 745 [1982]). Most of the decisions made by family and juvenile courts do not rise to this level because parental rights are not being terminated. In fact, the rights asserted in most family law cases are not considered significant enough to warrant the appointment of an attorney for an indigent party. *See* Weinstein, *supra* note 1, at 102 (discussing the right to be represented by counsel in these cases). The primary consideration should be whether due process is satisfied. Basically, that requirement is met if the party has "an opportunity to be heard in a meaningful manner." Mathews v. Eldridge, 96 S.Ct. 893 (1976). The constitution does not require a particular body to provide that opportunity, so as long as the process is fair and other appropriate mechanisms, similar to administrative law hearings, could be used. Of course, the intention of the proposed system is that the parties would be educated and counseled about alternative dispute resolution processes, rather than simply mandated to use them. Thus, if parties elect to use the services of private dispute resolution practitioners so that the parties themselves can eventually reach agreement, there is no issue of an inappropriate delegation of power to the private sector. In the end, we believe that parties who are empowered to participate in the resolution of their disputes will experience a more fair process and resolution than many now do by participating in the adversary system.

[20] For some disputes, the parties may have a right to litigate at this point, depending on the nature of the underlying problem (i.e., those that give rise to constitutional concerns), but in most cases, the DRC could direct the parties to an appropriate process even without their agreement.

[21] *See* SCHEPARD, *supra* note 1, at 118, for a discussion of screening of child custody disputes in the context of a judicial plan for Differential Case Management (DCM).

[22] *See*, e.g., Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 186 (2003).

[23] *See*, e.g., Alicia M. Homrich et al., *Program Profile: The Court Care Center for Divorcing Families*, 42 FAM. CT. REV. 141 (2004).

[24] *See* SCHEPARD, *supra* note 1, at 68, for a discussion of the types of court-affiliated educational programs available for divorcing and separating parents and children and the research evaluating their effectiveness.

[25] *See* Weinstein, *supra* note 1, at 157, suggesting interdisciplinary training including training in effective collaboration among disciplines.

[26] Philip M. Stahl & Greg Firestone, *Guest Editors' Introduction*, 38 FAM. & CONCILIATION CTS. REV. 292, (2000).

[27] *See, e.g.*, Greg Firestone, *Dependency Mediation: Where Do We Go From Here?* 35 FAM. & CONCILIATION CTS. REV. 222 (1997); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (National Council of Juvenile and Family Court Judges 1995); Susan M. Chandler & Marilou Giovanucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. (forthcoming April 2004

[28] *Supra* note 24.

[29] *See*, D. A. Rollie Thompson, *The Evolution of Modern Canadian Family Law Procedure-The End of the Adversary System? Or Just The End of the Trial?* 41 FAM. CT. REV. 155, 173-75 (2003), for a discussion of the evolution of two tiers of family law procedure in Canadian, with one geared to self-represented litigants and simplified matters.

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An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective

Barbara A. Babb

Introduction

The task of jurisprudence for legal realists is a practical aim to ensure that judicial decisionmaking promotes social welfare and increases the predictability of legal outcomes.[1] This focus on the functional effects of judicial decisionmaking requires sufficient knowledge of the social sciences to enable judges to understand social policy implications when fashioning legal remedies.[2] Legal realism has dominated judicial decisionmaking in most areas of the law.[3] Family law[4] jurisprudence, however, reflects the law's inconsistency with families real life experiences and with relevant social science research in child development and family relations.[5] Historically, judges have attempted to fashion morality in the determination of family legal issues rather than to devise legal remedies that accommodate how families live.[6] This approach to decisionmaking must change if family law jurisprudence is to effectuate the well-being of families and children. A new approach to family law jurisprudence can assist decisionmakers to account for the realities of families lives when determining family legal issues.

The lack of legal realism in family law is troublesome given the extent of court involvement in the lives of families and children. A recent Wall Street Journal article has revealed that family law cases constitute about thirty-five percent of the total number of civil cases handled by the majority of our nation's courts, a percentage which constitutes the largest and fastest growing part of the state civil caseload.[7] The focus of judicial decisionmaking in family law needs to become how the state intervenes in family life, rather than whether the state ought to intervene,[8] as court involvement itself constitutes state intervention.

Changes over the last few decades in the structure and function of the American family, as well as the relative complexity of contemporary family legal issues, challenge judges to adopt an appropriate jurisprudential philosophy that addresses these transformations. The tremendous volume and breadth of family law cases now before the courts, coupled with the

critical role of the family in today's society to provide stable and nurturing environments for family members, require that judges understand relevant social science research about child development and family life. This informed perspective can assist decisionmakers to dispense justice aimed at strengthening and supporting families.[9]

This Article proposes an interdisciplinary approach to resolve family legal proceedings. The interdisciplinary perspective helps judges consider the many influences on human behavior and family life, thereby resulting in more pragmatic and helpful solutions to contemporary family legal issues. Part I of the Article begins with an overview of demographic information about the composition and function of the American family in today's society. It then reviews the scope of family law adjudication facing today's courts and justifies the need for decisionmakers to view family legal problems with an expansive focus. Part II argues for application of a behavioral sciences paradigm, or the ecology of human development,[10] to provide the social science basis for more effective and therapeutic jurisprudence[11] in family law. Demonstrating the relevance of this theoretical framework to fashion family legal outcomes, a novel application of social science within the law, makes clear the need to rely on social science theories and findings in family law adjudication. Part III of the Article explains how an ecological and therapeutic jurisprudential paradigm operates when applied to determine family legal matters, as well as how this interdisciplinary approach differs from traditional notions of adjudication.

* * * *

C. Adopting a Therapeutic Perspective

Family law adjudication by definition involves court intervention in the lives of families and children. In contrast to social science, law does not describe how people do behave, but rather prescribes how they should behave.[145] Thus, the following questions become pertinent: How deeply into the domestic realm can or should government go when it intervenes in the lives of families and children? Conversely, what is government's duty to families and children who are in legal and social distress? These political and philosophical questions still bedevil public officials in America today. Yet when society chooses to intervene, it must be done well and there must be accountability.[146]

The notion of intervention implies an ability to influence the underlying situation to make it more positive.[147] In family law adjudication, one function of court intervention ought to aim to improve the participants underlying behavior or situation.[148] Application of therapeutic jurisprudence[149] to family law can assist with this improvement effort. The concept of therapeutic jurisprudence emerges from the field of mental health law, where it is defined as follows:

> Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (law yers or judges).

> The task of therapeutic jurisprudence is to identify and ultimately to examine empirically relationships between legal arrangements and therapeutic outcomes. The research task is a cooperative and thoroughly interdisciplinary one . . . . Such research should then usefully inform policy determinations regarding law reform.[150]

The goal of therapeutic jurisprudence suggests a need to restructure the law and the legal process by applying behavioral science knowledge to accomplish therapeutic outcomes without interfering with traditional notions of justice.[151] The potential exists to apply therapeutic jurisprudence to family law.[152]

In the family law context, this concept of the law as a therapeutic agent is particularly relevant to situations where families experience intra- or inter-family crisis. Envisioning the court's role in these family crisis situations as that of facilitating more positive relationships or outcomes and of strengthening families functioning, or a prescriptive focus,[153] seems particularly appropriate.

Liberalized divorce laws[154] have encouraged a therapeutic focus by some professionals involved in these cases, thereby providing an example of the relevance of therapeutic jurisprudence to family law. As the legal focus in these divorce cases has shifted away from questions of fault surrounding marital breakup, the mental health profession's emphasis has centered on the effects of divorce on family members. [155] In turn, these professionals have advocate therapeutic intervention in the legal aspects of divorce in an attempt to transform the process to a more positive experience.[156]

This therapeutic focus in divorce served as the basis for many states to create conciliation courts with the advent of the liberalized divorce laws. These courts provided separated or divorcing couples with marital counseling.[157] States justified the creation of the courts by asserting their need to provide services to families to ease the families crises.[158] The role of the court system was therapeutic in that the system attempted to assist families to adjust more positively to the post-divorce context.[159] The therapeutic focus, however, stalled in the 1960s due to an inability to reconcile the focus with the advocacy process and to a concern about cost.[160]

Family law jurisprudence can adopt and expand this service-oriented and therapeutic focus. To accomplish this family law reform, a significant part of the task becomes creating a jurisprudential model that assists judges to fashion therapeutic interventions and outcomes for individuals and families.

To establish criteria designed to enhance the therapeutic nature of any reform, family law reformers can look to proponents of therapeutic jurisprudence in the field of mental health law. These reformers already have identified some of the issues to promote in constructing a therapeutic jurisprudential paradigm. Some of these issues include the ability of the reform to empower individuals by allowing them to learn self-determining behavior and acquire decisionmaking skills, as well as the ability of the reform to empower judges to exercise sufficient controls to minimize abuse of the therapeutic measures.[161] In the field of family

law, therapeutic justice should strive to protect families and children from present and future harms, to reduce emotional turmoil, to promote family harmony or preservation, and to provide individualized and efficient, effective justice.[162]

Incorporating the notion of therapeutic jurisprudence, however, raises questions about whether proponents of the therapeutic model are neutral, or whether they have a bias toward procedures and results designed to ensure their continued involvement in the resolution process.[163] Applying therapeutic justice to family law also invites concerns about whether judges and lawyers should deviate from the traditional advocacy model of adjudication,[164] a system that can further splinter already fragmented family relationships due to the adversarial and protracted nature of many court proceedings. In resolving family law matters, where the parties have some degree of relationship to one another and likely need to continue their relationship to some extent, adjudication may not represent the most appropriate dispute resolution technique.[165] On the other hand, recognizing that adjudication is available as even a last resort can compel the parties in family law proceedings to adopt less extreme positions and to negotiate or mediate as dispute resolution techniques.[166] Mediation itself in related-party cases can prove a therapeutic process.[167]

The therapeutic jurisprudence perspective, or assessing the therapeutic impact of adjudication,[168] offers a useful philosophy around which to structure family law decisionmaking. Applying the notion of therapeutic jurisprudence does not mean that the law serves predominantly therapeutic ends, nor does it suggest that courts avoid other jurisprudential outcomes. An application of therapeutic jurisprudence to family law means that decisionmakers need to evaluate the therapeutic consequences of the application of substantive family law, as well as the therapeutic effects of court rules, practices, and procedures.[169] This concern about the therapeutic nature of family law decisionmaking, in combination with the application of the ecology of human development paradigm, underlies the interdisciplinary approach to family law jurisprudence proposed in this Article.

III. Expanding the Role of Social Science in the Law: An Ecological and Therapeutic Paradigm for Family Law Jurisprudence

The American macrosystem has evolved into one in which the judiciary is the arbitrator in most domains of family and community life.[170] Thus, perhaps unwittingly, family law decisionmakers, including judges and masters, play a critical role in shaping social policy.[171] Because the law compels parties involved in family legal matters to utilize the court system, the system has a corresponding responsibility to resolve these issues in a helpful way.[172] An approach to family law jurisprudence that structures decisionmaking by applying the ecology of human development paradigm, buttressed by notions of therapeutic jurisprudence, provides a functional family law jurisprudential model. This type of decisionmaking has the potential to facilitate problem-solving and to positively enhance the quality of parties daily lives, thereby rendering a more effective outcome for individuals and families.[173]

The ecological perspective conceptualizes individual and family development as a process that occurs as a result of the nurturance and feedback that individuals receive on a daily

basis from their interpersonal relationships.[174] To be effective as a family law decisionmaking model, advocates, parties, and human services providers[175] must identify for decisionmakers the types and strengths of the microsystem relationships within which people function, or the relationships between and among family members. In addition, decisionmakers need to understand family members mesosystem relationships, or relationships between individuals and aspects of their immediate environment, such as neighborhoods, schools, and religious organizations. For example, in a custody proceeding, the judge needs to understand the degree of parental participation in their children's schooling.

According to the ecological perspective, development also occurs both directly and indirectly as a result of influences outside the family, or resulting from macrosystem influences, such as the parents employment setting.[176] As a consequence, advocates themselves must understand and elucidate for decisionmakers the effects of macrosystem influences on the family. In a custody proceeding, for example, the judge needs to know time demands of parental employment relative to time available for parents to engage in child- rearing activities.

Utilizing an ecological approach to family law jurisprudence implies that decisionmakers appreciate the importance of socially rich environments for family members, including environments that provide support to families and children through a mix of formal and informal relationships.[177] In addition, decisionmakers must recognize the interactions of individuals within a system and between systems over time and across the course of a lifetime, as each system participant continually adjusts to the other.[178] The responsibility of family law decisionmakers to foster supportive environments for individuals and families by adopting an ecological and therapeutic jurisprudential framework, then, challenges decisionmakers to look beyond the individual litigants involved in any family law matter, to holistically examine the larger social environments in which the participants live, and to fashion legal remedies that strengthen a family's supportive relationships. Decisionmakers must attempt to facilitate linkages for the litigants between and among as many systems in their lives as possible.

The adversarial nature of traditional methods of family law adjudication can further fragment the relationship between family law litigants. A court system that accommodates a range of dispute resolution techniques, including negotiation, mediation, and adjudication, is important to ecological and therapeutic family law jurisprudence. These methods enable judges to strike an appropriate balance between the parties own resolution of a family legal matter by their private ordering or agreement and full court trial of family law issues. Judges must have the ability to direct the parties to the most effective dispute resolution techniques for their particular situation.[179]

To positively affect family members behavior, thereby achieving a therapeutic outcome, family law remedies must reflect an integrated approach to family legal issues.[180] This means that decisionmakers must consider all of the parties related family legal proceedings,[181] as well as all of the institutions or organizations potentially affecting the behavior of families and children, including the community, peer groups, educational institutions, and religious organizations. Judges must know the neighborhoods of the families and children whose lives the courts influence in order to conduct this mesosystem and exosystem analysis.[182] This

need for connection to the community also challenges the judiciary and the courts to become leaders in the community and to attempt to build procedures, dispositions, and structures that foster extended-family and community responsibility.[183]

In an effort to establish and nurture linkages between and among the microsystems, mesosystems, and exosystems within which family members participate, family law advocates, decisionmakers, and services providers must coordinate their efforts to assist individuals and families. This need for collaboration may result in shifting to social services[184] agencies external or adjunct to the court system some of the court's functions.[185] In the process of attempts at timely agency intervention to resolve families problems, however, [p]eople should not have to go to court to get help.[186] Society as a whole must begin to acknowledge that this type of intervention and support is therapeutic for families, rather than viewing the intervention as an indication that families have failed.[187] The fact that service agencies in our society generally are very highly specialized, with little integration among the various service agencies and with an emphasis on treatment of problems rather than on problem prevention,[188] complicates this facet of an ecological and therapeutic approach to family law decisionmaking.[189] On the other hand, the need for collaboration with other agencies does not mean that courts must relinquish their role as the last resort arbiter[190] of fundamental legal questions. To the contrary, courts must insist on maintaining this function, as this belongs uniquely to the adjudicative process. [191] An ecological and therapeutic approach to family law jurisprudence, however, does modify longstanding notions of adjudication.

Advocates and parties to disputes generally perceive adjudication as focused. They ask the judge to determine whether one party has a right or duty, rather than request the judge to devise alternatives for the parties.[192] Adjudication of family legal proceedings in an ecological and therapeutic jurisprudential model, however, compels a judge to consider alternatives. The judge must attempt to establish as many linkages as possible between and among various systems within which family members participate.

In contrast to the resolution of disputes in a piecemeal process, where the judge's power to decide extends only to the issues presented,[193] application of the interdisciplinary family law jurisprudential model encourages judges to consider all of a family's legal proceedings and related issues. This type of problem identification enables judges to develop a holistic assessment of the family's legal and social needs and to devise more comprehensive legal remedies

Traditionally, judges conduct fact-finding at some distance from the social settings of the cases they decide.[194] This isolation can render judges' fact-finding misguided and uninformed. Pursuant to an ecological and therapeutic jurisprudential paradigm, judges' involvement with the community and its organizations enables the judges to understand the contextual basis for their fact-finding. This contextualized fact-finding allows judges to more realistically and effectively address litigants needs.

Finally, traditional notions of adjudication make no provisions for policy review, as judges base their decisions on precedent and behavior that predates the litigation.[195] Acknowledging

that judges decisions in family legal proceedings constitute family intervention, the remedies judges fashion in an interdisciplinary jurisprudential paradigm need to reflect policies that support families.

Application of both the ecology of human development perspective and notions of therapeutic justice to the resolution of family legal proceedings provides a jurisprudential paradigm for family law decisionmaking that empowers the court. This jurisprudential framework offers a means for courts to approach family problems in a systematic manner and to more effectively resolve the many and complex family legal matters they face. The distinctiveness of the judicial process its expenditure of social resources on individual complaints, one at a time is what unfits the courts for much of the important work . . . . Retooling the judicial process to cope with the new responsibilities of the courts means enhancing their capacity to function more systematically in terms of general categories that transcend individual cases. Some . . . innovations are required.[196]

An interdisciplinary jurisprudential approach can refit the courts now, as well as adequately prepare the courts to effectively address the novel and complex family legal challenges of the future.

Conclusion

This Article has proposed an interdisciplinary jurisprudential paradigm that provides a common analytic framework for the resolution of all family legal proceedings. The paradigm assists family law decisionmakers to account for the diversity among individuals, legal issues, social issues, and other related matters that constitute the cases before them and that create the plurality and richness of American society. The paradigm can operate within any decisionmaking structure or system for resolving family legal matters. As such, the ecological and therapeutic jurisprudential paradigm can enjoy broad and universal application.

Because parties seeking resolution of family legal matters entrust judges to make critical decisions affecting individuals and families daily lives, judges in these cases must be more than triers of fact. Family law decisionmakers must embrace as a goal of family law jurisprudence the need to strengthen individuals and families and to enhance their functioning. This objective challenges decisionmakers to examine the family holistically, identifying how family members interact with other aspects of the family ecology at the present time and over the course of time. Judges must know and understand the backgrounds and communities from which family law litigants and their legal issues emerge.

A novel and expanded role for social science in the law can assist with this task. Applying the ecology of human development paradigm to structure family law decisionmaking allows judges to identify the systems within which individuals and families function, as well as the organizations and human services agencies that can assist families in a therapeutic manner. In fashioning their legal remedies, judges must establish linkages between individuals and the various systems within which they operate. These remedies can strengthen families functioning by providing families with necessary support.

This Article has attempted to respond to calls for a change in legal perspective in family law decisionmaking,[197] as well as challenges to enhance cooperation between lawyers and social scientists concerned with family law and public policy.[198] Social science has contributed to the law in diverse ways since the beginning of this century. As society prepares to move into the next century, application of this interdisciplinary paradigm to resolve family legal proceedings represents an appropriate evolution in the collaboration between law and the social sciences. While the American family may face an uncertain future,[199] history assures us that some form of the family is certain to endure. An interdisciplinary paradigm for family law jurisprudence that applies the ecology of human development perspective and notions of therapeutic justice can ensure that family law decisionmakers and the courts are a source of strength and support for the continued and enhanced functioning of American families.

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Notes

[1] THEODORE M. BENDITT, *Legal Realism*, *in* LAW AS A RULE AND PRINCIPLE 1-21 (1978), *reprinted in* DALE A. NANCE, LAW AND JUSTICE: CASES AND READINGS ON THE AMERICAN LEGAL SYSTEM 69 (1994)

[2] *Id.* at 70.

[3] Gary B. Melton & Brian L. Wilcox, *Changes in Family Law and Family Life: Challenges for Psychology*, 44 AM. PSYCHOLOGIST 1213, 1214 (1989)

[4] Family law in this Article means a comprehensive approach to family law subject matter jurisdiction, including jurisdiction over cases involving divorce, separation, and annulment; property distribution; child custody and visitation; alimony and child support; paternity, adoption, and termination of parental rights; juvenile delinquency; child abuse and child neglect; domestic violence; criminal non-support; name change; guardianship of minors and disabled persons; withholding or withdrawal of life-sustaining medical procedures, involuntary admissions, and emergency evaluations. *See, e.g.*, DEL. CODE ANN. tit. 10 §§ 921-928 (1975 & Supp. 1994); HAW. REV. STAT. §§ 571-11 to 571-14 (1993); MD. CODE ANN., [FAM. LAW] § 1-201 (1991 & Supp. 1996); NEV. REV. STAT. ANN. § 3.223 (Michie Supp. 1995); N.J. REV. STAT. ANN. § 2A:434-8 (West 1987); S.C. CODE ANN. § 20-7-736 (Law Co-op. 1985 & Supp. 1996); VA. CODE ANN. § 16.1-241 (Michie Supp. 1996)

[5] Melton & Wilcox, *supra* note 3, at 1214. Another scholar has critiqued the incoherence between the social reality of families and family law:

The current incoherence between family reality and the images of family in law expose the dominant ideology [of the traditional family model] and its role in policy formation. Refusing to address and to assess the continued viability of ideological assumptions, politicians and pundits resort to condemnation and to repressive policy suggestions. This pattern of reaction to changing family behavior should raise questions about the responsive capabilities of our law-making institutions.

Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2186 (1995).

[6] Melton & Wilcox, *supra* note 3, at 1214; *cf.* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995) (arguing that state legislatures and courts fashion laws and decisions in the domestic relations area by reflecting shared or community values about family life).

[7] ST. JUSTICE INST., ST. CT. CASELOAD STAT. ANN. REP.. 1992 (Feb. 1994), *cited in* Amy Stevens, *The Busines of Law: Lawyers and Clients; More Than Just Torts*, WALL ST. J., July 1, 1994,

at B6; *see also* Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2006-07 (1993) (predicting that family law cases will increase and are likely to become more difficult).

[8] SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 130 (1989).

[9] *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 854-55 (1985) (arguing that courts base their decisions in family law cases on policy considerations, which decisions thereafter affect the nature of family roles and relationships).

[10] URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT (1979).

[11] David Wexler defines therapeutic jurisprudence as follows:

> Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers or judges).

David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991)

[145] Monahan & Walker, *supra* note 107, at 489 (footnote omitted).

[146] Michael A. Town, The Unified Family Court: Therapeutic Justice for Families and Children 1 (Mar. 11, 1994) (transcript available in Chicago Bar Association Building).

[147] Irving E. Sigel, *The Ethics of Intervention*, *in* CHANGING FAMILIES 1, 8-9 (Irving E. Sigel & Luis M. Laosa eds., 1983).

[148] *See* Donald B. King, *Accentuate the Positive--Eliminate the Negative*, 31 FAM. & CONCILIATION CTS. REV. 9 (1993); *see also* Judith T. Younger, *Responsible Parents and Good Children*, 14 L. & INEQ. J.. 489, 501 (1996) (arguing that American families face an uncertain future, such that "[t] he need to strengthen and stabilize them seems obvious and calls for a change in legal perspective").

[149] Wexler, *supra* note 11, at 8; *see also* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 989 (1991) ("The therapeutic jurisprudence perspective can provide a useful lens through which to view an existing body of literature in order to discover new value and applications."). A focus on the therapeutic aspects of jurisprudence calls for an expanded notion of jurisprudence:

> To speak of the therapeutic in a jurisprudential sense--to speak of it as a possible form of public discourse in any sense--may seem strange to many, because at first blush the very concept of the therapeutic would seem to be unremittingly private. After all, therapy is, or once was, based upon the concept of a wholly private space in which patient and therapist would explore, and perhaps remodulate, aspects of personality.

Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062, 1081 (1996) (footnote omitted).

[150] Wexler, *supra* note 11, at 8 (footnote omitted).

[151] David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280 (1993). A focus on therapeutic jurisprudence may assist with law reform efforts:

> When there is a substantial literature available, this type of research … basically relates a body of relevant behavioral science to a body of law and explores the fit between the two; in the process, certain legal schemes and arrangements may stand out as comporting particularly well with therapeutic interests, and others may seem less satisfactory from a therapeutic viewpoint. If the therapeutically-appropriate legal arrangements are not normatively objectionable on other grounds, those arrangements may point the way toward law reform.

David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Research Tool*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 303 (David B. Wexler & Bruce J. Winick eds., 1991).

[152] Wexler, *supra* note 151, at 281.

[153] David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L.. 17, 21 (1993).

[154] *See supra* note 43 and accompanying text.

[155] The social work profession now has an expanded role relative to many family legal proceedings:

As the number of families going through the legal process has increased, social workers have become involved in an attempt to make the process less adversarial so that family ties can continue. Counselors and therapists, who worked in roles supportive of the adjudicative function, have become more central to the family dissolution process.

Cahn, *supra* note 57, at 1091-92 (footnote omitted).

[156] FINEMAN, *supra* note 60, at 90; *see also* WEITZMAN, *supra* note 23, at 16-17 (discussing the efforts in California in the early 1960s of Professors Herma Hill Kay and Aidan Gough to restructure the divorce process to reduce hostility and to create a Family Court to "help couples divorce with the least possible harm"). *But see, e.g.*, J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 520 (1994) (proposing that "[t]herapeutic divorce represented compelled nondivorce, holding families together through 'directive' psychiatry").

[157] FINEMAN, *supra* note 60, at 151; *see* J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535 (1994) (detailing the historical development of therapeutic divorce reform and early family courts and suggesting why the effort stalled); DiFonzo, *supra* note 156, at 520 (tracing the origins of the no-fault divorce movement and the history of conciliation courts as precursors to more recent family courts).

[158] FINEMAN, *supra* note 60, at 151.

[159] *Id.* at 152.

[160] DiFonzo, *supra* note 157, at 575.

[161] Wexler & Winick, *supra* note 151, at 309, 317.

[162] Town, *supra* note 146, at 3, 21.

[163] FINEMAN, *supra* note 60, at 164.

[164] DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 18 (1990).

[165] Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 L. & SOC'Y REV. 371, 395 (1980). The authors criticize adjudication as a proper method of fact-finding in "related-party" cases. *d.* at 396.

[166] *Id.* at 399, 400.

[167] *Id.* at 401.

[168] Wexler & Winick, *supra* note 149, at 981.

[169] *Id.* at 1004.

[170] James Garbarino et al., *Social Policy, Children, and Their Families*, *in* CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT 271, 291 (James Garbarino et al. eds., 2d ed. 1992); *see also* Weinstein, *supra* note 38, at 254 ("Increasingly, we depend on the secular legal system to tell us how to live.").

[171] Garbarino et al., *supra* note 170, at 275-76 ("For our purposes, a policy is a statement or a set of statements intended to guide decisions, activities, or efforts that generally describe either desired (or undesired) outcomes and/or desired (or undesired) methods of achieving them."); *see also* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 56 (1977) (defining social policy as "policy designed to affect the structure of social norms, social relations, or social decisionmaking"); Opening Remarks of Clark C. Abt, *in* THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS 1 (Michael J. Saks & Charles H. Baron eds., 1978) (arguing that judicial intervention in social policy has been increasing to encompass social problem solving); MORONEY, *supra* note 12, at

2 ("[S]ocial policy is concerned with a search for and an articulation of social objectives and the means to achieve these.").

[172] *See* King, *supra* note 148, at 9; *see also* Younger, *supra* note 148, at 501-02.

[173] *See* HENGGELER & BORDUIN, *supra* note 123, at 28; *see also* Wexler & Winick, *supra* note 149, at 984 ("If the therapeutically appropriate legal arrangements are not normatively objectionable on other grounds, those arrangements may point the way toward law reform.") (footnote omitted).

[174] James Garbarino & S. Holly Stocking, *The Social Context of Child Maltreatment*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT: DEVELOPING AND MAINTAINING EFFECTIVE SUPPORT SYSTEMS FOR FAMILIES 1, 6 (James Garbarino & S. Holly Stocking eds., 1980).

[175] *See* James Garbarino & Florence N. Long, *Developmental Issues in the Human Services*, *in* CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT 231, 232 (James Garbarino et al. eds., 2d ed. 1992) ("The term 'human services' encompasses a broad range of activities, programs, and agencies designed to meet the physical, intellectual, and social-emotional needs of individuals and families. These services are encountered primarily in microsystems … or mesosystems (e.g., referral or liaison between agencies).")

[176] Garbarino & Stocking, *supra* note 174, at 4.

[177] *Id.* at 3.

[178] *Id.* at 5.

[179] Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 255, 256 (1985). "A judge's duty has never been purely adjudication. Judges have long engaged in case and calendar management as well as court administration, mediation, regulation of the bar, and other professional activities." *Id.* at 261; *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV.. 374 (1982). Several justifications exist for the increasing use of alternative dispute resolution techniques in family law:

> Although thus far change exists more in the literature than in practice, the appropriate role in family law for extra-judicial procedures such as mediation, arbitration, and representation of both spouses by a single attorney is a subject of great interest. Several factors account for this development. First, courts' resources have been strained by a dramatic increase in the amount of family litigation, and judicial time for the resolution of these disputes is seriously inadequate. Second, the capacity of adversary proceedings (the litigational model used in the United States) to handle these matters in a humane and effective fashion continues to be seriously questioned. Finally, the financial costs of litigation have become so burdensome that many people seek less costly alternatives.

Bruch, *supra* note 122, at 115 (footnote omitted). An examination of the form of state statutes regarding custody mediation provides an example of how widespread the use of alternative dispute resolution techniques in family law has become:

> The majority of the [state] statutes [regarding custody mediation] are [[[sic] discretionary in nature, allowing for mediation upon the recommendation of the court or the request of one of the parties. Only eight states, including California, require the mediation of all contested custody issues. Some states are still in the process of implementing pilot programs in order to evaluate the effectiveness of custody mediation prior to a full-scale commitment.

Dane A. Gaschen, Note, *Mandatory Custody Mediation: The Debate over Its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL.. 469, 472 (1995) (finding that approximately 60% of the states have some form of custody mediation statute). On the other hand, judges must understand the social science research documenting the coercive and anti-therapeutic nature of alternative dispute resolution techniques in some circumstances, such as actions involving victims of domestic violence and their abusers. *Cf.* Grillo, *supra* note 62, at 1584-85 (discussing the role of mediation in situations involving victims of domestic violence).

[180] Melton, *supra* note 7, at 2003. The conclusion that judges in family legal proceedings already affect participants' behavior seems inescapable:

> Because judges presumably are affecting therapeutic and rehabilitative consequences anyway, a therapeutic jurisprudence approach would suggest that, while they remain fully cognizant of their obligation to dispense justice according to principles of due process of law, judges should indeed try to become less lousy in their inescapable role as social worker.

Wexler, *supra* note 151, at 299.

[181] RUBIN & FLANGO, *supra* note 45, at 3.

[182] Melton, *supra* note 7, at 2004, 2044 n.272 (discussing the need for citizen advisory groups to provide input to the courts).

[183] *Id.* at 2004; *see also* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, *in* DIVORCE REFORM AT THE CROSSROADS 166 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). Some fear, however, that courts may become too much like human services agencies if they attempt to perform these functions:

> Retooling the judicial process to cope with the new responsibilities of the courts means enhancing their capacity to function more systematically in terms of general categories that transcend individual cases. Some such innovations are required. And yet, it would seem, there is a limit to the changes of this kind that courts can absorb and still remain courts…. The danger is that courts, in developing a capacity to improve on the work of other institutions, may become altogether too much like them.

HOROWITZ, *supra* note 171, at 298.

[184] *See* MORONEY, *supra* note 12, at 13 (defining social services "as those services designed to aid individuals and groups to meet their basic needs, to enhance social functioning, to develop their potential, and to promote general well-being") (footnote omitted).

[185] Melton, *supra* note 7, at 2001; *see also* Resnik, *supra* note 179, at 438-40 (discussing the issues of alternative dispute centers and agency adjudication). Many barriers exist to attempts by courts and agencies to coordinate efforts to serve families:

> Agencies and organizations often jealously guard their organizational turf and may be reluctant to relinquish some of the control they have over clients in traditional one-to-one relationships. Practitioners may be unwilling to share their functions with non-professionals. They may see central figures in personal social networks as incapable of dispensing help to needy families. New approaches that work to strengthen personal social networks may appear to be luxuries that most agencies cannot afford. What is more, efforts to promote and strengthen personal social networks raise the issues of confidentiality, autonomy, and privacy.

Garbarino & Stocking, *supra* note 174, at 11.

[186] Melton, *supra* note 7, at 2047.

[187] Americans tend to believe that reliance on social services or reliance on others for assistance constitutes an admission of failure:

> It is apparent that all families make use of (and many more are in need of) some form of outside help in raising their children, yet we still maintain a myth of self-sufficiency. Since in reality we *are* dependent on each other, it makes little sense to perpetuate the myth that we are not. Valuing independence stigmatizes those individuals who use family services as well as those individuals who provide them. A new concept of the way in which families (and individuals) should interact with each other and the other elements of society is imperative. Why not acknowledge the interdependence that already exists? Why not see it as positive?

James Garbarino et al., *Who Owns the Children? An Ecological Perspective on Public Policy Affecting Children*, *in* LEGAL REFORMS AFFECTING CHILD & YOUTH SERVICES 43, 46-47 (Gary B. Melton ed., 1982) (footnote omitted).

[188] Anne Marie Tietjen, *Integrating Formal and Informal Support Systems: The Swedish Experience*, *in* PROTECTING CHILDREN FROM ABUSE AND NEGLECT: DEVELOPING AND

MAINTAINING EFFECTIVE SUPPORT SYSTEMS FOR FAMILIES 15, 17 (James Garbarino & S. Holly Stocking eds., 1980).

[189] *See* Edward F. Hennessey, *The Family, the Courts, and Mental Health Professionals*, 44 AM. PSYCHOLOGIST 1223, 1224 (1989) (advocating the need for therapeutic services due to the traumatic nature of many divorce and custody matters, as well as the importance of the fundamental familial rights courts must address in these cases); *see also* Peter Salem et al., *Parent Education as a Distinct Field of Practice: The Agenda for the Future*, 34 FAM. & CONCILIATION CTS. REV. 9 (1996) (examining issues of professional responsibility, accountability, standards, and procedures for the proliferation of parent education programs developed to help families deal with the difficult impact of separation and divorce, as well as the need for these programs to be court connected). "Most parent education programs are court connected in the sense that much of their support and referrals come from judges who hear cases arising out of separation and divorce. The legal system needs assistance in enabling parents to help their children." *Id.* at 18.

For examples of existing educational programs designed specifically to assist participants in family legal proceedings, see Larry Lehner, *Education for Parents Divorcing in California*, 32 FAM. & CONCILIATION CTS. REV. 50 (1994) (describing a variety of court-connected educational programs for family law litigants in California); Virginia Petersen & Susan B. Steinman, *Helping Children Succeed After Divorce: A Court-Mandated Education Program for Divorcing Parents*, 32 FAM. & CONCILIATION CTS. REV. 27 (1994) (discussing a mandatory parent education program in Ohio for divorcing couples with children, the goals of which include providing parents information about how to help their children with the divorce process, about divorce-specific resources and services, about options for problem solving, and about how to remain independent of the court); Carol Roeder-Esser, *Families in Transition: A Divorce Workshop*, 32 FAM. & CONCILIATION CTS. REV. 40 (1994) (describing a court-connected mandatory divorce orientation program in Kansas that focuses on the psychological, social, legal, and child-related effects of divorce, as well as enumerating optional educational programs on other topics, including step parenting, grandparents' visitation, and single parenting); Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131 (1993) (describing a court connected interdisciplinary parent education program in New York for parents involved in custody, child support, and divorce and separation, and detailing the cooperation among the courts, mental health professionals, and educators); Bill Miller, *Divorce's Hard Lessons: Court-Ordered Classes Focus on the Children*, WASH. POST,, Nov. 21, 1994, at A1, A12 (describing parent education programs in Maryland, Virginia, and Washington, D.C.).

For a discussion of court-based mediation programs, see Milne, *supra* note 65, at 68-69. *See also* ROBERT A. BARUCH BUSH, MEDIATION INVOLVING JUVENILES: ETHICAL DILEMMAS AND POLICY QUESTIONS 45 (1991) (discussing the use of mediation in disputes wherein one of the parties is a juvenile).

[190] Melton, *supra* note 7, at 2045.

[191] *See* HOROWITZ, *supra* note 171, at 298 ("The danger is that courts, in developing a capacity to improve on the work of other institutions, may become altogether too much like them.").

[192] *Id.* at 34.

[193] *Id.* at 35.

[194] *Id.* at 45.

[195] *Id.* at 51.

[196] *Id.* at 298.

[197] Younger, *supra* note 148, at 501.

[198] Ramsey & Kelly, *supra* note 77, at 685.

[199] Younger, *supra* note 148, at 501 (footnote omitted).