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Representing Children in Families

Susan L. Brooks



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REPRESENTING CHILDREN IN FAMILIES

Susan L. Brooks*

I. INTRODUCTION/PROLOGUE

The title of this conference, *Representing Children in Families*, is a statement of purpose. It demonstrates that a critical agenda for the conference is for us—lawyers who represent children¹—to revisit the question, or perhaps genuinely to examine the question for the first time, of what it really means that the children we represent are part of families, as well as communities and cultures, that form their larger world. I am deeply heartened by the fact that we are finally focusing on this issue because virtually all of my work represents an effort to embrace the families that are inextricably connected to the children and young people we generally view as our individual clients.

Perhaps it does not seem innovative, let alone radical, to suggest that we take into account children's families in our representation of them. I assume all of the participants in this conference genuinely believe they incorporate some sort of social framework into their representation of individual child clients. However, that framework may be informed by any number of considerations, including personal experiences and values. My radical proposal is that we *all* need to embrace a disciplined theoretical framework grounded in well-established, proven social science research. The framework I propose we adopt is family systems theory.

Family systems theory is a holistic approach to human development. The *au-courant* terminology for essentially this same set of ideas is "ecological theory," to make it apparent that the theory concerns the broader environment in which an individual, or in our case, a child, exists, as well as the child's family.² Nevertheless, I believe it is significant to continue to refer to this

* Clinical Professor of Law, Vanderbilt University Law School. J.D. New York University, 1990; M.A. in Social Work, University of Chicago, School of Social Service Administration, 1984; B.A. University of Chicago, College, 1983. I would like to express heartfelt appreciation to Annette Appell, whose vision and tireless efforts brought this conference to life, and whose insightful comments contributed a great deal to this paper. I would also like to thank the other members of our conference planning committee, Bernardine Dohrn, Martin Guggenheim, and Jean Koh Peters, each of whom has been a source of inspiration for this work.

¹ I have struggled with how to refer to this role because the terms "child advocate" or even "children's lawyer" connote an individually oriented approach to representing children, to which I am fundamentally opposed. It also fails to recognize that many of our clients are indeed not children, but adolescents or youth, a developmental difference that has its own significant implications from a representational standpoint. Having said all that, in referring to the role of attorneys appointed to represent children and youth throughout this paper, I may use such terminology purely for the sake of convenience.

² The difference between "family systems theory" and "ecological theory" is essentially that ecological theory places greater emphasis on what are referred to as "mesosystems," which involve the interface with the immediate community: for instance, the connection between a

approach as family systems theory, in part because I still believe that the family, broadly defined, holds a pre-eminently important place in a child's life, and therefore cannot be ignored if we are truly to try to understand a particular child. Moreover, we need to be reminded to keep families in the forefront of our considerations about children, inasmuch as many professionals with good intentions would prefer to set the family aside and focus on the community or other broader systems, because of their own ambivalence about the families connected to these children.

By using the term family system, it is also important to emphasize that I am not speaking about a narrow or traditional definition of family. The family system is defined by bonds of intimacy as well as by blood ties. This means that a family system surrounding a child could include neighbors, close family friends, "fictive kin," as well as foster parents. It also means that a family system might also include individuals who have a special interest in establishing bonds of intimacy with the child as well as those with whom the child has existing bonds. For instance, a biological mother of a newborn infant may be part of that child's family system to the extent that she seeks to establish a bond with that infant. This latter category is not open-ended, but instead is limited to persons who have a reasonable basis to form an intimate bond with the child, such as members of the child's biological family, or perhaps prospective foster or adoptive parents. In general, it should be limited to others whose bonds with the child have been created with parental consent.³

This theory represents the core of my proposal. At the same time, I also want to promote a broader set of constructs that are part of what is now known as generalist social work practice. We and our legal colleagues (i.e., other private attorneys, agency lawyers, public defenders, prosecutors, and judges) need to become more familiar with this set of constructs in order to represent children properly, regardless of the subject area in which we practice, be that delinquency, dependency, special education, immigration, etc. These constructs relate to both the "micro"-level, in terms of the "attorney-client" relationship, as well as the "macro"-level, in terms of broader institutional reforms. In addition to family systems theory, this discussion will highlight the role of culture as a necessary counterpart.

The vehicles I will use for discussing these constructs are two interdisciplinary approaches that are emerging as critical legal movements in their own right with an international scope. These two critical approaches are therapeutic jurisprudence ("TJ") and preventive law ("PL"). TJ offers an overarching

child's family and school, as well as "macro-systems," which involve the interface with the larger community, such as the child welfare system. Compare Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 4-8 (1996); with Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 788-92 (1997).

³ I have added this limiting factor to my definition of the family system as a result of the discussions that took place at the conference within the Working Group on the Role of the Family. The group emphasized that the consent of the parents is important "to ensure that the definition protects against rather than aggravates state intervention into families," a point with which I wholeheartedly agree. See *Report of Working Group on the Role of the Family*, 6 NEV. L.J. 616, 617 (2006).

framework for this paper's critique as well as its proposals, while preventive law provides a complementary approach to that of therapeutic jurisprudence.⁴

After laying out these theoretical underpinnings, I will discuss micro-and macro-level critiques of the current child representation model. I will then describe two interlocking recommendations that could potentially shift children's representation towards a more family-centered direction: (1) incorporate alternative approaches to procedural justice; and (2) focus on best practices. Finally, I will examine a couple of different scenarios that challenge the notion that an attorney can effectively represent children using a family systems perspective: the context of the child who wants to "divorce" her parents, and the delinquency context. These examples will highlight the importance of focusing to a much greater extent on alternative approaches to procedural justice and best practices as the direction our efforts must take in order to embrace fully what it means to represent children in families.

I want to begin by sharing a story from my "former life" as a practicing social worker. The purpose of the story is to begin to demonstrate what I believe must be a fundamental premise of our work if we are to represent children: to understand the child, we must understand the family.

II. WHY UNDERSTANDING FAMILIES MATTERS—A SOCIAL WORK "WAR STORY"

I first learned about the critical importance of understanding family systems not as a lawyer, but as a social worker. I was working at a non-profit family services agency, and I was given an intake that had been done in which the parents were requesting individual counseling for their twelve-year-old son, Ned.⁵ In their minds, everything else in the family was fine, but Ned was a "problem child." He had a terrible attitude, refused to mind his parents, and was failing most of his subjects in school. Although I was not very experienced at the time, I had been trained as a family therapist, so I insisted that I would agree to see Ned on an individual basis only if the whole family also agreed to participate in family counseling. Reluctantly, his parents agreed.

Right from the start, it became apparent that everything was far from "fine." In fact, the family was experiencing a great deal of upheaval with respect to a number of issues that were seemingly quite separate from Ned's behavior and certainly not within his control. Ned's mother, Alice, had been suffering from Lupus for a number of years. Her struggle with this chronic and often debilitating disease undoubtedly affected every member of the family, but no one ever spoke about it. Another salient characteristic was the impending marriage of the oldest child, Rachel. Ned's mother was particularly close to Rachel and confided in her daughter more than anyone else in the family, prob-

⁴ I have also discussed these theoretical underpinnings in earlier works. See generally Brooks, *supra* note 2; Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951 (1999) [hereinafter Brooks, *Therapeutic Jurisprudence*]; Susan L. Brooks, *The Case for Adoption Alternatives*, 39 FAM. CT. REV. 43 (2001) [hereinafter Brooks, *Adoption Alternatives*].

⁵ This is a true story, but the names have been changed and a few details have been altered to protect the privacy of the members of this family.

ably including her husband. The closeness of the mother-daughter relationship was intensifying the significant upheaval Rachel's marriage was already causing within the family. Moreover, the marital relationship between Ned's father and mother was especially threatened by Rachel's departure. For years, the close mother-daughter relationship had allowed the marital couple to avoid emotional intimacy with each other, but now that equilibrium was being disturbed. Of course, no one was talking about any of these dynamics. Instead, Ned seemed to be carrying all of the family's emotions and acting them out inappropriately all over the place.

Once the family entered therapy, though, immediate changes began to take place. Within just a few sessions, the atmosphere in the room transformed from a high level of tension to a palpable sense of relief and greater calmness. The family members began talking with each other about issues, such as the mother's Lupus, and dynamics that previously had never been mentioned aloud, let alone openly discussed. Once they began airing these issues, many of these family concerns became less threatening, and could be "normalized." The family members could begin to see that the underlying tensions that existed in many ways were an expected response to what was going on in the family, and that the family members were not "crazy" or even "highly dysfunctional."

A family systems approach suggested that if the family members were willing to engage in several months of therapy, particularly if the parents were willing to try to address their marital issues, they would likely see some significant changes in Ned. Although they were initially skeptical, the family began experiencing positive results within a relatively short time.

On an individual level, when Ned first began our weekly sessions, he would arrive at his sessions completely hostile and sullen, and would remain that way for the entire hour. He barely spoke to me, except to express his anger for having to waste his time sitting in my office at all. Nevertheless, after just a handful of family sessions and marital sessions, Ned's disposition and his affect began to change. Gradually, he went from being completely sullen and withdrawn to starting to talk and open up a bit. Over time, he developed greater self-confidence. Not only was he able to open up more and talk more freely to me, but his home situation greatly improved, and he began to see positive results in other spheres of his life. Ultimately, he succeeded in accomplishing what had seemed to be an unattainable dream for him—making the basketball team at his school. Making the team also reinforced the progress that was already evident in Ned's development. Socially, he began to make friends with his peers and his school performance dramatically improved.

After a number of months of focusing primarily on family and marital issues, as we all witnessed and celebrated Ned's transformation into a well-adjusted teenager, we agreed to terminate his individual sessions and taper off, and eventually end, the family sessions. Meanwhile, Ned's mother requested to see me on an individual basis. She used her individual time to talk about her struggles with Lupus and her other personal struggles.

If this all sounds too good to be true, or almost magical, I assure you it was neither. For Ned, undoubtedly the simple fact of his parents' willingness to engage in family counseling, and, more importantly, his parents' ability to begin to examine their own issues, including marital issues, was a huge relief

for him. Rather than carrying all of the family's emotion, he could finally just be a kid and focus on forging his own sense of self. There is no doubt in my mind that if I had continued to meet with Ned solely on an individual basis, nothing significant would have changed for him or his family.

Of course, this is just one example, and one that may seem too remote to be of much utility. Ned's family was a middle class family and a two-parent family at that. They were also fairly sophisticated and, once they were prompted, they had the ability to talk about their emotions and develop insights they could use to resolve some of their own difficulties. In some of these respects, they may be different from many or most of the children and families most of us encounter in our legal work.

Some of you are probably reading this right now thinking, "Okay, so what does that have to do with the children I represent and the families they come from"? Let me reassure you that, over the years, I have seen exactly the same types of dynamics play out in situations involving my *legal* clients, all of whom have had less social and economic advantages than Ned and his family. One situation I wrote about in 1996 involved a girl who had been raped by her mother's boyfriend.⁶ When I entered the picture, my client had already been out of the home for over a year and had been receiving individual counseling, but no progress was being made. Instead, she was sinking deeper and deeper into depression to the point that the child welfare professionals wanted her to be hospitalized, and the hospital staff wanted her to take anti-depressant medication. All she (and her mother) wanted was family reunification. It was only after I fought to secure family counseling that would include mother and daughters together that progress began occurring and reunification eventually succeeded.

It is important to note that I had to *fight* for family counseling, which was resisted by all other parties involved, including the judge, for many months. It was only after everything else failed, and after a counselor working for a private agency contracted with by the child welfare agency also insisted upon it, that the agency grudgingly agreed to provide family counseling. You see, they were intent on punishing this girl's mother, and the refusal to provide family counseling was part of the punishment, despite having the official goal of reunification. Indeed, looking back, I fear that secretly, and perhaps unconsciously, they were hoping the case would fail, and that they could turn their efforts toward adoption.

The examples I have provided thus far are intended to set the stage for a discussion of how we genuinely take into account a child or young person's family system when representing a child. This concern cuts across the ongoing debate about whether the lawyer's role is or should be more about the child's best interests or about representing the child's expressed views or wishes. In either case, the failure to appreciate the importance of families does a disservice to our child clients. Lawyers, whether they view themselves as representing children's views or promoting their best interests, often place themselves into roles that are deleterious to the well-being of their child clients. This often

⁶ See Brooks, *supra* note 2, at 1-3, 20-22.

occurs because, in one way or another, lawyers disrespect, ignore, or fail to appreciate the importance of the child's family system.

This concern can be understood in part by examining situations such as Ned's case. What he needed most was for his parents to function in their appropriate parental roles and to resolve as much as possible the tensions in their marriage. Attending to him on an individual basis could never reach those issues, let alone resolve them.

III. THEORETICAL APPROACHES FOR CHANGING THE STATUS QUO

A. *Therapeutic Jurisprudence*

One approach to this critique, also which helps frame the ways we might begin to think about positive reforms, is the rubric of Therapeutic Jurisprudence. Therapeutic Jurisprudence, or TJ, as I will refer to it from this point forward, is an interdisciplinary movement that examines the role of law as a therapeutic agent.⁷ This movement, co-founded well over a decade ago by two legal scholars, David Wexler and Bruce Winick,⁸ now has an international following among judges, lawyers, and mental health professionals.⁹ TJ examines the extent to which our laws, policies, and practices have therapeutic or anti-therapeutic consequences for those who are affected by them.¹⁰ Therapeutic jurisprudence promotes exploration of the effects of laws and the legal system on the well-being of the persons they are meant to serve. A TJ inquiry asks: Is this particular law or aspect of the legal system "therapeutic" or "anti-therapeutic" for the persons affected by it?¹¹ Identifying and understanding what is anti-therapeutic ideally will lead to positive law reform.¹²

Given that the law is designed to uphold many values, such as due process and fairness, it nevertheless appears that many, if not most, lawyers are seeking

⁷ See, e.g., DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997). For more information about TJ, including a comprehensive bibliography of TJ scholarship, see Therapeutic Jurisprudence, <http://www.therapeuticjurisprudence.org> (last visited Apr. 18, 2006).

⁸ See generally David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990); DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996).

⁹ This international following is evidenced by [therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org), which references numerous articles and books penned by scholars, judges, and practitioners from many fields around the globe. See Therapeutic Jurisprudence, <http://www.therapeuticjurisprudence.org> (last visited Apr. 18, 2006).

¹⁰ See generally DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); WEXLER & WINICK, *supra* note 8; PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000).

¹¹ Robert G. Madden & Raymie H. Wayne, *Social Work and the Law: A Therapeutic Jurisprudence Perspective*, 48 SOC. WORK 338, 339-40 (2003). It is also important to point out that TJ does not take the position that therapeutic goals should replace other goals of the law, such as fairness and due process. It simply posits that, all else being equal, the law should aim toward therapeutic goals. *Id.* at 340.

¹² David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 224 (1995).

to promote "higher values" in their practices. They want to see their clients' lives, and perhaps society itself, improve in some measurable way.¹³ This seems especially to be the case in the area of child representation. Many, if not most, children's lawyers would like to believe that their work is serving a therapeutic goal as well as promoting the law's other values. Occasionally, tensions may arise among these goals, but there is no reason we have to assume that they are necessarily contradictory.

Assuming we agree that, all else being equal, the law should work in ways that are therapeutic for our child clients, how do we assess its therapeutic value? This is perhaps the toughest question, but it must be grappled with if TJ is to be worth pursuing at all. In other words, a TJ inquiry must be grounded in a particular normative framework if we are truly to be able to determine whether a given practice, rule, or law is indeed therapeutic for the children we represent.

To be clear, TJ itself as a movement does not dictate a particular normative framework;¹⁴ rather, it sets up a line of inquiry and is not prescriptive as to outcomes, processes, or roles. The TJ movement simply promotes the use of social science research to inform the understanding of what is therapeutic or anti-therapeutic, as the case may be. This is perhaps understandable for a movement in its early development, particularly because the goals of TJ are simply to try to raise questions about how the law operates and advocate for the use of social science research to answer those questions. It is also understandable that, the leaders of the TJ movement, would not want to limit themselves to one particular social science framework, in order to be able to take full advantage of the dynamic nature of scientific research.

Nevertheless, the lack of a particular normative framework for assessing the therapeutic value of our work in representing children is highly dangerous. Indeed, we are increasingly faced with a proliferation of legal and non-legal institutions, directed at children, which claim to have therapeutic value: specialized courts and residential treatment programs are examples. Without a specific, empirically sound theory to ground the substantive work that occurs within such institutions, their work may at best be ineffectual or, at worst, anti-therapeutic.¹⁵ Thus, I would argue strenuously that to be able to measure properly and effectively whether therapeutic goals are indeed being achieved, children's lawyers must operate within some identifiable normative framework. The evaluation of our work should not simply be based on our (or anyone

¹³ I have stated this same position in a recent article discussing what TJ can offer to clinical legal education in terms of guidance for building effective relationships with students, clients, and communities. See Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients, and Communities*, — CLINICAL L. REV. (Forthcoming).

¹⁴ "A normative framework states how things ought to be. It serves as a baseline from which to evaluate a current state of affairs. A normative framework shapes the way people conceptualize problems and the solutions they seek." Robert G. Madden & Raymie H. Wayne, *Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model*, 18 *TOURO L. REV.* 487, 488-89 (2002).

¹⁵ See, e.g., Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 *FAM. CT. REV.* 453 (2002).

else's) subjective judgment of whether things seemed to turn out well, or whether we achieved a desired outcome.

For many years, I have argued that the core elements of the social work provide a comprehensive, useful, evidence-based framework that should inform the understanding of what is therapeutic as it relates to representing children.¹⁶ Other scholars likewise have proposed that social work principles and values offer a normative framework for TJ.¹⁷ This body of knowledge represents a relatively cohesive set of ideas, some of which are familiar to and have already been embraced by legal scholars and practitioners, such as client self-determination, cultural competence and social justice.¹⁸ On the other hand, social work principles also include important theoretical approaches that are generally unfamiliar to most lawyers, including family systems theory.¹⁹

Within the legal field, lawyers who represent children or who practice "family law" in one way or another may well think they are already incorporating these approaches into their work. Nevertheless, children's lawyers stand to gain a tremendous amount from looking outside of our own discipline and drawing upon the richness of the body of literature that has been developed in the social work field to help describe a wide range of issues, including how individuals function within families and the larger community. A useful way to understand this range of perspectives is the distinction that is also drawn in the TJ literature between micro-level analysis and macro-level analysis.²⁰ Micro-analytic TJ focuses on particular rules, procedures, and roles, as compared with macro-analytic, which looks at broader considerations, such as entire areas of law.²¹ This paper examines children's representation from both the micro-analytic and macro-analytic perspectives.

¹⁶ Perhaps the natural fit I have always perceived between my social work background and my current role as a clinical law teacher explains why the notion of a *therapeutic* jurisprudence has resonated with my sense of my work as a teacher, advocate and scholar. The effectiveness of social work-based approaches has been demonstrated time and time again to address a wide range of issues related to vulnerable children and families. Professional practice journals such as *SOCIAL WORK* and *CHILD WELFARE* are devoted almost entirely to presenting this research. Specifically elements, family systems theory has been proven effective through research on Multi-Systemic Therapy ("MST") and Functional Family Therapy ("FFT"), both of which have been evaluated primarily in the field of juvenile delinquency. For a detailed discussion of these approaches, see Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities among Parents, Children and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 841-44 & n.41 (2006).

¹⁷ See Madden & Wayne, *supra* note 14; see also Babb, *supra* note 2, at 775, 788-806 (discussing the "ecology of human development theory" articulated by prominent social work scholar, Professor Uri Bronfenbrenner, and its relationship to TJ and family law).

¹⁸ See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 1 (2d ed. 2004); MARTHA R. MAHONEY ET AL., *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW: CASES AND MATERIALS* (2003); Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN'S L.J. 20 (1997).

¹⁹ Madden & Wayne, *supra* note 14; see generally Brooks, *Adoption Alternatives*, *supra* note 4, at 43.

²⁰ See Wexler, *supra* note 12, at 220, 226, 229-36.

²¹ *Id.* at 226, 229-36.

B. Preventive Law

The preventive law movement has developed parallel to the TJ movement, and shares a somewhat similar approach to the law.²² The proponents of preventive law believe that legal practitioners need to be pro-active in their work, and to work with clients toward the avoidance of adversarial litigation.²³ The preventive law approach is very much modeled after preventive medicine, including the idea of "legal check-ups."²⁴ Preventive lawyering requires practitioners to view their clients in a more holistic manner, and to try to anticipate the kinds of legal issues they might face. By having legal check-ups, the lawyer can better assess the client's situation and help the client to take steps to resolve impending legal issues in a peaceful manner that is conducive to the client's well-being. This process has also been referred to as identifying "legal soft spots."²⁵

These two approaches, TJ and preventive law, are highly compatible. In synthesizing the two movements, TJ and preventive law scholars have described their work as that of identifying "psycho-legal soft spots."²⁶ Accordingly, in the process of the regularly checking in with clients, lawyers can be sensitive not only to the potential legal pitfalls of the client's situation, but also to the client's vulnerabilities from a mental health perspective.

IV. CORE SOCIAL WORK CONSTRUCTS

A. "Generalist" Social Work

As I have noted elsewhere,²⁷ the social work profession represents a synthesis of theories and practice approaches that has developed over time by incorporating elements from other mental health fields as well as the social sciences.²⁸ Its overarching goal is to help people become increasingly self-sufficient by enhancing their own adaptive skills and abilities, while simultane-

²² See Dennis P. Stolle & David B. Wexler, *Preventive Law and Therapeutic Jurisprudence: A Symbiotic Relationship*, 16 PREVENTIVE L. REP. 4 (1997); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997).

²³ See generally ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS (2d ed. 1997).

²⁴ See Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997). A legal check-up has been analogized to a medical check-up. *Id.* at 17.

²⁵ Hardaway, *supra* note 23, at 189-92.

²⁶ Stolle et al., *supra* note 24. Psycho-legal soft spots have been described as ways in which certain legal procedures or legal interventions may be expected to precipitate or reduce anger, hurt feelings, anxiety, and other dimensions of law-related psychological well-being. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317 (1998).

²⁷ See Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques Into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513 (2005).

²⁸ Madden & Wayne, *supra* note 14, at 496 ("The theories that ground social work practice are derived from the fields of sociology, psychology, economics, human biology and political science. These disciplines provide social workers with the ability to understand human behavior, development, mental health, family and group dynamics, cultures, and political

ously decreasing existing environmental barriers.²⁹ The balancing of individual, community, and societal interests, as well as the systems orientation, creates a solid model from which to build a normative framework for TJ.³⁰

One clear source of identification of many of the core elements of social work is the Code of Ethics of the National Organization of Social Workers (NASW).³¹ The core values identified in the Code are (a) service, (b) social justice, (c) dignity and worth of the person, (d) importance of human relationships, (e) integrity, and (f) competence.³² Other guiding ethical principles described in the Code include commitment to clients' self-determination, informed consent, cultural competence, social diversity, awareness of conflicts of interest, privacy, and confidentiality.³³

The principles and values identified in the Code may be broken down into those addressing micro-level concerns and those addressing macro-level concerns. At the micro-level, the Code addresses the social worker's need for integrity, competence, commitment to client³⁴ self-determination, informed consent, and other ethical considerations. At the macro-level, the Code defines the social worker's responsibilities to the broader society by stating that social workers should promote the general welfare of society at the local and more global levels. It goes on to state that social workers should advocate for improved living conditions and should promote social, economic, political, and cultural values and institutions that are compatible with the realization of social justice.³⁵

These core social work elements are also reflected in the social work literature describing the "generalist" approach to practice.³⁶ Again, this literature addresses micro- as well as macro-level aspects of the practice. At the micro-level, the literature includes many concepts pertaining to the professional relationship with the client, which is expressly viewed as offering a model for the client's other relationships.³⁷ The literature also defines important relationship-

processes to allow for an intervention at whatever system level is warranted by an ecological assessment.").

²⁹ See *id.* at 494-95.

³⁰ See *id.* at 495. This approach is referred to in social work literature as the "generalist" approach to social work. See JOHN POULIN ET AL., *STRENGTHS BASED GENERALIST PRACTICE 2* (2d ed. 2005).

³¹ NAT'L ASS'N OF SOCIAL WORKERS, *CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS* (1999), available at <http://www.socialworkers.org/pubs/code/code.asp>.

³² *Id.*

³³ *Id.*

³⁴ See, e.g., Karen K. Kirst-Ashman & Grafton H. Hull, Jr., *UNDERSTANDING GENERALIST PRACTICE* 49-53 (4th ed. 2004).

³⁵ *Id.*

³⁶ See, e.g., *id.*; POULIN ET AL., *supra* note 30, at 2.

³⁷ See BEULAH COMPTON ET AL., *SOCIAL WORK PROCESSES* 247-48 (7th ed. 2005); see also KIRST-ASHMAN & HULL, *supra* note 34, at 100-01. "Modeling" offers an overarching micro-level construct for thinking about client representation, including children. Social workers are taught to be cognizant of the fact that, over time, if one is doing one's job successfully with clients, the clients will begin to observe the ways one interacts with them and will begin to mirror those interactions with others. For example, a child who has a difficult time expressing her feelings is sent to a social worker for counseling. If the relationship succeeds, the child will learn to express her feelings to the social worker. In turn, the therapeutic relationship will serve as a model, meaning that it will naturally translate into

enhancing characteristics including warmth, empathy, and genuineness.³⁸ Further, the generalist approach emphasizes the importance of a strengths orientation, which incorporates client self-determination and empowerment. It must be kept in mind, however, that the term "client" when used in a social work context, does not necessarily mean the same thing as it does in a legal context. For lawyers, specifically children's lawyers, clients are generally thought of as individuals. For social workers, the client may indeed be a family. For this reason, the literature often refers to "client systems."³⁹

The strengths orientation, also known as a strengths-based approach, is a feature of family systems theory, but has also developed into a specific orientation in its own right. The strengths-based approach emphasizes the client's inherent resources and coping abilities, as opposed to focusing on deficits or problems.⁴⁰ Clients are seen as being capable of change, and they are partners and active participants in the change process. The social worker's role is to help clients recognize, marshal, and enhance their inherent abilities.⁴¹ Strengths-based generalist social work practice involves the formation of a helping relationship between a professional and an individual, family, group, organization, or community for the purpose of empowerment and promotion of social and economic justice.⁴² The professional collaborates with the client and/or with the systems that may assist the client, while focusing on the client's strengths and resources.⁴³

As stated above, the strengths orientation is a feature of family systems/ecological theory, which is the fundamental paradigm of generalist social work practice. Understanding this paradigm is essential in order for us to achieve a full and genuine comprehension of what it means to represent children in families. Moreover, to the extent we embrace this theory, we are forced to rethink our current models of representation as well as the processes we use to address legal concerns related to children.

B. Family Systems Theory

Family Systems Theory is a fundamental theme in social work theory and practice.⁴⁴ It is sometimes referred to broadly as ecological theory or the ecology of human development.⁴⁵ This approach incorporates a strengths-based, non-judgmental orientation, as well as an understanding of family dynamics

the child's ability to articulate her feelings with others in her family system as well those as in her broader social system, such as peers and teachers.

³⁸ KIRST-ASHMAN & HULL, *supra* note 34, at 49-53.

³⁹ See, e.g., POULIN, ET AL., *supra* note 30, at 8-9.

⁴⁰ See KIRST-ASHMAN & HULL, *supra* note 34, at 27; POULIN ET AL., *supra* note 30, at 2.

⁴¹ *Id.*

⁴² POULIN ET AL., *supra* note 30, at 3.

⁴³ *Id.*

⁴⁴ NAT'L ASS'N OF SOCIAL WORKERS, *supra* note 31; Madden & Wayne, *supra* note 14, at 496 ("The theories that ground social work practice are derived from the fields of sociology, psychology, economics, human biology and political science. These disciplines provide social workers with the ability to understand human behavior, development, mental health, family and group dynamics, cultures, and political processes to allow for an intervention at whatever system level is warranted by an ecological assessment.").

⁴⁵ See, e.g., Babb, *supra* note 2, at 777.

and human development. Family systems theory advocates studying the entire family in order to understand the individual, including a child.⁴⁶ The notion is that the family is a system that functions in many ways similar to the natural ecosystem. Whatever one member of a family does in some way affects the larger family dynamic. Thus, the whole is greater than the sum of the parts, and the individual cannot truly be understood outside the context of the family system.⁴⁷ It must also be kept in mind that the term “family” does not simply refer to the nuclear biological family. The term must be defined broadly in terms of bonds of intimacy and, therefore, can easily include extended family as well as neighbors and friends, depending on the particular circumstances.⁴⁸

This theory provides a specific orientation toward understanding a child’s best interests.⁴⁹ Since the child is part of the family system, the child’s best interests are coextensive with the family’s best interests when those interests are properly understood.⁵⁰ The key point here is that those interests are co-extensive *when properly understood*. It may easily be the case that the family members themselves do not have a proper understanding of their mutual interests.

For instance, in an earlier paper, I discussed a well-known U.S. Supreme Court case of *Parham v. J.R.*⁵¹ concerned, in part, a situation in which parents “voluntarily” admitted their child to a state mental institution. Although a majority of the Court decided that no additional legal protections were needed based on the notion that parents generally act in the best interests of their children, the dissenters and many advocates agreed that this is precisely the type of scenario in which the interests of children are likely to be in direct conflict with those of their parents.⁵² A family systems approach would suggest that the apparent conflict in such a case reflects a failure of the family members to appreciate their mutual interests. It certainly may be the case, for instance, that parents are blaming their child rather than addressing problems that exist in their marital relationship. In such a case, family therapy would be the most effective intervention, rather than a more legalistic approach, such as offering a contested hearing in which the parents and child would each have separate lawyers, which would create a further gap between parents and child.

Two important and unique concepts in family systems theory are mutual interaction and shared responsibility. Since the family is an interactive and dynamic system, everything that occurs within the family, including an individual’s behavior, is attributable in some way to the family as a whole. This concept also means that every family member is important to what happens within

⁴⁶ For a more detailed description of family systems theory, see Brooks, *supra* note 2, at 4-8.

⁴⁷ See *id.* at 5.

⁴⁸ See *id.* at 4; see also *supra* note 2 and accompanying text.

⁴⁹ Although it is a specific orientation, family systems theory is not monolithic. There are many schools and a vast literature in this area. Nevertheless, there are some general principles and common themes.

⁵⁰ Brooks, *supra* note 2, at 12-14.

⁵¹ See Brooks, *Therapeutic Jurisprudence*, *supra* note 4, at 960-61 (citing *Parham v. J.R.*, 442 U.S. 584 (1979)).

⁵² See *id.* at 961.

the family and to improving the family members' functioning.⁵³ It is critical to understand these two important principles in the context of two other aspects of family systems theory. First, family systems approaches are descriptive and not evaluative; and therefore the approaches focus more on present situations than past conduct. Second, family systems approaches focus on family strengths rather than pathology. These last two characteristics demonstrate that family systems theory approaches families from a non-judgmental posture.⁵⁴

It cannot be emphasized enough that "mutual responsibility," when used in the family systems context, is simply descriptive of the family dynamic. It by no means implies mutual "blame" or liability in the legal sense; rather, it is simply a characterization of how a family functions in psychological terms. Although mutual responsibility is difficult to appreciate in the legal context, it is an essential component of the understanding of children and families and how they operate.⁵⁵

The conceptual framework of family systems theory describes a family's properties using roles and structural characteristics commonly found in families. One such structure is the "subsystem," which would include a "coalition." Coalitions consist of two or more family members and may either promote unity and harmony in a family or be divisive.⁵⁶ Coalitions may be destructive forces when they engage in "triangulation,"⁵⁷ or otherwise blur generational lines.⁵⁸ For instance, in Ned's family, it turned out that some triangulation was occurring between his mother and his older sister, Rachel, who was about to be married. Both parents had allowed the mother-daughter relationship to interfere with their marital coalition, which was not only destructive to their relationship, but also reverberated in ways that negatively affected Ned and the other family members. Part of the work that was ultimately so helpful to Ned involved restoring their marital coalition and empowering his mother and father to create healthier generational boundaries with their daughter.

Another set of structural characteristics relates to how families manage new information.⁵⁹ To receive new information effectively, a family must have some degree of openness, but yet must still maintain its distinctness from its

⁵³ Brooks, *supra* note 2, at 5.

⁵⁴ *Id.* at 8. A family systems approach is completely foreign to the way most legal systems operate, including in the area of child and family law. Legal systems generally are not set up to take account of family systems, but rather focus on individuals' rights and responsibilities. *Id.* at 9-11. They also do not accept mutual interaction or shared responsibility. A fundamental principle of most legal systems is the fact that in every proceeding, responsibility or liability is attached to one individual. *Id.* at 9.

⁵⁵ The failure to appreciate this dynamic, I have argued, often undermines the effectiveness of legal responses to concerns such as child abuse and neglect, including legal advocacy on behalf of children. See Susan L. Brooks & Ya'ir Ronen, *On the Notion of Interdependence and its Implications for Child and Family Policy*, 17 J. FEMINIST FAM. THERAPY (Forthcoming 2006).

⁵⁶ JASON P. MONTGOMERY & WILLARD FEWER, *FAMILY SYSTEMS AND BEYOND* 107, 110 (1988).

⁵⁷ Triangulation occurs when two members of a system are in conflict, and each tries to make an ally of another family member in an attempt to avoid true resolution of the conflict.

⁵⁸ MONTGOMERY & FEWER, *supra* note 56, at 109.

⁵⁹ See *id.* at 110-17.

external environment.⁶⁰ Families that are too open often lack cohesion, while families that are too closed may become overly rigid.⁶¹

The way information enters and leaves a family system is through its "boundaries,"⁶² which is another construct for understanding the family's relative openness or closedness. The term, "boundaries," also refers to communication within families. "Disengaged"⁶³ families have diffuse boundaries, while "enmeshed" families have difficulty differentiating their thoughts and feelings from each other. Such families will resist any efforts by individual members to separate or initiate change.⁶⁴

Generally the degree of openness or closedness of a family system determines whether the family will tend toward stability or change.⁶⁵ A relatively open and thoughtfully creative family can act in new ways that are completely independent from its beginnings.⁶⁶ Closed families, on the other hand, will tend toward repeated limited behaviors and patterns that were set when the system was created.⁶⁷

Using Ned's family as an example once again, it was probably the case that, when our work began, the family was rather enmeshed and closed. Ned was in many ways expressing the whole range of feelings being experienced within the family. However, because the boundaries were so diffuse, none of the family members was in a position to take ownership of his or her feelings. Ned's initial expressions of depression, frustration and anger were in many ways free-floating emotions within the family. Additionally, the family as a whole was closed, in the sense that there was little outside input being received by the members of the family, and all of them had become stuck in certain patterns of interaction, which involved very little communication. Interestingly, from this perspective, it was Ned's seemingly negative behavior that precipitated the family receiving much-needed help and that ultimately facilitated the family's ability to open itself up to positive change. This strengths-based perspective on Ned's conduct is an example of re-framing,⁶⁸ a commonly used technique in family therapy which derives from family systems principles.

As stated above, a family systems approach emphasizes the importance of understanding "what is"—describing current functioning, as opposed to "why"—past history and the need for insight.⁶⁹ The idea of focusing on current functioning fits with notions of mutual interaction and shared responsibility because the helping professional can observe these qualities through the interactions that take place in her presence. This concept is also consistent with

⁶⁰ *Id.* at 117.

⁶¹ RAPHAEL J. BECVAR & DOROTHY STROH BECVAR, *SYSTEMS THEORY AND FAMILY THERAPY: A PRIMER* 11 (1982).

⁶² *Id.*

⁶³ MONTGOMERY & FEWER, *supra* note 56, at 29-30.

⁶⁴ LYNN HOFFMAN, *FOUNDATION OF FAMILY THERAPY: A CONCEPTUAL FRAMEWORK FOR SYSTEMS CHANGE* 72 (1981).

⁶⁵ *Id.* at 17.

⁶⁶ MONTGOMERY & FEWER, *supra* note 56, at 145.

⁶⁷ *Id.*

⁶⁸ See KIRST-ASHMAN & HULL, *supra* note 34, at 337-8; POULIN ET. AL., *supra* note 30, at 88.

⁶⁹ See Brooks, *supra* note 2, at 8.

a non-judgmental approach insofar as the need to understand why a particular behavior exists is often accompanied by attaching blame to a particular individual.

Additionally, as discussed earlier, a family systems approach emphasizes the identification of a family's strengths rather than its pathology.⁷⁰ Family systems theory operates with the philosophy that people have unused or under-used competencies and resources that may be brought forth when constraints are removed. Together with the emphasis on current functioning and the non-judgmental approach, the competency-based emphasis of the family systems model allows professionals to empower the family and to build a positive treatment atmosphere.⁷¹

Family systems theory offers a framework and a thought process. It does not dictate a particular outcome. There is no doubt that family members do not always act in ways that are consistent with the family's best interests. Once a family systems analysis is applied to a particular set of facts, for instance in the context of an abuse or neglect situation, it may lead to a conclusion that a family should remain intact, or it may lead to a different conclusion, depending on the circumstances.

Further, the recognition that an understanding of the family system is essential to an understanding of a child does not mean that the child is a non-entity or should have his or her viewpoint or "voice" disregarded. There is nothing inconsistent with an approach that supports the importance of respecting what children think and feel and believe, and a family systems approach. Indeed, recognizing the importance of the family system creates a circumstance that allows us to be more attuned to what children are often unable to articulate for themselves.⁷²

C. *Appreciating Difference: The Role of Culture*

Elsewhere, I have emphasized the importance of the integration of family systems thinking and cultural competence, which is also fundamental to social work principles and values.⁷³ Culturally competent services have been defined

⁷⁰ Rocco A. Cimmarusti, *Family Preservation Practice Based Upon a Multisystems Approach*, 71 CHILD WELFARE 241, 246 (1992).

⁷¹ *Id.*

⁷² Ned's family situation represents a typical example of this phenomenon, which I have witnessed in both my careers practicing social work and law. A child or young person exhibits challenging or anti-social behaviors, and the institutional response is to treat the child as the one who has the "problem." In reality, the child is simply acting out as a result of dysfunction that exists elsewhere in the family system, such as a situation in which the parents are experiencing marital difficulties. If a professional person can help the family first to acknowledge, and second, to address that other dysfunction, the young person will experience a great sense of relief, and probably their problematic behavior will subside.

⁷³ See Susan L. Brooks, *Re-Envisioning "Child Welfare" as a New Agenda for the Child*, in THE CASE FOR THE CHILD—TOWARDS THE CONSTRUCTION OF A NEW AGENDA (Ronen et al., eds.) (Forthcoming). A detailed discussion of the important role of culture is outside the scope of this article, but has been addressed very effectively elsewhere, specifically with respect to the lawyer-client relationship. See Susan J. Bryant & Jean Koh Peters, *Six Practices for Connecting Clients Across Culture: Habit Four, Working With Interpreters and Other Mindful Approaches*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver, ed.) (forthcoming 2006); Paul R. Tremblay

as "systems, agencies, and practitioners that have the capacity, skills, and knowledge to respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream American."⁷⁴ Cultural competence requires not simply the recognition of the need for cultural sensitivity, but an ongoing process⁷⁵ involving the ability to implement and to fully integrate cultural knowledge through specific policies, practices, and attitudes responsive to the strengths and interests of a minority culture.⁷⁶

"Five elements contribute to a system's ability to be culturally competent."⁷⁷ The system should: (1) value diversity, (2) have the capacity for cultural self-assessment, (3) be conscious of the dynamic inherent when cultures interact, (4) institutionalize cultural knowledge, and (5) develop adaptations to service delivery that reflect an understanding of the diversity between and within cultures. In other words, it is not sufficient for institutions or entities merely to give lip service to the idea of valuing diversity. Cultural competence requires an affirmative ongoing process, the effectiveness of which is measurable in improved outcomes for children and families.⁷⁸ Further, these elements should be manifested in every level of the service delivery system.⁷⁹

Cultural competence may be seen as part of a continuum, ranging from cultural destructiveness to cultural proficiency.⁸⁰ The full continuum, from most to least competent, includes: (1) cultural proficiency, (2) cultural competency, (3) cultural pre-competency, (4) cultural blindness, (5) cultural incapacity, and (6) cultural destructiveness. "It has been suggested that, at best, most human service agencies providing services to children and families fall between the cultural incapacity and cultural blindness on the continuum."⁸¹

V. ALTERNATIVE APPROACHES TO PROCEDURAL JUSTICE

The approaches described above, particularly TJ and preventive law, also emphasize the need for appropriate procedural justice mechanisms, which are legally sanctioned processes that give the parties a greater voice in determining the solutions to their own legal dilemmas. In order to truly take account of families, we may need to consider increased use of these alternative mecha-

& Carwina Weng, *Multicultural Lawyering: Heuristics and Biases*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (Marjorie A. Silver, ed.) (forthcoming 2006).

⁷⁴ Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 *BERKELEY WOMEN'S L. J.* 20 (1997) (quoting Terry Cross, *Developing a Knowledge Base to Support Cultural Competence*, 14 *FAM. RESOURCE COALITION REP.* 2, 3-4 (1995-96)).

⁷⁵ See generally Sakil Malik and Jorge Velasquez, Jr., *Cultural Competence and the New Americans*, *CHILDREN'S VOICE*, July/Aug. 2002, available at <http://www.cwla.org/articles/cv0207culturalcompetence.htm>.

⁷⁶ See Brooks, *Adoption Alternatives*, *supra* note 4, at 48 (citing <http://www.air-dc.org/cecp/cultural/>).

⁷⁷ *Id.* at n.59.

⁷⁸ See Mark A. King et al., *How is Cultural Competence Integrated into Education* 3, http://www.air-dc.org/cecp/cultural/Q_integrated.htm (last visited Oct. 19, 2004).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* (citing TERRY CROSS ET AL., 1 *TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE* (1989)).

nisms. Examples of processes that tend to offer greater procedural justice include non-adversarial dispute resolution and planning processes, such as family group conferencing⁸² and mediation.⁸³ These alternative processes are being successfully implemented in many jurisdictions, and are being used in many different types of legal proceedings involving children. To fully consider families in our representation of children, which will in turn incorporate more therapeutic and preventive justice, we may need to think about further institutionalizing alternative processes that are consistent with family systems theory. Two examples of such approaches that have had some proven success are family group conferencing and mediation.

A. Family Group Conferencing

The general idea behind the family group conference ("FGC") is to empower the family, including as much as possible of a child's extended family system to develop a plan to keep the child safe, meet the child's needs, and promote the child's best interests.⁸⁴ One basic premise of the FGC is that the family has unique strengths and often has the best information about how to use those strengths to address existing concerns about the child and family.

Through the FGC process, professionals are initially given the opportunity to present their concerns to the family members with the help of a professional facilitator. After the concerns are presented, all of the professionals leave the room and allow the family to work on a plan to address those concerns. The family is also given the opportunity to access appropriate services and community resources to assist them in carrying out the plan. Assuming the plan developed by the family is acceptable to the professionals and to the court, it can become the official resolution of the matter.

FGC is a relatively new process, but its popularity has increased dramatically in the past several years. A few of the many states that are using FGC (or similar variations) include California, Kansas, and Michigan.⁸⁵ Many states have tried to implement the use of FGCs at the earliest possible point in time, such as when the child or family first comes to the attention of their child protective services agencies. FGCs have great therapeutic potential along the

⁸² See Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J. L. REFORM 57 (1997) (proposing broad implementation of family group conferencing in child welfare cases).

⁸³ See Maria Wilhelmus, *Mediation in Kinship Care: Another Step in the Provision of Culturally Relevant Child Welfare Services*, 43 SOCIAL WORK 117 (1998) (advocating the usefulness of mediation, particularly in working with kinship families).

⁸⁴ For a detailed description of family group conferences and their origins, see Mike Doolan, *The Family Group Conference—Ten Years On*, http://www.restorativepractices.org/Pages/vt_doolan.html (last visited Oct. 17, 2003). "Family system" is defined very broadly for this purpose, and could include anyone with whom a child shares a bond of intimacy. Lowry, *supra* note 82, at 69.

⁸⁵ Donald N. Duquette & Mark Hardin, *Adoption 2002: Guidelines for Public Policy and State Legislation Governing Permanence for Children*, CHILDREN'S BUREAU, June 1999, at V-5; see generally Lowry, *supra* note 83. Additional information about different states' usage of family group conferencing or similar processes is available at http://www.americanhumane.org/site/PageServer?pagename=pc_fgdm_research (last visited Apr. 18, 2006).

lines that have been outlined in this paper insofar as they focus on identifying, bringing together, and giving voice to the entire family system.

Early evaluations of the effectiveness of FGCs have been very positive. Studies have found that families often develop more creative plans and also have a better rate of following through and sticking with the plans they themselves develop.⁸⁶

B. Mediation

Mediation is an alternative dispute mechanism that has become a well-established component of many court systems, particularly in the area of domestic relations. Although it is a somewhat more recent addition to the juvenile and family court arena, the use of mediation in juvenile court proceedings is now widespread in many parts of the country.⁸⁷ Mediation, as it relates to the involvement of the family system in problem solving, can be used to serve purposes similar to FGC.

Often, mediation is an appropriate alternative once a court proceeding has already been filed. It allows the parties to assume greater control over the process, with the assistance of a trained, independent mediator. The parties then have the opportunity to resolve the case in a way that serves both their interests and the child's best interests. Through the mediation process, family members may better identify common interests and work collaboratively to meet the needs of the child. Some of the numerous jurisdictions using mediation in their juvenile and family courts are Florida, Ohio, Michigan, California, Texas, Connecticut, and Kentucky.⁸⁸

VI. MICRO-LEVEL TJ CRITIQUE OF CHILDREN'S REPRESENTATION

On the micro-level, the reality of children's representation is that many, if not most, lawyers probably have no coherent mental health theory guiding their practice. Others may unknowingly be relying on a particular viewpoint, such as the psychodynamic approach,⁸⁹ without fully appreciating where or how this

⁸⁶ Lowry, *supra* note 82.

⁸⁷ For descriptions of several states' programs and a good list of resources, see National Resource Center for Foster Care & Permanency Planning, *Tools for Permanency Tool #3: Child Welfare Mediation*, <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/tools/cwm-tool.pdf> (last visited Oct. 18, 2003).

⁸⁸ Duquette & Hardin, *supra* note 85, at V-2.

⁸⁹ I have extensively criticized this approach, which is probably best known through the body of work created by Joseph Goldstein, Anna Freud, and Albert Solnit. See Brooks, *supra* note 2, at 11-14; Brooks, *Therapeutic Jurisprudence*, *supra* note 4, at 957-58. These mental health scholars, all of whom approached child custody issues from a psychoanalytic perspective, co-authored a series of three highly influential books aimed at a legal audience. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53-54 (1973); see also JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* 90-91 (1986); JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 3-11 (1979). They criticized the best interests standard for not focusing sufficiently on the individual child's interests and believed that the only way for "children's rights" truly to predominate was to influence courts to focus on identifying and vindicating the rights of the child's true "psychological parent." They defined the psychological parent as the single individual to whom the child forms a unique emotional attachment, which, according to this now rather outmo-

approach fits into the broader range of approaches that have been developed within the mental health fields. A great number of lawyers probably simply rely on their own sensibilities or "gut feelings" in representing children. Granted, these well-intended legal professionals are probably oblivious to the potentially anti-therapeutic consequences of the way they go about their work in representing children.

A prime example of such well-intended but misguided conduct, which I described in an earlier paper,⁹⁰ would be that of a lawyer appointed to represent a child in a case involving allegations of child neglect or abuse. Lawyers in these cases sometimes are appointed in the role of a guardian *ad item* ("GAL"), which means they are appointed by the court to represent the child's "best interests."⁹¹ Frequently, the GAL may be motivated by a desire to rescue the child from what she perceives to be an unhealthy or unsafe situation. That GAL may unknowingly begin to play the role of a family member, or a "competent" parent by trying to establish a close, special relationship with the child. By interjecting herself as an important figure in that child's life, however, the GAL may inadvertently undermine the child's real parents' immediate efforts at rehabilitation, and ultimately, the effective functioning of the child's own family system. Rather than playing a role that is supportive of effective family functioning, which generally will require the restoration of the child's

ded approach, is essential to the child's healthy development. These authors initially supported the idea that the psychological parent should have sole custody and should have absolute discretion over whether the child has contact with any other parental figures. Despite innumerable critiques to this approach, including these authors' own tempering of it in their later work, probably the majority of courts deciding custody matters continue to embrace the concept of the "psychological parent" as well as this narrow interpretation of the best interests standard, regardless of whether they understand the theoretical underpinnings of these notions. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53-54 (1973); see also JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* 90-91 (1986); JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 3-11 (1979).

⁹⁰ See Brooks, *Therapeutic Jurisprudence*, *supra* note 4, at 959.

⁹¹ I used the example of the GAL because it seems like this role is more vulnerable to the type of misguided approach I am trying to highlight, although attorneys representing children in many different contexts probably fall prey to the same misguided thinking. The role of the GAL, in which the lawyer substitutes her own judgment for that of the child, is often contrasted with the role of the child's attorney, who represents the child's "expressed interest." Because the GAL's role is unlimited in this respect, the GAL may more readily subscribe to a child rescue mentality, which often goes hand in hand with the misguided approach described in this illustration. Much has been written on the topic of the ethical issues surrounding the role of attorneys representing children in this type of proceeding. Indeed, this was one of the main concerns at the original Fordham Conference on Ethical Issues in the Representation of Children, upon which the present conference is built. See, e.g., Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996). In 1996, the American Bar Association adopted guidelines generally endorsing the more traditional attorney role as a general model. See *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 *FAM. L. Q.* 375 (1995). The ABA guidelines were certainly not the end of the story. Many, if not most, jurisdictions still continue to appoint attorneys as GALs, and a few also use non-attorneys as GALs. A further elaboration of this debate about child representation models is outside the scope of this paper, but is a topic that will be discussed further during this conference.

parents in a position of greater power and authority, the lawyer, in this instance the GAL, may also cause a "second abandonment" by establishing such a special relationship and then ending contact abruptly when the case is "closed."⁹²

Another negative consequence of this misguided approach is that the lawyer may exacerbate the child's dysfunctional role by giving the child too much power in the family. Lawyers often think of their role as one of "empowering" the child. The idea of empowering a client in general would seem to be a good idea, but when it comes to children, lawyers need to consider the more complex web of relationships in which the child is involved, and how giving that child greater power will affect that broader dynamic. In many instances, it may be more harmful than helpful to the child, and to the family, for the lawyer to advocate for giving the child more power. This certainly would have been the case had Ned been given more power. In the other scenario involving the twelve-year-old who had been raped by her mother's boyfriend, what she needed, as she herself articulated, was not more power, but for her mother to be restored to a more powerful role in her life.

Lawyers often commit these errors with the best intentions of helping children. However, most lawyers lack any knowledge about family systems, and they fail to recognize the ways in which their advocacy may inadvertently cause harm to children and families involved in child-related proceedings. As a result, they may unintentionally create serious anti-therapeutic consequences for children and their families.

VII. MACRO-LEVEL TJ CONSIDERATIONS

At the macro-level, we can examine these issues at the level of institutional, systemic, or community-wide concerns. A great deal of my own scholarship has been devoted to critiquing the child welfare system at the macro-level.⁹³ The juvenile justice and public education systems have been the subject of equally as much criticism along similar lines.⁹⁴ These critiques implicate fundamental, structural, and conceptual concerns about our legal system, including the notion that our legal system is entirely built around individual

⁹² Gennifer Sherman, an assistant district attorney, has identified this concern with respect to district attorneys who work with child witnesses while prosecuting child abuse cases. GENNIFER SHERMAN, THERAPEUTIC JURISPRUDENCE AND THE ROLE OF THE PROSECUTOR IN A CHILD SEXUAL ABUSE CASE (March 5, 1998) (unpublished manuscript, on file with author).

⁹³ See, e.g., Brooks, *Adoption Alternatives*, *supra* note 4. For instance, I have critiqued the systems that support traditional closed adoption. In child welfare, an example of this inadequacy is the priority given to traditional adoption in the current system, in which a child's family ties must be severed prior to the adoption. This means that not only is the child cut off from the birth parents, but also from siblings, grandparents, and other extended family members. The child will likely also be cut off from other important parts of the family system, such as friends or neighbors, as well as larger intersecting systems, like the child's school, religious institution, and neighborhood. Traditional adoption practices tend to be inconsistent with family systems approaches and, accordingly, may be anti-therapeutic for children. See *id.*

⁹⁴ See, e.g., Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137 (2006) (addressing macro-level concerns related to race and gender in the juvenile justice system).

rights and individual representation, and is also based fundamentally upon an adversarial system of dispute resolution or problem solving.⁹⁵

They also implicate social justice concerns, including race- and class-based concerns.⁹⁶ One of the broader implications of these critiques is that the replication of our misguided approach to children's representation across legal systems that affect children has had devastating consequences that have been felt unevenly in our communities and society in general. Specifically, it is poor, Black, single women and their children who have borne the brunt of the macro-level consequences of our anti-therapeutic approaches. According to renowned scholar Dorothy Roberts and others, the ultimate effect has been to destroy Black families and communities.

VIII. POSSIBLE THERAPEUTIC DIRECTIONS FOR CHILDREN'S REPRESENTATION

Given these conditions, there is no doubt that both at the micro- and at the macro-levels, we need to look outside of the traditional legal framework at alternative approaches to children's representation if we are truly to take account of families in our work. I see two possible directions for this reform, which have both micro- and macro-level implications: (1) pursuing alternative approaches to procedural justice; and (2) focusing on best practices.

A. *Alternative Approaches to Procedural Justice*

A traditional approach to procedural justice, in which we simply try to ensure that all of the parties in children's cases have good, solid lawyers, who provide zealous advocacy, may be well and good, but in the end it will only serve to maintain the status quo. It will certainly not move us toward a more therapeutic or just legal system. In contrast, if we can move children's proceedings out of a traditional adversarial context and pursue alternative approaches to procedural justice, we may create the necessary space in which therapeutic and preventive approaches, which demonstrate an appreciation of children's families and their cultures, may emerge.

Such approaches might include family group conferencing or mediation or other alternative approaches, such as community conferences and sentencing circles. Here, we may also be able to draw upon successful models from other cultures within our own society, as well as ideas that have been developed and

⁹⁵ For a detailed discussion of the traditional legal system's individualistic and atomistic conception of human rights, see Brooks, *supra* note 2, at 9-11. More recently, I have written about these ideas in the context of advocating for the notion of "interdependence" to shape child and family policy. Brooks & Ronen, *supra* note 55.

⁹⁶ See Brooks, *Adoption Alternatives*, *supra* note 4; see also, Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in The Child Protection System [An Essay]*, 48 S.C. L. REV. 577 (1997); Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409 (1997); Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479 (1999).

have proven successful in other parts of the world. Indeed, sentencing circles have been utilized for generations by Native American family systems and communities, and family group conferencing was imported and adapted from the indigenous practices of the Maori people of New Zealand.

B. Best Practices

The reference to best practices is shorthand for returning the discussion to the therapeutic and preventive approaches to children's representation—that is, family systems theory plus cultural competence, and how these approaches might translate into the representational context. In my early work, I identified five guidelines for child custody decision making that are consistent with a family systems approach, including making sure we identify the members of the family system, consider their mutual interests, and maintain family ties and continuity wherever possible.⁹⁷ More recently, I have defined five basic principles that I believe more fully take into account considerations of culture combined with family systems thinking. These principles might be a useful starting point for thinking about best practices in the realm of child representation. They are as follows: (1) respect the dignity of all individuals and families; (2) approach every child as a member of a family system; (3) respect individual, family, and cultural differences; (4) adopt a non-judgmental posture that focuses on identifying strengths and empowering families; and (5) appreciate that families are not replaceable.⁹⁸

First, we must start from a place of respecting the dignity of all individuals and families and believing that, with support, most, if not all families can draw upon their own strengths to provide what is needed for their children.

Second, we must approach every child not as an isolated individual, but as an essential member (like every other member) of a family system that is not solely defined by blood, but by bonds of intimacy. Whatever we do and however we think we need to do it, we must be mindful of the critical need to allow children to maintain *all* of their important attachments. We must also recognize that probably the most effective way to help any child is to help the child's family, even if that means providing precious resources to a parent we would rather punish.

Third, we must respect differences, including cultural differences, and not allow cultural biases (or any other biases) to obstruct our ability to think about children in a therapeutic manner. Culture is inclusive of race and ethnicity, but it goes beyond those easily identifiable attributes to encompass more subtle and nuanced aspects of family life. This aspect of best practices will generally require us to slow down in making assessments of children's vulnerability. We must not simply react to things we hear about a child's experiences that are different from our own; rather, we should approach those observations or revelations as the beginning of a learning process in which we partner with families

⁹⁷ See Brooks, *supra* note 2, at 14-20. The five guidelines are: (1) identify the members of the family system; (2) consider the mutual interests of all members; (3) maintain family ties and continuity wherever possible; (4) emphasize current status; and (5) focus on family strengths. *Id.*

⁹⁸ This discussion is largely reprinted from a forthcoming chapter in a book focusing on presenting new models for child advocacy. See Brooks, *supra* note 73.

to understand their cultures and to try to work within their cultural norms and expectations to find mutually agreeable solutions.

Fourth, we must adopt a non-judgmental posture. This idea reinforces all of the other recommendations discussed above. However, what I am positing here goes beyond simple neutrality: It requires an affirmative stance that focuses on strengths and empowerment of families. We must not approach families as "them" versus "us." We must join with them and collaborate with them in their struggles and in their successes.

Fifth, we must appreciate that families cannot ever truly be replaced in children's lives. Children are adaptive, and they will often be able to form new attachments, but that is not the same as replacing a parent. Too often it seems like well-intentioned advocates intervene and try to assess a child's situation the same way a passenger might approach her seating assignment on a plane. This child was born into *coach*, but maybe we can give her *an upgrade*—seat her in business class. We must realize that life doesn't work that way. What we might perceive as *an upgrade*, that same child will experience as a devastating loss. Again, this must cause us to slow down and think before we act.⁹⁹

IX. CHALLENGING APPLICATIONS: CHILDREN WHO WOULD "DIVORCE" THEIR PARENTS AND JUVENILE JUSTICE

I will now turn to two types of scenarios that might be seen as posing serious challenges to a family systems approach to child representation. By discussing these applications, which at first blush may seem inconsistent with the notion of taking account of families, it will become clearer how the recommendations outlined above can move children's representation in a new, more therapeutic direction.

The first, which I will paint in dramatic terms for illustrative purposes, is the child who wants to "divorce" her parents. How does a lawyer who embraces a family systems approach deal with a child client who wants nothing to do with her parents—who essentially wants to "divorce" them?¹⁰⁰ I would

⁹⁹ This principle may also be interpreted as "do no harm." Nevertheless, as noted earlier, incorporating this basic principle into decision making around children will not always lead to keeping families together. The point here is that we must recognize that there is always a cost to separating children from their families, whether temporarily or permanently, and we must fully and carefully weigh that cost in our decision making. There may well be times when we decide that the risk of keeping a particular family together is too great, and therefore the cost of separation is necessary. If we make that decision, however, we must acknowledge that the cost is there to ensure that the child receives all of the services that are needed to address the accompanying issues of grief and loss that the child is sure to experience. For a detailed discussion of the impact of separation and loss on children, see VERA I. FAHLBERG, *A CHILD'S JOURNEY THROUGH PLACEMENT I* (1991).

¹⁰⁰ Of course, as we all know, children truly do not have standing to divorce their parents; nor generally do they have standing to pursue a termination of parental rights. Nevertheless, we probably have heard of at least one or two high profile cases in which the media has painted the situation as such. See, e.g., *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). I would like to emphasize that I am using this terminology and offering the starkest possible example for discussion purposes only. In my many years of practice, I have not encountered a genuine scenario like this, but to play my own devil's advocate, it seems like this type of scenario must be discussed, because some readers of this paper are bound to be asking this question.

want to begin by pointing out that, in my experience, even a child who is angry at his or her parents, and may for a moment state that he or she wants nothing to do with them, will eventually change her mind and want at least some contact. That does not mean the child will necessarily want to live under the parents' roof, but let's be clear that the situation that makes the headlines of the child truly wanting to divorce her parents is a rarity.

Having said that, remember that we are talking about family systems rather than a narrow definition of families. We need to bear in mind that it may well be that the child who seemingly wants nothing to do with her "family" is perhaps wanting to define her family system differently than it may have been perceived by the outside world of professionals. In other words, one positive approach to this situation is to use it to try to gain a better understanding of how the family system is being defined from the child's viewpoint, including seriously considering the reasons the child is choosing to reject parts of her family at a particular moment in time.

Still, as a *lawyer* representing the child, what are we to do in a situation in which the child is stating specifically that she does not want any contact with her parents. If we are operating in the traditional representational framework, as recommended by the *Fordham Conference*, we are presented with a narrow set of choices. Certainly, we may feel that it is appropriate to counsel and advise our client. Indeed, we may want to bring in a professional of another discipline, such as a family therapist, to help us think about how to approach this issue with our client and to urge our client to be willing to engage with her parents, at least in the context of some form of therapy. Nevertheless, if our client rejects our recommendation, we are ethically bound to advocate for what the client wants, including to "divorce" her parents.

Now, let us move this situation out of an adversarial context. Let us assume that we have the option of pursuing some alternative process, such as a family group conference or some form of mediation between our client and her parents. At that point, a mediator or other trained professional in the art of problem solving with families will enter the picture. We will still be available to advocate for our client, but we can offer our client the opportunity to try to work through her difficulties with her parents in a safe environment. In mediation, the stakes are not so high, and, if she is not comfortable, she can simply walk away without compromising other rights she may have to assert a contrary position. This approach is informed by best practices in the field—and by that I do not mean the legal field, but the field of social work as well as other mental health professions. Best practices would guide us in the direction of engagement between a child and parents in conflict, rather than cutting off communications, unless there is some immediate danger or significant trauma that will be caused by direct contact. But again, the assessment of what type of contact makes sense should not be made by the child's lawyer, but instead should rely on someone with mental health expertise, who is familiar with and embraces family systems theory.

Now, I will turn to an entirely different context—delinquency. This is not my field and, in some ways, I know little about the representation of children in delinquency matters. What I do know is that, generally, not only is the family *not* considered part of the lawyer-client relationship, it is often viewed as an

anathema to the effectiveness of the representation. Defense attorneys for kids are trained that their client is the individual child. If a parent is present, no attorney-client privilege exists.

I am not here to question these basic legal premises. My question is more hypothetical: What would happen if we could move these proceedings out of the courtroom, and out of a traditional adversarial context that prevails in delinquency cases? If we could use some alternative form of process, such as a community conference or a sentencing circle, could we not develop a different response to the question of the extent to which we might be able to consider the family system in our representation? This line of inquiry seems particularly critical in the delinquency context because, somehow, we seem to have decided that when children commit offenses they are no longer children who are part of and dependent upon families, but instead they are those individuals who have been "accused." In general, it seems that when we are dealing with adolescents, we sometimes fall into the trap of believing that they are miniature adults, who can or should be dealt with as individuals. Nevertheless, it has been proven that family therapy is one of the most effective treatment modalities even for the most "serious and chronic juvenile offenders."¹⁰¹ It is unsurprising to me that once the focus is brought back to the family, and once the young person can see that his or her parents are willing to try to function in the role of an effective parent, the family systems approach is much more effective than any approach aimed at the youth as an individual. Kids are a part of, and truly need, their families, regardless of their age—(as do adults, for that matter).

X. CONCLUSION/EPILOGUE

I recently had a conversation with a lawyer who does juvenile defense work. She was bemoaning a situation in which she was appointed to represent a child, and the child's mother, as well as the mother's lawyer, simply could not understand why she couldn't agree with them. The defense lawyer kept trying to explain to them that she only represented the child, not the child's mother, and that was the end of the story.

I am in no way suggesting that her position was plainly wrong or unethical under our current understandings. However, I would submit that if we really care about trying to achieve the best outcomes for the kids and parents we represent, we cannot allow that to be the end of the story. We need to challenge ourselves to think about how we might address that situation differently. Maybe it means considering a different forum or a different process, including alternative dispute mechanisms, where the stakes are different. Perhaps, if we can move away from traditional adversarial approaches to matters related to children, we can begin to incorporate best practices into our representation, meaning that we represent the child in a manner that embraces, rather than supplants or rejects, the child's family system. This is the challenge that lies ahead of us.

¹⁰¹ See *supra* note 16.