



2008

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

Barbara A. Babb

University of Baltimore School of Law, bbabb@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

 Part of the [Family Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

"An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective," reprinted in *Resolving Family Conflicts*, Jana Singer and Jane Murphy, eds., 2008.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

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 law⁴ 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 jurisprudence¹¹ 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 jurisprudence¹⁴⁹ 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 (lawyers 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 laws¹⁵⁴ 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 advocated 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 providers¹⁷⁵ 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 services¹⁸⁴ 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 arbiter¹⁹⁰ 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.

Barbara A. Babb, J.D., is Associate Professor of Law and Director, Center for Families, Children and the Courts at the University of Baltimore School of Law.

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 Business 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 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, 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 Shepard, *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-education programs in Maryland, Virginia, and Washington, D.C.*, 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).