

# 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.<sup>1</sup> 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.<sup>2</sup> Legal realism has dominated judicial decisionmaking in most areas of the law.<sup>3</sup> Family law<sup>4</sup> jurisprudence, however, reflects the law's inconsistency with families' real life experiences and with relevant social science research in child development and family relations.<sup>5</sup> Historically, judges have attempted to fashion

---

\* Assistant Professor; University of Baltimore School of Law. B.S., Pennsylvania State University, 1973; M.S., Cornell University, 1978; J.D., Cornell Law School, 1981. I am especially grateful to Professors Jane Murphy, Lynn McLain, Jana Singer, John Capowski, Dana Shoenberg, and Cheryl Hystad for their support and comments on previous drafts of this Article and to Margaret May for her dedication and outstanding clerical expertise. I also wish to thank my superb research assistants, Kristin Woolam, Jamie Marthaler, Robert Durocher, and Francine Krumholz, and summer interns, Melanie Keller and Dian Sujono. Finally, I dedicate this Article to Professor Urie Bronfenbrenner, whose creative vision helped chart my professional life course and whose dedicated study of children and families continues to improve the lives of so many.

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

morality in the determination of family legal issues rather than to devise legal remedies that accommodate how families live.<sup>6</sup> 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."<sup>7</sup> 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,<sup>8</sup> 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.<sup>9</sup>

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

---

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).

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,<sup>10</sup> to provide the social science basis for more effective and therapeutic jurisprudence<sup>11</sup> 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.

## I. FAMILY LAW JURISPRUDENCE IN CONTEXT: THE STATE OF THE AMERICAN FAMILY AND AMERICAN FAMILY LAW

### A. *The Changing Nature of the Family*

The family justice system increasingly finds itself attempting to respond to changes in family life.<sup>12</sup> Dramatic changes in the structure of the family have occurred in the past few decades. These changes have resulted in part from greater geographic mobility, increased life expectancy, new reproductive technologies, transformations in women's roles, and declining adherence to formal religion.<sup>13</sup>

---

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) (footnote omitted).

12. Melton, *supra* note 7, at 1993-94. It is challenging to define the notion of family:

It is impossible to offer many generalizations or universal statements about the family that some authority will not challenge. While one expert argues that the family as a social institution is not only dissolving but has actually become an anachronism, another applauds its state of health and a third maintains that though there might be some changes in family structure, eventually it will evolve to a more viable form. Each position is accompanied by an impressive array of data. Each conclusion is credible if the reader is willing to accept each authority's implicit definition of what a family is and what it should be.

ROBERT M. MORONEY, *THE FAMILY AND THE STATE: CONSIDERATIONS FOR SOCIAL POLICY* 15 (1976) (footnotes omitted).

13. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 4 (1989).

An examination of birth rate statistics documents that over the last few decades children comprise a smaller proportion of today's society, and there are fewer children per family.<sup>14</sup> From 1950 until 1992, the birth rate for all Americans declined by one-third,<sup>15</sup> although births to unmarried women increased from five percent in 1960<sup>16</sup> to twenty-four percent in 1992.<sup>17</sup>

Mothers' employment outside the home also has changed dramatically. Married mothers who work outside the home and who have children between the ages of six and seventeen years have increased from a rate of thirty-nine percent in 1960 to seventy-five percent in 1993.<sup>18</sup> The percentage of unmarried mothers participating in the labor force has increased from sixty-six percent in 1960 to seventy-eight percent in 1993.<sup>19</sup> Among married mothers with children under the age of six years, labor force participation has increased from about nineteen percent in 1960 to almost sixty percent in 1993.<sup>20</sup> The labor force participation rates for unmarried mothers with children under six years have increased from forty-one percent in 1960 to sixty percent in 1993.<sup>21</sup>

The number of individuals divorcing has quadrupled from 1950 to 1992.<sup>22</sup> The high divorce rate translates to the termination of over one million American marriages annually, and these divorces disrupt the lives of over three million men, women, and children.<sup>23</sup> This unparalleled divorce rate has resulted in "a high remarriage rate and the creation of blended [or reconstituted] families."<sup>24</sup> In

---

14. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 64, 75 (114th ed. 1994); *see also* MARY JO BANE, *HERE TO STAY: AMERICAN FAMILIES IN THE TWENTIETH CENTURY* 19 (1976).

15. U.S. BUREAU OF THE CENSUS, *supra* note 14, at 75.

16. Melton, *supra* note 7, at 1994.

17. AMARA BACHU, U.S. BUREAU OF THE CENSUS, *FERTILITY OF AMERICAN WOMEN, JUNE 1992*, at xix (1993).

18. U.S. BUREAU OF THE CENSUS, *supra* note 14, at 402.

19. *Id.*

20. *Id.*; *see also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 8 (1992).

21. U.S. BUREAU OF THE CENSUS, *supra* note 14, at 402.

22. *Id.* at 75.

23. *Id.* at 103; *see also* LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* at xvii (1985).

24. Melton, *supra* note 7, at 1996; *see* Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 87 (1981). Younger criticizes current divorce law because of the courts' failure to consider children's welfare in deciding whether to grant or deny the divorce. *Id.* at 84. She suggests that "[t]he law should require at least an individual determination of how a divorce will affect minor children; their welfare should bear directly on their parents' rights to end their marriage." *Id.* at 90; *see also* Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 91 (1990) (arguing for family law to reflect parties' precommitment to relationships in the areas of marriage and divorce in order to reduce psychological and economic harm, especially to children).

addition, the number of unmarried Americans cohabitating has increased from about eleven million in 1960 to thirty-seven million in 1993.<sup>25</sup>

Along with changes in the structure of the American family, many of the functions the family performs for its members also have changed.<sup>26</sup> Historically, the family has served as the locus of emotional, spiritual, financial, and educational support for its members.<sup>27</sup> The state now performs many of the functions once performed only by the family.<sup>28</sup> For example, the state has become more involved in matters of education and in caring for the dependent members of our society through public assistance and social security.<sup>29</sup> This shifting of family functions to the state has contributed to a new image of the family that contemporary family law decisionmaking must reflect. Despite the fact that the state has assumed some functions traditionally performed by the family, however, the state has not met all of families' needs for social support.<sup>30</sup> Some needs, such as child care for working parents, remain unmet.<sup>31</sup>

Family roles and relationships also have transformed as the structure of the family has altered. These changes in family roles and relationships both arise from and contribute to the redefined functions the family now performs. Family life has become more complex and demanding. Many families regularly face the crises and challenges surrounding unemployment, violent crime, drug and alcohol abuse, spousal and child abuse, and the stress created by competing time demands.<sup>32</sup> The increased mobility of contemporary families often results in a

---

25. U.S. BUREAU OF THE CENSUS, *supra* note 14, at 58. Statistics related to family composition may not provide a complete picture of the reality of family life:

Looking at family reality, however, involves more than just a reference to these empirical changes. The statistics have normative as well as empirical implications.

The fact that the United States has a multiplicity of ethnic, religious, and cultural traditions, supports the argument that we should develop a pluralistic social model inclusive of diverse family practices.

Fineman, *supra* note 5, at 2189.

26. See David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 212-56 (1995) (providing a comprehensive historical analysis of the political role of the family in American society, including its responsibility to produce good citizens, to produce socially diverse citizens, to facilitate the development of associations with others, and to promote tolerance for diversity); *cf.* Fineman, *supra* note 5, at 2182 (arguing that continuing to hold certain unrealistic beliefs about the family negatively affects our ability to resolve social problems of caring for dependent members of society).

27. PETER L. BERGER & RICHARD J. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 19 (1977).

28. MARY ANN GLENDON, *STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* at viii (1977).

29. *Id.* at viii, 1.

30. Melton, *supra* note 7, at 2000.

31. See Fineman, *supra* note 5, at 2214 (discussing empirical information regarding how families respond to caretaking issues and who performs child care for families).

32. See Melton, *supra* note 7, at 1996-97.

loss of stability for family members,<sup>33</sup> a lack of social support systems, and increased isolation.<sup>34</sup> Nevertheless, relationships outside the family unit, including informal social support systems and kinship networks, remain important for effective family functioning.<sup>35</sup> Paradoxically, for many people the complexity of modern society also results in a retreat to the private institution of the family for stability.<sup>36</sup>

### *B. Contemporary Family Law Issues*

Given the changes occurring in the structure and function of the American family, the family law systems of Western industrial societies began a radical transformation in the 1960s in the areas of marriage, divorce, support, and parent-child relationships.<sup>37</sup> Problems of child maltreatment, juvenile delinquency, family violence, substance abuse, economics, and medical or mental health issues often began to play a role in and complicate family law cases.<sup>38</sup> Other areas of the law not generally considered family law, such as public benefits and employment law, increasingly affected families and children.<sup>39</sup> If these family problems were not challenging enough for the justice system, new family members and relationships began to emerge before the courts, including the gestational or surrogate mother (who carries the fetus to term),<sup>40</sup> the sperm

---

33. *Id.*; see also Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 795-96 (1992-93) (documenting recent demographic data and social, psychological, and related consequences to geographic moves involving families and children, including the fact that over eleven million children in America change residences annually).

34. Melton, *supra* note 7, at 1999; see also EXTENDING FAMILIES: THE SOCIAL NETWORKS OF PARENTS AND THEIR CHILDREN (Moncrieff Cochran et al. eds., 1990).

35. Moncrieff Cochran & Frank Woolever, *Beyond the Deficit Model: The Empowerment of Parents with Information and Informal Supports*, in CHANGING FAMILIES 225, 227 (Irving E. Sigel & Luis M. Laosa eds., 1983); see also BANE, *supra* note 14, at 37, 50.

36. BERGER & NEUHAUS, *supra* note 27, at 19 (defining the value many people attribute to the family as follows: "Here [within the context of the family] they make their moral commitments, invest their emotions, plan for the future, and perhaps even hope for immortality.").

37. GLENDON, *supra* note 13, at 1.

38. Melton, *supra* note 7, at 1997-98, 2028 (discussing the effects of AIDS cases on the family justice system, including an increased need for foster care and complex dependency cases); see also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 256 (1996) ("Another source of new litigation is increased sensitivity to social injustice, and the attendant creation of legally enforceable rights intended to assist the previously disenfranchised . . . . Once it was established that women have a right not to be battered, the courts became a natural forum for enforcing those rights.").

39. GLENDON, *supra* note 28, at 1.

40. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (concluding that the husband and wife were the natural parents of a child born to a gestational surrogate).

donor (who remains legally unrelated to the resulting child),<sup>41</sup> and the psychological parent (who may or may not be a biological parent to the child).<sup>42</sup>

Most family law scholars attribute the skyrocketing divorce rate in the United States to the change in substantive family law spawned by California's no-fault divorce statute enacted in 1970, enabling couples to divorce more easily.<sup>43</sup> This change in substantive family law has contributed to refashioning the legal rights and responsibilities relative to marriage and to creating new behavioral norms for husbands, wives, and family members.<sup>44</sup> The need for court intervention to accomplish this redefinition of legal rights and responsibilities has resulted in substantial increases in the volume of family law cases courts must adjudicate and in radical alterations regarding the substance and breadth of the legal and social issues involved.<sup>45</sup> In addition, the transformation of family law has occurred so rapidly that our society and our courts continue to address the challenges presented.<sup>46</sup>

41. See *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993) (finding that a sperm donor was equitably estopped from asserting parental rights). *But see Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Dist. Ct. App. 1986) (affirming the declaration of the sperm donor of a child conceived by artificial insemination to be the resulting child's legal father).

42. See *Ronald FF v. Cindy GG*, 511 N.E.2d 75 (N.Y. 1987) (finding that a nonbiological or psychological "parent" had no rights to visitation absent the consent of the natural mother).

43. WEITZMAN, *supra* note 23, at x (noting that by 1980, every state but South Dakota and Illinois adopted similar legislation). *But cf.* Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989) (arguing that the economic circumstances of women and children following divorce were not better off under the fault-based system). Legislatures in several states, including Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, and Virginia, recently proposed initiatives designed to end no-fault divorce due to concern over high divorce rates and the effects of divorce on children. See Barbara Vobejda, *Critics, Seeking Change, Fault 'No-Fault' Divorce Laws for High Rates*, WASH. POST, Mar. 7, 1996, at A3; *infra* note 122.

44. WEITZMAN, *supra* note 23, at xv. Family law has begun to reflect some changes in sex-role behaviors:

The law has abandoned its former express or implicit stereotyping of sex roles within marriage and has moved toward a new model in which there is no fixed pattern of role distribution. We have seen a movement . . . toward equal sharing of parental rights and obligations. At the same time, there has been a trend toward diminution of the rights of both mothers and fathers, as children are increasingly treated as individuals with rights of their own.

GLENDON, *supra* note 13, at 102.

45. See Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995) (discussing legal challenges to define marriage and family in contemporary American society). Family law continues to present complex challenges:

No-fault divorce, which was once thought to be one of our more significant social achievements, has paled in significance as we have moved on to such achievements as children divorcing parents, parents divorcing children, and increasingly prevalent awards of joint and multiple custody, palimony, galimony, and surrogate parents, in an ever-richer and ever-bubbling family stew.

H. TED RUBIN & VICTOR E. FLANGO, COURT COORDINATION OF FAMILY CASES 64-65 (1992).

46. WEITZMAN, *supra* note 23, at xvii.

One challenge courts face that requires their increasing regulation<sup>47</sup> in family dissolution cases is determining the economic consequences for family members. While enactment in all states of child support guidelines has removed significantly the element of judicial discretion in establishing child support and generally has resulted in higher and more consistent child support awards,<sup>48</sup> the poor rate of collection of child support from noncustodial parents<sup>49</sup> represents a substantial deprivation to children's lives, as well as an example of a serious failing of the current court system.<sup>50</sup> Another economic decision courts must make in family dissolution cases is determining whether to grant spousal support and how to distribute property upon divorce. In these areas, also, the court system appears to shortchange some of its most vulnerable participants:

The economic consequences to divorce today are the "equitable" division of property worth too little to matter; no or short-term alimony; child support that fails to ensure a standard of living for the children and their mother equivalent to that of the father; outcomes that are inconsistent and often unpredictable, and that, for women and children, do [not] appear to be getting better; and economic hardship that often could have been lessened through more equitable rules.<sup>51</sup>

The increase in more female-headed households resulting from a greater number of divorces<sup>52</sup> has contributed to the "feminization of poverty,"<sup>53</sup> a term describing most women's significant decline in their standard of living within one year after divorce, contrasted with their former husbands' improved standard of living.<sup>54</sup>

In addition to the complexity of family law cases, family law issues have become the subject of increased numbers of federal appellate cases<sup>55</sup> and of

47. See GLENDON, *supra* note 13, at 2.

48. Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 238 (1991-92) (arguing that fixed rules in family law decisionmaking offer greater predictability and benefits to litigants in these cases than does adjudication involving judicial discretion); see also Margaret Campbell Haynes, *Understanding the Guidelines and the Rules*, 16 FAM. ADVOC. no. 2, 1993, at 14, 17; cf. Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIM. L. 103, 129 (1990) (finding that, even with application of the child support guidelines, there are substantially inconsistent amounts of child support awarded under similar factual circumstances depending upon the normative guidelines amount adopted by a particular state).

49. See Charles Drake & Jan Warner, *Support Collection—What's A Client To Do?*, 16 FAM. ADVOC., 1993, no. 2, at 38 (finding that only half of all parents awarded child support collect the full amounts; whereas, the other half receive only partial payment or nothing); see also WEITZMAN, *supra* note 23, at 321 (citing a recent survey revealing that non-custodial parents fail to comply with child support orders at a rate of sixty to eighty percent); Elrod, *supra* note 48, at 128; Fineman, *supra* note 5, at 2211 n.74.

50. WEITZMAN, *supra* note 23, at 262.

51. Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 22 (1994).

52. WEITZMAN, *supra* note 23, at 350.

53. *Id.*

54. *Id.* at 400.

55. For examples of family law decisionmaking by the United States Supreme Court, see *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (finding an action in tort by woman on behalf of her children against their father and her former husband for child abuse was properly before



substantial federal and model state legislation.<sup>56</sup> While some scholars argue in favor of this increased federal involvement in family law decisionmaking,<sup>57</sup> others maintain that state decisionmaking in the family law area more appropriately reflects a community's perception of family life.<sup>58</sup> In at least one area of family law, the establishment and enforcement of child support, "the federal government has effectively usurped traditional state supremacy."<sup>59</sup> The debate concerning the federalization of other family law issues is likely to continue.

---

the federal court, but upholding the domestic relations exception excluding divorce, alimony, and child custody decrees from federal court jurisdiction); *Burnham v. Superior Court*, 495 U.S. 604 (1990) (affirming jurisdiction over a non-resident defendant in a divorce case when service complied with due process requirements); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding the constitutionality of an irrebuttable presumption of legitimacy); *Mansell v. Mansell*, 490 U.S. 581 (1989) (holding that state courts may not treat military retirement pay waived by the retiree to receive veterans' disability benefits as property divisible upon divorce); *Turner v. Safley*, 482 U.S. 78 (1987) (holding unconstitutional certain regulations relating to inmate marriages); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding unconstitutional a racial classification as a basis for child custody determination); *Lehr v. Robertson*, 463 U.S. 248 (1983), *Quilloin v. Wolcott*, 434 U.S. 246 (1978), and *Caban v. Mohammed*, 441 U.S. 380 (1979) (determining the constitutionality of state statutes prescribing conditions precedent to unwed fathers' receiving notice of adoption proceedings); *Orr v. Orr*, 440 U.S. 268 (1979) (holding unconstitutional a gender-based alimony statute); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding unconstitutional state restrictions on marriage based upon failure to satisfy child support obligations); *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding durational residency requirements incident to divorce); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding unconstitutional a statute presuming unwed fathers unfit to raise their children); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional a state restriction on interracial marriage).

56. For examples of federal legislation in the family law area, see Safe Homes for Women Act of 1984, § 110A, 18 U.S.C. §§ 2261-2266 (1994); Indian Child Welfare Act, § 21, 25 U.S.C. §§ 1901-1963 (1994); Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994); Child Support Enforcement Act, § 7, 42 U.S.C.A. §§ 651-669 (West 1991 & Supp. 1996); Child Abuse Prevention and Treatment and Adoption Reform Act, § 67, 42 U.S.C. § 5101-5106h (1994); Family Violence Prevention and Services Act, § 110, 42 U.S.C. §§ 10401-10418 (1994). For examples of model state legislation in the family law area, see UNIF. ADOPTION ACT §§ 1-101 to 8-106, 9 U.L.A. 1 (1994); UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 115 (1968); UNIF. MARITAL PROPERTY ACT §§ 1-26, 9A U.L.A. 97 (1983); UNIF. MARRIAGE AND DIVORCE ACT §§ 101-506, 9A U.L.A. 147 (1973).

57. See Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1075 (1994) (advocating that federal courts exercise diversity of citizenship jurisdiction over divorce, alimony, and child custody cases).

58. See Dailey, *supra* note 6, at 1790-91 (defending state sovereignty over family law based on the premise that state legislatures and state courts reflect community values in fashioning family laws and in rendering decisions in these cases); cf. Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1 (1984) (suggesting that family law cases raising issues beyond the domestic relations exception may be appropriate for federal courts to entertain).

59. Elrod, *supra* note 48, at 103 (tracing the history of the federal government's involvement in child support issues as a means to reduce the number of welfare recipients).

*C. The Need for an Ecological Approach to Family Legal  
Issues*

Most family law scholars argue that the dominant trend in family law adjudication and the underlying policy in family law legislation have resulted in a greater recognition of individual rights and pragmatism in place of moral relativism.<sup>60</sup> As a result of this focus on individualism, some suggest that the law in this area should permit and encourage couples to negotiate, bargain, and determine their own arrangements through private ordering or agreement.<sup>61</sup> Given the growing sophistication of family law practitioners and the increase in court-ordered or court-supported mediation,<sup>62</sup> it is likely that more individuals will

---

60. Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273, 289 (1995); see also MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 6, 86 (1991); Janet L. Dolgin, *The Family in Transition From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1520 (1994); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). According to Schneider, American family law has undergone two transformations, the first of which occurred in the nineteenth century and “increasingly ordered relations between husband and wife, that increasingly dealt with the termination of those relations, and that increasingly spoke to the relations between parent and child and between the state and the child.” *Id.* at 1805. The second transformation occurred in the last 20 years and has been a “shift away from public standards to private ordering,” including “a fruitful area of generalization [about] the relationship between morals and family law . . .” *Id.* at 1805-06 (citations omitted). The author suggests, however, that there has been a shift in control of moral decisionmaking from the law to the people previously regulated by the law. *Id.* at 1819-20.

61. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950-51 (1979). The authors point out the advantages of private ordering, including financial savings by avoiding the costs of litigation, reduction of emotional pain by avoiding an adversary proceeding, avoidance of the uncertainty of litigation, reduction of delays in court hearings, and achievement of a resolution that is more acceptable to both parties over time than one imposed by a court. *Id.* at 956-57. The authors also “believe divorcing parents should be given considerable freedom to decide custody matters—subject only to the same minimum standards for protecting the child from neglect and abuse that the state imposes on *all* families.” *Id.* at 957 (emphasis in original). In fact, the authors propose that “the primary function of the legal system should be to facilitate private ordering and dispute resolution . . .” *Id.* at 986; see also J. Thomas Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757 (1984) (proposing a regulatory scheme to determine the enforceability of marital and premarital contracts in an effort to streamline the divorce process and to decrease court involvement).

62. While an analysis of mediation of domestic disputes is beyond the scope of this Article, documentation of the growing practice of court-related mediation abounds. See, e.g., Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343 (1992) (providing an extensive analysis of comprehensive survey data regarding attitudes toward and practices that comprise alternative dispute resolution in California’s civil courts, as well as identification of problems and proposals); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) (arguing that courts must incorporate more alternative dispute resolution, yet they must continue to adjudicate cases in the traditional manner); Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug.

resolve their disputes outside the courtroom. Nonetheless, the number and complexity of adjudicated family law cases are likely to increase.<sup>63</sup> Even those who advocate negotiated settlements acknowledge that some family law cases may result in protracted litigation for a variety of reasons, including feelings of spite on behalf of one or both parties, as well as a distaste for negotiation.<sup>64</sup> Similarly, others doubt that abdicating family law decisionmaking to any other professional group outside the adversary system can improve results.<sup>65</sup> The public nature of the adversary system involves explanation, debate, and contemplated decisions, in contrast to a process such as mediation, where decisions generally evolve without any formal consideration by the justice system.<sup>66</sup>

The concept of privatization suggests a trend in all substantive family law areas, as well as in procedural issues, toward private rather than state-imposed decisionmaking.<sup>67</sup> In the quest for family law jurisprudence that more appropriately promotes families' well-being, the privatization of family law over the last few decades may offer "a sort of transition strategy—a way of moving from an outdated and unjust public law regime to a system whose publicly-imposed constraints more accurately reflect social reality and more fairly distribute the benefits and burdens of family life."<sup>68</sup>

Family law adjudication involves functions in addition to the social and private dispute resolution functions. Historically, family law has helped shape our conceptions of proper roles and values for interpersonal relationships.<sup>69</sup> Along with the need for family law decisionmaking to promote families' well-being, the

---

1996, at 55 (assessing the incorporation of alternative dispute resolution techniques in America's courts and discussing survey results revealing an even split on the desirability of mandatory alternative dispute resolution programs, as well as a preference for mediation over litigation and arbitration); *see also* Weinstein, *supra* note 38, at 246-47. *But see* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (arguing that spousal power disparities evident in divorce mediation reverse efforts of divorce reform movements that have availed women of greater economic rights); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that settlement is not preferable to court judgments and should not be indiscriminately institutionalized or encouraged); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1551 (1991) (expressing concern about the ability to derive quality agreements through the process of mediation).

63. Melton, *supra* note 7, at 2045-46.

64. Mnookin & Kornhauser, *supra* note 61, at 974; *see also* Folberg et al., *supra* note 62, at 347.

65. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 729 (1988). *But see* Ann Milne, *Mediation—A Promising Alternative for Family Courts*, 42 JUV. & FAM. CT. J., no. 2, 1991, at 61, 72 (arguing that mediation is ideally suited to resolve complex conflicts between individuals who have a continuing relationship with each other, family law litigants).

66. Fineman, *supra* note 65, at 770.

67. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444.

68. *Id.* at 1446.

69. *Id.* at 1559; *see also* Dailey, *supra* note 6, at 1861 (footnote omitted) (viewing family law "as the product of a normative discourse among a community of citizens living in a particular place at a particular time in history").

task of family law jurisprudence to continue this tradition of imparting values necessitates a "revitalization of family law."<sup>70</sup> This revitalization may require substantial changes to the manner in which courts currently address family legal issues, including restructuring the existing court system. Recent recommendations have called for states to create unified family courts,<sup>71</sup> and some jurisdictions already have responded.<sup>72</sup> While this effort represents a significant improvement in how courts address family legal matters, a novel and more expansive approach to the resolution of these issues in any context or court setting can fundamentally reform family law decisionmaking. Irrespective of the particular court structure or setting, family law decisionmakers must consider factors beyond their conceptions of the family and account for the "family ecology."<sup>73</sup> Examination of the neighborhoods, religious organizations, and other associations or institutions within which family members participate can provide this broader context for decisionmakers. These institutions represent mediating structures that influence families and on which families must rely to perform their nurturing and caregiving functions.<sup>74</sup> In order to assist families by promoting their well-being through family law decisionmaking, judges must account for and attempt to strengthen various aspects of families' environments or ecologies:

There is at present in legal discourse little recognition that family members may need nurturing environments as much as they need rights, or that families themselves may need surrounding communities in order to function at their best. By systematically—though for the most part unintentionally—ignoring the "little platoons" from which families and individuals have always drawn emotional and material sustenance, modern legal systems probably contribute to some extent to their atrophy.<sup>75</sup>

---

70. Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 280 (1990) (reviewing GLENDON, *supra* note 13).

71. See A.B.A. PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 54 (1993) (recommending the establishment of unified family courts in all states); see also Mary Wechsler, *Unified Family Courts*, in 2 THE CONFERENCE CALL, Summer 1995, at 1 (reporting on a national conference of bar presidents, which group called for the creation of unified family courts).

72. Since 1994, three state legislatures have authorized the creation of family courts within the entire state or within selected areas of each state. See 1996 MD. LAWS 13; 1995 N.H. LAWS 152:2; VA. CODE ANN. § 16.1-241 (Michie 1995).

73. GLENDON, *supra* note 13, at 308; see also Weinstein, *supra* note 38, at 248 ("The courts' functioning must be put in a social context, as part of a web of institutions that enable people to live together peaceabl[y]. We have learned to see legal institutions as part of a larger ecology in which various dispute institutions interact and effect [sic] one another.").

74. See BERGER & NEUHAUS, *supra* note 27, at 2-6. The authors argue that neighborhoods, families, churches, and voluntary associations, among other institutions affecting an individual's private life, must be empowered wherever possible in place of governmental agencies to accomplish social goals, as opposed to defending the individual against these institutions.

75. GLENDON, *supra* note 13, at 308.

Knowledge gained from social sciences relevant to family issues can assist with developing this expanded focus for decisionmakers.<sup>76</sup> In addition, competence in a variety of disciplines, particularly for those engaged in family law, is critical for family law to achieve legal realism, or to become more reflective of and responsive to social realities.<sup>77</sup>

## II. THE CASE FOR AN INTERDISCIPLINARY FRAMEWORK IN FAMILY LAW JURISPRUDENCE

The challenge for those charged with resolving family law issues in a responsive manner becomes how to consider the institutions composing the family ecology. Application of a theoretical research paradigm from the social sciences, known as "the ecology of human development,"<sup>78</sup> can facilitate "functional integration"<sup>79</sup> between social science and public policy.

---

76. See SANFORD N. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* 146-47 (1971); see also Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 *HOFSTRA L. REV.* 1295, 1308-09 (1993) (footnote omitted); Melton & Wilcox, *supra* note 3, at 1214; Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 191 (Stephen D. Sugarman & Herma Hill Kay eds., 1990). Joan Meier shows how, in the domestic violence context, social science research has elucidated for legislative policy makers the impact of spouse abuse on children living in a home where that domestic violence occurs. "Numerous states and the United States Congress have in the last few years passed legislation calling for state courts to consider evidence of spouse abuse in custody determinations, thereby mandating a transformation in traditional judicial approaches to the issue." Meier, *supra* at 1309 (footnote omitted).

77. Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 *MICH. L. REV.* 1977, 1991 (1993). The author finds that this interdisciplinary competence "cannot be dismissed as simply a professorial predilection for dabbling. To the contrary, at least in family law, interdisciplinary studies are not a distraction from, but a critical part of, modern lawyering. It would be futile to isolate legal doctrine and practice from psychology, economics, sociology, religion, and history . . ." *Id.*; see also Meier, *supra* note 76, at 1297 (suggesting that the subject of domestic violence encompasses the disciplines of psychology, sociology, public policy, criminology, medicine, public health, and law); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 *S. CAL. INTERDISC. L.J.* 631, 632 (1994) (acknowledging that "[s]ocial science research can make a valuable contribution to family law analysis and formation. It can help define problems, identify possible solutions, and challenge underlying normative assumptions").

78. BRONFENBRENNER, *supra* note 10, at 21.

79. *Id.* at 8-9. Bronfenbrenner defines this functional integration as follows:

Knowledge and analysis of social policy are essential for progress in developmental research because they alert the investigator to those aspects of the environment, both immediate and more remote, that are most critical for the cognitive, emotional, and social development of the person. Such knowledge and analysis can lay bare ideological assumptions underlying, and sometimes profoundly limiting, the formulation of research problems and designs and thus the range of possible findings.

*Id.* at 8.

*A. An Explanation of the Ecology of Human Development  
as a Theoretical Model*

In order to understand how and why family law jurisprudence can benefit by application of a perspective that draws on the wealth of knowledge social scientists can contribute to the resolution of family conflict, it is necessary to understand exactly what that perspective is. This section outlines the relevant theoretical underpinnings of Professor Urie Bronfenbrenner's ecology of human development, one goal of which is to provide a comprehensive paradigm to study how human development occurs. This social science model promotes an understanding of the interaction among individuals, institutions, and the social environment, thus helping to identify problems and to propose solutions.<sup>80</sup> The ecological perspective strives to strengthen these interactions and interconnections in order to improve the world in which families and children function.<sup>81</sup>

Bronfenbrenner's overriding thesis is that "[t]he family is the most humane, efficient and economical system for making human beings human known to man."<sup>82</sup> Thus, for Bronfenbrenner, the interactions between a child and his family are the main focus of human development. Bronfenbrenner studies how the child's immediate interactions with family members, as well as the child's and his family members' interactions within other settings of their lives, such as the school and the workplace, influence the child's development. He suggests ways to strengthen the child's and family members' development by pursuing strategies designed to establish connections among all the competing influences on children and families. The perspective assumes that the functioning of children and families can be enhanced and, consequently, human development

---

80. GARY B. MELTON, CHILD ADVOCACY: PSYCHOLOGICAL ISSUES AND INTERVENTIONS 64 (1983); see also GARY B. MELTON ET AL., COMMUNITY MENTAL HEALTH CENTERS AND THE COURTS: AN EVALUATION OF COMMUNITY-BASED FORENSIC SERVICES (1985). This book offers a comprehensive examination of the relationship between the mental health professions and the legal system, with suggestions for strengthening that relationship.

81. James Garbarino & Robert H. Abramowitz, *Sociocultural Risk and Opportunity*, in CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT 35 (James Garbarino et al. eds., 2d ed. 1992). Application of an ecological perspective may present challenges:

It would be easy to cast aside the many interconnections and pretend that there is *just* the developing child, or *just* the family as a social unit, or *just* the community power structure, or *just* the professional delivering human services. It would be easy, but we believe it would not be enough. Rather, we seek to capture the whole tangled mass of relationships connecting child, family, and social environment.

James Garbarino & Mario T. Gaboury, *An Introduction*, in CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT 1, 1 (James Garbarino et al. eds., 2d ed. 1992) (emphasis in original).

82. *American Families: Trends and Pressures, 1973: Hearings on Examination of the Influence that Governmental Policies Have on American Families Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 93rd Cong.*, 134, 179 (1973) [hereinafter *Hearings*] (statement of Urie Bronfenbrenner, Professor of Human Development and Family Studies and Psychology, College of Human Ecology, Cornell University).

may be improved by strengthening the quality and quantity of relationships and of interactions among systems.

The paradigm devised by Bronfenbrenner is unique in that it focuses on human development outside the research laboratory and in situations regularly occurring in the environment that present risks or opportunities to individuals, such as within families, among friendship groups, within neighborhoods, at schools, and within communities.<sup>83</sup> "It sees the social environment as a grand human experiment, and thus invites our efforts to improve it, to make it better."<sup>84</sup> Bronfenbrenner arranges the situations or contexts within which individuals live their lives on a scale from smallest to largest. He sees a person's experience "as a set of nested structures, each inside the next, like a set of Russian dolls."<sup>85</sup> He labels the most immediate context within which development occurs as the "microsystem,"<sup>86</sup> comprised of the settings in which the individual experiences daily reality, such as the parent-child relationship, the husband-wife relationship, and the child-teacher relationship.

For Bronfenbrenner, the next level of interaction within which development occurs is the "mesosystem,"<sup>87</sup> or the relationships between those contexts or microsystems in which a person experiences reality. For example, consideration of the mesosystem involves determining the amount of interconnectedness between a child's school and his home setting, or between a child's home and church setting, or between a child's school and the neighborhood setting. "The central principle here is that the stronger and more complementary the links between settings, the more powerful the resulting mesosystem will be as an influence on the child's development. A rich range of mesosystems is both a product and a cause of development."<sup>88</sup>

The next largest system affecting human development Bronfenbrenner labels the "exosystem,"<sup>89</sup> or those settings that have power over one's life, yet in which one does not participate. For example, a parent's place of employment or peer group has an influence on the child's life, even though the child is not directly involved in those experiences.<sup>90</sup>

---

83. Garbarino & Gaboury, *supra* note 81, at 4.

84. *Id.* at 3.

85. BRONFENBRENNER, *supra* note 10, at 3.

86. *Id.* at 7, 22.

87. *Id.* at 7-8, 25.

88. James Garbarino & Robert H. Abramowitz, *The Ecology of Human Development, in CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT* 11, 26 (James Garbarino et al. eds., 2d ed. 1992).

89. BRONFENBRENNER, *supra* note 10, at 7-8, 25.

90. *See, e.g.*, Cahn, *supra* note 57, at 1113-14 (discussing the effect of family roles and responsibilities on workplace participation, as well as how the workplace structures family life); *see also* Fineman, *supra* note 5, at 2184 ("Altered expectations and aspirations about equality and economic opportunity have been the impetus for many individual women to change the ways they practice mothering. On a societal level, these changes have generated reconsideration of the meaning and implications of motherhood."). An example of exosystem effects exists in the following:

The effects of divorce, nonpayment of child support, foster-care, restrictions on marriage, and numerous other aspects of family life on the national economy are

Finally, “[m]eso- and exosystems are set within the broad ideological and institutional patterns of a particular culture or subculture. These are the *macrosystems*. Thus, macrosystems are the ‘blueprints’ for the ecology of human development. These blueprints reflect a people’s shared assumptions about ‘how things should be done.’”<sup>91</sup> The macrosystem ideology or social policy creates various risks and opportunities for the individual. In defining macrosystem risk and opportunity, “macrosystem risk is any social pattern or societal event that impoverishes the ability and willingness of adults to care for children and children to learn from adults, while opportunity is the social pattern or event that encourages and supports parents and children.”<sup>92</sup> An example of macrosystem risk is a national economic policy that contributes to child and family poverty; an example of macrosystem opportunity is a national policy that values families by giving economic incentives for families with young children.<sup>93</sup>

Bronfenbrenner espouses a phenomenological approach, in that researchers must examine the meanings that aspects of the environment have for the person within a given context or setting and between or among those contexts.<sup>94</sup> He also recognizes that over the course of a lifetime, situations may change in their effects on individuals and families, thereby imposing a life-course perspective on the study of families and children.<sup>95</sup>

Nonetheless, “[t]he most important thing about this ecological perspective is that it reveals connections that might otherwise go unnoticed and helps us look beyond the immediate and the obvious to see where the most significant influences lie.”<sup>96</sup> Bronfenbrenner argues that these naturally-occurring interactions or interconnections can be strengthened to enhance individual and

widely documented. Indeed, it is arguable that no institution has more direct links to the economic, social and political well-being of this country than the family.

Dailey, *supra* note 6, at 1819 (footnote omitted).

91. Garbarino & Abramowitz, *supra* note 88, at 27 (emphasis in original).

92. *Id.* at 28.

93. *Id.*

94. Garbarino & Gaboury, *supra* note 81, at 9-10; Garbarino & Abramowitz, *supra* note 88, at 29-30.

95. *Id.* The following illustrates the need for a life-course perspective:

Since most data are a cross-sectional snapshot of families, families are assumed to be static. A more realistic (though much more difficult) approach is to recognize and analyze the fluidity, change, and transitions as individuals live in a variety of family patterns. There are periods in the life cycle when an individual family may be one in which the father works and the mother stays home with the children. This stage is relatively short-lived when the total family life course is analyzed. There are periods, also, when women (and men) find themselves raising a family without a spouse present, but again, for many this is a transition period. None of these types or stages, however, should be viewed as the dominant or “ideal” family type. No one family type is superior to another or to be favored over others. Effective policies and services should be sensitive to the needs and stresses of certain types of families and recognize that some families are at greater risk (statistically) than others.

ROBERT M. MARONEY, FAMILIES, SOCIAL SERVICES, AND SOCIAL POLICY: THE ISSUE OF SHARED RESPONSIBILITY 50 (1980).

96. Garbarino & Abramowitz, *supra* note 88, at 19.



family development.<sup>97</sup> He suggests that the crucial question becomes whether we can change social institutions so that they can function as positive influences on the lives of the families and children with whom they interact by increasing the quantity and quality of individuals' and families' connections among the systems of his paradigm.<sup>98</sup> Also, since each level of functioning can produce either positive or negative effects, either opportunities or risks, it is important to assess the impact of each system on individuals and families:<sup>99</sup>

[The researcher's task is to determine] how the essential functions of the parent [at each level of functioning] are supported, encouraged, supplemented, and reviewed by people with a long-term investment in the welfare and well-being of the child. A truly poor child is one whose parents are left to their own devices, particularly when those devices are too limited for the difficult task of rearing a child. A poor child is one who is unprotected. A rich child is one whose life is full of diverse and enduring relationships and whose parents are similarly involved in an interlocking web of supportive, nurturant, and concerned relationships. The higher the personal risk of the child, the greater the importance of sociocultural resources. The principal task for the community is to know how socially well-fixed their families are and to proceed accordingly. The community needs to recognize positive forces where they exist naturally (and then leave them alone) and to learn how to generate and sustain them where they do not exist already.<sup>100</sup>

The ecological perspective, then, is vitally concerned with the reciprocal and functional relationship between social science and public policy.<sup>101</sup>

In terms of fashioning responsive family law decisionmaking aimed at "creating a more human ecology,"<sup>102</sup> "the ecological perspective on human development offers a kind of map for steering a course of study and intervention."<sup>103</sup> This perspective leads to a recognition of family law

97. BRONFENBRENNER, *supra* note 10, at 214. *But see* Moncrieff Cochran et al., *Personal Networks and Public Policy*, in *EXTENDING FAMILIES: THE SOCIAL NETWORKS OF PARENTS AND THEIR CHILDREN* 307, 310 (Moncrieff Cochran et al. eds., 1990) (mentioning that the policy focus of most family support programs has involved the creation of "additions to the local social ecology," or creating new programs such as domestic violence shelters and parenting classes).

98. *Hearings*, *supra* note 82, at 157 (statement of Urie Bronfenbrenner).

99. Garbarino & Abramowitz, *supra* note 88, at 28.

100. Garbarino & Abramowitz, *supra* note 81, at 65-66.

101. BRONFENBRENNER, *supra* note 10, at 130. "Public policy questions are relevant for basic science primarily because they can alert the researcher to aspects of the immediate and, especially, the more remote environment that affect developmental processes and outcomes." *Id.* As an example, Bronfenbrenner's own experiences as a researcher have determined a social policy designed to enhance human development, in that he was a founder of Project Head Start:

[P]ublic policy has the power to affect the well-being and development of human beings by determining the conditions of their lives. This realization led to my heavy involvement during the past fifteen years in efforts to change, develop, and implement policies in my own country that could influence the lives of children and families.

*Id.* at xiii; *see also* Head Start Act § 105, 42 U.S.C. §§ 9831-52(a) (1994).

102. Elizabeth M. Eddy, Book Review, 83 *AM. ANTHROPOLOGIST* 643 (1981) (reviewing BRONFENBRENNER, *supra* note 10).

103. Garbarino & Abramowitz, *supra* note 88, at 28.

jurisprudence as more than a mechanism for domestic dispute resolution. Application of the ecology of human development paradigm to family law decisionmaking can assist judges to identify the complex factors affecting families' lives. Equipped with this expanded knowledge and consistent with notions of the law's need to promote social welfare, family law decisionmakers can use the law's power to more effectively intervene in families' and children's lives. Adoption of this ecological framework thus compels the need for an interdisciplinary approach to family law jurisprudence.

### *B. The Existing Relevance of Social Science*

A willingness to cross scholarly boundaries and to engage in interdisciplinary study or collaboration does not distract from the focus of family law; instead, it enriches and clarifies that perspective. What is it that social science can offer the field of law in general and family law in particular?

[S]ocial science is often the best source available for descriptive and explanatory knowledge. It is undertaken systematically, with care for methodological soundness and concern for objectivity. Social science tries to build a cumulative understanding of the ways in which the world works. Thus it provides both descriptive "facts" about a situation and understanding of cause-effect linkages (i.e., the theories underlying policy action). As its findings move into public view, they tend to reshape the images we all hold of the social world.<sup>104</sup>

The complex and technical nature of our society prompts this need to utilize several professions and disciplines.<sup>105</sup>

Oliver Wendell Holmes argued in the late nineteenth century that a better understanding of the social world must inform our knowledge of legal rules in order to effectuate rational justice.<sup>106</sup> At that time, classical jurisprudence, or adjudicating through a process of mechanical deductive logic and immutable law, dominated the legal system.<sup>107</sup> Legal realists revolted against this notion of opposition to change in the law,<sup>108</sup> consistent with their belief that law must reflect social reality,<sup>109</sup> a jurisprudential philosophy that prevails today. Thus, a reliance on social science<sup>110</sup> to provide that better understanding of the social world advocated by Holmes is appropriate.

---

104. Carol H. Weiss, *The Diffusion of Social Science Research to Policymakers: An Overview*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 63, 72 (Gary B. Melton ed., 1987).

105. Lynn M. Akre, Comment, *Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the "Best Interest of the Child" Standard*, 75 MARQ. L. REV. 628, 629 (1992).

106. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

107. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 479 (1986).

108. *Id.* at 482.

109. Melton & Wilcox, *supra* note 3, at 1214.

110. Monahan & Walker, *supra* note 107, at 479. Here, social science is defined as "the application of empirical research methods to questions of human behavior." *Id.* at 479 n.4.

The United States Supreme Court first relied on social science research at the turn of the century,<sup>111</sup> and the Court only began to rely with any frequency on such evidence within the last forty years.<sup>112</sup> State courts, on the other hand, still appear reluctant to rely on the use of social science data.<sup>113</sup>

A focus on the application of social science to the law recently has become more visible.<sup>114</sup> Familiarity with social science can assist in honing lawyers' insights and analyses.<sup>115</sup> Social science fosters the development of an "empirical 'frame of reference.'"<sup>116</sup> The application of social science to the law can range from its relevance in the creation of a rule of law pursuant to the notion of social authority, to the resolution of a specific case, or to the suggestion of a broad-based decisionmaking perspective or frame of reference, as espoused in this Article.

A specific example of the relevance of interdisciplinary study to the field of family law arises in the determination of child custody cases. A better understanding of child development, including the various developmental needs

---

111. *Muller v. Oregon*, 208 U.S. 412 (1908), as discussed in Monahan & Walker, *supra* note 107, at 477 & n.1.

112. Thomas L. Hafemeister & Gary B. Melton, *The Impact of Social Science Research on the Judiciary*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 27, 54 (Gary B. Melton ed., 1987); see also Monahan & Walker, *supra* note 107, at 484. But see Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995) (discussing cases where the Supreme Court has misused social science research or has refused to rely on relevant social science data).

113. Hafemeister & Melton, *supra* note 112, at 54-55; see also Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207 (1995) (detailing how courts have considered social science research to grant and to deny adoptions by gay and lesbian parents, as well as how opponents to these adoptions often have misrepresented this social science data); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995) (concluding there is no evidence from social science research to support arguments and court decisions that gay and lesbian parents' adopting children harms the adoptees, rendering adoptive parents' sexual orientation an irrelevant consideration in adoption proceedings).

114. JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* at v (3d ed. 1994). The authors define their work as a "traditional law school casebook, albeit on a non-traditional topic" that seeks to convince readers of the relevance of social science in American law. *Id.* A work summarizing papers and dialogues related to the Conference on the Use/Nonuse/Misuse of Applied Social Research in the Courts held in Washington, D.C. in 1978 describes the relationship between law and social science:

The papers and dialogues contained in this volume reflect the current state of interchange between the applied social research community and the legal/judicial community. That relationship is marked by mutual ignorance and misunderstanding, but also by the promise of more and better utilization of social research findings in the courts. Use of such findings in a legal context has increased considerably in recent years and will almost certainly continue to do so.

Michael J. Saks & Charles H. Baron, *Preface* to THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS at ix (Michael J. Saks & Charles H. Baron eds., 1978).

115. MONAHAN & WALKER, *supra* note 114, at v.

116. Monahan & Walker, *supra* note 107, at 488 n.40.

and stages of children, may help decisionmakers reach more appropriate outcomes in child custody cases.<sup>117</sup> This follows from the proposition that the most appropriate source of child development information is the social science expert.<sup>118</sup> In addition, the use of social scientific guidelines or findings regarding child development can serve as the basis for factors judges should consider in custody cases,<sup>119</sup> thereby limiting judges' discretion in these matters. In this manner, social science research can contribute to the field of family law by providing scientific alternatives to individualized judicial discretion.<sup>120</sup>

Yet another area of family law appropriate for the introduction of social science research is divorce. Because some judges misconstrue divorce as a one-time event rather than an ongoing process in the parties' lives,<sup>121</sup> social science research can assist the court's decisionmaking by contributing studies documenting the long-term psychological effects of divorce on the parties and on their children.<sup>122</sup> These studies can guide judges to consider the many

---

117. Akre, *supra* note 105, at 628; *see also* Elovitz, *supra* note 113, at 207; Patterson, *supra* note 113, at 191.

118. Akre, *supra* note 105, at 629.

119. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107; *see also* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984) (providing an empirical examination of joint custody arrangements and proposing a legal rule to limit the authority of judges to order joint custody to those cases wherein the parties voluntarily agree).

120. Fineman & Opie, *supra* note 119, at 109.

121. MACCOBY & MNOOKIN, *supra* note 20, at 19. Maccoby and Mnookin discuss four relationships that become transformed by divorce:

In the *spousal divorce* the intimacy—sexual, psychological, and social—between husband and wife must be brought to an end. The *economic divorce* requires that the previous economic relationship based on a single household be transformed. The *parental divorce* requires the spouses to redefine their respective parental roles because of the new arrangements required for the children. And the *legal divorce* requires a process aimed at producing a written document specifying the custodial and financial arrangements that will govern after the dissolution. Though interconnected, these four aspects of divorce involve different processes, and they may differ greatly in how difficult they are for a couple to manage.

*Id.* (emphasis in original); *see also* Akre, *supra* note 105, at 638.

122. *See* E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers, and Survivors*, 60 CHILD DEV. 1 (1989). The author found in a longitudinal study that individual characteristics of children, interpersonal family dynamics, and factors external to the family (such as a child's peer relationships) interact to affect any consequences to children resulting from their parents' change in marital status. In addition, any negative consequences subside within two to three years after divorce if there is not continued family stress. *Id.*; *see also* JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980) (exhaustive studies on the effects of divorce and remarriage on children and parents); Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J.L. & FAM. 106, 117-18 (1988) (summarizing studies concerning the effects of mediation of child custody proceedings on children's well-being); E. Mavis Hetherington & Kathleen A. Camara, *Families in Transition: The Process of Dissolution and Reconstitution*, in 7 REV. CHILD DEV. RES. 398 (Ross D. Parke ed., 1984) (examining the effects of divorce and subsequent transitions in family life on changes in the parent-child relationship and in the

influences on the participants' adjustment to the divorce process, as well as how that adjustment may affect other aspects of their lives, such as the academic performance of their children.<sup>123</sup> This knowledge allows judges to understand the effects of their decisions on individuals' and families' lives.

Family law reform projects illustrate other applications of social science research with a focus beyond assisting in the determination of an individual case. Examples include the creation of child support guidelines,<sup>124</sup> analyses of the effectiveness of wage withholding in increasing and collecting child support awards,<sup>125</sup> identification of the concept of achieving timely permanent placements for children in foster care,<sup>126</sup> and more general studies of the impact of foster care on children.<sup>127</sup>

While the advantages to applying social science research findings in family law decisionmaking are many, justifications for a cautious approach to this

---

relationships between adults, as well as discussing resources available to assist families in transition); Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment*, 31 FAM. & CONCILIATION CTS. REV. 29 (1993) (reviewing current research concerning the effects on children of marital conflict, parental adjustment to divorce and separation, custody arrangements, and parental access to children).

123. Akre, *supra* note 105, at 643; Hetherington, *supra* note 122; Hetherington & Camara, *supra* note 122; see also SCOTT W. HENGGELER & CHARLES M. BORDUIN, *FAMILY THERAPY AND BEYOND* at vii (1990) (discussing the contributions of family systems theory, which sees behavior as a result of interactions among family members, to more effective approaches to interventions in the family and arguing for a multi-systemic approach to such interventions); Robert E. Emery & Michele Tuer, *Parenting and the Marital Relationship*, in *PARENTING: AN ECOLOGICAL PERSPECTIVE* 121, 123-25 (Tom Laster & Lynn Okagaki eds., 1993) (providing a general explanation of family systems theory and family life cycle development). For an example of an integrated systems approach to court reform, see William D. Mccoll, Comment, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 502 (1996) (discussing the interactions of the legal, correctional, and medical systems in the recently-created drug court).

124. Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157, 166-70 (1990).

125. See Ramsey & Kelly, *supra* note 77, at 632 n.1.

126. Herring, *supra* note 26, at 206-08 (arguing for a new approach to achieve timely permanent placements for children in foster care based upon a political role of the American family).

127. MICHAEL S. WALD ET AL., *PROTECTING ABUSED AND NEGLECTED CHILDREN* (1988); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 133-34 (1995) (finding that involuntary termination of parental rights has resulted in a record number of children available for adoption but not yet adopted); see also *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (affirming a preliminary injunction on behalf of present or former foster children in the custody of the Baltimore City Department of Social Services to redress deficiencies in the administration of the foster care program and finding that city and state officials administering the program were not immune from damages for their actions or inactions); Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 246 (1986) (suggesting that legal reforms designed to achieve permanency for children in foster care have not achieved these goals and proposing strategies for attorneys involved in foster care cases).

application exist.<sup>128</sup> One concern about the use of social science research is that those attempting to apply the research may not have kept up with the literature in the field and may not be as informed as possible regarding the social science discipline.<sup>129</sup> Another fear is that users of social science research may misinterpret the findings or may apply the information in the wrong context.<sup>130</sup> In addition, judges and lawyers may give undue emphasis to social science findings as a means to justify their arguments and conclusions in the difficult area of family law decisionmaking.<sup>131</sup> Finally, incorporating and applying social science research may serve to mask a political or value-laden approach to family law decisionmaking and, instead, to treat it as a scientific approach.<sup>132</sup>

Lawyers, judges, and policymakers who look to social science for assistance in their work can address these inherent dangers. Primarily, it is incumbent upon these users of social science research to thoroughly understand the particular limitations and applications of any social science studies.<sup>133</sup> In addition, in the same manner as family law decisionmaking reflects values and biases of decisionmakers, users of social science findings must ascertain the particular personal biases and values of the social science researcher.

When deciding whether to employ social science research, potential users of such research must question whether the findings are ready for application in a particular legal forum, a determination about which there are no strict rules.<sup>134</sup> In evaluating the scientific strength and relevance of social science studies, however, asking the following questions about the research offers useful assistance: "How strong are the findings . . .? How much disagreement exists in the field? How appropriate is generalization from the laboratory to the specific

---

128. FINEMAN, *supra* note 60, at 113; Akre, *supra* note 105, at 663-65; Fineman & Opie, *supra* note 119, at 107-08; Statement of Sue Johnson, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 40-41 (Michael J. Saks & Charles H. Baron eds., 1978); Gary B. Melton, *Judicial Notice of "Facts" about Child Development*, in *REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH* 232, 239-40 (Gary B. Melton ed., 1987).

129. Fineman & Opie, *supra* note 119, at 108.

130. *Id.*; see Ramsey & Kelly, *supra* note 77, at 654-55.

131. See Melton, *supra* note 128, at 240 (suggesting that it may be difficult by any means to educate judges about family life and child development).

132. Fineman & Opie, *supra* note 119, at 110. In works particularly appropriate for the education of professionals in the law, other scholars have suggested extensive frameworks for assessing the validity, reliability, and overall methodological soundness of social science research. See, e.g., David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 *EMORY L.J.* 1005, 1009-10 (1989); Ramsey & Kelly, *supra* note 77, at 634.

133. See Faigman, *supra* note 132, at 1009, 1080-82.

134. Lois A. Weithorn, *Professional Responsibility in the Dissemination of Psychological Research in Legal Contexts*, in *REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH* 253, 260-61 (Gary B. Melton ed., 1987). But see *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), where the Court established criteria that scientific evidence must meet for admissibility in federal court. A court must examine (1) whether the technique has been empirically tested; (2) whether the technique has undergone peer review and publication; (3) the error rate of the technique; and (4) the general acceptance of the technique among the appropriate scientific community. *Id.* at 593-94. The test looks at the validity of research techniques and the methodology. *Id.* at 592-93.

legal context in which the legal findings will be applied?"<sup>135</sup> In addition, those seeking to utilize social science research must weigh the potential benefits to society against any harm resulting from application of the research.<sup>136</sup> Finally, users of social science findings must evaluate the conceptual framework of the study, the appropriateness of the methodology, alternative explanations for the conclusions, and whether the conclusions are consistent with other research.<sup>137</sup>

One suggestion to combat some of the criticisms leveled at social science methodology, including a purported failure of some social science studies to account for important variables or factors that do not fit within a rational or objective framework,<sup>138</sup> is a suggestion that research be a "'collaborative' endeavor."<sup>139</sup> For example, in the law reform context, interdisciplinary collaboration allows those interested in reform to review social science research, either policy-oriented or theory-oriented, and to make decisions about the utility of the research.<sup>140</sup> It permits those knowledgeable in family law to identify and apply social science research relevant to documented legal problems.<sup>141</sup> Collaborative research and reform also assist social scientists, who can rely on their legal colleagues to identify issues and frame questions for research.<sup>142</sup>

While the debate about the role of social science in the law is likely to continue, attempts at cooperation and collaboration between the disciplines can strengthen the bond.<sup>143</sup> This increased interaction can benefit both professions by revealing linkages among the law, social science research, families, and children.<sup>144</sup> Adopting the ecology of human development as a theoretical framework for family law jurisprudence can inform and improve the effectiveness of this collaborative effort, with an outcome of improved family law decisionmaking.

---

135. Weithorn, *supra* note 134, at 260-61.

136. *Id.* at 261; *see also* Bersoff & Glass, *supra* note 112, at 293-301 (discussing cases where the Supreme Court has refused to rely on relevant social science data or has relied on irrelevant or misapplied findings); Elovitz, *supra* note 113, at 217-20 (discussing how courts have considered social science research to grant and to deny adoptions by gay and lesbian parents).

137. Ramsey & Kelly, *supra* note 77, at 669.

138. FINEMAN, *supra* note 60, at 115.

139. Fineman & Opie, *supra* note 119, at 129 (emphasis added).

140. Ramsey & Kelly, *supra* note 77, at 675.

141. *Id.* at 683.

142. *Id.*; *see, e.g.*, GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (1987) (providing an exhaustive summary and blueprint of the roles of mental health professionals and lawyers in a wide variety of legal actions, including juvenile delinquency, child abuse and neglect, and child custody in divorce); *see also* Statement of Charles H. Baron, in THE USE/MISUSE/NONUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS 154, 156 (Michael J. Saks & Charles H. Baron eds., 1978) ("Once social scientists become an intimate part of this adversary system, they will be able to suggest changes in the system from a more informed point of view and with more credibility . . .").

143. Ramsey & Kelly, *supra* note 77, at 684.

144. *Id.*

### 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.”<sup>145</sup> 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.<sup>146</sup>

The notion of intervention implies an ability to influence the underlying situation to make it more positive.<sup>147</sup> In family law adjudication, one function of court intervention ought to aim to improve the participants’ underlying behavior or situation.<sup>148</sup> Application of “therapeutic jurisprudence”<sup>149</sup> 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).

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

146. Michael A. Town, *The Unified Family Court: Therapeutic Justice for Families and Children I* (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).



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.<sup>150</sup>

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.<sup>151</sup> The potential exists to apply therapeutic jurisprudence to family law.<sup>152</sup>

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,"<sup>153</sup> seems particularly appropriate.

Liberalized divorce laws<sup>154</sup> 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.<sup>155</sup> In turn, these professionals have advocated

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).

therapeutic intervention in the legal aspects of divorce in an attempt to transform the process to a more positive experience.<sup>156</sup>

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.<sup>157</sup> States justified the creation of the courts by asserting their need to provide services to families to ease the families' crises.<sup>158</sup> 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.<sup>159</sup> 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.<sup>160</sup>

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.<sup>161</sup> 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.<sup>162</sup>

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

---

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.

continued involvement in the resolution process.<sup>163</sup> Applying therapeutic justice to family law also invites concerns about whether judges and lawyers should deviate from the traditional advocacy model of adjudication,<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> Mediation itself "in related-party cases can prove a therapeutic process."<sup>167</sup>

The therapeutic jurisprudence perspective, or assessing the therapeutic impact of adjudication,<sup>168</sup> 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.<sup>169</sup> 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."<sup>170</sup> Thus, perhaps unwittingly, family law decisionmakers, including judges and masters, play a

---

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. *Id.* 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.").

critical role in shaping social policy.<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup>

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.<sup>174</sup> To be effective as a family law decisionmaking model, advocates, parties, and human services providers<sup>175</sup> 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.<sup>176</sup> As a

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.

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.<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup>

---

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

To positively affect family members' behavior, thereby achieving a therapeutic outcome, family law remedies must reflect an integrated approach to family legal issues.<sup>180</sup> This means that decisionmakers must consider all of the parties' related family legal proceedings,<sup>181</sup> 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.<sup>182</sup> 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."<sup>183</sup>

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.

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<sup>184</sup> agencies external or adjunct to the court system some of the court's functions.<sup>185</sup> 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."<sup>186</sup> 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.<sup>187</sup> 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,<sup>188</sup> complicates this facet of an ecological and therapeutic approach to family law

---

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).

decisionmaking.<sup>189</sup> 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”<sup>190</sup> of fundamental legal questions. To the contrary, courts must insist on maintaining this function, as this belongs uniquely to the adjudicative process.<sup>191</sup> 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

---

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.”).



request the judge to devise alternatives for the parties.<sup>192</sup> 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,<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup>

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.

---

192. *Id.* at 34.

193. *Id.* at 35.

194. *Id.* at 45.

195. *Id.* at 51.

196. *Id.* at 298.

## 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,<sup>197</sup> as well as challenges to "enhance cooperation between lawyers and social scientists concerned with family law and public policy."<sup>198</sup> 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,<sup>199</sup> 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.

---

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

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

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